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ARTICLES

THE COMMONING OF THE COMMON LAW:
THE RENAISSANCE DEBATE OVER PRINTING ENGLISH LAW,
1520-1640

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Why publish the laws of England? What effects would printing have? From the early sixteenth century through the Civil War, these questions framed a debate among English lawyers over the propriety, advantages, and risks of legal publication. Advocates of law printing, in their soaring moments, prophesied national unity, godliness, and social harmony flowing from the legal press as readily as quartos and folios. The barrister William Hudson, by contrast, looked back with "reverence" on the common lawyers who abstained from "publishing their meditations and arguments, . . . holding it as a flag of their vain-glory unworthy of their gravity."¹ Such laudable restraint was no more in

¹ I have modernized spelling, punctuation, and capitalization in quotations from primary sources (including titles of works listed in the text and footnotes). I consulted manuscripts on microfilm or microfiche, except for works in the Harvard Law Library Rare Book Room, Yale's Beinecke Library, and John Hales's *Oration in Commendation of Laws* in the Free Library of Philadelphia, which I examined in person.

Because of the particular demands of early modern historical scholarship, the author has requested waiver of several *Bluebook* citation rules. First, the *University of Pennsylvania Law Review* has not been able to check all pre-1700 imprints and manuscripts. Mistakes are the sole responsibility of the author. Second, the author has cited materials according to chronological order or according to his estimation of

this cracking age, when all men in all professions *quicquid subito crepant omnino à statu Apollinis credunt* [believe that whatever they suddenly rattle forth entirely comes from an Apollonian state (e.g. authoritative frenzy)]; who, for fear of burying their talent, post to the press to publish to others that which they well understand not themselves; it being assuredly no matter of necessity to publish the reasons of the judgment of the law, or *apices* [tittles or small points] or *fictiones juris* [legal fictions] to the multitude, who are apt to furnish themselves with shifts to cloak their wickedness, rather than to gain understanding to further the government of the Commonwealth: for surely few men would be ruined by dishonest means, if men knew not how to cover their dishonesty under some color of law or justice²

Participating in the expansion of law publishing underway in Elizabethan and early Stuart England, lawyers questioned print's impact on a profession heavily dependent on manuscripts and oral tradition and on a nation reading lawbooks without the interpretive conventions imbued by legal training.³

Print's effect on English legal culture has not received the sustained attention devoted to the history of the book in religion, statecraft, and science. But neither has it gone unnoticed. Historians of communications have explored the social impact of law publishing, and legal historians have examined the influence of printing on the doctrinal and institutional development of the common law. To cite only several of its various ramifications, print, historians say, helped

their relative importance. *Bluebook* rules governing citation order have not been followed. Third, places of publication and publishers for pre-1900 works have not been supplied in conformity to historical citation practice and because of the difficulty of ascertaining such information for some sixteenth-century imprints. Fourth, the rule governing citation of material from microforms has been disregarded. Pre-1700 imprints on microfilm have been cited by author, title, and date of publication. Manuscripts have been cited by author, title, date of composition, and the manuscript identification number of the library holding the source.

The following abbreviations have been used throughout the Article: "MS" for "manuscript," "MSS" for "manuscripts," and "c." for "circa."

² William Hudson, *A Treatise of the Court of Star Chamber* (MS, c.1621), in 2 COLLECTANEA JURIDICA 1, 1-2 (Francis Hargrave ed., 1792). Hudson (1577/78-1635) was a bencher of Gray's Inn who practiced as a counsellor in Star Chamber. He wrote the *Treatise* in the 1610s and presented it to newly appointed Lord Keeper John William in 1621. The *Treatise* circulated widely in manuscript in the 1620s and 1630s as the more than 20 surviving copies attest. See Thomas G. Barnes, *Mr. Hudson's Star Chamber*, in TUDOR RULE AND REVOLUTION: ESSAYS FOR G.R. ELTON FROM HIS AMERICAN FRIENDS 285, 286-87, 296 (Delloyd J. Guth & John W. McKenna eds., 1982). An "Apollonian state" is a reference to the Delphic oracle, implying an authoritative pronouncement.

³ In the early modern period, "publication" meant to "make public," whether through the press, through handwritten documents, or by speech. Unless otherwise noted, I will use "to publish" in its modern sense as a synonym for "to print."

along the recognition that law was made rather than found; facilitated the formation of the modern notion of precedent, the solidification of a group identity within the profession, and the breakdown of the oral learning exercises in the Inns of Court; and both provoked and carried a common law apologetic and nationalist literature.⁴

The legal press was a causal agent, and an important one. But law printing was also an intellectual problem, its meaning and repercussions uncertain and divisive. It provoked attacks, called forth defenses, conjured aspiration and warning. That history has yet to be written. This Article offers a contribution to recovering this lost debate, focusing on contemporaries' disagreements over the promises and drawbacks of legal publishing, treating the political and social effects of books as contexts shaping the discussion. The first Part explores the initial justification of law printing offered in Henrician England, an echo of humanist and Protestant advocacy of textual dissemination as an agent of godly order, solidifying obedience as it dissolved obscurantism. The second Part discusses the dispute that broke into public view in the latter sixteenth century over the perceived threats and advantages of legal publishing, a controversy pressed by an emerging group of skeptics such as Hudson, whom I dub the "anti-publicists." Anti-publicist arguments were not confined to a discernible circle, still less the program of a movement, but were an idiom of disapproval employed selectively. The third Part explores the context engendering the debate and making plausible the disputants' contrasting prophesies about the effects of lawbooks. Three interrelated developments stand out: the growing lay audience putting lawbooks to political uses and undermining the tacit identification of the reading public with the profession; increasing episcopal and absolutist suspicion of the unwitting dangers of licit printing; and the gradual realization within the profession of how print reshaped the control of knowledge (and hence of status and power) among themselves and between themselves and the nation. The fourth and final Part reflects on how the controversy over law printing implicated a larger change in English legal culture: the "commoning" of the common law along the simultaneous dimensions of communication

⁴ See 1 ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE: COMMUNICATIONS AND CULTURAL TRANSFORMATIONS IN EARLY-MODERN EUROPE* 119 (1979); M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 35-39, 215-18 (1989); 6 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 481-83 (7th ed. 1966); Peter Goodrich, *Poor Illiterate Reason: History, Nationalism and Common Law*, 1 SOC. & LEGAL STUD. 7, 7-28 (1992).

and ideology as the law evolved, in the realm of perception, from a guild possession to a national inheritance.

In pursuing these topics, this Article has several aims. First, it employs methods and asks questions characteristic of work on the "history of the book"⁵ in order to enrich the received picture of the common law's growing intellectual and social presence in Tudor and

⁵ The "history of the book" is an umbrella term used to describe scholarship concerned with the production, distribution, assimilation, and social effects of all manner of texts, from manuscripts, to ephemeral print, to finely bound treatises and First Folios. Capacious in its choice of topics, it has studied such issues as how the medium of print shaped cultural interactions among learned, middling, and plebeian groups in society; how the constraints of economics, patronage, taste, and censorship affected the content and presentation of works; and how authors and readers, authorities and sundry dissidents perceived the proper uses and cultural meaning of different genres of texts (Bibles, histories, chapbooks, almanacs) and different media of communications (print, manuscript, speech). On the scholarly ambitions and approaches of "history of the book" scholarship, see, for example, ROGER CHARTIER, *THE CULTURAL USES OF PRINT IN EARLY MODERN FRANCE* (Lydia G. Cochrane trans., 1987); Robert Darnton, *What Is the History of Books?*, in *BOOKS AND SOCIETY IN HISTORY* 3, 3-26 (Kenneth E. Carpenter ed., 1983); Robert Darnton, *History of Reading*, in *NEW PERSPECTIVES ON HISTORICAL WRITING* 140, 140-67 (Peter Burke ed., 1992); DAVID D. HALL, *CULTURES OF PRINT: ESSAYS IN THE HISTORY OF THE BOOK* (1996); MICHAEL WARNER, *THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH CENTURY AMERICA* (1990).

As this Article will reveal, I have employed methods associated with "history of the book" scholarship, such as: compilation of data on patterns of book ownership (based on estate inventories) and longitudinal patterns of book production (based on bibliographies); attention to the mechanics of licensing; investigation of how books signal their imagined or ideal readers; consideration of how manuscript and print as carriers of information differentially allocate intellectual power; and exploration of changing attitudes towards and cultural implications of print (as opposed to speech and manuscript) as a medium for disseminating knowledge.

It is worth noting, parenthetically, how seldom the methods and approaches of the "history of the book" have been brought to bear on law, compared to their flourishing application to religion, statecraft, literature, and science. Law is a promising candidate. Its doctrines and mores have been transmitted through precisely the sort of fluid interactions among print, manuscript, and oral tradition that historians of the book have done so much to illuminate. As simultaneously a mandarin intellectual system, a technique of governance, a protest ideal, and a generator of social and political categories, law always had to bridge practitioner elites, government, and the various strata of society, presenting the intellectual circulation that attracts historians of the book. How to properly promulgate law has been a continuous problem in Western legal history, since an unknown, hermetic law is ineffectual, yet what Weber called "legal honoratiore" resist unveiling the inner reasons of their craft. See MAX WEBER, *The Legal Honoratiore and the Types of Legal Thought*, in *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 198, 198 (Max Rheinstein & Edward Shils trans., 1967). Dissemination of law is at once unavoidable, politically dangerous, and potentially unpalatable to legal specialists, making the problem of communications—and hence the value of "history of the book" approaches—even more pressing in law than in fields that can pretend to esotericism or political neutrality such as, say, science or literature.

early Stuart England.⁶ The flourishing of lawbooks around the turn of the seventeenth century studied from within legal history under the rubric of "legal literature" and from without as an agent of state-building and political argument was a more deeply controversial process than generally supposed. Not only were the jurisprudential content and organizational strategies of lawbooks contested, but more fundamentally, so was the very wisdom of resorting to print as a communicative medium.⁷ Parts II and III delineate the costs of law printing and explore justificatory strategies that emerged in response. Second, this Article portrays the anti-publicists as part of a larger late Elizabethan and early Stuart backlash against "publicity" in statecraft and nonconformist "popularity" in religion, as a legal correlate to these latter two movements. The family resemblances among the three testify to the breadth of Courtly ambivalence with printed tutelage. In particular, the overlap of anti-publicist and absolutist vocabulary hints at an absolutist concern with the pace and style of dissemination, a largely overlooked part of their legal agenda (to go along with their well-known efforts to reshape constitutional norms). Third, and most broadly, the debate over legal publishing identifies as a historical problem the emergence of the idea, or ideal, that subjects ought to know the inner reasons as well as the commands of the law at a time when print made this possible for the first time. Initially serving Henrician solidification of the kingdom, this ideal of a justified rather than apodictic law later became a carrier of

⁶ The development, or "triumph," of the common law in Tudor-Stuart England was a process at once social, jurisprudential, doctrinal, political, and cultural. A selection of the leading works on the topic would include CHARLES OGILVIE, *THE KING'S GOVERNMENT AND THE COMMON LAW, 1471-1641* (1958); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956); J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 30-69 (1987); WILFRID R. PREST, *THE RISE OF THE BARRISTERS: A SOCIAL HISTORY OF THE ENGLISH BAR, 1590-1640* (1986); 1 CHARLES M. GRAY, *THE WRIT OF PROHIBITION: JURISDICTION IN EARLY MODERN ENGLISH LAW* 22-38 (1994).

⁷ Students of English legal literature have explored contemporaries' praise for and objections against various early modern lawbooks—such as Coke's *Reports*, compilations of maxims, and the "methodized" treatises using Ramist logic as an organizing system. They have not considered the advantages and drawbacks of print itself as a communicative medium. See, e.g., LOUIS A. KNAFLA, *LAW AND POLITICS IN JACOBAN ENGLAND: THE TRACTS OF LORD CHANCELLOR ELLESMERE* 123-54 (1977); A.W.B. SIMPSON, *The Rise and Fall of the Legal Treatise*, 48 U. CHI. L. REV. 632, 632-79 (1981); PETER STEIN, *REGULAE JURIS: FROM JURISTIC RULES TO LEGAL MAXIMS* (1966); PETER GOODRICH, *LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS* 15-52 (1990).

“constitutionalist” politics under the challenge of a contrary absolutist model of royal proprietorship of legal knowledge.

I. WHY WAS IT ACCEPTABLE TO PRINT LAW?

In the early sixteenth century, print was unusual, even a touch anomalous among the law’s manuscripts, orations, and memorial traditions. How could lawyers justify the legal press? The state’s desire for widespread promulgation of legal commands, the growth of legal education and the profession, litigation and a legally literate lay readership, and the increasing importance of the common law in national political argument expanded the book market. The lawyer’s desire for status, patronage, professional standing, and political advantage motivated him to write for the press (when his work was not being stolen or posthumously appropriated). But neither the structural forces driving the market nor the individual motivations of authors provided an intellectually and politically satisfying rationale for legal publishing. Lawyers fashioned one out of the vocabulary of early- to mid-sixteenth-century English humanism and Protestantism, which favored them with well-recognized, polemically powerful idioms attached to a cultural politics supportive of law publishing.

A. *Humanism*

Building on Plato’s concept of a *res publica* by way of Erasmus, English humanists such as Thomas More and Thomas Starkey championed a vision of an ideal commonwealth. The public interest of the community rather than the private interest of rulers or dominant factions was its end, the participation in governance of citizens tutored in the virtues of honesty, public-spiritedness, and godliness its foundation. The Platonic model of sound knowledge expressing itself in virtuous action made the proper education of the political nation an especially salient concern. As Peter La Primaudaye would later put it in *The French Academy*, sound knowledge was the “efficient cause of prudence.”⁸ Cultivation of the citizenry’s virtues through immersion in the *studia humanitatis* and religion would contain aggression and faction and encourage harmony and unity, the central ends of the cooperative commonwealth. With a little ingenuity, the legal press

⁸ PETER LA PRIMAUDAYE, *THE FRENCH ACADEMY* 69 (4th ed. 1602).

could be cast as a brother educator, another prop for informed order.⁹

John Rastell (1475-1536) pioneered the argument. One of the earliest important legal publishers, editors, and translators, he used his English-language prefaces to the *Liber Assisarum et Placitorum Corone* [*Book of Assizes and Pleas of the Crown*] (c.1511-1514), *Abbreviation of the Statutes* (1519), and *Expositiones Terminorum Legum Anglorum* [*Expositions of the Terms of the Laws of England*] (c.1525)¹⁰ to place the printer alongside the traditional trio of legislator, magistrate, and lawyer as legal educators serving the commonwealth.¹¹ Rastell constructed his argument out of humanist *topoi* about law popular in the intellectual circle surrounding the early (pre-Reformation) Thomas More, his brother-in-law. Well-made laws, not riches, power, or honors, were the foundation of the commonwealth, tutoring subjects in good manners, respect for God, and the art of peaceful living among neighbors. Wholesome law could only do its good work if conscientiously taught to subjects, who must know what they were bound to obey and must have before them the models towards which to orient their character.¹² Through legal publishing, "universally the people

⁹ See FRITZ CASPARI, *HUMANISM AND THE SOCIAL ORDER IN TUDOR ENGLAND* (1968); ARTHUR B. FERGUSON, *THE ARTICULATE CITIZEN AND THE ENGLISH RENAISSANCE* (1965); 1 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 101-12, 193-243 (1978).

¹⁰ All of these books appeared in more than one edition, particularly the *Expositiones*, which was reprinted numerous times in the original law French and in translation for over a century. In the second half of the sixteenth century, an anonymous lawyer copied Rastell's preface to the *Liber Assisarum* into his commonplace book. See COMMONPLACE, Harvard Law School Rare Book Room, MS 5021. This fortuitous survival suggests the continuing importance of Rastell's work a half-century after its publication.

¹¹ JOHN RASTELL, *Prologus, in Liber Assisarum & Placitorum Corone* [*Book of Assizes and Pleas of the Crown*] (c.1511-1514), reprinted in *THE THOUGHT AND CULTURE OF THE ENGLISH RENAISSANCE: AN ANTHOLOGY OF TUDOR PROSE, 1481-1555*, at 169, 169-73 (Elizabeth M. Nugent ed., 1956) [hereinafter *THOUGHT AND CULTURE*].

¹² On Rastell's interaction with the humanists surrounding More, see ALBERT J. GERITZ & AMOS LEE LAINE, *JOHN RASTELL* 1-27, 92-105 (1983); A.W. REED, *EARLY TUDOR DRAMA: MEDWALL, THE RASTELLS, HEYWOOD, AND THE MORE CIRCLE* (1926); PEARL HOGREFE, *THE SIR THOMAS MORE CIRCLE: A PROGRAM OF IDEAS AND THEIR IMPACT ON SECULAR DRAMA* (1959). On the ideas of More and his circle, see FERGUSON, *supra* note 9; RICHARD MARIUS, *THOMAS MORE: A BIOGRAPHY* (1984); CASPARI, *supra* note 9, at 50-75.

of the realm might soon have the knowledge of the said statutes and ordinances, . . . the better to live in tranquillity and peace."¹³

Rastell's encomium to law printing followed and was part of humanist efforts to widen the conventionally acceptable boundaries of scholarly and political audiences. Italian and Northern European humanists impressed on their English followers a respect for the press's diffusion of purified classical texts, which facilitated study of philosophy and rhetoric. A handful of English political writers followed Italian civic humanists in addressing their appeals beyond the prince, Court, and aristocracy to the class of "governors," as in Thomas Elyot's *The Book Named the Governor* (1531), or to the whole body of citizens (of appropriate social status), as in Thomas More's *Utopia* (1516) and Thomas Starkey's *Dialogue Between Reginald Pole and Thomas Lupset* (MS, 1535). In a sense they worked alongside Henry VIII's government, which used printed pamphlets to mobilize educated opinion in favor of the royal divorce and the break with Rome.¹⁴ Humanists generally encouraged, for want of a better term, a disseminationist bias, which favored legal publishing.¹⁵ Law, wrote Rastell, "kept secretly in the knowledge of a few persons and from the knowledge of the great multitude may rather be called a trap and a net to bring the people to vexation and trouble than a good order to bring them to peace and quietness."¹⁶

This disseminationist bias underlay the humanist commitment to legal accessibility, a goal with three interrelated components: a manifest or unspoken approval of print; a preference for Latin or English over law French in the hope of opening law to the learned or to all

¹³ See JOHN RASTELL, *Prohemium*, in *THE ABBREVIATION OF THE STATUTES* (1519), reprinted in Howard Jay Graham, *Our Tong Maternall Marvellously Amendyd and Augmentyd: The First Englishing and Printing of the Medieval Statutes at Large, 1530-1533*, 12 *UCLA L. BULL.* 58, 97-98 (1965).

¹⁴ See G.R. ELTON, *POLICY AND POLICE: THE ENFORCEMENT OF THE REFORMATION IN THE AGE OF THOMAS CROMWELL 171-216* (1972); FRANKLIN LE VAN BAUMER, *THE EARLY TUDOR THEORY OF KINGSHIP 211-24* (1940).

¹⁵ This disseminationist bias was no more than a bias—by no means an unwavering commitment. It was consistent with support for the suppression of "irresponsible" publications and for revival at times of crisis of traditional disdain for the "multitude's" political participation and judgment. FERGUSON, *supra* note 9, at 156-59.

¹⁶ JOHN RASTELL, *Prohemium*, in *EXPOSITIONES TERMINORUM LEGUM ANGLORUM* (c.1525), reprinted in *THOUGHT AND CULTURE*, *supra* note 11, at 176, 176-77. The humanist lawyer John Hales wrote around 1540 that "if law be a rule whereunto every man should reduce his living me thinks it very necessary, to put it in writing, to the intent the people might know what they ought to do and not hang in one man or in few learned men's heads." JOHN HALES, *ORATION IN COMMENDATION OF LAWS* (MS, c.1540), Free Library of Philadelphia, Carson Collection, MS LC 14:32.1, fol. 14r.

literate; and the direction of books to a broad rather than narrowly professional readership, a matter of signaling an imagined target audience.¹⁷ Support for the legal press typically arose as a corollary of this wider commitment to legal accessibility, manifesting itself through calls, in print, for the broad diffusion of legal knowledge among laypeople.¹⁸ Christopher St. German's second dialogue in *Doctor and Student* (1530) was among the broadest, appearing in English rather than the Latin of the first dialogue, inviting in even illiterates:

[M]any can read English that understand no Latin and some that can not read English by hearing it read may learn divers things by it they should not have learned if it were in Latin. Therefore for the profit of the multitude it is put into the English tongue. . . . To them therefore that be not learned in the law of the realm this treatise is specially made.¹⁹

Thomas Phaer, Richard Taverner, and Ferdinand Pulton followed the lead of St. German and Rastell.²⁰

¹⁷ There was an affinity, but no necessary connection, among the three forms of accessibility. Thomas Elyot's *The Book Named the Governour* (1531) and Thomas Starkey's *A Dialogue Between Reginald Pole and Thomas Lupset* (MS, c.1533), for example, two of the leading humanist attacks on "barbarous," insular law French, did not address the desirability of printed law. See THOMAS ELYOT, *THE BOOK NAMED THE GOVERNOR* 62-64 (R.C. Alston ed., 1907) (1531); THOMAS STARKEY, *A DIALOGUE BETWEEN REGINALD POLE AND THOMAS LUPSET* 117, 129 (Kathleen M. Burton ed., 1948) (MS, c.1533).

¹⁸ I do not wish to conflate the lawyers influenced by the humanism of More, Starkey, Elyot, and the commonwealth ideal with the English "legal humanists" of the latter sixteenth century, such as William Lambarde and Thomas Egerton, who adopted a philologically inspired historicist approach to law pioneered on the Continent. On this latter "legal humanism," see DONALD R. KELLEY, *FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP: LANGUAGE, LAW, AND HISTORY IN THE FRENCH RENAISSANCE* (1970); DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* (1990) [hereinafter KELLEY, *THE HUMAN MEASURE*].

¹⁹ CHRISTOPHER ST. GERMAN, *DOCTOR AND STUDENT* 3, 176-77 (T.F.T. Plucknett & J.L. Barton eds., 91 Selden Soc'y 1974) (1530). Note St. German's favorable reference to the "multitude."

²⁰ Thomas Phaer, lawyer and physician, translator of Vergil's *Aeneid* (1558) and the French medical text *The Regiment of Life* (1545), also published a formulary of legal instruments, the *New Book of Presidents* (1559 ed.), whose preface invited "every person that can write and read and intends to have any thing to do among the common weal" to "apply his mind unto this kind of learning." THOMAS PHAER, *A NEW BOOK OF PRESIDENTS* (1559 ed.), quoted in H.S. BENNETT, *ENGLISH BOOKS & READERS, 1558 TO 1603*, at 162-63 (1965). The book appeared in 11 editions from 1543 to 1562 and was republished continually through 1641.

The lawyer and translator of Erasmus, Richard Taverner, composed the English-language *Institutions in the Laws of England* (c.1540), a short book concerned mainly with the land law. He aimed to set forth English law "plainly and simply" to teach obedience to the prince and the laws while serving God and the commonwealth. See RICHARD TAVERNER, *Peroration*, in *INSTITUTIONS IN THE LAWS OF ENGLAND* (c. 1540)

The humanist case for law printing captured the imagination of more than nationally prominent writers. The saga of the unfortunate Essex-county practitioner William Barlee (1538-1610) testifies to its appeal to provincial lawyers and suggests the breadth of its importance in English legal culture. Barlee pursued a rural Essex practice without much financial success. Compelled to sell the family manors in 1568, he watched his fortunes and reputation sink: "albeit I am not worth ten groats, neither have I house to dwell in, . . . nor power to get meat for my self." To win reputation and office, he determined to publish a treatise ("Concordance") of manorial law followed by works on ecclesiastical law, last wills, and common officers (such as sheriffs and bailiffs).²¹ Difficulties arose. He needed money to finish and publish the Concordance and endorsement of the project by a prominent figure at Court, but he was not an important enough man to approach a Privy Councilor or royal judge himself. So in 1578 Barlee recruited the Sheriff of Essex, Gabriel Poyntz, as an intermediary. Arming Poyntz with an outline of the half-begun Concordance as a précis of the larger project, Barlee aimed him in the direction of Poyntz's friend Sir Thomas Heneage of the Privy Chamber.²² After hearing nothing for several months, Barlee wrote to Lord Treasurer William Cecil, who had also received a copy through Poyntz's efforts, imploring him, unsuccessfully, to stand as a patron of the work.²³ The

and preface to the 1542 edition of the work under the title, *THE PRINCIPAL LAWS AND STATUTES OF ENGLAND NEWLY RECOGNIZED AND AUGMENTED* at iib (1542). The *Institutions* was anonymous. I have followed John Baker's identification of Taverner as the author. See 2 *THE REPORTS OF SIR JOHN SPELMAN* 3 (J.H. Baker ed., Selden Soc'y 1978). The book appeared in numerous editions under varying titles for almost 100 years. See also FERDINANDO PULTON, *Preface to AN ABSTRACT OF ALL THE PENAL STATUTES WHICH BE GENERAL, IN FORCE AND USE* (1579 ed.) [hereinafter PULTON, *ABSTRACT*]. Pulton's *Abstract* was reprinted on eight separate occasions between the first edition of 1560 and the last of 1600. Pulton repeated his belief that printed law furthered the "profit and quiet of the common-wealth" in the prefaces to his *A COLLECTION OF SUNDRY STATUTES, FREQUENT IN USE* (1618) and *A CALENDAR, OR TABLE, COMPREHENDING THE EFFECT OF ALL THE STATUTES* (1609).

The anonymous Elizabethan author of *The Origin of the Laws of England* combined approval of Edward III's 1362 statute mandating pleading in English with a call for publishing the Readings delivered in the Inns of Court. See *Origin*, British Library, Harleian MS 4317, fols. 2v and 4r-v.

²¹ See WILLIAM BARLEE, *A CONCORDANCE OF ALL WRITTEN LAWS CONCERNING LORDS OF MANORS, THEIR FREE TENANTS, AND COPYHOLDERS* at i-iv, 49, 30-31 (Manorial Soc'y 1911) (MS, 1578).

²² See *id.* at 55, 61. Poyntz was to deliver the Concordance to Heneage as an inducement to bestow on Barlee an office and financial support.

²³ See Letter from William Barlee to William Cecil (Nov. 7, 1578) (British Library, Lansdowne MS 99 #45).

Concordance ultimately came to rest in the State Papers Domestic, where it appears to have slept undisturbed until the Manorial Society roused it at long last for the press in 1911.²⁴

To win over Poyntz and Cecil, Barlee composed one of the few sixteenth-century reflections on the likely effects of published law. Once printed and placed in “every manor by such subjects as desire to buy wisdom, without any great cost,” his Concordance would help soothe the differences of religion, status, and class troubling Elizabethan England. Eager to deny that a published lawbook stirred up trouble, he emphasized its influence on education rather than its impact on comparative resources in litigation. Its provision of a public measure of legal duties and boundaries more standardized, readily available and, hence, “disinterested” than manuscript or oral tradition allowed informed tutelage in moments of conflict. Agents of “righteousness,” vernacular lawbooks taught rulers how to govern fairly and gave inferiors the means to “instruct their lord’s officers” away from error; they led masters away from “cruel purposes” under the “gracious admonishment of their servants”; they turned servants away from “froward ways by the loving instructions of their learned masters.”²⁵ Along with a projected work on ecclesiastical law, his Concordance would “make motions of exhortation unto the heads of papists and to these ringleaders of Protestants whereby they may bend or bow each other to one peaceable rule and to one charitable concordance in matters touching religion,” the better to “turn their swords of contention into peaceable plowshares.”²⁶ Barlee thus expanded to fantastic proportions the humanist trope that education fostered social harmony, skirting close to the parodic as Catholic and Protestant, lord and tenant, and master and servant found the straight path in the lawbook’s lines.

Viewing lawbooks as a foundation for informed obedience and peacefulness was not simply a way of making the legal press the servant of widely shared values. It also hinted at how lawbooks could further the important Tudor political objective of strengthening royal justice against local and seigniorial rivals. The sixteenth-century ex-

²⁴ The Manorial Society’s 1911 imprint of Barlee’s *Concordance* is a reproduction of the copy in the State Papers Domestic, Elizabeth 12/123/14.

²⁵ Letter from William Barlee to William Cecil, *supra* note 23. Like other humanists, Barlee championed not print per se, but “common knowledge in laws,” which meant both translating and publishing rules “obscurely hid” in law French manuscripts.

²⁶ BARLEE, *supra* note 21, at 38, 43.

pansion of the common law and royal justice in the counties was a cultural as well as a jurisdictional and administrative project. Lawyers, humanist educators, and the Crown united in championing law as an art proper to a gentleman, in part to appropriate the prestige of the armigerous classes for the law and the lawyers, in part to refashion the aristocracy as a governing rather than a military elite while the War of the Roses haunted the Tudors' long memory, and in part to inspire the local gentry to serve responsibly as justices of the peace and on royal commissions. Sir Humphrey Gilbert's model academy for the education of Queen Elizabeth's wards included legal lectures within the curriculum of classical languages, philosophy, and rhetoric. Gilbert charged the lawyer-tutor with reducing the law into maxims "for the more facile teaching of his auditory" and publishing a book on the common law every six years.²⁷ Humfrey Braham saw the legally literate peer and gentleman upholding the cardinal virtue of justice through wise governance as the successor to the chivalric knight. The law became their weapon and shield, excellence in its study and use an honor worth winning and a mark of the "true nobility" of merit over lineage.²⁸

In teaching peers and gentry the duties and political etiquette of governance, legal publication promised to make them more willing to subordinate local interests to the king's law. Rastell claimed that knowledge of a "good reasonable common law" enforced by "one good governor" could bring "divers and much people to one good unity," restraining the "divers rulers and governors, and divers orders and laws, one contrary to another" jostling throughout England. For when "every governor will have the law after his mind," it "brings one multitude of people to variance and division."²⁹ Putting legal dissemination at the service of national authority in the localities was a favorite tactic of Elizabethan and early Stuart would-be statutory redactors. Elizabeth's Lord Keeper Nicholas Bacon and James I's Attorney General Edward Coke, to pick two examples, both advocated a trimmed-down and clarified printed compilation of the statutes on the grounds that the obscurity encouraged lawbreaking and disregard

²⁷ SIR HUMPHREY GILBERT, *QUEEN ELIZABETH'S ACADEMY* 6, 9 (F.J. Furnivall ed., 1869) (MS, between 1562 and 1583).

²⁸ See HUMFREY BRAHAM, *THE INSTITUTION OF A GENTLEMAN* at Biiii, Ci'-Ciii', Eiii (1568) (1555). This theme continued into the early Stuart period. See JAMES CLELAND, *THE INSTRUCTION OF A YOUNG NOBLEMAN* 95-97, 144-46 (1612) (lay legal study as preparation for governance and attainment of "true nobility").

²⁹ RASTELL, *supra* note 16, *reprinted in* *THOUGHT AND CULTURE*, *supra* note 11, at 176, 176-78.

for authority.³⁰ Braham's defense of legal literacy among the gentry included a reminder from Plato to "conserve and keep together all the whole body of the commonwealth, not maintaining some part thereof and to suffer the rest to fall to decay."³¹ So long as statute and common law primarily signified agents of national authority against local and seigneurial resistance, legal publication could represent itself as an agent of royal power and state-building (or more accurately, kingdom-building). By the turn of the seventeenth century, when the role of statute and common law as constraints on royal prerogative came to the fore, the alliance became harder to maintain, particularly when absolutists expanded the claims of secrecy over "publicity" in statecraft (as we shall see in Parts III.B and IV).

* * * *

Rastell, Taverner, Phaer, Pulton, and Barlee—for want of a better term, the "Rastellians"—not only identified social and political values that the legal press supposedly furthered. They inaugurated a style of apologetic writing that hid artful assumptions and elisions under a studied surface naiveté. The Rastellians legitimated the press by emphasizing its continuities with prior forms of legal communication. Ferdinand Pulton's *Abstract of all the Penal Statutes* (1560) placed law printing within an ongoing pedagogical tradition that ran from the Romans' display of the tables of their law in the open places of their cities, through the Israelites' writing of commandments on their gates and doorposts, through the oral declamation of English ordinances at assizes, sessions, and leets.³² This technically superior form of disseminating law was not a particularly transformative, hopeful, or threatening development.³³ Age-old rationales for popular legal

³⁰ Bacon engaged in a decades-long effort to eliminate redundancies, obsolete provisions, and confusing partial repeals and amendments from the penal statutes, hoping to set a well-organized, printed version of them before a confused public, lest England close its "laws in fair books or rolls and . . . lay them up safe without seeing them executed." 1 PROCEEDINGS IN THE PARLIAMENTS OF ELIZABETH I, 1558-1581, at 191, 49, 464 (T.E. Hartley ed., 1981) [hereinafter PROCEEDINGS 1558-1581]. For examples of Bacon's repeated appeals to Parliament to reorganize the statutes, see *id.* at 49, 82-84, 111-12, 171, 183, 189-93, 464-65. Coke declared that printing "one plain and perspicuous law divided into articles" would teach subjects "how much is of them in force, and how to obey them." EDWARD COKE, *Preface* to REPORTS, pt. 4, at ix-x (1826 ed.) (1604).

³¹ BRAHAM, *supra* note 28, at Cii^v.

³² See PULTON, *Preface* to ABSTRACT, *supra* note 20.

³³ I do not claim that the writers under discussion (Rastell, Taverner, St. German, Pulton, Barlee, and so forth) stood together as a group in other contexts, for instance, in the polemical contests over the Henrician Reformation. I gather them here only as advocates of legal publication.

pedagogy justified the new mechanical voice. Subjects could not obey rules they did not know; they could not live peacefully without legal boundaries; they improved character as they learned law and directed conduct towards its demands.³⁴ These were arguments that in large part could be, and were, used in medieval and classical manuscript legal cultures.

In large part, but not entirely. For the Rastellian appeal for the legal press displayed some emphases and inflections particular to its time and purpose. To begin with, it understood legal publication more as an unveiling than a promulgation. The difference is subtle, but revealing. One promulgates a law made for the first time, or imposed in a new place, or perhaps taught to a new generation. The Rastellians, by contrast, imagined print unlocking a law hidden away, continually driving back the boundaries of ignorance—a familiar humanist and early Protestant image.³⁵ Calling for emulation, they saw themselves as part of an ongoing and accelerating program of legal education for the public. Taverner hoped that his *Institutions* would encourage skilled writers to instruct the “whole community of this land” in the law.³⁶ St. German offered *Doctor and Student* “not merely for instruction, but still more to incite others to collect and put into writing additional cases in English law.”³⁷

Yet unlike the humanists and Protestants whose rhetoric of disclosure they borrowed, the Rastellians lacked a reformist temper. Thomas Starkey, Thomas Elyot, the young Thomas More, and the early

³⁴ As with much Renaissance thought, one can find classical and medieval antecedents for most elements, if not for the overall configuration. That subjects must know the rules they are supposed to obey, for example, was an ancient theme, one forcefully expressed in the medieval Statute of Pleading of 1362. The statute mandated English as the language of pleading and argument in the King’s courts on the grounds that the laws and customs “shall be perceived and known, and better understood in the tongue used in the said [English] realm, and by so much every man of the said realm may the better govern himself without offending of the law.” DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 111 (1963) (citing 36 Edw. III, Stat. I, ch. 15 (1362)). Written law (as opposed to custom, oral tradition, or the whim of princes) had long been cast as a guardian of social peace, a role that printed law could appropriate with only a minor rhetorical sleight of hand. See JOHN BRITTON, *BRITTON: AN ENGLISH TRANSLATION AND NOTES* 1 (Francis Morgan Nichols trans., 1901) (MS, c.1300).

³⁵ On the importance humanists attached to the dissemination of “sound knowledge,” see FERGUSON, *supra* note 9, at 169; 1 SKINNER, *supra* note 9, at 195-96; MARGO TODD, *CHRISTIAN HUMANISM AND THE PURITAN SOCIAL ORDER* 43-52 (1987).

³⁶ See TAVERNER, *Peroration*, in *INSTITUTION IN THE LAWS OF ENGLAND*, *supra* note 20; TAVERNER, *Preface to THE PRINCIPAL LAWS AND STATUTES OF ENGLAND NEWLY RECOGNIZED AND AUGMENTED*, *supra* note 20, at iv.

³⁷ ST. GERMAN, *supra* note 19, at 3.

English Protestants had married tutelage in philosophy, arts, and Scripture to programs of social or spiritual amelioration.³⁸ Legal publication, as the Rastellians advocated it, was not intended to help subjects diagnose social ills and offer remedies. It beckoned no challenge to the pretensions of power or to economic exploitation. It promised no betterment of the law itself according to a progressive model (a push toward a higher state) or a restorative model (a stripping away of impurities and return to a lost excellence). Lawbooks might improve society by restraining overreaching as subjects became better aware of their appointed boundaries and duties, knowledge breeding the virtuous action requisite for harmony. But this was education into a preexisting, preemptively good order—the stratified harmony longed for by Barlee and the public pronouncements of Tudor authorities—not education as a precondition to reform of that order. In so doing, the Rastellians avoided the characteristic humanist challenge of squaring reform with social stability.³⁹

Casting legal dissemination as a friend to order was no invention of the print age, but the notoriety of the press in stoking sixteenth-century religious and political strife made the task essential to the Rastellians.⁴⁰ To be sure, lawbooks posed less of a danger than the re-

³⁸ This is, of course, a question of degree. I exclude St. German from the generalization.

³⁹ On the commonwealth ideal and the importance to English humanists of the educated citizen offering reforms, see FERGUSON, *supra* note 9; 1 SKINNER, *supra* note 9, at 213-28; CASPARI, *supra* note 9, at 32-49; J. W. ALLEN, *A HISTORY OF POLITICAL THOUGHT IN THE SIXTEENTH CENTURY* 134-56 (1941). On the importance of reconciling simultaneous commitments to reform, stability, and obedience to constituted authority, see 1 SKINNER, *supra* note 9, at 229, 235-36; FERGUSON, *supra* note 9, at 367-68.

⁴⁰ Rastell's generation watched printed propaganda fuel the Continental Protestant Reformation, the German Peasants' War, and the Henrician Reformation. Their successors experienced the polemical campaigns accompanying the risings of 1536 and 1549, and the regime changes from the Protestant Edward VI to the Catholic Mary to the Protestant Elizabeth. The power of print to undermine hierarchy and inflame dissension as readily as reinforce order had become commonplace by the middle sixteenth century. Englishmen ironically linked two great Renaissance inventions, print and gunpowder, in their shared explosiveness. "And, better to effect a speedy end,/Let there be found two fatal Instruments,/The one to publish, th'other to defend./Impious Contention, and proud Discontents." SAMUEL DANIEL, *THE CIVIL WARS* bk.6, 216 ¶ 37 (Laurence Michel ed., 1958) (1609); see also GABRIEL HARVEY'S *MARGINALIA* 109 (G.C. Moore Smith ed., 1913); William Camden, *Printing* (MS, c.1590s), reprinted in R. D. Dunn, *Fragment of an Unpublished Essay on Printing by William Camden*, 12 BRIT. LIBR. J. 145, 147 (1986). Statutes, royal proclamations, and the Tudor homilies rued and rebuked the disputatiousness and schism unleashed by Scriptural publication. See, e.g., An Act for Abolishing of Diversity of Opinions in Certain Articles Concerning Christian Religion, 31 Henry VIII, ch. 14 (1539); Proclamation

ligious printing tearing apart Europe. Unlike the bishops, the lawyers faced no foreign or underground press. No dissident translations of the statutes set sail from Worms and Geneva; no nonconformist year-books and treatises slid off presses hidden in London basements and country homes, vying with the official books for influence. The Bible and religious pamphlets engaged a larger stratum of the population with emotional urgency than legal works masked by French, Latin, and terms of art. Still, printed lawbooks made dissent more formidable. They did not so much create social cleavages as provide intellectual and political resources to local magnates and other rivals of royal justice, enabling them to mount more sophisticated legal challenges.⁴¹

The Rastellians relied on three question-begging forensic strategies to reassure Courtly and professional readers suspicious of the press. First, they attributed to consumers of lawbooks a particular psychology of reading to obscure how legal publication could bring critical appraisal and tactical manipulation. By making the hiddenness of law the deprivation that the legal press overcame, they could covertly appropriate the Erasmian and early Protestant trope that the disclosure of Scripture (and by implication law) pulled the soul to-

Limiting Exposition and Reading of Scripture (1539), in 1 TUDOR ROYAL PROCLAMATIONS 1485-1603, at 284, 284-86 (Paul L. Hughes & James F. Larkin eds., 1964) (contrasting the "virtuous living and godliness" expected from vernacular Scriptural publication with the ensuing unrest and factions); Hugh Latimer, *A Sermon Against Contention and Brawling* (1547), in CERTAIN SERMONS OR HOMILIES APPOINTED TO BE READ IN CHURCHES IN THE TIME OF QUEEN ELIZABETH I, at 89, 89-98 (1968) [hereinafter CERTAIN SERMONS OR HOMILIES].

Rastell himself began suggesting how legal publishing helped political stability and national unity in the middle 1520s in his *Expositiones Terminorum Legum Anglorum* (c. 1525), published as the dissension unleashed by Continental religious pamphleteering and Scriptural translation preoccupied Henry VIII's government. Throughout the 1520s, Henry's government fought to seal off England from Lutheran tracts imported from Europe, seizing and burning them. William Tyndale's English translation of the *New Testament* (1525), a work heavily influenced by Luther's German text, set off a new round of confiscations and public conflagrations. The pressure continued to build for the next two years as Wolsey strained to demonstrate English orthodoxy while his negotiations with Rome over Henry's divorce entered a delicate phase. Rastell had personal or professional connections with several of the principals involved in the suppression of books. He served as one of the lawyers evaluating Chancery bills for Chancellor Wolsey; he knew Wolsey's aide Thomas Cromwell from the late 1510s, when Cromwell played bowls at his house; and he was the brother-in-law of Thomas More. See CHRISTOPHER HAIGH, *ENGLISH REFORMATIONS: RELIGION, POLITICS, AND SOCIETY UNDER THE TUDORS* 57-67 (1993); REED, *supra* note 12, at 160-85; GERITZ & LAINE, *supra* note 12, at 19-21; JOHN GUY, *TUDOR ENGLAND* 154 (1988).

⁴¹ On Henry VIII's conflicts with the church and "overmighty subjects," see 2 *THE REPORTS OF SIR JOHN SPELMAN*, *supra* note 20, at 64-68; G.R. ELTON, *ENGLAND UNDER THE TUDORS* 82, 102-07 (1974).

wards godliness and virtuous living—vernacular publication as a lesser form of personal revelation. The echo was faint, but the theme was there, audible in Barlee's almost evangelical phrasing: to put printed law before the multitude's "own eyes" will suffuse them with "loving obedience" and "subdue their hearts . . . to one accord."⁴² This profoundly evasive strategy tacitly figured the reader, to continue the religious metaphor, as in a state of grace rather than sin. For just as the elect's understanding of the Word brought not localist politics or pursuit of individual advantage but unity in the universal Christ, so legal publication promised inculcation into the *paideia* of the national commonwealth.

Second, with this psychology of reading in the background, Rastellians labored to show fusions, not trade-offs, among the various ends served by legal publication. Might legal publishing reduce lawyers' income by draining away profitable counseling resting on control of legal knowledge? Might it heighten rather than reduce strife by providing the lawyer with better tools for serving his client at the expense of truth and neighborliness? Rastell addressed both worries by depicting lawbooks as an introductory tutor to the conscientious reader, a starting point. But when uncertainties or lawsuits arose, the good subject should

resort to some man, that is learned in the laws of this realm, to have his counsel in such points, which he thinks doubtful concerning these said statutes, by the knowledge whereof, and by the diligent observing of the same, he may the better do his duty to his prince and sovereign, and also live in tranquillity and peace with his neighbor, according to the pleasure and commandment of almighty God.⁴³

Publication, Rastell assured his readers, furthered professional and lay legal education, loyalty to God's word, obedience to the prince, neighborliness, social peace, and political unity. The deep sixteenth-

⁴² BARLEE, *supra* note 21, at 30. This rhetoric was also popular among statutes, proclamations, homilies, and book prefaces justifying Scriptural and religious publication under government auspices, a matter of speaking in a voice of aspiration while averting the eyes from other statutes, proclamations, and prefaces condemning the interpretive discord, murmuring, and railing unleashed by printed Bibles and sermons. See, e.g., An Act for the Translating of the Bible and Divine Service into the Welsh Tongue, 5 Eliz., ch. 28 (1562) (translating the Bible and Book of Common Prayer into Welsh will teach that land to "better learn to love and fear God, to serve and obey their prince, and to know their duties towards their neighbors"); *Preface to CERTAIN SERMONS OR HOMILIES APPOINTED TO BE READ IN CHURCHES* [xv] (1562 ed.), reprinted in *CERTAIN SERMONS OR HOMILIES*, *supra* note 40.

⁴³ RASTELL, *supra* note 13, reprinted in Graham, *supra* note 13, at 97, 97-98.

century conflicts between God's word and the prince's, between the prosperity of the bar and neighborly aversion to litigation, between the drive for national unification and the preservation of local order, faded from view as Rastell's anodyne prefaces placed law printing in a unified-field theorem of harmony.

Third, the widely-shared Renaissance assumption of an imperfect correspondence between heavenly and earthly governance tacitly enlisted the lawbook on the side of order. Rastell assumed that chaos, an undirected multiplicity, impended in both nature and human society unless kept at bay by law, which brought and sustained harmony. Just as the natural world depended on the "law of nature which compels every thing to do his kind," so the commonwealth, teeming with multitudes of people "fragile and prone and ready to vice," could not "continue in unity and peace" without positive law.⁴⁴ Since promulgation and dissemination were necessary conditions to the operation of law, legal publication appeared order-reinforcing. Not logic, but connotation made the argument work. The emotional impact of linking law so strongly to both cosmic and political order mitigated against seeing the dangers of faction and litigiousness that publication threatened.

* * * *

The humanist defense of legal publishing that the Rastellians pioneered, with its characteristic emphases and elisions, recurred into the early seventeenth century. Lawbook prefaces, governmental publication programs, even poetry continued to support widespread vernacular legal publication directed at an educated populace in order to tutor subjects in virtue and advance the common good of the realm or the "commonweal" (usually gestured at without further elaboration).⁴⁵ The Rastellian influence survived in the inflection of these

⁴⁴ The c.1525 and 1527 versions of Rastell's preface to the *Expositiones* differ slightly. I have drawn quotations from both. The c.1525 version is reproduced in THOUGHT AND CULTURE, *supra* note 11, at 176, 176-78; the 1527 version can be found in 1 JOSEPH AMES, TYPOGRAPHICAL ANTIQUITIES 331, 331-32 (1785).

⁴⁵ See, e.g., R.F. & J.D., *Preface* to JAMES DYER, LES REPORTS DES DIVERS SELECT MATTERS & RESOLUTIONS DES REVEREND JUDGES & SAGES DEL LEY (1672 ed.) (1585); JOHN MANWOOD, *To the Reader, in A TREATISE AND DISCOURSE OF THE LAWS OF THE FOREST* [5] (1598); RICHARD CROMPTON, L'AUTORITE ET JURISDICTION DES COURTES (1594); FULKE GREVILLE, *A Treatise of Monarchy*, verses 259-61 (MS c.1600-1610), in THE REMAINS: BEING POEMS OF MONARCHY AND RELIGION 100 (G.A. Wilkes ed., 1965); EDWARD COKE, *Preface* to REPORTS, pt 1, at xxix (1826 ed.) (1600); *Printer to the Reader, in* NICHOLAS FULLER, THE ARGUMENT OF MASTER NICHOLAS FULLER IN THE CASE OF THOMAS LAD AND RICHARD MAUNSELL [2] (1607); THOMAS POWELL, *To the Reader, in* THE ATTORNEY'S ACADEMY [11] (1623) [hereinafter POWELL, THE ATTORNEY'S

appeals: their support for a continuing and expanding publication program; their lack of overt reformist ambition; their linkage of law printing to national unity and social harmony; and their unwillingness to consider the countervailing social consequences of the legal press. The humanist celebration of the political *vita activa* and the Crown's need to recruit "governors" in the counties enforcing national law—the context that gave rise to the Rastellian defense of law printing—continued into the early Stuart years.⁴⁶ But as Parts II, III, and IV of this Article will suggest, however, the latter sixteenth century's episcopal campaign against nonconformity, "politique" suspicion of the compatibility of learning and order, and stirrings of absolutism wore away at the optimism about printed legal pedagogy that the Rastellians expressed.

B. Protestantism

Protestants' celebration of themselves as the party of enlightenment against Catholic darkness and their respect for print's role in advancing the Reformation provided the legal press important, but indirect and qualified, support. However much Protestant ministers joined government officials in complaining about printers' poor judgment, "licentiousness," and unseemly profit-seeking, the press enjoyed in their eyes a lasting prestige won in disseminating vernacular Bibles and religious tracts through decades of confessional struggle.

ACADEMY]; T.N., *Commendation*, in POWELL, *THE ATTORNEY'S ACADEMY*, *supra*, at [10]; I.L., *Preface* to *THE LAW'S RESOLUTIONS OF WOMEN'S RIGHTS* [A5] (1632); R. POWELL, *Epistle Dedicatory*, in *A TREATISE OF THE ANTIQUITY, AUTHORITY, USES AND JURISDICTION OF THE ANCIENT COURTS OF LEET* (1641). Two other popular justifications for printing law should be noted. First, it allowed men and women to avoid penalties, since ignorance of the law was no excuse. See, e.g., *To the Reader*, in MANWOOD, *supra*, at [5]; EDWARD COKE, *Proemium*, in *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* ¶ 2 (1628) [hereinafter COKE, *FIRST INSTITUTE*]; William Hughes, *The Translator to the Reader*, in *THE BOOK CALLED, THE MIRROR OF JUSTICES: MADE BY ANDREW HORNE at A3* (William Hughes trans., 1646) [hereinafter MIRROR OF JUSTICES]. Second, it instructed officials and subjects in their duties. See, e.g., *To the Reader*, in *A COLLECTION OF THE LAWS . . . CONCERNING LIVERIES OF COMPANIES AND RETAINERS* [3]-[4] (1571); R. POWELL, *Epistle Dedicatory*, *supra*. Manuals for local legal officials, who were often laymen, commonly stressed this theme. See, e.g., WILLIAM LAMBARDE, *Epistle to EIRENARCHA: OR THE OFFICE OF THE JUSTICES OF PEACE* (1970) (1581); MICHAEL DALTON, *Epistle to THE COUNTRY JUSTICE* (1618); MICHAEL DALTON, *Preface to OFFICIUM VICECOMITUM* (1623); WILLIAM SHEPPARD, *THE OFFICES AND DUTIES OF CONSTABLES* (1641).

⁴⁶ On the continuities of and challenges to humanism in Elizabethan and early Stuart England, see, respectively, MARKKU PELTONEN, *CLASSICAL HUMANISM AND REPUBLICANISM IN ENGLISH POLITICAL THOUGHT, 1570-1640* (1995); TODD, *supra* note 35.

The Bible translator William Tyndale and John Foxe's immensely influential *Acts and Monuments* [The Book of Martyrs] (1563) offered two of the most famous testaments to the "divine and miraculous invention of printing" for carrying forward God's true word against Papal resistance, convincing "darkness by light, error by truth, ignorance by learning."⁴⁷ Elizabeth Eisenstein has aptly observed that Protestant ministers viewed "printing as a providential device which ended forever a priestly monopoly of learning, . . . pushed back the evil forces commanded by Italian popes, and, in general, brought Europe out of the dark ages." The partly real, partly stereotyped Catholic suspicion of the press offered a convenient foil for Protestant self-congratulation. For in comparison to the Tridentine Catholic Church, reformed religion did exercise a lighter hand in censorship and offered greater support for vernacular Bibles, popular literacy, and unsupervised lay study of Scripture and theology.⁴⁸

Lawyers turned to their own purposes the series of stark contrasts that Protestants drew between their reforms and supposed Catholic reaction. To its friends, the Protestant faith stood for an open vernacular Scripture, knowledge, light, informed liberty, and rationality; Catholicism meant a hidden, Latin Scripture, ignorance, darkness, tyranny, mystification, and superstition.⁴⁹ This habit of seeing the "bright beams of heavenly truth" driving back the "mists and clouds" of popish darkness and superstition migrated from religious to legal

⁴⁷ 3 JOHN FOXE, *ACTS AND MONUMENTS* 718-19 (1965) (1563) ("How many printing presses there be in the world, so many block-houses there be against the high castle of St. Angelo, so that either the pope must abolish knowledge and printing or printing at length will root him out."). See generally *id.* at 718-22; 4 *id.* at 252-53. William Tyndale claimed that Catholics

be all agreed, to drive you from the knowledge of the scripture, and that ye shall not have the text thereof in the mother-tongue, and to keep the world still in darkness, to the intent they might sit in the consciences of the people, through vain superstition and false doctrine.

William Tyndale, *The Preface of Master William Tyndale, That He Made Before the Five Books of Moses, Called Genesis* (1530), in *DOCTRINAL TREATISES AND INTRODUCTIONS TO DIFFERENT PORTIONS OF THE HOLY SCRIPTURES* 390-93 (Henry Walter ed., 43 Parker Soc'y Publications 1848). On the widespread influence of Foxe, see WILLIAM HALLER, *THE ELECT NATION: THE MEANING AND RELEVANCE OF FOXE'S BOOK OF MARTYRS* 220-27 (1963).

⁴⁸ See EISENSTEIN, *supra* note 4, at 305, 355, 426; Paul F. Grendler, *Printing and Censorship*, in *THE CAMBRIDGE HISTORY OF RENAISSANCE PHILOSOPHY* 25, 45-51 (Charles B. Schmitt et al. eds., 1988).

⁴⁹ See Peter Lake, *Anti-popery: The Structure of a Prejudice*, in *CONFLICT IN EARLY STUART ENGLAND: STUDIES IN RELIGION AND POLITICS, 1603-1642*, at 72, 75-77 (Richard Cust & Ann Hughes eds., 1989).

polemic.⁵⁰ Abraham Fraunce of Gray's Inn praised seekers of the "reason of law," opposing them to Catholics who "believed as the Church believed, but why the church believed so, it never came within the compass of their cogitation."⁵¹ Were not Catholics to blame for obscurantism in law? John Hales's "Oration in Commendation of Laws" (MS, c.1540) asked why

if it be so necessary to have the principles and maxims of the law gathered together and written, then will you say why has it not been done this many years? . . . Master Dunce [that is, the schoolman] and his disciples in all sermons and exhortations that they had in times past to the people, used to outcry upon [the] lawyer and to blaspheme and condemn man's law as a thing most execrable. . . . By this . . . they alienated divers good wits from the study of the law. . . . This I judge to be one of the causes that the laws of this realm be not so set forth as the civil laws must be.⁵²

In reinforcing the disseminationist bias generated by humanism and creating an intellectual climate favorable to legal publishing, Protestantism was a symbolic more than a confessional category. Proponents of making law accessible through translation and printing styled their opponents as Papists irrespective of actual religious professions. In the 1530s, for example, Thomas Starkey likened legal to Scriptural translation, implicitly denigrating law French as a form of Roman mystification.⁵³ Forty-five years later, William Barlee compared the arguments against printing law in the vernacular to those advanced "by old men for the suppressing of the English Scriptures."⁵⁴

⁵⁰ The lawyer Henry Finch, in the heat of his youthful puritanism, traced the "corruptions" of English law to the pre-Reformation "popish and Antichristian" tyranny, adding:

So the Lord having in mercy dispersed those mists and clouds of darkness by the bright beams of his heavenly truth, it were to be desired that together with the banishment of their [the Catholic hierarchy's] superstitions, the very names and remembrance of them were also defaced and sent back into the bottomless pit of hell.

HENRY FINCH, A CONFERENCE AND REFORMATION OF THE SAME LAW BY THE LAW OF GOD (MS, before 1586) (Bodleian Library, Rawlinson MS C 43, fols. 2-3 (bound with *Nomotexnia*)). On Finch's religious views, see Wilfrid Prest, *The Dialectical Origins of Finch's Law*, 36 CAMBRIDGE L.J. 326 (1977); Wilfrid R. Prest, *The Art of Law and the Law of God: Sir Henry Finch*, in *PURITANS AND REVOLUTIONARIES: ESSAYS IN SEVENTEENTH-CENTURY HISTORY PRESENTED TO CHRISTOPHER HILL* 94, 94 (Donald Pennington & Keith Thomas eds., 1978).

⁵¹ Abraham Fraunce, *Dedication to THE LAWYER'S LOGIC* ¶ 2 (1969) (1588).

⁵² HALES, *supra* note 16, at MS LC 14:32.1, fol. 16v-17r.

⁵³ See STARKEY, *supra* note 17, at 129.

⁵⁴ Letter from William Barlee to William Cecil, *supra* note 23.

In the midst of the Civil War, over 120 years after Starkey, William Sheppard and Bulstrode Whitelocke were still tilting with the useful if shadowy Papists. "It was Romish policy," said Whitelocke in the 1650 Parliament, to keep the English people "in ignorance of matters pertaining to their souls' health; let them not be in ignorance of matters pertaining to their bodies, estates, and all their worldly comfort."⁵⁵ Lawyers pushed the trope so far as to find ersatz popes in unlikely places. The anonymous author of *Directions for the Orderly Reading of the Law of England* (MS, c.1648) linked King Henry III's suppression of law study in London with the "Pope's prohibiting the Bible much to the same end, to keep men ignorant and wholly depend[ent] on them for knowledge."⁵⁶

In a more roundabout way, reformed religion supported legal publication by generating interest in the pedagogical "method" of French logician Peter Ramus, popular among hot Protestants in the Elizabethan universities. Ramus offered a system for organizing knowledge in epitomes proceeding from the most general propositions of an art down to the most particular via a process of bipartite division. Of the numerous Renaissance peddlers of organizational schemes for teaching and remembering, Ramus made the greatest

⁵⁵ Bulstrode Whitelocke, Speech to Parliament in Support of the Bill Turning Lawbooks and Judicial Proceedings into English (1650), in 3 BULSTRODE WHITELOCKE, MEMORIALS OF THE ENGLISH AFFAIRS 260, 272 (1853); see WILLIAM SHEPPARD, THE TOUCHSTONE OF COMMON ASSURANCES A5 (1648). The identification of opponents of translation with Catholics was a common trope. In the 1614 comedy *Ignoramus*, the bumbling, pretentious common lawyer Sir Ignoramus enjoyed speaking in the "unknown tongue" of his broken Latin rather than in English. Another character likened him to a "popish priest." R. RUGGLE, *IGNORAMUS* 54, act 2, sc. 6 (Robert Coddington trans., 1662). Translators of medical texts also tarred opponents as "Papists." See, e.g., EISENSTEIN, *supra* note 4, at 362.

⁵⁶ DIRECTIONS FOR THE ORDERLY READING OF THE LAW OF ENGLAND (MS, c.1648) (Bodleian Library, Rawlinson MS C 207, fols. 245-46).

In the spirit of reformed religion's eagerness to find Scriptural precedent for current policies, lawyers also cited Biblical verses in support of vernacular publication. "Moses read all the laws openly before the people in their mother tongue," noted Whitelocke. "God directed him to write it, and to expound it to the people in their own native language; that what concerned their lives, liberties, and estates, might be made known unto them in the most perspicuous way." Whitelocke, *supra* note 55, in 3 WHITELOCKE, *supra* note 55, at 272-73. Barlee reasoned that the Scriptural injunction to magistrates to "make plain paths for their people to walk in" meant that the "express word of God" required "common knowledge in law" through English law printing. Letter from William Barlee to William Cecil, *supra* note 23. Such Scripturalist arguments were, of course, no monopoly of Protestants.

impact on the English universities and the study of English law.⁵⁷ He particularly appealed to the more determined and vigorous English Protestants. His celebrated death in the St. Bartholomew massacre of 1572—in the Protestant view, his martyrdom—recommended him. So did his stripped-down dialectical system. It promised to reduce any body of knowledge to an easily taught and memorized epitome capable of reproduction on the printed page without the visually arresting, irreverent, or even pornographic images that the classical “Art of Memory” used to fix information in the mind. By relying on an “imageless dialectical order,” Ramus promised, in Frances Yates’s telling phrase, an “inner iconoclasm” of the mind compatible with Protestant “outer iconoclasm,” their sweeping away of religious pageantry and Scholastic clutter.⁵⁸

Ramist logic spread through the English universities in the latter sixteenth century and continued with somewhat less vigor into the next, touching lawyers and students en route to the Inns of Court.⁵⁹ Three generations of English legal writers drew on it: from Abraham Fraunce’s *The Lawyer’s Logic* (1588), through the pedagogical works of William Fulbecke, *A Direction or Preparative to the Study of the Law* (1600), and John Dodderidge, *The English Lawyer* (1631), through synoptic overviews of the law by Henry Finch, *Law or a Discourse Thereof* (1627), and Edmund Wingate, *The Body of the Common Law of England* (1655), through the numerous publications of William Sheppard from the 1640s to the 1670s.

Ramists were generally leery of confining knowledge within mysteries and behind walls of contempt for the intellectual capacities of readers. A pedagogic tool born in the academic classroom, Ramist

⁵⁷ See NEAL W. GILBERT, *RENAISSANCE CONCEPTS OF METHOD* 72-73, 95-96, 129-44 (1960); KELLEY, *THE HUMAN MEASURE*, *supra* note 18, at 209-13.

⁵⁸ See FRANCES A. YATES, *THE ART OF MEMORY* 231-41, 234-35, 237 (1966); see also WILBUR SAMUEL HOWELL, *LOGIC AND RHETORIC IN ENGLAND, 1500-1700*, at 146-233 (1956); WALTER J. ONG, *RAMUS: METHOD, AND THE DECAY OF DIALOGUE* 167-68, 194-95, 227-28 (1958).

⁵⁹ See HOWELL, *supra* note 58, at 7, 146-233; WILFRID R. PREST, *THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS, 1590-1640*, at 137-49 (1972); Louis A. Knafla, *Ramism and the English Renaissance, in SCIENCE, TECHNOLOGY, AND CULTURE IN HISTORICAL PERSPECTIVE* 26, 26-50 (Louis A. Knafla et al. eds., 1976); Louis A. Knafla, *The Influence of Continental Humanists and Jurists on English Common Law in the Renaissance, in ACTA CONVENTUS NEO-LATINI BONONIENSIS: PROCEEDINGS OF THE FOURTH INTERNATIONAL CONGRESS OF NEO-LATIN STUDIES* 60, 60-71 (R.J. Schoeck ed., 1985); David J. Seipp, *The Structure of English Common Law in the Seventeenth Century, in LEGAL HISTORY IN THE MAKING: PROCEEDINGS OF THE NINTH BRITISH LEGAL HISTORY CONFERENCE GLASGOW 1989*, at 61, 61-83 (W.M. Gordon & T.D. Fergus eds., 1991).

method promised the rapid and effective imparting of any art or science to unspecialized audiences.⁶⁰ Its practitioners appropriated the Protestant and humanist championing of enlightenment over ignorance as part of its appeal. Roland MacIlmaine's 1574 translation of Ramus's logic invoked "the duty of all Christians . . . to labor by all means, that they may profit and aid their brethren, and to hide or keep secret nothing, which they know may bring great utility to the commonwealth." The "envious . . . think it not decent to write any liberal art in the vulgar tongue," a "mischievous opinion" that did "great hurt . . . to the Church of God."⁶¹ Abraham Fraunce, expounding on Ramus's logic through the use of legal materials in *The Lawyer's Logic* (1588), depicted the resentments of academics who had come to look upon philosophy as a proprietary guardianship bestowed on only a select few. His vehicle was a "raging and firefaced Aristotelian":

Hereby it comes to pass that every cobbler can cog a syllogism, every carter crake of propositions. Hereby is logic profaned, and lies prostitute, removed out of her sanctuary, robbed of her honor, left of her lovers, ravished of strangers, and made common to all, which before was proper to schoolmen, and only consecrated to philosophers.⁶²

Fraunce replied to his foe: "Cobblers be men, why therefore not logicians? And carters have reason, why therefore not logic?" Logic does not become "less commendable, because it is more common," and it should not be locked up in "secret corners."⁶³ Historians' concentration on Ramism's impact on the structure of legal literature perhaps obscured the social values Ramism conveyed that favored legal publication in the first place: in particular, its blurring of the boundary between "professional" and "lay" knowledges through its self-promotion as a universal teaching method applicable to any art or discipline; its mitigation of traditional disdain for the "vulgar" mind; and its humanist confidence in the social consequences of broad dissemination of the arts and philosophy. Lawbooks touched by Ramism tended disproportionately to be written in English and to envision a broad audience of laymen as well as lawyers.

⁶⁰ See HOWELL, *supra* note 58, at 192, 201; ONG, *supra* note 58, at 167, 171, 194-96, 228.

⁶¹ *Epistle to the Reader*, in THE LOGIC OF THE MOST EXCELLENT PHILOSOPHER P. RAMUS MARTYR 7, 15 (Roland MacIlmaine trans., 1574).

⁶² FRAUNCE, *Preface*, *supra* note 51, ¶¶ 2b-3a.

⁶³ *Id.*

Yet the relationship of Protestantism to the legal press was not direct and untroubled and calls out for cautions and reservations. First, some skepticism is in order about treating Protestant polemic as a meaningful cause—as opposed to justification—of increasing legal publication. In Continental Europe, the period from 1500 to 1630 saw a surge of law printing in both Catholic and Protestant areas alike, as in England. Lawbooks offered in the biennial catalogues of the Frankfurt Book Fair doubled in absolute numbers between 1570-1590 and 1600-1620. The growth in the population of law students, in the size of state bureaucracies, in lay literacy, and in the number of lawsuits heard by national courts (in England) and courts applying learned law (in Europe) drove up demand for printed lawbooks. These were forces operating across confessional boundaries. In Germany, for example, both Reformation Protestants and Counter-Reformation Catholics opened universities that took in the swelling mass of law students.⁶⁴ Within England, the depiction of Catholicism as a proxy for ignorance and darkness in Protestant diatribes suggests little about the relative support of Catholic and Protestant lawyers for the legal press. In particular, one is hard-pressed to correlate Catholic lawyers with resistance to law printing and Protestant lawyers with enthusiasm. Some of the most distinguished figures responsible for legal publishing were Catholics, including the printer William Rastell, the statutory compiler Ferdinand Pulton, and the reporter Edmund Plowden. Most of the critics of law printing around the turn of the seventeenth century were Protestants.⁶⁵

Second, English lawyers seldom pointed to the edification of conscience, a staple of Protestant argumentation, as a reason for printing law. Barlee provides a rare counterexample. He thought that printed

⁶⁴ See IAN MACLEAN, *INTERPRETATION AND MEANING IN THE RENAISSANCE: THE CASE OF LAW 19-20* (1992); Steven Rowan, *Jurists and the Printing Press in Germany: The First Century*, in *PRINT AND CULTURE IN THE RENAISSANCE* 74, 74-77 (Gerald P. Tyson & Sylvia S. Wagonheim eds., 1986).

⁶⁵ For identification of Rastell, Pulton, and Plowden as Catholics, see, respectively, Howard Jay Graham, *The Rastells and the Printed English Law Book of the Renaissance*, 47 *L. LIBR. J.* 6, 12-13 (1954); PREST, *supra* note 59, at 179; 4 *HOLDSWORTH*, *supra* note 4, at 309 (7th ed. 1956).

Most English lawyers, of course, were Protestants. A government survey commissioned by Lord Keeper Nicholas Bacon in 1577 found 180 Catholics within the Inns of Court, about 20% of the membership, though most of these eventually demonstrated their orthodoxy. Repression by the Inns and the government in the latter sixteenth century reduced the numbers and visibility of Catholics within the law. By century's end, they were a small minority with little influence on the governance of the Inns. See PREST, *supra* note 59, at 175-76, 186.

lawbooks cultivated an informed conscience, the foundation of social order, thereby fusing his Protestant and humanist sympathies by highlighting a structural similarity: Both enlisted education in the service of stability through the intermediaries, respectively, of conscience and virtue.⁶⁶ Yet Barlee was atypical. Perhaps by the 1570s "conscience" savored too much of the Puritans and separatists that the bishops, Privy Councilors, and assize judges were trying to suppress. Indeed, deradicalizing conscience by setting strict boundaries to its right to challenge positive law was a favorite exercise of royalist preachers and assize sermons.⁶⁷ Lawyers seeking career preferment and publication licenses would have been ill-advised to invoke a code word annoying to the Erastian and conformist outlook increasingly ascendant at Court from the latter third of the sixteenth century.

Third, Protestantism could heighten resistance as well as openness to legal publication, an outgrowth of the ambivalences surrounding the concept of "law" in Calvinist thought. Reformed Protestantism reliant on Calvin assigned great importance to positive law, like government necessary and divinely instituted. It identified three purposes, or "uses," of the law. The civic or political use of the law restrained the violence and rapacity of fallen man. The theological use revealed humanity's depravity and inability to fulfill the burdens of the Old Law, teaching that only Gospel offered a path to salvation ("[t]he law first killeth, that Christ may make alive; it condemneth, that Christ may justify").⁶⁸ The normative use cast law as a guide to charitable conduct among neighbors and as a model of the lineaments of the proper church and state. Law tutored the believer in God's will, so that the Gospel could be termed the fulfillment of Law rather than its antithesis. This third, normative use of the law helped account for the relative importance of "legalism" within Calvinist thought (as compared to the Lutheran tradition). The normative use recommended pursuit of moral reformation through legal regulation under official auspices and treatment of Scripture as a fund of precedents, with attendant disputes over the proper fashioning of analogy

⁶⁶ The Protestant, and particularly Puritan, desire to see the rightly instructed conscience as a prop of social order is discussed in TODD, *supra* note 35, at 118-75.

⁶⁷ See JOHN BUCKERIDGE, A SERMON PREACHED AT HAMPTON COURT BEFORE THE KING'S MAJESTY 5-8 (1606); PATRICK SCOT, VOX VERA 25-27 (1625); ROBERT HARRIS, SAINT PAUL'S EXERCISE 14-16 (1628).

⁶⁸ ROGER HUTCHINSON, *The Image of God* (1550), in THE WORKS OF ROGER HUTCHINSON 11, 15 (Joseph Bruce ed., 22 Parker Soc'y Publications 1842).

and over the continuing relevance, if any, of Mosaic judicial legislation.

Yet law also evoked troubling connotations. John Hales's *Oration* dismissively thought that Catholics condemned "man's law as a thing most execrable."⁶⁹ But a touch of this distaste traveled through Pauline and Augustinian thought into Lutheranism and, with more qualifications, into Calvinism. First, the political use of the law was a necessary evil, always evoking the original sin that made it imperative. In Luther's vivid phrasing, the legal "rope" held back "a furious and untamed beast."⁷⁰ Second, the theological premise of "Christian liberty," the abrogation of the "curse" of the Law as an impossible route to salvation and its replacement with justification through faith, could be misunderstood as the dissolution of legal restraint on the elect saint. Protestant ministers labored hard to contain the latent antinomian possibilities of the doctrine, squaring the theological implications of Christian liberty with a strong duty of obedience to the positive laws of the Christian polity. This was a central theme in treatises and sermons.⁷¹ But the tensions inherent in the positioning of Gospel and Law—Gospel as both abrogation of Law's curse and fulfillment of Law—meant that valorization of Gospel often led to disparagement of Law. Protestants pressing a radical polarization of Law and Gospel directed some of their distaste for Law as Gospel's antithetical theological category toward the prosaic doings of earthly courts and lawyers. Luther gave heightened prominence to the slur "*bonus jurista malus Christa*," a jibe aimed at lawyers but touching by implication those too absorbed in legal study or litigation.⁷² For over-attentiveness to law, what Englishmen disdainfully called "lawing," stoked unChristian selfishness and aggression.⁷³ It also invited theo-

⁶⁹ HALES, *supra* note 16, at MS LC 14:32.1, fol. 16v.

⁷⁰ See Edward A. Dowey, *Law in Luther and Calvin*, 41 THEOLOGY TODAY 146, 150 (1984).

⁷¹ See, e.g., WILLIAM PERKINS, *A Discourse of Conscience*, in THE WORKS OF THAT FAMOUS AND WORTHY MINISTER OF CHRIST IN THE UNIVERSITY OF CAMBRIDGE, WILLIAM PERKINS 645-46 (1605) [hereinafter THE WORKS OF WILLIAM PERKINS] (arguing that Christian liberty is a spiritual freedom, not a civil liberty, which confutes the "libertines, who think that by the death of Christ they have liberty to live" as they wish); SAMUEL BURTON, A SERMON PREACHED AT THE GENERAL ASSIZES IN WARWICK 2 (1620); ROBERT SIBTHORPE, APOSTOLIC OBEDIENCE 33 (1627) (high royalist gloss); HENRY VALENTINE, GOD SAVE THE KING (1639).

⁷² See Courtney Kenny, *Bonus Jurista Malus Christa*, 19 L.Q. REV. 326, 330-32 (1903).

⁷³ In the anonymous *A Dialogue Concerning the Strife of Our Church* (1584), the bishop's chaplain Philochrematos charged that the Puritans interested in preaching the law—here understood as the Ten Commandments and the moral law of God as

logical confusion through category slippage, concern for earthly law compromising the purity of the believer's understanding that faith alone, not adherence to Law, marked the path to salvation.

In these various senses, the Protestant revival of Pauline and Augustinian theology reinvigorated Saint Paul's admonition against Christians that "go to law one with another."⁷⁴ Only peripheral Protestant sects took Paul's dictum to its extreme, forbidding true Christians from serving as magistrates or suing their spiritual brethren. Mainstream English Protestant ministers cabined off an uncomfortable number of New Testaments to defend the privilege of a Christian to go to law, but portrayed lawsuits as an unfortunate last resort, permissible if brought without malice or desire for revenge, after the failure of compromise, and in defense of important interests. Indeed, imposing restrictions on when the Christian might justly sue was a favorite exercise in the cases of conscience literature, paralleling the preference for mediation and arbitration rooted in the localist ethos of neighborliness.⁷⁵ The strong respect Calvinists afforded law as a divinely ordained instrument of order, social regulation, and moral improvement and their consequent stress on popular legal instruction uneasily coexisted, then, with disdain for "lawing," with a suspicion that overeager, too precise interest in positive law could undermine charitable living and unwittingly aid Law against Gospel on the theo-

revealed in the Bible—stir up "contention and part-taking" as men and women rush to prove each other for neglecting their duties. *See id.* at 56. "For one is ready in everything to control another, you may not do this, you may not do that." *Id.* Better to preach the "glad tidings of the gospel to comfort men." *Id.* The German lawyer Henry Agrippa's polemic against the canon law in *THE VANITY AND UNCERTAINTY OF ARTS AND SCIENCES* (1569, English trans.) (1531, Latin ed.) depicted this as reminiscent of Jewish "legalism," pointedly observing that "Christians are enforced to live rather after the order of the canons, than after the gospel." *Id.* at 164r.

⁷⁴ 1 *Corinthians* 6:7.

⁷⁵ *See, e.g.,* ROGER HUTCHINSON, *The Second Sermon of Oppression, Affliction, and Patience* (1550), in HUTCHINSON, *supra* note 68, at 313, 322-32; HUGH LATIMER, *The Fourth Sermon upon the Lord's Prayer* (1552), in *SERMONS BY HUGH LATIMER* 368, 481-82 (George Corrie ed., 27 Parker Soc'y Publications 1844); JOHN JEWEL, *Defense of the Apology of the Church of England* (1567), in 2 *THE WORKS OF JOHN JEWEL* 863 (John Ayre ed., 24 Parker Soc'y Publications 1847); WILLIAM PERKINS, *An Exposition of the Lord's Prayer*, in *THE WORKS OF WILLIAM PERKINS*, *supra* note 71, at 412 (explaining that one Christian may sue another if: he is not motivated by revenge, the suit is not scandalous to the church, the purpose of the action is to maintain godly peace, the offender is thereby chastized and brought to repentance, and the law was the last remedy); 3 WILLIAM PERKINS, *CASES OF CONSCIENCE* 289-92 (1642). On English Protestant ambivalence towards litigation, see RICHARD L. GREAVES, *SOCIETY AND RELIGION IN ELIZABETHAN ENGLAND* 651-57 (1982). On the ethic and characteristics of neighborliness, see KEITH WRIGHTSON, *ENGLISH SOCIETY, 1580-1680*, at 51-57 (1982).

logical plane. These ambivalences compromised the ideological support Protestantism lent legal publishing.⁷⁶

Compromised, but not erased. For on balance, Protestantism did legal publicists important service. It supplied them with an emotionally resonant vocabulary for tainting and delegitimizing critics. And Tyndale's and Foxe's heroic narrative of Protestant Biblical publication driving back Catholic obscurantism became a trope for programs of textual disclosure in literature, history, science, and medicine, furthering efforts to make knowledge more widely available in the printed vernacular, which in turn fostered a climate of opinion favorable to similar efforts in the law.⁷⁷ Through its celebration of the press as the vehicle for bringing the hitherto hidden word of God into the light and through the mediation of the Ramists, Protestantism overlaid and reinforced the humanists' support for accessible law.

II. THE DEBATE OVER THE RISKS AND ADVANTAGES OF PUBLISHING LAW: PUBLICISTS AND ANTI-PUBLICISTS

The formulation of a humanist and Protestant idiom for justifying legal publication was the work of the second quarter of the sixteenth century. By the latter third of the century, the skepticism about law printing that these idioms addressed and reassured broke into public view, engendering a debate among lawyers over the perceived risks and advantages of legal publishing. As William Hudson lambasted the crafty evasion and factiousness flowing from the legal press, friends of print such as Ferdinando Pulton composed arguments against "opinative persons" who "by disputes encounter [i.e., "go counter to"] the publishing or reading" of English law.⁷⁸ What to call these two positions? I shall borrow a term from Christopher Brooks's

⁷⁶ The preceding paragraphs have relied on P.D.L. Avis, *Moses and the Magistrate: A Study in the Rise of Protestant Legalism*, 26 J. ECCLESIASTICAL HIST. 149, 158-59 (1975) (discussing the concept of Lutheran "polarization" of Law and Gospel); Kenny, *supra* note 72, at 330-32; Dowey, *supra* note 70, at 146-53; A.G. ROEBER, *PALATINES, LIBERTY, AND PROPERTY: GERMAN LUTHERANS IN COLONIAL BRITISH AMERICA* 72-74 (1993); JOHN S. COOLIDGE, *THE PAULINE RENAISSANCE IN ENGLAND: PURITANISM AND THE BIBLE* 23-54 (1970); GERHARD EBELING, *On the Doctrine of the Triplex Usus Legis in the Theology of the Reformation*, in *WORD AND FAITH* 62, 62 (James W. Leitch trans., 1963); WERNER ELERT, *LAW AND GOSPEL* 7-13, 38-48 (Edward H. Schroeder trans., 1967).

I am indebted to Prof. Charles Donahue for suggesting that I think about this issue.

⁷⁷ See CHRISTOPHER HILL, *INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION* 28 (1965); EISENSTEIN, *supra* note 4, at 361-62.

⁷⁸ FERDINANDO PULTON, *Preface to DE PACE REGIS* (1609).

recent articles on sixteenth-century legal thought and label advocates of printed dissemination of law the "publicists," an apt term suggesting its opposite, the anti-publicists.⁷⁹

It is important to remember that the publication of sedition, error, and heresy did not divide the bar; all disapproved in theory. The anti-publicists differed from the publicists in expressing unease about the unexceptional lawbook that passed muster with the censors. The licensed and licit, not the underground book, was Hudson's target.

A. *Forensic Boundaries*

Neither the publicists nor anti-publicists pressed their position to its fullest possible theoretical extension, towards removal of regulation and censorship of lawbooks in the name of intellectual liberty or a "free" market, or towards a ban upon law printing. The publicists' support for printed dissemination of law, for example, respected the government's licensing and censorship regime. From 1553 through the Civil War, a royally appointed law patentee held the monopoly privilege of publishing common-law books, with the Queen's or King's printer enjoying the right to print statutes and proclamations. The Crown enforced a system of pre-publication licensing, reserving to the Privy Council, Archbishop of Canterbury, and Bishop of London the power of approving most works for the press, while the justices (and for some decades the serjeants) passed on common law books.⁸⁰ While printers attacked the law patentee's monopoly for driving up prices and lowering quality, a claim likely to win lawyers' sympathy, the principle of legal censorship itself went unchallenged. Like other Englishmen before the Civil War, lawyers supposed a free

⁷⁹ See Christopher W. Brooks, *The Place of Magna Carta and the Ancient Constitution in Sixteenth-Century English Legal Thought* [hereinafter Brooks, *The Place of Magna Carta*], in *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF THE RULE OF LAW* 62, 67 (Ellis Sandoz ed., 1993); Christopher Brooks, *Professions, Ideology and the Middling Sort in the Late Sixteenth and Early Seventeenth Century*, in *THE MIDDLING SORT OF PEOPLE: CULTURE, SOCIETY, AND POLITICS IN ENGLAND, 1550-1800*, at 113, 121-22 (Jonathan Barry & Christopher Brooks eds., 1994).

To be sure, opinions about the press did not split lawyers into contending camps. Support for and concern about printing intermingled within the profession and within individual members, and judgments about the wisdom and effects of using the press were sensitive to context, in particular to the type of work printed and the political situation. Yet, for the sake of clarity bought at the cost of some abstraction, it is possible to ask how lawyers justified legal publishing or warned of its consequences.

⁸⁰ For details on the licensing and censorship system, see *infra* Part III.B.

press would bring slipshod inaccuracies, the propagation of error, and licentiousness. Their debates centered around the terms, methods, and targets of censorship.⁸¹

The anti-publicists, for their part, did not call for the suppression of law printing, however vigorous their warnings about its effects. Opposition to publication per se was not a fanciful position. Had they adopted it, they would not have lacked for company in early modern England, where hard anti-publicists fought a losing battle in many fields of learning. There were physicians, mathematicians, chemists, university scholars of classics, and royalist guardians of the *arcana* of statecraft unwilling to let their "high" knowledge, elevated above common capacity, come out among the vulgar; there were artisans eager to conceal their trade secrets out of economic interest; and there were occultists, alchemists, and hermeticists plying, hammering, burning, and incanting their mysteries beyond the public eye.⁸² Why did the legal anti-publicists accept at least some publication of the law, even as they echoed the characteristic arguments of the press's learned enemies (more on this later)? The social role of law provided

⁸¹ Complaints that the patent system's monopolies artificially drove up prices can be found from the latter 1570s through the Long Parliament. See, e.g., *The Grievs of the Printers, Glass Sellers and Cutlers Sustained by Reason of Privileges Granted to Private Persons* (MS, c.1577), in 1 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON, 1554-1640, at 111, 111 (Edward Arber ed., 1875) [hereinafter TRANSCRIPT OF THE REGISTERS]; MICHAEL SPARKE, SCINTILLA, OR LIGHT BROKEN INTO DARK WAREHOUSES (1641) ("The monopolist[s] have not only gotten all the Gospel, but also the Law."); WILLIAM PRYNE, BRIEF ON THE ORIGIN OF PRINTING IN ENGLAND ON THE ISSUE OF THE PRINTERS' PETITION (MS, 1642), Inner Temple Library, Petyt Collection, MS 511, vol. 23, fol. 14 (argument before the committee on printing in the Long Parliament).

⁸² See Carlo Ginzburg, *High and Low: The Theme of Forbidden Knowledge in the Sixteenth and Seventeenth Centuries*, PAST & PRESENT, Nov. 1976, at 28; C.H. CONLEY, THE FIRST ENGLISH TRANSLATORS OF THE CLASSICS 89-90, 102-03 (1927); RICHARD FOSTER JONES, THE TRIUMPH OF THE ENGLISH LANGUAGE: A SURVEY OF OPINIONS CONCERNING THE VERNACULAR FROM THE INTRODUCTION OF PRINTING TO THE RESTORATION 47-50 (1953); William Eamon, *From the Secrets of Nature to Public Knowledge*, in REAPPRAISALS OF THE SCIENTIFIC REVOLUTION 333, 333 (David C. Lindberg & Robert S. Westman eds., 1990); WILLIAM R. NEWMAN, GEHENNICAL FIRE: THE LIVES OF GEORGE STARKEY, AN AMERICAN ALCHEMIST IN THE SCIENTIFIC REVOLUTION 115-18 (1994); FRANCIS BACON, *The Advancement of Learning* (1605), in 3 THE WORKS OF FRANCIS BACON 253, 289 (James Spedding et al. eds., 1870) (noting the affinity of magicians and alchemists for "enigmatic writings" and "auricular traditions"). The close-mouthed artisan proved a barrier to the Royal Society's efforts to compile a history of trades after the Restoration. Thomas Sprat observed that the Society's investigations might "afright private men, from imparting many profitable secrets to them; lest they should thereby become common, and so they be deprived of the gain, which else they might be sure of, if they kept them to themselves." THOMAS SPRAT, HISTORY OF THE ROYAL SOCIETY 71 (1959 ed.) (1667), quoted in Eamon, *supra*, at 355.

the first of many constraints. In a society lacking a standing army, professional police force, and bureaucracy exercising effective local control, law was a central means of setting priorities and of coordinating action, whether regulating trade, agriculture, or enclosure, controlling amateur officials in the counties and parishes, suppressing crime and dissent, or solidifying a national Protestant church. The value of print to administrative efficacy went hand in hand with widespread belief that public promulgation underlay the legitimacy of law.⁸³ The humanist depiction of law as tutoring subjects in virtue and as binding together a polity and society ever-threatened by the centrifugal forces of localism and faction supposed vigorous promulgation.⁸⁴ Legal anti-publicists could not portray their knowledge as recondite and capable of confinement among trustworthy initiates as readily as could students of Seneca, Euclid, Vulcan, or Hermes Trismegistus. To be sure, the bar's reliance on law French as a private language and their immersion in a "common erudition" never fully captured in any set of texts and always diffusely circulating in oral tradition bore a passing resemblance to the secretive transmission of lore. But the guildlike teaching of legal tradition among generations of lawyers never obscured the necessarily public role of law, precluding the anti-publicists from making an esotericist case for non-publication.

Indeed, a thoroughgoing anti-publicist position, had one been in the offing, would have also needed to set itself against the bar's and printers' economic interests, the state's communications machinery, and the royal prerogative. The law patentee and the Queen's and King's printer profited from the sale of statutes and common law books.⁸⁵ The transfer of common law titles from the patentee to the partners of the "English stock" of the Stationer's Company in 1603 only increased the number of printers gaining from legal publish-

⁸³ St. Thomas Aquinas was a popular cite for this proposition. See THOMAS AQUINAS, *Summa Theologiae*, in SAINT THOMAS AQUINAS: THE TREATISE ON LAW 113, 140-45 (R.J. Henle ed., 1993) (Question 90, Article 4).

⁸⁴ See Greville, *supra* note 45, verses 259-62; Brooks, *The Place of Magna Carta*, *supra* note 79, at 64-68; PELTONEN, *supra* note 46, at 18-118.

⁸⁵ They profited, but they griped about the burdens they shouldered and the decline of their patents' return in the latter sixteenth century. See Christopher Barker, *A Note of the Offices, and Other Special Licenses for Printing, Granted by Her Majesty to Diverse Persons, with a Conjecture of the Valuation* (MS, 1582), in 1 TRANSCRIPT OF THE REGISTERS, *supra* note 81, at 115-16.

ing.⁸⁶ Consumers benefited also. An expanding market of law students, barristers, attorneys, justices of the peace, clerks, constables, and other local officials relied on printed books that were cheaper and more readily available than manuscripts.

Meanwhile, the government's licensing regime and appointment of a royal printer and law patentee facilitated and directed law publishing in the process of confining it, insuring that the Crown had a permanent communications network. From the early sixteenth century, the government had been cooperating with publishers of statutes and proclamations, incorporating printing into long-standing patterns of scribal and oral promulgation.⁸⁷ By the 1530s, Henry VIII's secretary, Thomas Cromwell, brought to the fore the propagandistic power of legal texts, taking advantage of how proclamations and statutes identified national problems, presented stylized historical accounts, and articulated values and standards of conduct in the course of issuing commands. He supported the vernacular publication of the statutes, planning to use a more widely known Magna Carta and statute of praemunire to rally support for the Henrician Reformation, and ordered the distribution in proclamation form of Parliament's Act in Restraint of Appeals (1533).⁸⁸ Special, separate printings of important statutes continued into the seventeenth century along with texts of less dramatic importance, such as pardons and subsidies.⁸⁹ Elizabethan and early Stuart Privy Councilors and lawyers held up legal printing as a partial antidote to the persistent underenforcement or nonenforcement of governmental policy at the local level, arguing that a redacted compilation of the statutes, particularly the penal statutes, would reduce the ignorance of the law at the heart of noncompliance.⁹⁰ The importance of statutes and proclamations

⁸⁶ See CYPRIAN BLAGDEN, *THE STATIONERS' COMPANY: A HISTORY, 1403-1959*, at 93 (1960).

⁸⁷ See Katharine F. Pantzer, *Printing the English Statutes, 1484-1640: Some Historical Implications*, in *BOOKS AND SOCIETY IN HISTORY*, *supra* note 5, at 69, 69; G.R. Elton, *The Sessional Printing of Statutes, 1484-1547*, in *WEALTH AND POWER IN TUDOR ENGLAND* 68, 68 (E.W. Ives et al. eds., 1978).

⁸⁸ See Graham, *supra* note 13, at 73-75.

⁸⁹ See Elton, *supra* note 87, at 77-79.

⁹⁰ On Elizabeth's Lord Keeper Nicholas Bacon's efforts for a reorganized printed compilation of statutes, see *PROCEEDINGS 1558-1581*, *supra* note 30, at 49, 82-84, 111-12, 171, 183, 189-93, 464-65. Bacon's many successors in advocating abortive schemes to redact the statutes included King James I, the royal counselors Francis Bacon and Lord Ellesmere, and leaders of the legal profession in Parliament such as Edward Coke, William Noy, and Heneage Finch. See Barbara Shapiro, *Codification of the Laws in Seventeenth-Century England*, 1974 *WIS. L. REV.* 428.

gives them pride of place in assessing the government's use of the legal press, but there were other texts, episodic but significant, in setting administrative priorities: royal speeches, articles of religion, the *Book of Sports*, and the *Book of Orders* directed to the justices of the peace.⁹¹

Attacking legal publishing in its entirety would have also offended the royal prerogative. The Crown argued that its power to enforce licensing, censorship, and monopoly rights in the law patentee flowed from the prerogative, which had admitted and nurtured printing in its infancy as it guided the press in the present. To disapprove of what the Crown allowed was to second-guess, even affront the prerogative.⁹²

B. *Contrasting Predictions*

If the anti-publicists, like the publicists, faced and at least implicitly accepted an expanding market for printed lawbooks regulated and censored by the government, what was the difference between them? To what, in particular, did the anti-publicists object? These are plain enough questions, but with elusive answers. Early modern lawyers did not write essays about the political and cultural effects of the legal press. Their opinions survive in a handful of sentences in the midst of a preface or tucked within a letter. The anti-publicists' habit of disdaining publication of the laws without providing the reasons and distinctions the modern reader wants lends an unfortunate, if unavoidable, imprecision to the reconstruction of their thought.

⁹¹ See ANTHONY FLETCHER, *REFORM IN THE PROVINCES: THE GOVERNMENT OF STUART ENGLAND* 56-59, 215-16, 269-70 (1986).

⁹² In 1583 the bishops proposed concentrating power over press licensing in the Archbishop of Canterbury and Bishop of London to the implied detriment of the Queen and Privy Counsel, who had shared the right of licensing with the bishops under Elizabeth's Injunctions of 1559. A puritan critic of the proposal argued that "it robs and spoils her Majesty's own royal person . . . to discern what writings may be fruitful or commendable." *The Copy of a Letter Written by a Gentleman in the Country unto a Londoner, Touching an Answer to the Archbishops' Articles* (MS, c. middle 1580s) [hereinafter *The Copy of a Letter*], in A PART OF A REGISTER, CONTAINING SUNDRY MEMORABLE MATTERS 143, 143 (1593). On prerogative as the basis of press regulation, see *The Arguments of the Patentees in Favor of Privileges for Books* (May 4, 1586), in 2 TRANSCRIPT OF THE REGISTERS, *supra* note 81, at 804 (Edward Arber ed., 1875); *Argument Before the Committee on Printing in the 1642 Parliament, in A True Diurnal of the Passages in Parliament* (March 7-14, 1642), in MAKING THE NEWS: AN ANTHOLOGY OF THE NEWSBOOKS OF THE ENGLISH REVOLUTION (Joan Raymond ed., 1994) [hereinafter MAKING THE NEWS]. See generally HAROLD M. WEBER, *PAPER BULLETS: PRINT AND KINGSHIP UNDER CHARLES II* (1996).

Critics of printing focused on publication of national law—of the common law, Chancery, and royal prerogative courts (such as Requests and Star Chamber). Publication of local law posed less of a threat to the professional and Courtly interests that the anti-publicists spoke for and spoke to. Knowledge of national law was the bar's stock in trade. It also stood as a resource for contesting royal and ecclesiastical policies in a way that local law did not, however much manorial lords and town oligarchies that relied on control of charters and legal records would have been discomforted by publication. The charge of "commoning" or of improper disclosure that the anti-publicists aimed at national law printing ill-fit local law. Although royal officials and the bar styled themselves the repositories of the unwritten common law and the legal folkways of the various national courts, the "multitude" could better describe the particularities of law obtaining in the thousands of towns, manors, and parishes. The London-trained lawyers did not embody local law so much as oversee the machinery for collecting and authenticating that law as it became relevant in the national courts (e.g., what was the immemorial custom of Groton manor or the town of Dorchester?). In any event, publication of the content of local law was largely a hypothetical danger since the London-based presses avoided it, concentrating on printing primers usable in any location, such as books on the duties of constables, justices of the peace, and manorial court keepers. The law of Groton manor or the town of Dorchester interested too few readers to justify printing for a national market.⁹³

As for national law, the danger lay not in printing per se but in the wrong style of publication. Hudson provided a hint: It was "assuredly no matter of necessity to publish the reasons of the judgment of the law, or *apices* [titles or small points] or *fictiones juris* [legal fictions] to the multitude."⁹⁴ His dislike of disclosing the reasons and titles of the law implied a two-tier model of legal knowledge. Lawyers and the state should present to the multitude, indeed, should hammer into them, a surface layer of commands while reserving to professionals the deeper stratum of fictions and judgments.⁹⁵

⁹³ The county histories popular from the latter sixteenth century stand as a qualification to this generalization as they sometimes discussed shire custom. See, for example, William Lambarde's explication of gavelkind in WILLIAM LAMBARDE, *A PERAMBULATION OF KENT 475-531* (3rd ed., c.1596) (1970).

⁹⁴ Hudson, *supra* note 2, at 1.

⁹⁵ Publicists recognized, as readily as anti-publicists, the difference between the lineaments of the law appropriate to state officials and justices of the peace and the "cunning points of law" taught in the Inns of Court. GILBERT, *supra* note 27, at 7. But

Distinctions between public knowledge and the more profound lore reserved for initiates were common if contested in learned culture, among scientists, statesmen, and magicians no less than lawyers. Francis Bacon, himself no anti-publicist and rather more generous than Hudson in revealing to the public legal craft, recognized what was at stake. Bacon's typology of methods for teaching arts and bodies of knowledge acknowledged the occasional value of

publishing part, and reserving part to a private succession, and of publishing in a manner whereby it shall not be to the capacity nor taste of all, but shall as it were single and adopt his reader, . . . both for the avoiding of abuse in the excluded, and the strengthening of affection in the admitted.⁹⁶

Not just the content, but the psychological "framing" of printed lawbooks could irk the anti-publicists. In what style should legal literature speak? As the Athenian dialogist in Plato's immensely influential *Laws* asked: "How should we imagine the rightful position of a written law in a society? Should its statutes disclose the lineaments of wise and affectionate parents, or should they wear the semblance of an autocratic despot—issue a menacing order, post it on the walls, and so have done?"⁹⁷ Publicists outside as well as within the law read Plato to advocate "persuasion" as "a more winning, and more manlike

whereas publicists characteristically argued that reasons, fictions, and titles need not be taught to laymen acquiring rudimentary knowledge of law, anti-publicists suggested it should not be taught, focusing on the dangers of so doing.

⁹⁶ FRANCIS BACON, *Valerius Terminus of the Interpretation of Nature: With the Annotations of Hermes Stella*, in 3 THE WORKS OF FRANCIS BACON, *supra* note 82, at 215, 248. In the *New Atlantis* (1627), Bacon gave his scientists in the utopian research institute, Salomon's House, the discretion to withhold discoveries from publication. He disdained, however, use of an "enigmatical" method, whose purpose was to "remove the vulgar capacities from being admitted to the secrets of knowledges, and to reserve them to selected auditors, or wits of such sharpness as can pierce the veil." BACON, *supra* note 82, at 404-05. His prejudice against enigma informed the preface of his *Maxims of the Law* (MS, 1597), which preferred the use of law French "for excluding any others than professed lawyers." The alternative of writing in obscure conceits invited the danger of laymen thinking they understood the law when they did not. In the end, he composed the commentary upon his Latin maxims in English rather than law French. See FRANCIS BACON, *Maxims of the Law* [hereinafter Bacon, *Maxims of the Law*], in 7 THE WORKS OF FRANCIS BACON 307, 322 (James Spedding et al. eds., 1872). See generally Frances A. Yates, *The Hermetic Tradition in Renaissance Science*, in ART, SCIENCE AND HISTORY IN THE RENAISSANCE 255, 264 (Charles S. Singleton ed., 1967); Eamon, *supra* note 82, at 333-65.

⁹⁷ Plato, 9 *Laws* 859a-b, in THE COLLECTED DIALOGUES OF PLATO 1419 (Edith Hamilton & Huntington Cairns eds., 1961) [hereinafter DIALOGUES OF PLATO]. Seneca also posed the dichotomy between threat and persuasion, arguing in favor of the latter. See SENECA, *Epistle 94*, in 3 SENECA AD LUCILIUM EPISTULAE MORALES 35-37 (Richard M. Gummere trans., 1925).

way to keep men in obedience than fear." These were the words of John Milton, urging printed discussion of the purposes of church government as well as human laws. Had not Plato followed the precedent of Moses, who as God's amanuensis had written *Genesis* as historical and moral prologue to legislation? Milton's commonplace book recorded the other side of Plato's dichotomy—that the "lawgiver who gives the reason for his law diminishes his authority"⁹⁸—attributing the opinion to the Council of Trent, the symbol among hot Protestants of reaction.⁹⁹

But disdain for the voice of "lordly command" seemed naive to the Recorder of London Anthony Benn. Persuasion invited popular contempt, a growing problem over the years as the law had progressively disarmed in the process of explaining itself: "It was wont to be *jubeat non suadeat lex* [that law commanded not persuaded], but now our laws must come forth ushered with a luminary oration or preamble as though they had not in themselves and of their own presence a sufficient majesty and grace."¹⁰⁰ A disadvantage of strategies of persuasion, as Francis Bacon observed of parliamentary preambles, was that they "represent laws disputing and not commanding." The official and assured tone of parliamentary preambles seemed to discourage scrutiny and rebuttal. But the very use of a language of justification rather than of prescription and sanction was implicitly dialogic,

⁹⁸ JOHN MILTON, *Commonplace Book*, in 18 THE WORKS OF JOHN MILTON 128, 165-66 (Frank Allen Patterson ed., 1939).

⁹⁹ See JOHN MILTON, *The Reason of Church-Government Urged Against Prelaty* (1641), in 3 THE WORKS OF JOHN MILTON, *supra* note 98, at 180, 181-82. Theologians argued over whether civil law should persuade or command, the former view correlating roughly with support for limited monarchy, the latter with absolute monarchy. Compare Richard Hooker, *A Learned Sermon of the Nature of Pride* (1612), in 3 OF THE LAWS OF ECCLESIASTICAL POLITY AND OTHER WORKS 597, 597 (John Keble et al. eds., 1994) ("The nature of man, being much more delighted to be led than drawn, does many times stubbornly resist authority, when to persuasion it easily yields. . . . A law simply commanding or forbidding, is but dead in comparison of that which expresses the reason wherefore it does the one or the other."), with JAMES USSHER, *The Power Communicated by God to the Prince* (MS, during Charles I's reign), in 11 THE WHOLE WORKS OF THE MOST REV. JAMES USSHER 223, 349-50 (Charles Richard Elrington ed., Dublin 1864) ("And who sees not what confusion would be brought, as well into a family as a state, if a son or servant might have liberty to stand upon terms and chop logic with his father[,] master, or prince, and refuse to yield obedience to their commands until he should see some reason for it?" Ussher said the law "should be accepted 'as a voice from God, that should command and not dispute.'").

¹⁰⁰ ANTHONY BENN, *Lawyers*, in ESSAYS WRITTEN BY ANTHONY BENN (MS, c.1616-1618) (Bedford Record Office, L28/46, fol. 43v).

allowing or, worse, teaching disputation in the guise of persuasion.¹⁰¹ This feature of lawbooks—the way they “represent” law in the course of disclosing it—dismayed anti-publicists. At some level, of course, the very promulgation of legal texts unleashed the contrasting interpretations latent within them. Creativity knew few limits: The Puritan pamphleteer Martin Marprelate twisted a 1571 act protecting the legitimacy of Elizabeth’s royal title into an implied abolition of the English bishops, the very accessibility of the printed statute beckoning the mischief.¹⁰² But there was better and worse here. Insofar as critics of legal printing made distinctions among types of objectionable lawbooks—and often they did not, questioning publication of the laws *per se*—they aimed less at texts detailing the content of the law (such as statutes and manuals for lay legal officials) and more at monographs opening the “judgments” and “fictions” of the law. For no matter how resolutely lawbooks preached obedience and deference to professional skill, publication of the law’s reasons unwittingly summoned popular disputation by presenting law as riven with multiple argumentative possibilities.¹⁰³

The anti-publicists resembled the publicists in relying less on “empirical” information, well-wrought arguments, or telling anecdotes than on contrasting prophecies about the social effects of legal publishing. Four major objections to vernacular law printing structured the debate.

1. The Law’s “Mystery”; Publicist Appropriations of Law Printing for Professional Self-Defense

Critics denounced the legal profession as monopolists of the law, hiding away a public good in the jargon of law French and in private

¹⁰¹ Bacon advised the crown to avoid parliamentary preambles that savored of “disputing,” rather letting “the law commence with the enactment.” FRANCIS BACON, *Aphorism 69*, in *De Augmentis Scientiarum*, in 5 THE WORKS OF FRANCIS BACON, *supra* note 82, at 102, 102. He recognized that preambles were “necessarily used in most cases, not so much to explain the law, as to persuade Parliament to pass it, and also to satisfy the people.” *Id.* I cite Bacon here not as an anti-publicist, but as one who articulated assumptions implicit in their thought.

¹⁰² See THE MARPRELATE TRACTS: 1588-1589, at 39, 50, 314 (William Pierce ed., 1911). The statute in question was 13 Eliz., ch. 1 (1571).

¹⁰³ Lawbooks acknowledging the political costs of legal publication or responding to such critiques tended, disproportionately, to be those opening the “reasons and fictions” of the law to lay audiences. See, e.g., HENRY FINCH, *LAW, OR A DISCOURSE THEREOF* (1627); COKE, *FIRST INSTITUTE*, *supra* note 45; SHEPPARD, *supra* note 55; PULTON, *supra* note 78.

manuscripts and oral traditions, the better to cultivate a politically useful appearance of mystery and to maintain income and status. The law was not masked, said lawyer-apologists such as John Davies and Edward Coke. They offered a valiant, if strained, defense of law French as an easily learned tool of unequalled linguistic precision, necessary to fix the precise meaning of legal terms securing property and liberty.¹⁰⁴ Yet the publicists' appeals suggest that at least some lawyers agreed with the critics' premise, if not their conclusion, seeing the law's opacity as a positive good for the profession rather than grounds for reform. The anti-publicist attachment to mystery called forth the publicist reassurances. "[S]ome monks in elder times, and some clerks and officers, might have a cunning, for their private honor and profit . . . to have as much as they could of our laws to be in a kind of mystery to the vulgar, to be the less understood by them," said the champion of vernacular publication Bulstrode Whitelocke, at once answering lawyers' fears of losing income and respect while diplomatically and disingenuously making Catholics and attorneys, not barristers, the friends of obscurity.¹⁰⁵ Printing the law in English does not make it "despised" and the lawyer "less regarded and used," William Sheppard insisted.¹⁰⁶ Ferdinand Pulton concurred, assuring readers that "divulging" the criminal law did not "impeach [its] credit."¹⁰⁷

Thomas Powell's prefaces to his *Attorney's Academy* (1623) testify to the power of the barristers' sense of proprietary control over legal mysteries, an attitude Powell slyly mocks.¹⁰⁸ The epistle dedicatory casts Lord Keeper John Williams as Neptune presiding over a storming sea as the waterlogged Powell, harried by lawyers, protests he never sought "to rob the Sea-gods bed of Corall, I mean Law's mysteries, (for that's the Moral.)" In an epistle to the reader, Powell implores the public's aid against the "privy malice of those who are only studious of private profit." Powell sets forth the scoffers' bill of in-

¹⁰⁴ See JOHN DAVIES, *Preface to Irish Reports* (1615), in 2 THE COMPLETE WORKS OF JOHN DAVIES 257, 257 (Alexander B. Grosart ed., 1876) ("[C]ritics object that 'the professors of our law . . . write their reports and books of the law in a strange and unknown tongue which none can understand but themselves, to the end that the people being kept in ignorance of the law, may the more admire their skill and knowledge, and esteem and value it a higher price.'"); see also COKE, *Proemium*, in FIRST INSTITUTE, *supra* note 45.

¹⁰⁵ 3 WHITELOCKE, *supra* note 55, at 272.

¹⁰⁶ SHEPPARD, *supra* note 55, at A5.

¹⁰⁷ PULTON, *Preface*, *supra* note 78.

¹⁰⁸ See POWELL, THE ATTORNEY'S ACADEMY, *supra* note 45, at [7]-[15].

dictment against him: "I have waded thus far, without calling of those of the mystery to my guidance" and "I have slept beside the common causeway and trespassed *pedibus ambulando* upon some men's Inclosure." Admitting that no book can reduce the infinite particulars of the law to clarity on the first try, and that some "few imperfect *quidlibets*" were the price of "many useful *quodlibets*," Powell turns on his pursuers in a remarkable passage:

Surely, whatsoever you be that shall do it [attack the crafter of law-books], I must tell you, that the million multitude will repute and report you for a second Alexander, not the conqueror, but the copper-smith; not famous for triumph, but for trade: Not Alexander, who in his greatness would be worshipped as a god himself, but Alexander who in his leather apron would have the very puppets which his hand rough-hewed, draw an adoration and reverence among the people.¹⁰⁹

This is cultural jujitsu of a high order, smoothly turning the barristers' conceits against them. In moments of high self-regard, Elizabethan and early Stuart barristers dismissed attorneys, Powell's core audience, as apprentice-trained "mechanics" knowing the craft of the law but not its science and deeper principles, familiar with forms but not with humane studies and learned languages. But how different are the barristers, Powell asks. Are they not also leather-aproned artisans fashioning puppets for the marketplace, but expecting reverence as well as gain? Are not their vaunted mysteries an enclosure of what ought to be common? Indeed, Powell intensifies the class-tensions underneath the mock by imagining himself as the sort of man who does not trespass into an enclosure on horseback, but is reduced to traveling on foot.¹¹⁰ Even the words he chooses to describe his foot-sore trespasser—*pedibus ambulando*—drive the stiletto down another inch. For here and in the other two places in the epistle where Powell uses Latin, he does so ironically, highlighting its pretentiousness (*quidlibets* dwelling in the "company and fellowship" of *quodlibets*).¹¹¹ His invocation of Latin as gibe rather than ornament at once defends readers with slight command of the language and suggests the intellectual shallowness of resistance to vernacular publication of the law.

¹⁰⁹ *Id.*

¹¹⁰ Powell plays off the opposition of common and private in another place as well: "Beyond the Pole of property, I care not in what stream my Keel leaves her dinted impression." *Id.* at [13]. Impression was a pun suggesting both the physical mark left by the keel and publication (for example, the press makes a work common by impression).

¹¹¹ His third use of Latin was: "For my faults of insufficiency, I do not blush at them: *Barnardus non videt omnia.*" *Id.* at [14].

But if Powell did not think much of the anti-publicist barristers' position, the length and warmth of his retort suggests the importance of their attitudes.

* * * *

The publicists' response to their fellow lawyers' reluctance to part with mystery went beyond reassurance and well-turned mocks. By the latter sixteenth century, they began to argue that legal publication was not only consistent with the bar's status, but essential to maintaining it. The printing press brought forth criticisms of English law and lawyers, and calls for reform far faster than it produced lawbooks. Could the lawbook be enlisted in defense?

The streams of criticism of common law and lawyers flowing from the Elizabethan and early Stuart presses mostly recycled Biblical, classical, and medieval formulae of abuse kept alive in sermons, literature, and popular lore. The complaints were familiar: lawyers corrupted the equity of law with false glosses, twisting words in search of payment; dishonest, greedy, they stirred up strife for gain, preying off opponents and their own clients alike; judges and advocates manipulated technicality in favor of local notables and the rich against the honest, the simple, and the poor; lawsuits moved slowly and cost much, the path smoothed by bribes. Satire and drama figured lawyers as associates of the devil. As managers of litigation, that is, conflict, for those who could pay, the lawyer remained a symbol for disruptions of the ideal of social harmony and a target for class resentments in both directions, by the powerful upset at being called to account at law, and by artisans, small farmers, and workingmen perceiving lawyers as the enforcement arm of their betters.¹¹²

To this legacy, Elizabethan and early Stuart critics added refinements, elaborating criticisms long present in a more inchoate form. The rapid growth of the Elizabethan legal profession, particularly attorneys, bred complaints of lack-learned lawyers bungling clients' cases. Satire and character books filled with stories of Inns of Court men gaming and dancing while Littleton's *Tenures* sat unread, the

¹¹² See C.W. BROOKS, *PETTYFOGGERS AND VIPERS OF THE COMMONWEALTH* 132-36 (1986); E.W. IVES, *THE COMMON LAWYERS OF PRE-REFORMATION ENGLAND: THOMAS KEBELL: A CASE STUDY* 190-94 (1983); G.R. OWST, *LITERATURE AND PULPIT IN MEDIEVAL ENGLAND: A NEGLECTED CHAPTER IN THE HISTORY OF ENGLISH LETTERS & OF THE ENGLISH PEOPLE* 338-49 (1966); PREST, *supra* note 6, at 283-312; E.F.J. TUCKER, *INTRUDER INTO EDEN: REPRESENTATIONS OF THE COMMON LAWYER IN ENGLISH LITERATURE, 1350-1750* (1984); E.W. Ives, *The Reputation of the Common Lawyers in English Society, 1450-1550*, 7 U. BIRMINGHAM HIST. J. 130 (1959); Edward F.J. Tucker, *Ignoramus and Seventeenth-Century Satire of the Law*, 19 HARV. LIBR. BULL. 314 (1971).

apprenticeship-trained attorneys setting a lower standard, drafting little well beyond a bill.¹¹³ Humanist concern for purity and eloquence in the use of classical languages prompted sarcasm by clerics and university scholars at lawyers' bumbling command of Latin ("*Quotu est Clocka nunc?* What a Clock is it now?" said the pompous fictional lawyer Sir Ignoramus on the Cambridge stage.).¹¹⁴ Protestant and humanist support for the dissemination of Scripture and classical learning fanned centuries-old resentment at law French as a language of legal concealment. The point could be put in a broader political context by linking concealment to the common law's role as "Norman Yoke," an agent of social exploitation and political control on behalf of the aristocracy and the landed elite.¹¹⁵ Puritan use of the judicial law of the Old Testament as a touchstone for evaluating positive law highlighted disparities between the common law and God's legal blueprint.¹¹⁶

Concern especially mounted over the uncertainty of the law, what Francis Bacon called "the most just challenge that is made to the laws of our nation."¹¹⁷ This in part reflected long-standing lay unease with the casuistical nature of common law reasoning. The common law "is infinite, and without order or end," Thomas Starkey complained through the mouth of Reginald Pole, his dialogist.¹¹⁸ "There is no stable ground therein, nor sure stay; but everyone that can color reason makes a stop to the best law that is before-time devised."¹¹⁹ Yet

¹¹³ See Francis Lenton, *A Young Barrister* (1631), in CHARACTERS: OR WIT AND THE WORLD (1663) [hereinafter CHARACTERS]; Francis Lenton, *A Young Inns of Court Gentleman* (1631), in CHARACTERS, *supra*; THOMAS OVERBURY, *A Fantastic Inns of Court Man*, in THE OVERBURIAN CHARACTERS 45, 45 (W.J. Paylor ed., 1936) (1615). See generally PREST, *supra* note 6, at 287.

¹¹⁴ RUGGLE, *supra* note 55, at act I, sc. 3. The play was performed at Cambridge University for King James I in 1614.

¹¹⁵ See CHRISTOPHER HILL, *The Norman Yoke*, in PURITANISM AND REVOLUTION: STUDIES IN INTERPRETATION OF THE ENGLISH REVOLUTION OF THE 17TH CENTURY 50, 50 (1964).

¹¹⁶ For good examples of the genre, see FINCH, *supra* note 50; HENRY BARROW, *A Brief Discovery of the False Church* (1591), in THE WRITINGS OF HENRY BARROW 259, 599-601 (Leland H. Carlson ed., 1962). See generally Avis, *supra* note 76, at 149-72; THEODORE DWIGHT BOZEMAN, *TO LIVE ANCIENT LIVES: THE PRIMITIVIST DIMENSION IN PURITANISM* 160-92 (1988).

¹¹⁷ BACON, *Maxims of the Law*, *supra* note 96, at 319.

¹¹⁸ STARKEY, *supra* note 17, at 173.

¹¹⁹ *Id.* An anonymous petitioner to Parliament in the early 1570s, for example, observed that judges who "presume their bosoms to be the chests of [the] laws" made decisions conflicting with the year books and with their associates, so "that which is known to have been law in one king's government is become no law in another's." REFORMATIIONS PROPOSED IN PARLIAMENT BY THE QUEEN'S MAJESTY, IN FAVOUR OF

the vehemence of the complaints also owed to structural factors. Difficulties in sorting through the Statutes of Uses and Wills and the growing mass of penal statutes vexed lawyers. Clashes between common law, ecclesiastical, regional, conciliar, and prerogative jurisdictions allowed for forum shopping and invocation of one tribunal's authority against another while cases were in progress, highlighting the manipulability of the system.

Since printed critiques survive where most manuscripts, sermons, and tavern cursing do not, it is hard to compare the scale and intensity of the Elizabethan and early Stuart dissatisfaction to previous periods of English history. Wilfrid Prest and Edward F.J. Tucker have detected a particular vehemence in this period. They point to the frequency of complaints in literary, satiric, and religious sources and the emergence of the lawyer from the company of physicians, merchants, and other sinners and exploiters—the fellowship of the denounced—to special prominence as a target. The increasing numbers, wealth, social prominence, and political influence of the common lawyers built resentments, as did the growth in common law litigation and the greater intervention of national law in the localities through justices of the peace, assizes, and royal commissions.¹²⁰ The proliferation of law bills introduced in late Elizabethan and early Stuart parliaments suggests the central, and growing, importance of the issue to the political nation. The first seven parliamentary sessions of Elizabeth's reign saw relatively few bills seeking improvement of the law; in the final six sessions, by contrast, over a quarter of the bills introduced concerned law reform.¹²¹ The agreement during the Eng-

JUSTICE AND OF HER WELL BELOVED SUBJECTS (MS, c.1572-1576), *quoted in* G.R. ELTON, *THE PARLIAMENT OF ENGLAND, 1559-1581*, at 277-78 (1986). In the Parliament of 1610, Thomas Hedley complained that even "divers of good understanding . . . say the common law is nothing else but what the judges will." Thomas Hedley, Speech of June 28, 1610, to the House of Commons, *in* 2 *PROCEEDINGS IN PARLIAMENT 1610*, at 173 (Elizabeth Read Foster ed., 1966) [hereinafter *PROCEEDINGS IN PARLIAMENT*].

¹²⁰ See PREST, *supra* note 6, at 286-87; Tucker, *supra* note 112, at 314.

¹²¹ See DAVID DEAN, *LAW-MAKING AND SOCIETY IN LATE ELIZABETHAN ENGLAND: THE PARLIAMENT OF ENGLAND, 1584-1601*, at 188 (1996). In light of these parliamentary figures and the serious interest by the late Elizabethan privy council in consolidation of the law, Dean concludes: "There certainly seems to have been a change in public perceptions of the law." *Id.*

A similar story emerges by comparing the number of law reform bills, generously defined, introduced in parliament during the first half of Elizabeth's reign, 1558-1580, a span of 22 years, against the number introduced in the 22 years of James I's reign, 1603-1625. Elizabeth's early parliaments saw 85 bills, James I's parliaments saw 225 bills. These numbers are based on bills noted in the journals of the House of Commons and House of Lords, and in modern scholarly editions of parliamentary records. (I owe these numbers to the diligent research assistance of Joanna Grisinger.)

lish Revolution among parliamentarians, merchants, Levellers, radicals, and sectarians alike that the law needed repair, however different the proffered schemes, further identifies the early seventeenth century as a time of particular disaffection with the common law.¹²²

Even if the apparent multiplication of complaints about the law was a trick of the sources, an interpretive illusion worked by the migration of long-standing dissatisfactions into long-surviving printed sheets, the change in form itself suggests the novelty and seriousness of the challenge that defenders of the law and legal profession faced. Peter Goodrich has argued that the print-carried critique of the legal system encouraged Edward Coke, John Davies, William Fulbeck, and other lawyers to produce an "apologetic" literature.¹²³ This was true, but it is worth asking what made the press as a medium particularly dangerous. In what fashion did it transform murmuring long heard at quarter sessions, taverns, churchyards, merchant offices, and Westminster chambers?

Printing, centered in London and distributed throughout England, further nationalized the themes and vocabulary of complaint (as it did of praise and resignation). It spread the acerbities of clerics, university scholars, civilians, and London and provincial wits beyond the limits of a city or country home, incorporating jibes prevalent in localities and subcultures into a common critique. As a literary matter, this offered a core of formulae for repetition and variation. As a political matter, it highlighted the systematic and national (as opposed to local, regional, idiosyncratic, or personal) failings of the law. It therefore tacitly invited national solutions. There is an old saw that a hundred grumbling people aware that all are dissatisfied over the same issues constitute a political constituency in a way that grumblers hearing only their neighbors snort in agreement do not. The press fostered this consciousness of shared and patterned antagonism fa-

¹²² See generally DONALD VELL, *THE POPULAR MOVEMENT FOR LAW REFORM, 1640-1660* (1970); CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION* 216-22 (1972); ROBERT BRENNER, *MERCHANTS AND REVOLUTION: COMMERCIAL CHANGE, POLITICAL CONFLICT AND LONDON'S OVERSEAS TRADERS, 1550-1653*, at 571-76 (1993).

¹²³ See GOODRICH, *supra* note 7, at 70-71; Goodrich, *supra* note 4, at 13-14. Leading works included the prefaces to Edward Coke's *Reports* and the first volume of his *Institutes*, John Davies's preface to his *Irish Reports* (1615), and William Fulbeck's *A Direction or Preparative to the Study of the Law* (1600). Lawyers amply displayed their sensitivity to criticism and eagerness for self-justification in reaction to the comedy *Ignoramus* (1614). See, e.g., JOHN STEPHENS, *Reproof: Or, a Defence for Common Law and Lawyers Mixed with Reproof Against the Lawyers' Common Enemy*, in *ESSAYS AND CHARACTERS, IRONICAL AND INSTRUCTIVE* 29, 29-50 (1615) [hereinafter *ESSAYS AND CHARACTERS*].

vorable to national political action even as merchants and clerics, civilians and Biblicists, country gentry and city artisans would have proffered quite different solutions.¹²⁴

Printing also reinforced a taken-for-grantedness about the severity of the law's failings (however inflected), an impression created when poets, dramatists, historians, landed gentry, ministers, scholars, satirists, and merchants joined together in printed criticism. Their complaints echoed through different genres of published works. The poet Samuel Daniel, for example, rhymed the law's "uncertainty" with its "obscurity," its "brawls" with its "walls" of Norman subtlety and subjection.¹²⁵ Printed ballads sang of lawyers "making wrong right,"¹²⁶ while published plays featured unscrupulous "suck-purses" babbling in law French and legalese until onlookers suspected demonic possession as the cause of such confused tongues.¹²⁷ Turning from the arts

¹²⁴ I wish to make only a limited point here: that by nationalizing and underscoring a critical discourse, the press channeled and reinforced, not caused, a politically potent law reform movement. The causes were many, including the common law litigation boom, the intrinsic failings of the system, and social resentment.

¹²⁵ Remain concussed with uncertainty,/ And seem to foster rather than withstand/ Contention, and embrace obscurity,/ Only t'afflict, and not to fashion us,/ Making her cure far worse than the disease./ . . . / If it be wisdom, and not cunning, this/ Which so imbroils the state of truth with brawls,/ And wraps it up in a strange confusedness/ As if it liv'd immur'd within the walls,/ Of hideous terms fram'd out of barbarousness/ And foreign customs, the memorials/ Of our subjection, and could never be/ Deliver'd but by wrangling subtlety.

SAMUEL DANIEL, *Dedication to Sir Thomas Egerton* (pre-1603), in *POEMS AND A DEFENCE OF RHYME* 101, 101-02 (Arthur Colby Sprague ed., 1950). Among many other examples, see, for example, THOMAS SCOTT, *FOUR PARADOXES* at B5r (1602) (Justice "still is blind, and deaf, yet feels apace,/ Her scales now weigh her fees, and not the case").

¹²⁶ "So Lawyers that wrest law, and matters prolong,/ Their footsteps will appear of making right wrong." A NEW BALLAD ENTITLED DANIELS SIFTING IN THESE OUR DAYS (1572), quoted in GREAVES, *supra* note 75, at 657. See also *A Mournful Ditty on the Death of Certain Judges and Justices of the Peace* (1590), in *ANCIENT BALLADS AND BROADSIDES PUBLISHED IN ENGLAND IN THE SIXTEENTH CENTURY* 297-98 (1867). Almanacs reiterated the image of the corrupt lawyer impoverishing his foolish clients. See BERNARD CAPP, *ENGLISH ALMANACS: 1500-1800*, at 106-07 (1979).

¹²⁷ In the lawyer-taunting Cambridge University comedy *Ignoramus* (performed in 1614), the barrister-antihero's nonsensical use of law French and jargon nearly earned him a fiery exorcism. See RUGGLE, *supra* note 55, at 21, 99-103. As Edward F.J. Tucker notes, the "law-distracted madman who is thought to be possessed with evil spirits" was common in Jacobean drama. Tucker, *supra* note 112, at 318-20. Dramatists enjoyed putting legal baffle and debased classical languages in the mouths of lawyers. In John Day's *Law-Tricks* (1608), Lurdo declares: "Do but send out your *iterum summonneas/ Or capias ut legatum* to attach/ And bring him *viva voce* tongue to tongue, and *vi & armis* I'll revenge this wrong." JOHN DAY, *LAW-TRICKS* act 5, sc. II, ll. 1908-11 (1608). *Ignoramus* opened with a talking horse which observed that "Ignoramus the lawyer and I

to history, one learned from Raphael Holinshed's popular *Chronicles* (1577) that Englishmen suffered death and penalty at the hands of a Frenchified law they could not understand.¹²⁸ Readers saw the bar's vices and the law's delays and corruption in comic dress in the satiric character books,¹²⁹ in earnest garb in Philip Stubbes's *The Anatomy of Abuses in England* (1583),¹³⁰ and with classical trimmings in *The Anatomy of Melancholy* (1621), where Robert Burton used Plato, Livy, and other learned quotables to dissect the damage the "gowned vultures" did to the body politic.¹³¹ Printed sermons, particularly those offered at assizes, kept up the scholarly and political pressure, though with prooftexts replacing togas in the margin notes. Scripture afforded vivid images for chastisement. The wayward lawyer might spend the morning vomiting up riches he swallowed down (Job 20:15);¹³² and though not allowed to "wrest judgment" (Deut 16:19), he might pass the afternoon stretching "the law with glosses, as shoemakers do with leather" before harrying cases from court to court.¹³³ Assize sermons typically closed with an appeal for godly conduct from corrupt judges and lawyers who act as "bug-bears to their innocent neighbors, using the laws for traps and snares" and making it "stink in the nostrils of the people."¹³⁴ Criticism of law and lawyers, then, was not a specific

are near of kin," to which his keeper replied, "And well you may be, you speak Latin both alike." RUGGLE, *supra* note 55, at act I, sc. 3; first prologue at 4.

For one of many portrayals of greedy lawyers stirring up trouble for profit, see JOHN WEBSTER, *THE DEVIL'S LAW CASE* act II, sc. i, iii; *id.* act IV, sc. i (1623).

¹²⁸ For comic relief, Holinshed spun a fish story about a client twice putting fees into the thrusting hands of lawyers only to stare vainly as they remained silent at the bar, hoping to extort more. See 1 RAPHAEL HOLINSHED, *CHRONICLES OF ENGLAND, SCOTLAND AND IRELAND* 304 (1807) (1577); 2 *id.* at 13. He also condemned lawyers' arrogance and "excessive taking of money." *Id.*

¹²⁹ See JOHN EARLE, *An Attorney*, in *MICRO-COSMOGRAPHY* at C3v-C5r (1628); Lenton, *supra* note 113, at B4v-B6r; Francis Lenton, *A Young Inns of Court Gentleman Thomas Overbury*, in *CHARACTERS*, *supra* note 113, at F4r-F6r; THOMAS OVERBURY, *A Mere Common Lawyer*, in *THE OVERBURIAN CHARACTERS*, *supra* note 113, at 30, 30-32; THOMAS OVERBURY, *supra* note 113, at 45-46; OVERBURY, *A Mere Pettifogger*, in *THE OVERBURIAN CHARACTERS*, *supra* note 113, at 64, 64-65; JOHN STEPHENS, *A Pettifogging Attorney*, in *ESSAYS AND CHARACTERS*, *supra* note 123, at 335, 335-41.

¹³⁰ 2 PHILIP STUBBES, *THE ANATOMY OF ABUSES* 9-14 (Frederick J. Furnivall ed., 1882) (1583).

¹³¹ ROBERT BURTON, *THE ANATOMY OF MELANCHOLY* 82-86 (Holbrook Jackson ed., 1977) (1621).

¹³² ROBERT BOLTON, *A Sermon Preached at Lent Assizes*, in *MR. BOLTON'S LAST AND LEARNED WORK* 259 (4th ed. 1639).

¹³³ SAMUEL GARY, *IENTACULUM IUDICUM: OR, A BREAKFAST FOR THE BENCH* 35-60 (1623).

¹³⁴ ANTHONY CADE, *A SERMON OF THE NATURE OF CONSCIENCE* 11-17 (1621); THOMAS GATAKER, *God's Parley with Princes*, in *CERTAIN SERMONS* 112 (1637); HARRIS,

type of work, distinct, concentrated, and readily missed like a book of music or hawking. It was rather a device recurring across genres, diffuse and pervasive like the figure of the fool or the appeal to fictive kinship.

This critical offensive made lawyers' resort to the press an attractive countermeasure. Historians have stressed the importance of lawyers' apologetic writings proliferating in the latter sixteenth century. Indebted to John Fortescue's *De Laudibus Legum Angliae*, they mixed apostrophes to practitioners' skill and morality with praise for the common law, lauding its immemorial antiquity and suitability to the English nation, its consonance with Scripture and reason, and its virtues of speed, certainty, and precision. Alongside this deeply important justificatory enterprise emerged an appreciation of legal publishing as an instrument of professional defense. Its roots lay in the dictum that shallow misapprehension of the law bred dissatisfaction and criticism, while deeper study cultivated appreciation and acceptance. Typical was Edward Coke's retort to the French civilian Francois Hotman's ridicule of Thomas Littleton's *Tenures* (1481): "Alas, our books of law seem to them [civilians and canonists] to be dark and obscure; but no wise man will impute it to the laws, but to their ignorance, who by their sole and superficial reading of them cannot understand the depth of them."¹³⁵ Coke found the Catholic controversialist Robert Parsons "utterly ignorant (but exceeding bold, as commonly those qualities concur) in the laws of the realm."¹³⁶ Here was another branch of the Fortescue revival, sharing a sentiment voiced in chapter five of *De Laudibus*: "what is not known is usually not only unloved but also spurned; hence a certain poet observes, 'All that he is ignorant of, the rustic declares, ought to be despised.' . . . Wherefore it is commonly said that 'Art has no enemy except the ignorant.'"¹³⁷

supra note 67, at 24-25; THOMAS SUTTON, JETHRO'S COUNSEL TO MOSES 24 (1631); SAMUEL WARD, JETHRO'S JUSTICE OF PEACE 51 (1621).

¹³⁵ EDWARD COKE, *Preface* to REPORTS, pt. 10, at xxx (1826 ed.) (1614). See also JOHN FERNE, THE BLAZON OF GENTRY 39 (1586) ("No science can have a greater enemy than ignorance.").

¹³⁶ EDWARD COKE, *Preface* to REPORTS, pt. 6, at xvi (1826 ed.) (1607).

¹³⁷ Fortescue also adds: "But how shall you be able to love justice, if you do not first somehow grasp a knowledge of the laws by which justice itself is known? For Aristotle says that 'Nothing is loved unless it be known.'" See JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* 10-11 (Shelley Lockwood ed., 1997) (MS, c.1470) (Chapter 5 title: "Here he proves that ignorance of the law causes contempt for it."). The notes to the 1997 Cambridge edition of Fortescue cannot identify Fortescue's "poet" and

The attribution of criticism to ignorance cast legal education as both preventative and antidote, a point implicit in the apologetic literature and openly defended as the 1640s turned the common lawyers' attention from the lesser challenge of their disciplinary and jurisdictional rivals to the greater problem of answering a more vocal and dangerous law reform agitation. Perhaps, some publicists thought, the vernacular legal press could tutor critics in law's hidden virtues. Perhaps it could assuage lay anger provoked by the collision of unreasonable expectation with misperceived reality, a result of fifty years of printed scurrility passing for common wisdom and providing the lens for viewing law. "Which of us has not heard it objected," asked Thomas Wentworth in *The Office and Duty of Executors* (1641), "that we the professors of the law, seek to hide and secret the knowledge thereof under this dark and distasted" French language? Wentworth counseled English-language publication as a remedy for the overstated complaint. The "more nobles, gentlemen and others, shall be acquainted with the law of the land, and the justness, equity, prudence and providence thereof, the more they will love it and affect it; . . . the want of knowledge of it causes the leanness of love to it."¹³⁸ William Hughes translated the *Mirror of Justices* (1646) in part to dissuade the "meaner sort of the people" from charging that the common laws were "built but upon a sandy foundation, viz., the conceits of a few men, and that they are not grounded upon the laws of God, from which all laws of men ought to flow."¹³⁹ Hughes thought that ignorance "principally nourished" this "vulgar . . . objection," and he turned out several translations of lawbooks in the cause of education.¹⁴⁰ Indeed, interregnum pamphleteers defending the legal system from critics declared that the common law "never had an enemy who understood it."¹⁴¹

William Sheppard's property treatise, *The Touchstone of Common Assurances* (1648), hinted at the psychology of using dissemination as

find that Fortescue misattributed to Aristotle a sentiment expressed in St. Augustine's *On the Trinity*.

¹³⁸ THOMAS WENTWORTH, *Preface* to THE OFFICE AND DUTY OF EXECUTORS at A2-A7 (1641).

¹³⁹ Hughes, *Preface* to MIRROR OF JUSTICES, *supra* note 45, at A3. In addition to the *Mirror of Justices*, Hughes's translations included Anthony Fitzherbert's *New Natura Brevium* (1652), and *Diversity of Courts* (1646), William Leonard's *Reports and Cases of Law* (1658-1675), and Arthur Gregory's *Moot Book* (1663).

¹⁴⁰ Hughes, *supra* note 45, at A3.

¹⁴¹ ALBERTUS WARREN, EIGHT REASONS CATEGORICAL: WHEREIN IS EXAMINED AND PROVED, THAT IT'S PROBABLE, THE LAW COMMON WILL STAND, AND CONTINUE AT LONDON AND WESTMINSTER 3 (1653).

professional defense.¹⁴² A moderate law reformer sympathetic to the interregnum government, but opposed to radical populist and Bibli-cist programs, Sheppard maintained a genuine commitment to legal accessibility. Opening law to the people will win it regard "as a jewel whose properties are known" despite the objections of "Papists" (as ever, lurking).¹⁴³ Yet he shrewdly perceived that printed lawbooks, particularly complex, technical ones brimming with "judgments, statutes, resolutions and cases" could intimidate while enlightening.¹⁴⁴ The jewel of legal argument, if intricately cut and polished, demonstrated the difficulty of thinking properly about law, let alone practicing it. It dissolved the critical confidence born of a quick look at law, instead cultivating modesty and driving laymen back to lawyers for guidance. Had the "Papist" *manqué* whom Sheppard's preface depicted as the obstacle to publishing English law succeeded in banishing the *Touchstone* to Romish darkness, he would have kept from the people a sustained lesson in the limits of their own capabilities. For law was

somewhat transcendent, and too high for ordinary capacities, the manner of putting cases is so concise, the distinctions and differences of law are so many, that it is hard for any man not well read in the laws of general, to judge or make use of any part of them in particular.¹⁴⁵

Though Sheppard, Wentworth, and Hughes followed the middle sixteenth-century humanists in casting popular legal knowledge as an "efficient cause" of respect for law and lawyers, they imagined an intellectually more active and politically more skeptical audience. Hughes's readers would learn that the common law rested on "the laws of God" rather than the "conceits of a few men" only when they probed its allegedly "sandy foundation," while Sheppard's would-be reformers and cut-rate "empirics" needed a tour through the thickets of property law to appreciate the trained lawyer's skills. The onset of the Revolution favored articulation of a strategy implicit in Coke, Bacon, and earlier publicists: that in an age of growing pressures for re-

¹⁴² SHEPPARD, *supra* note 55, at A4-A5. I have stressed Sheppard's emphasis on the limits of lay abilities. He also thought that the *Touchstone* could help readers put better-informed questions to their counsel. What worried him was the danger posed by "pettifoggers" to the interpretive monopoly and hence dignity, political power and income of lawyers. On Sheppard's career and the *Touchstone*, see NANCY L. MATTHEWS, WILLIAM SHEPPARD, CROMWELL'S LAW REFORMER 77-91 (1984).

¹⁴³ SHEPPARD, *supra* note 55, at A4-A5.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

form, publication offered a more secure defense of the law and the bar's profitable specialty in interpretation than the anti-publicists' mystery. Just as the anti-publicists tacitly accused the humanists of facile optimism, so the early Stuart publicists returned the favor, suggesting that the anti-publicists' pessimism rested on an incomplete understanding of the consequences of legal dissemination. The publicists' critique was in the form of a counter-prophecy. The anti-publicists mistakenly thought legal printing corroded more than deepened respect for the law because they underestimated the power of legal publications to answer skeptics' doubts or, as useful, to create self-doubt, to cultivate in readers a politically recessive diffidence about criticizing the law.¹⁴⁶

2. Making Knowledge Common and Inviting Its Misuse

Printing made a text "common," an act that could bear both positive and negative connotations. William Lambarde's justice of the peace manual, *Eirenarcha*, became "common by impression" to help lay justices better conduct their offices.¹⁴⁷ What worried anti-publicists was a text improperly common, one laid before those who had no business reading it, a complicated judgment sensitive to context. "J.L.," author of the preface to Henry Finch's *Law, or a Discourse Thereof* (1627), a translation of an early draft of Finch's law French *Nomotechnia* (1613), claimed that "[t]o impart good is to improve it, which was one cause of the translation of this book; yet is it not thereby made so facile as to descend to vulgar capacities; witness the very phrase, the terms of art, excluding all hope of accrue to lay-conceited opinions."¹⁴⁸ Julius Caesar, a civilian admitted to the Inner Temple, published *The Ancient State Authority, and Proceedings of the Court of Requests* (1597), records demonstrating his tribunal's antiquity, in order to win it advantage in jurisdictional conflicts with the common law courts. Caesar's manuscript letter of dedication to Lord Burghley explained that since he found it "overchargeable to write many copies" of his work, he caused a

brief table of my collections themselves to be imprinted, not to the end to make them common but of purpose to deliver some of them to such, either counselors of estate or counselors at law, or such students of an-

¹⁴⁶ Revealing the "hidden" law also answered one of the critics' most powerful charges while appealing to segments of the bar committed to legal dissemination.

¹⁴⁷ LAMBARDE, *Epistle*, *supra* note 45, at Aiiiv.

¹⁴⁸ J.L., *To the Reader*, in FINCH, *supra* note 103, at A3v-A4r.

tiquities and of histories, as from whose wisdom and good observations either in law, or story, or antiquities there might be drawn such amendment of things amiss or addition of things wanting or justification of things misconstrued.¹⁴⁹

As J.L.'s and Caesar's comments suggest, the distinction between knowledge properly restricted and improperly common could be measured along multiple continua: between manuscript and print, between lawyers and laymen, between gentry and the vulgar, between the well- and ill-educated, between government officials and private persons. To become common meant to pass a boundary along one or more of these continua, with the placement of the boundary and the relevant continua varying according to context. Printing of a text and a broad, popular readership were "risk factors" in drawing the sneer "common," but neither was a sufficient nor a necessary condition. Manuscript writers, for example, complained when their works escaped from an envisioned limited circulation and, through unauthorized copying, wound up in too many or the wrong hands.¹⁵⁰ In Caesar's opinion, printing Court of Requests records did not make them unsuitably common—provided that government officials, lawyers, historians, and antiquaries comprised the audience. Since Caesar knew that laborers, journeymen, and small farmers would not snap up Court of Requests records, the danger of commoning lay, realistically, in distribution to the wrong segment of the educated, to those who had no warrant for this sort of knowledge. To the extent that commoning meant violation of imagined limitations, it demarcated the boundaries of expectation primarily, and of class, status, office, and educational attainment secondarily.

Commoning worked a double injury in the eyes of the anti-publicists. It debased the dignity of law as it did of any learning, a sentiment expressed throughout learned Europe from the early sixteenth century in metaphors of intellectual promiscuity, as in the common dictum, "The pen is a virgin, the printing press a whore."¹⁵¹

¹⁴⁹ JULIUS CAESAR, *THE ANCIENT STATE AUTHORITY, AND PROCEEDINGS OF THE COURT OF REQUESTS* 4 (L.M. Hill ed., 1975) (1597); L.M. Hill, *Introduction to id.* at xvii-xx.

¹⁵⁰ See HAROLD LOVE, *SCRIBAL PUBLICATION IN SEVENTEENTH-CENTURY ENGLAND* 35-89 (1993).

¹⁵¹ "*Est virgo hec penna, meretrix est stampificata.*" Roger Chartier, *The Practical Impact of Writing*, in 3 *A HISTORY OF PRIVATE LIFE: PASSIONS OF THE RENAISSANCE* 111, 123 (Roger Chartier ed., Arthur Goldhammer trans., 1989). See also CONLEY, *supra* note 82, at 89-90, 102-03 (opposition of universities to vernacular translation of classics and the fear that making learning common undercut awe among the multitude).

The law shared with classics and mathematics this descent to the vulgar that J.L. feared. Yet with the exception of divinity, the publication of law threatened social dislocations in a way that printing other bodies of knowledge did not. To make law common invited its abuse by readers unequipped or unwilling to use it well. Edward Coke printed his *Reports* but composed them in law French like the medieval year-books "lest the unlearned by bare reading without right understanding might suck out errors, and trusting to their conceit, might endanger themselves, and sometimes fall into destruction."¹⁵² Coke's concerns underlay the publicist William Sheppard's sketch of attorneys and scribes and, worse, vicars, blacksmiths, carpenters, and weavers having "no more law than is on the backside of Littleton," offering opinions on land titles to penny-wise customers. Publicists and anti-publicists alike shared a paternalistic concern for laymen taken in by patent-medicine lawyering. Solicitude for the unlearned moved them. So did a sharp-eyed defense of barristers' livelihood against the competition of attorneys and lay "empirics" ready to draft wills and conveyances, those "pettifoggers" who intruded "into other men's callings" and "thrust their sickles into other men's harvest."¹⁵³

The underlearned conveyancers and village autodidacts were only one half of the problem. The anti-publicists focused on the other, darker half, the deceit and disobedience facilitated by legal publication. Recorder of London Anthony Benn thought that "the worst of all are they that study daily how to break through laws to pervert and disorder all civil government."¹⁵⁴ Such talk drew on elite fear of the "many-headed monster," the common people and the alienated.¹⁵⁵ If the "runder sort" knew the "liberty allowed them by the law," a member of Parliament suggested in a 1597 debate on enclosures, they would be "as unbridled and untamed beasts."¹⁵⁶ But the anti-publicists' point was broader than this commonplace, as suggested by William Hudson's portrait of the multitude using lawbooks as "shifts to cloak their wickedness, rather than to gain understanding . . . for

¹⁵² EDWARD COKE, *REPORTS*, pt. 3, at xxxix-xl (1826 ed.) (1602).

¹⁵³ SHEPPARD, *supra* note 55, at A3-A5. Coke argued that doubts about the law arose, in part, because of "conveyances and wills drawn and devised by such as have *scientiam scilorum quae est mixta ignorantia*." COKE pt. 4, *supra* note 30, at xviii.

¹⁵⁴ BENN, *supra* note 100, at L28/46, fol. 44r.

¹⁵⁵ CHRISTOPHER HILL, *The Many-Headed Monster*, in *CHANGE AND CONTINUITY IN SEVENTEENTH-CENTURY ENGLAND* 181, 181 (1975).

¹⁵⁶ See Jim Sharpe, *Social Strain and Social Dislocation, 1585-1603*, in *THE REIGN OF ELIZABETH I: COURT AND CULTURE IN THE LAST DECADE* 204 (John Guy ed., 1995) [hereinafter *THE REIGN OF ELIZABETH I*].

surely few men would be ruined by dishonest means, if men knew not how to cover their dishonesty under some color of law or justice."¹⁵⁷ Hudson held up the moral superiority of untutored honesty over learned disingenuousness. From the ideal of Christian simplicity to the image of the noble savage, this trope appeared in widely different guises in English culture, no less in law, where it helped justify the denial of counsel to felony defendants. In the context of legal publication, this pose of unlearned forthrightness was ostensibly morally attractive, but in practice politically disabling, as the anti-publicists knew. Reluctance to print law not only restrained Hudson's cloaked multitude. It also supported any hierarchy resting on superior access to legal knowledge, including those at the upper levels of the political nation—Court and parliamentarians, city council and burgesses, bishops and clergy. Reading Hudson's and Benn's strictures primarily in class terms risks obscuring how withholding law from the press for fear of its misconstrual reinforced hierarchies of information within as well as between social strata. Indeed, as I will argue in Part III.A of this Article, the spread of printed legal knowledge through wider segments of the political nation, to burgesses, successful artisans and yeomen, professionals and lesser clergy, fueled anti-publicist fears of disclosure.

The publicist Ferdinand Pulton addressed anti-publicist complaints in the preface to his criminal law treatise, *De Pace Regis et Regni* (1610). Might printed law "be misconstrued by every ignorant and unlearned person . . . , the reader himself . . . be led into error, and others . . . be misinformed by his imbecility of judgment?"¹⁵⁸ Pulton held up the Bible in reply. The laity read Scripture despite the risk of misunderstanding. The "wresting" of God's Scriptural law, like man's positive law, convicted the reader of "ignorance, pride, self love, or folly," but did not indict the law. Besides, an initial unsteadiness hobbled the student of any branch of knowledge, from grammar to logic to music to law, who must begin in ignorance and proceed slowly to mastery. The "busy searcher of other men's knowledge" should consider the vast learning abroad in books and attend to his own shortcomings.

This defense of the dutiful novice's mistakes as a necessary stage in the cycle of learning was straightforward compared to Pulton's de-

¹⁵⁷ Hudson, *supra* note 2, at 2. Thomas Barnes argues that Hudson's sentiments were "conventional." Barnes, *supra* note 2, at 297.

¹⁵⁸ PULTON, *Preface*, *supra* note 78, at [7].

nial that his criminal law treatise provided apprentice felons with “shifts to cloak their wickedness.” I write about crimes, said Pulton, but I aim for peace obtained by “the laws that do punish or restrain” misdeeds.

As many Physicians have written large volumes of several infirmities in man’s body, and then expressed which be the medicines to cure them; not to the intent to allure the reader to seek the disease, but how to prevent it And several divines have composed whole tomes, of pride, malice, covetousness, and such like offenses, not to the intent to entice the frail man to fall into them, but to show the enormities of them, . . . to the end they might . . . discourage transgressors from them.

Curious reassurances, unless the anti-publicist critique is kept in mind. Why else worry that medical treatises will “allure the reader to seek” diseases, or that theological writings “entice the frail man to fall into” sin?¹⁵⁹

Pulton cleverly shifted the terrain of argument to engage the anti-publicists. He made temptation (“allure” into disease, “entice” into sin) the supposed hazard of books. Since sin and disease held little attraction for readers, the Promethean danger of published learning could be conveniently, if too lightly, dismissed. But lawbooks offered more alluring enticements than sin and disease: instruction in evasion of taxes and trade regulation; tactics for challenging royal parliamentary programs, entrenched urban oligarchies, and overcharging manorial lords; strategies for restraining bishops and the ecclesiastical courts. Nor did the anti-publicists think the cultivation of deviant interests the central danger of lawbooks. The problem was less psychological than tactical—the apparatus of justification provided by lawbooks, the training in covering “dishonesty under some color of law or justice” that Hudson condemned. Pulton minimized the political dangers of misreading by, ironically, misconstruing to his own advantage the anti-publicist critique.

With more justice, Pulton placed legal publication in a broad interdisciplinary context to alter the reader’s perception of anomaly, for the distinctive rather than the expected demanded justification. With the widespread oral and chirographic transmission of law in mind, law printing appeared anomalous; with the widespread vernacular printing of arts and sciences in Tudor England in mind, the failure to publish law appeared anomalous. Had not authors “written learnedly and profoundly, of grammar, logic, rhetoric, philosophy,

¹⁵⁹ *Id.* at [5]-[9].

physic, arithmetic, geometry, music, and astronomy, and published to all posterity the several grounds, principles, and maxims of every of them?"¹⁶⁰ Of these learned fields, scripture and medicine attracted Pulton's particular attention, and with good reason. Laymen felt themselves entitled to knowledge about their liberties and estates, God, and the body in a way that distinguished law, religion, and medicine from other learned fields, say, geometry or philology. Critics of the professions grouped lawyers with divines and physicians as jointly monopolizing knowledge that should, by right, belong to all.¹⁶¹ By highlighting at the rhetorical level law's connection to medicine and Scripture, Pulton increased the burden of explanation upon the anti-publicists.

3. Litigiousness

Critics of legal publication charged that it bred lawsuits, a potent complaint at a time when litigation in the royal courts was mounting rapidly. From 1500 to 1640, the litigation rate in the common law courts rose far faster than the population. Christopher Brooks has estimated that the number of cases in advanced stages in the King's Bench and Common Pleas increased from 2100 in 1490, to 5278 in 1560-1563, to 23,147 in 1606, and to 28,734 in 1640.¹⁶² Englishmen recognized that lawsuits redressed grievances and substituted for physical violence yet bemoaned litigiousness as an index of disharmony and moral decay. The reasons for the sixteenth-century rise in litigation rates were not well understood, making it easy to blame law printing as a cause, as it may have been. William Barlee "heard one old man," a lawyer, argue that "many suits have arisen in the Queen's courts among subjects . . . since our statute laws were published in the English tongue to the common sort of people."¹⁶³ Almost three quar-

¹⁶⁰ *Id.* at [8]-[9].

¹⁶¹ See HILL, *supra* note 122, at 297-300.

¹⁶² Population grew slowly until 1520, when it began a steady rise from about 2.4 million to 3.5 million by 1580, and about 5 million by 1640. The simultaneous expansion of population and economic activity in the sixteenth century created a host of disputes that found their way to Westminster rather than manorial and borough courts. This happened in small part because of procedural innovations in the common-law courts that made litigation there more attractive, and in large part because of weakness of the local courts as fora for civil disputes. The sevenfold price inflation of the sixteenth century drove down the real value of the 40 shilling amount in controversy minimum in the common-law courts, bringing more business there. See BROOKS, *supra* note 112, at 51, 88-100.

¹⁶³ Letter from William Barlee to William Cecil, *supra* note 23.

ters of a century later, in 1650, Bulstrode Whitelocke spoke in favor of a Parliamentary statute making English the language of court process and law-books. He entertained the objection that law “generally more understood, yet not sufficiently, would occasion the more suits.”¹⁶⁴

What did Whitelocke mean by law “more understood, yet not sufficiently”? William Fulbeck cited Cicero for the proposition that not knowledge of the law but its ignorance bred litigation, a *topos* as useful to publicists as to lawyers rebutting popular disdain for the contentiousness of their discipline.¹⁶⁵ “If the laws were plainly set forth,” predicted John Hales, “fewer suits, less trouble, more quiet and concord should be among people.”¹⁶⁶ Anti-publicists supposed that law printing would not inculcate the “sufficient” understanding of law necessary for Cicero’s ideal of informed harmony. Rather, the press would give the multitude but a taste of the law, conjuring in their addled minds fantasies of profiting through litigation and challenging hierarchical superiors without guiding them from superficiality through to sufficiency of understanding. If professional training greatly surpassed lay law reading in rigor, both ideally shared the same psychological aspiration: “to apply our minds to a virtuous and wise rather than to a cunning and curious knowledge of the law,” as the Recorder of London Anthony Benn put it.¹⁶⁷ Here in another guise was a debate over the probability of the multitude manipulating legal craft or interiorizing the virtues early modern legal panegyrists saw in the law—its aspiration towards a reflective order.

4. Political Unity

Critics of legal publication charged that it would multiply faction and dissension as had vernacular Biblical and religious printing after the Reformation. “Ignorance was the mother of devotion, as these men [the anti-publicists] now would make her of obedience,” wrote the publicist Ferdinand Pulton in caricature, underscoring the indebtedness of the point, at least in form of expression, to Tridentine Catholic critiques of unguided, and hence socially disruptive and intellectually promiscuous popular education.¹⁶⁸ The publicists con-

¹⁶⁴ 3 WHITELOCKE, *supra* note 55, at 272.

¹⁶⁵ FULBECK, *supra* note 123, at 67.

¹⁶⁶ HALES, *supra* note 16, at MS LC 14:32.1, fol. 17r.

¹⁶⁷ BENN, *supra* note 100, at L28/46, fol. 24v.

¹⁶⁸ See PULTON, *Preface*, *supra* note 78, at [7]. Identifying ignorance as “the mother and cause of true devotion and obedience” was a popular Protestant caricature of

tinually asserted that law printing strengthened social order and political unity, thereby hinting at the background critique they needed to answer, the frequency of their reassurances implying the seriousness of the challenge. Their strategy resembled that of Francis Bacon in *The Advancement of Learning* (1605), fending off critics of his far grander educational program:

For to say that a blind custom of obedience should be a surer obligation than duty taught and understood, it is to affirm that a blind man may tread surer by a guide than a seeing man can by a light. And it is without all controversy that learning does make the minds of men gentle, generous, maniable, and pliant to government; whereas ignorance makes them churlish, thwart, and mutinous; and the evidence of time does clear this assertion, considering that the most barbarous, rude, and unlearned times have been most subject to tumults, seditions, and changes.¹⁶⁹

C. *The Anti-Publicists*

The anti-publicists were an elusive group. They mainly resided offstage, as it were, with publicists responding to their arguments or alluding to an ongoing debate over the propriety of printing law. Ferdinand Pulton's *De Pace Regis et Regni* (1609), for example, defended legal publication in a several-page rebuttal to "the private conceits, or particular fantasies of a few opinative persons" who "by disputes encounter [i.e., "go counter to"] the publishing or reading of our . . . laws in the English tongue." But who were the "opinative persons"? And whom did he need to reassure that "divulging" the criminal law did not "impeach [its] credit"? Who suggested to William Sheppard that publication made the law "despised" and the lawyer "less regarded and used"? Who was the old lawyer that Barlee heard link the rise in litigation to the publication of the statutes "in the English tongue to the common sort of people"? Who were the barristers accusing Thomas Powell of trespassing in their enclosure and commoning their mysteries? Who were the "clerks and officers" that Bulstrode Whitelocke accused of wanting to retain the laws "in a kind of mystery to the vulgar" to sustain their "private honor and profit"? Who were the critics that Edward Coke had in mind when he

Catholic practice. See, e.g., JOHN JEWEL, *Of Ignorance, in Reply to M. Harding's Answer* (1565), in 2 THE WORKS OF JOHN JEWEL, *supra* note 75, at 799-800.

¹⁶⁹ BACON, *supra* note 82, at 273.

announced in the first volume of his *Institutes* (1628) that vernacular publication of legal treatises cannot “work any inconvenience”?¹⁷⁰

Reading these comments is like seeing footprints in the snow; they alert you to the passage of a group, but tell little about its makeup or principles. Indeed, was it a group? The anti-publicist critique appears as an intellectual position invoked selectively, even opportunistically, rather than a discernible movement.¹⁷¹ William Barlee, for example, prefaced his manuscript *Concordance* celebrating the healing balm of lawbooks with a warning to readers to hide the work “from rash headed fellows, lest they tear you or your friends in pieces. I mean lest they vex lords of manors.”¹⁷² One can image a manorial lord blaming lawbooks for encouraging copyholder suits while welcoming them as aids to performing his duties as a justice of the peace and a resource for parliamentary allies resisting royal purveyance, monopolies, and impositions.

The anti-publicists whose reservations survive on paper favored royalist politics. William Hudson’s *Treatise* on Star Chamber (MS, 1621) adopted James I’s view of the king as the fountain of justice within the realm, distributing judicature according to kingly prudence rather than constitutional or customary requirement.¹⁷³ As the civilian Julius Caesar, the Master of Requests, climbed to higher offices in the king’s service, Chancellor of the Exchequer in 1606, Master of the Rolls in 1614, he interleaved manuscript pages within his private copy of the *Ancient State Authority, and Proceedings of the Court of Requests* (1597), recording rules of decorous conduct at Court and of protocol at meetings of the Council, implying that the dignity of the Council reflected onto Requests.¹⁷⁴ J.L., whose preface to Henry Finch’s *Law* (1627) hoped that the work would not “descend to vulgar capacities,” approved of Finch’s separate treatment of “the flower of the crown, the king’s prerogative,” lest it “be valued in the hands of a

¹⁷⁰ PULTON, *Preface*, *supra* note 78; SHEPPARD, *supra* note 55, at A5; Letter from William Barlee to William Cecil, *supra* note 23; POWELL, *THE ATTORNEY’S ACADEMY*, *supra* note 45, at [7]-[15]; 3 WHITELOCKE, *supra* note 55, at 272; COKE, *Proemium*, in *FIRST INSTITUTE*, *supra* note 45.

¹⁷¹ I am indebted to Peter Hoffer for suggesting this point.

¹⁷² BARLEE, *supra* note 21, at 1.

¹⁷³ See Hudson, *supra* note 2, at 9-10. Thomas Barnes has labelled a “conventional concern” Hudson’s refusal to go into print lest the multitude obtain “shifts to cloak their wickedness.” Barnes, *supra* note 2, at 297.

¹⁷⁴ See L.M. HILL, *BENCH AND BUREAUCRACY: THE PUBLIC CAREER OF SIR JULIUS CAESAR, 1580-1636*, at xvii-xx (1988).

common person.”¹⁷⁵ Recorder of London Anthony Benn, who argued that the law did not bind but submitted itself to the king, noted sourly “how desirous every man is to publish laws and how faint hearted they are to execute them.”¹⁷⁶ Yet if anti-publicists showed an affinity for royalist politics, there was no necessary connection. Some of James’s champions in the bar, such as Francis Bacon and John Davies, offered (qualified) support to law printing.

Anti-publicist discomfort with the press sounded from the last quarter of the sixteenth century into the seventeenth. A darkening of mood, a growing (or at least more publicly expressed) ambivalence and suspicion clouded the earlier, and continuing, approval of the medium. Though “mood” and “ambivalence” are difficult to chart, three kinds of evidence support this hypothesis. First, comparison of the overall tenor of lawyers’ reflections on legal publishing suggests a deepening concern over the effects of print after, approximately, 1575. Lawyers optimistic, or at least matter of fact, about print’s potential (Rastell, St. German, Taverner, Phaer, Barlee, Pulton, Fraunce) began writing in roughly the 1520s and continued on into the seventeenth century to include the law publishing cottage industries of Michael Dalton, William Hughes, and William Sheppard. The lawyers who themselves expressed reservations about printing law (Caesar, “J.L.,” Hudson, Benn) or acknowledged background murmuring by answering objections (Barlee, Coke, Powell, Pulton, Sheppard, Whitelocke) wrote after, roughly, 1575.

Second, an increasing anxiety about resorting to the press appeared not only in successive groups of lawyers, but in the writings of one exceptionally long-lived author, Ferdinand Pulton (1536-1618). Pulton’s *Abstract of All the Penal Statutes*, published in 1560 and in multiple later editions, offered a Rastellian defense of legal publication. Almost fifty years later, the preface to his criminal law treatise *De Pace Regis et Regni* (1609) offered an extended rebuttal to those “opinate persons” opposing vernacular legal publication. This *apologia* responded not only to the critics’ questions and doubts but to their growing importance.

Third, authors of printed lawbooks from 1575-1640 who said nothing against law publishing did an awful lot of hand-wringing, apologizing for using the press in low bows of modesty and self-

¹⁷⁵ J.L., *To the Reader*, *supra* note 148, at A3v.

¹⁷⁶ ANTHONY BENN, *GOD BEFORE ALL, AND ALL AFTER THE KING*, Bedford Record Office, MS L28/49 [11]; BENN, *Of Laws*, in *ESSAYS WRITTEN BY ANTHONY BENN*, *supra* note 100, at fol. 41v.

abasement. "I published this book because a printer got hold of a manuscript through my friends or through a surreptitious copyist," thus Simon Theloall and Edmund Plowden.¹⁷⁷ "There are too many books these days, so with great trepidation I add one more," thus John Ferne, Henry Swinburne, and John Croke.¹⁷⁸ "I did not wish to print, but friends, patrons and the common good implored me," thus William Lambarde, Edward Coke, Edmund Plowden, James Dyer's literary executors, and Thomas Ashe.¹⁷⁹ Edmund Plowden assembled his law reports "without the least thought or intention of letting it appear in print," later resisting the solicitations of the judges "to make it public, which I was very unwilling to do."¹⁸⁰ The nephews of James Dyer, badgered by pleas to print the deceased judge's manuscript law reports, "assented not, nor purposed to yield unto at all" for two years, until the "importunacy of our said friends . . . procured others of greater countenance, most earnestly to move us in that behalf, who with sundry weighty reasons . . . very effectually assailed us."¹⁸¹

Did these touches of embarrassment and defensiveness suggest discomfort with law printing? One could read the rituals of reluctance as a reasonable hedge against the risk of publication. Lawyers feared damaging their reputation by appearing overeager and under-qualified. Being "conscious of the simpleness of my own understanding," wrote the reporter Edmund Plowden, "and consequently of my want of excellency in judgment, I thought it my duty to decline making public . . . the arguments of men more learned than myself, . . . and thereby to avoid the censure of affecting a more acute and discerning judgment than I really had."¹⁸² Would-be critics like William Hudson stood ready to condemn lawyers' books as "a flag of vain-glory unworthy [of] their gravity" that "publish to others that which they well understand not themselves," so legal authors adopted the Renaissance strategy of coupling modest disclaimers of skill with

¹⁷⁷ See SIMON THELOALL, *LE DIGEST DES BRIEFES ORIGINALS, ET DES CHOSES CONCERNANTS EUX* at iiii (1579); EDMUND PLOWDEN, *Preface to REPORTS AT V* (1816) (1578).

¹⁷⁸ See JOHN FERNE, *THE BLAZON OF GENTRIE* at Av^f (1586); HENRY SWINBURNE, *Preface to the Reader, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS* (1590-91); John Croke, *Introduction to KEILWAY, REPORTS* (1602).

¹⁷⁹ See LAMBARDE, *supra* note 45, at Aii; EDWARD COKE, *REPORTS* pt 1, at xxviii-xxix (1826 ed.) (1600); PLOWDEN, *Preface, supra* note 177, at iii-iv; R.F. & J.D., *To the Students of the Common Laws*, in DYER, *supra* note 45; Thomas Ashe, *Preface to ABRIDGEMENT DES TOUTS LES CASES REPORTES A LARGE PER MONSIEUR PLOWDEN* (c. 1600).

¹⁸⁰ PLOWDEN, *Preface, supra* note 177, at iii-iv.

¹⁸¹ R.F. & J.D., *supra* note 179.

¹⁸² PLOWDEN, *Preface, supra* note 177, at v.

invocation of a powerful patron to ward off attacks.¹⁸³ Lawyers with ambitions of royal preferment or sensitive to the fragility of their gentle status feared the social stigma attaching to printing in Courtly circles identifying publication with a grasping, popularizing spirit inappropriate in a gentleman.¹⁸⁴ And the political implications of an author's legal writings could thwart career advancement if officials took offense, even years after publication when the direction of the tides of conventional thinking could not have been foreseen.

One could also read the evidence as mere formulae, another appearance of a familiar figure—the unwilling author reluctantly allowing publication of his unworthy work. The diffident author enjoyed a long history among medieval manuscripts before serving Renaissance printing, and he took his works to the press with the same avid hesitancy with which he once took them to the scribes.¹⁸⁵ Yet if the trope was both conventional and a reasonable precaution, it did become far more common among published lawyers in the last quarter of the sixteenth century than before. Sieges of Dyeresque proportion were not among the humanists' literary clichés. The ebbs and flows of formulae mark the background conventions and problems against which authors wrote, and the dramatic increase after 1575 in the number of published lawyers explaining why they decided—or felt compelled—to print suggests a conflicted opinion about the propriety of resort to the press.

* * * *

The very elusiveness of the anti-publicists presents a challenging interpretive problem for the historian. Is the importance or the unimportance of the anti-publicists the phenomenon to be explained? Do the extant anti-publicist complaints and publicist responses represent the tip of an iceberg or the tip of an ice cube? For if one construes their arguments as but a small scribble upon the heap of paper generated by the Tudor and early Stuart legal profession, then the question to be asked is why law printing generated so little opposition

¹⁸³ Hudson, *supra*, note 2, at 1-2. See generally BENNETT, *supra* note 20, at 5-10, 29; H.S. BENNETT, *ENGLISH BOOKS & READERS, 1603 TO 1640*, at 29-31, 231-32 (1970).

¹⁸⁴ See J.W. Saunders, *The Stigma of Print*, 1 *ESSAYS IN CRITICISM* 139, 139 (1951). Martin Elsky has explored Francis Bacon's oscillations between carefully modulated praise and disdain for print as his courtly ambitions fell and rose. See MARTIN ELSKY, *AUTHORIZING WORDS: SPEECH, WRITING, AND PRINT IN THE ENGLISH RENAISSANCE* (1989).

¹⁸⁵ For a discussion of its late Renaissance incarnation, see BENNETT, *supra* note 20, at 5, 25, 29.

and discussion compared to publication of Scripture, medicine, and classics.¹⁸⁶

I have read the extant statements of the anti-publicists and publicists as evidence of an important debate. One cannot gauge the extent of the debate by merely tallying up surviving quotations. Anti-publicists were unlikely to put their complaints into print, as printers were unlikely to strike off denunciations of their business. Grumbling about the disadvantages of legal publication mainly appeared, one suspects, in conversation and correspondence (of which relatively little survives for lawyers). Counting quotations on the effects of legal publication likely underestimates the importance of the problem to early modern lawyers, who wrote surprisingly little about other sociocultural issues ranging from the effects of burgeoning foreign trade and population growth on the law, to the impact of expanding educational opportunity and New World discovery, to the differences between Biblical hermeneutics and legal interpretation. Did lawyers not think about these matters? (Technical, professional questions, politics, religion, and family matters occupy the bulk of their surviving writings.)

Questioning the correlation between the number of surviving quotations and the salience of a debate could terminate in sterile agnosticism or, worse, the invention of imaginary discourses. Fortunately, the identity of the authors and the content of the surviving evidence suggests the importance of the dispute over legal publication. William Hudson, for example, succeeded in the politically tinged Star Chamber practice. Would such a man present to the new Lord Keeper in 1621, the bishop John Williams, a letter dedicatory fulminating against the legal press if the opposition to law printing were the work of only a few cranks? If grumbling about legal publishing sounded only in dark byways of the bar, why would Hudson suppose a bishop interested in the matter? Hudson himself could be a crank, but Pulton's several-page reply to critics of law printing in the preface to *De Pace Regis* (1609) suggests otherwise. Did Pulton, a statutory compiler of fifty years' standing turned treatise writer, respond to a merely trivial critique, and reply no less at length, in print, and over the course of several editions?¹⁸⁷ Francis Bacon, likely thinking about the proper boundaries of publicizing religion, science,

¹⁸⁶ I am indebted to Prof. Thomas Green for suggesting that I think about this issue.

¹⁸⁷ Pulton's preface appeared in the 1610, 1615, and 1623 editions of *De Pace Regis*.

medicine, and other knowledges besides law, jotted a reminder to himself in a notebook: "Qu[ery] of the manner and prescripts touching secrecy, tradition, and publication."¹⁸⁸ The allusion to the effects of publication both by nationally prominent lawyers (Coke, Bacon, Bulstrode Whitelocke, Thomas Powell, William Sheppard) and by provincial practitioners such as Barlee suggest that the issue was neither ignored at the highest levels nor confined to London. Finally, publicist justifications of the press from Rastell onwards and publicist defensiveness about printing were aimed at somebody—a critic, an interlocutor—making the appeal to the audience necessary, or at least sensible.

Still, one can infer only so much from the ghostly presence of the anti-publicists, and many questions remain unanswered. Did the publicists and anti-publicists differ in social origins, type of practice, religious and political professions? Perhaps most intriguing: what were the anti-publicists for? At various places in this paper I have tried to reconstruct their commitments as the inverse of their critiques, but that method cannot ascertain whether they worked out a positive defense of oral and chirographic legal culture.

III. CHALLENGES TO THE PUBLICISTS, FOUNDATIONS FOR THE ANTI-PUBLICISTS: SOCIAL, POLITICAL, AND CULTURAL CONTEXTS FOR THE DEBATE ABOUT LAW PRINTING

The anti-publicists were not intellectual innovators, but foragers, their suspicion of popular legal dissemination expressed in borrowed frowns. Their critique of the legal press appropriated old, often Biblical and classical, criticisms of the improper dissemination of knowledge reinvigorated and directed against printing by Reformation polemics against theological publication. The power of print to foster dissension and rebellion, for example, was commonplace after Luther and the German Peasants' War. Plato's *Phaedrus* criticized writing for teaching only the semblance of wisdom and putting knowledge into the wrong hands, a point easily transposable to print.¹⁸⁹ St. Paul pro-

¹⁸⁸ FRANCIS BACON, *Transportata ex Comentario Vetere* (July 26, 1608), in 11 THE WORKS OF FRANCIS BACON 66 (James Spedding et al. eds., 1859).

¹⁸⁹ In *Phaedrus*, Socrates argued that writing offered a merely illusory promise of cultivating wisdom. Cut off from the give-and-take of dialogue and unable to answer questions, writing taught the surface of knowledge. And writing could not be properly contained, for it "drifts all over the place, getting into the hands not only of those who understand it, but equally of those who have no business with it; it doesn't know how

vided the classic prooftexts for disapproval of common people's taking up knowledge too "high" for their capacities.¹⁹⁰ Rulers and scholars had long tried to keep the vulgar from what they could not comprehend and would do them harm, an intellectual paternalism only intensified by the support Tridentine Catholic thought lent, even in Protestant countries, to strategies of selective concealment coupled with vigorous, didactic "framing" of knowledge set before the multitude.¹⁹¹

The forensic strategies of both the anti-publicists and publicists echoed as they were part of a wider debate in English learned culture about the propriety of vernacular publication of academic and professional knowledge. As Christopher Hill has observed, early translators, popularizers, and publishers of classics, medicine, mathematics, and astronomy, "like the early translators of the Bible, had to defend themselves against the charge that they were debasing the value of the originals, or making learning too common." The Oxford faculty put to its inceptors in the faculty of arts the question: "whether it be permitted to communicate a secret craft?" The suggested answer was "no." The surgeon William Clowes numbered among the worst of his critics those "who stand upon their tiptoe, saying with many puissant and forcible reasons, 'Away with all these books, and bookmen, for they have made our art too common.'" John Dee claimed that his English-language printing of Euclid (1570) did not undermine the honor of the universities, as the publicists Ferdinand Pulton, Bulstrode Whitelocke, and William Sheppard would later reassure lawyers worried that their repute rested on concealment. Dudley Fenner, a translator of Ramus, advocated disseminating academic learning "lest the people curse them," the strategy that Thomas Wentworth and William Sheppard pursued to blunt criticism of the common law.¹⁹² Publicists and anti-publicists alike alluded to vernacu-

to address the right people, and not address the wrong." PLATO, *Phaedrus* ll. 274d-275e, in *DIALOGUES OF PLATO*, *supra* note 97, at 520-21.

¹⁹⁰ See Ginzburg, *supra* note 82. *Ecclesiastes* 12:12 also warned "of making many books there is no end."

¹⁹¹ See TODD, *supra* note 35, at 206-60.

¹⁹² See HILL, *supra* note 77, at 28, 29, 31; *An liceat artis secreta communicare* (1619), in *Questiones Philosophiae*, in 2 REGISTER OF THE UNIVERSITY OF OXFORD 178 (Andrew Clark ed., 1887) (1571-1622); William Clowes, *Epistle to the Reader*, in A PROVED PRACTICE FOR ALL YOUNG SURGEONS [16] (1588); *Translator's Epistle to Christopher Hatton*, in PHILLIPPUS CAESAR, A GENERAL DISCOURSE AGAINST THE DAMNABLE SECT OF USERERS at ii^v (1578) [hereinafter *Translator's Epistle*] ("And although I am not ignorant, that among the learned some (as among all sorts there be, which, so themselves do gain, care not how many be undone) both think and speak much against the di-

lar printing underway in other disciplines. Pulton defended law printing on the precedent of physicians, divines, philosophers, mathematicians, and astronomers, while Coke described his first *Institute* as a necessary introduction to English law "not undertaken by any, albeit in all other professions there are the like."¹⁹³ Hudson lamented that not only lawyers, but "men in all professions" sullied themselves at the press.¹⁹⁴

Though aware of the debates over the propriety of religious and academic vernacular publication underway since the 1520s, the lawyers did not develop a significant anti-publicist opposition until about half a century later.¹⁹⁵ The story of the late Elizabethan and early Stuart legal anti-publicists is not the formulation of objections to printing never previously encountered or considered so much as a change in their assessment of the balance of advantages and disadvantages of the press. The challenge is to understand why the humanist confidence underlying Rastell's, Barlee's, and Pulton's reassurances wore thin and the doubts showed through, expressing themselves in traditional *topoi* of concealment and belittlement of popular intellectual capabilities common to anti-publicists outside law as well as within.

The explanation cannot be sought in the press itself in the abstract, considered as a technology or a capitalist business enterprise. Lawyers published, bought, and sold books for decades without much public negative comment. Indeed, the noticeable darkening of mood within the bar a hundred years after law printing began in 1481 presents an interesting interpretive challenge, a seeming anomaly. For it was not the introduction of legal publication that provoked an excited and disturbed coming to grips with the implications of the new communicative technology of the press, an agitation that faded with print's assimilation into routine. Rather, after a century a latent undercurrent of doubt emerged into prominence, drawing on condem-

vulging of good things into a common tongue"); JONES, *supra* note 82, at 47-50 (notes the opposition of the universities and physicians to vernacular publication of classics, mathematics, and medicine; his focus is on objections to translation rather than to publication).

¹⁹³ PULTON, *supra* note 78, at [8]-[9]; COKE, *Proemium*, in *FIRST INSTITUTES*, *supra* note 45.

¹⁹⁴ Hudson, *supra* note 2, at 1.

¹⁹⁵ I base this conclusion on two arguments: (1) though I do not assume that anti-publicist sentiments were unknown before 1570, my research has disclosed them in printed sources and manuscripts after that date; (2) publicists allude to an anti-publicist critique after the 1570s. This evidence suggests not the invention of anti-publicism in the 1570s, but an increase in its quantity and political and professional importance.

nations of vernacular religious, medical, and classical publications, deepening at the same time as the increasing variety and scale of legal publishing made lawbooks more familiar. Why did printed lawbooks evoke less anxiety as novelties than as everyday, accustomed parts of study and practice? The answer, which the rest of this Article will try to suggest, lies in the contingent relationship of the legal press to wider political and intellectual pressures. It is a history of the plausibility of second thoughts.

What might these wider pressures be? One possibility is that the anti-publicists disdained law printing for making the proliferating number of young barristers and, especially, attorneys more dangerous competitive rivals to the established lawyers, draining away business and income. While this provides a partial account of their motivation, it leaves unexplained why established, successful barristers wrote as both publicists and anti-publicists. It does not make sense of the timing of the anti-publicist rhetoric (why not complain of lawbooks produced in the middle third of the sixteenth century when Inns of Court matriculation rates began to climb?). Nor can it shed light on the content of anti-publicist rhetoric or the reasons for its persuasiveness (or lack), a result of downplaying overt political and cultural motivations in favor of unexpressed economic ones.

Perhaps the anti-publicists represent the impact on the legal world of what Hiram Haydn dubbed the "Counter-Renaissance," a growing wariness in the latter sixteenth century about humanist enthusiasm for spreading learning beyond clerical and scholastic elites coupled with a darker estimation of the social consequences of so doing. The upsurge of philosophical skepticism during the Continental wars of religion, the hot Protestant accusation that the pursuit of knowledge bred pride and immorality unless suffused by grace, and the "politique" emphasis on the connection between learning, disputation, and rebellion came together in the last decades of the sixteenth century and the beginning of the next, fusing into a critique that Bacon took on with his defense of learning at the outset of *The Proficiency and Advancement of Learning* (1605).¹⁹⁶ This pessimism, which underlay the anti-publicists' constrictive view of order, drew strength from the social and political instabilities of late sixteenth-century England: Spanish invasion attempts, assassination plots

¹⁹⁶ See HIRAM HAYDN, *THE COUNTER-RENAISSANCE* (1950); Geoffrey Bullough, *Bacon and the Defence of Learning*, in *SEVENTEENTH CENTURY STUDIES PRESENTED TO SIR HERBERT GRIERSON* 1, 1 (1967).

against Elizabeth, ideological competition with aggressive Catholic powers, and, most importantly, what has been called the "crisis of order," as population growth outstripped economic opportunities, resulting in growing poverty, vagrancy, social polarization, landlessness, the wandering of "masterless" men along the roads, and heightened crime rates and perceptions of criminality.¹⁹⁷

While these intellectual and social developments provide a general background to the dispute between the anti-publicists and publicists, their very generality invites a search for more finely-tailored explanations. It is a long way from the wandering poor and debaters' commonplaces on the follies of learning to the anti-publicists' distaste for publishing treatises on the court of Star Chamber. I will pursue the problem of explanation from two perspectives. First, I will explore in Part III the pressures within the legal world that made the printing of lawbooks problematic and the bridges that connected the debate over law printing to the broader question of the control of public knowledge. Three pressures, three bridges stand out: the political uses to which a growing lay readership put lawbooks; the late sixteenth-century tightening of censorship amid an increasing episcopal and royalist suspicion of the unwitting dangers of licit printing; and the deepening realization within the legal profession of how print was reshaping the control of knowledge (and hence of status and power) among themselves and between themselves and the nation. Second, I will consider in Part IV how the debate over law publishing implicated the proper role and political personality of subjects and the fictive "ownership" of law, issues raised by the collision of absolutism with publicist humanism, transforming the latter in the process.

The developments I trace in Parts III and IV provide further, inferential evidence to underscore the importance of the dispute over legal publishing. And they supply a context for the debate that helps

¹⁹⁷ See DAVID UNDERDOWN, REVEL, RIOT, AND REBELLION: POPULAR POLITICS AND CULTURE IN ENGLAND, 1603-1660, at 9-43 (1987); WRIGHTSON, *supra* note 75, at 121-48; Jim Sharpe, *Social Strain and Social Dislocation, 1585-1603*, in THE REIGN OF ELIZABETH I: COURT AND CULTURE IN THE LAST DECADE 192, 192-211 (John Guy ed., 1995); John Guy, *Introduction: The 1590s: The Second Reign of Elizabeth I?*, in THE REIGN OF ELIZABETH I: COURT AND CULTURE IN THE LAST DECADE, *supra*, at 1-19; J.S. Cockburn, *The Nature and Incidence of Crime in England, 1559-1625*, in CRIME IN ENGLAND, 1550-1800, at 49, 49-71 (J.S. Cockburn ed., 1977); Louis A. Knafla, "Sin of All Sorts Swarmeth": *Criminal Litigation in an English County in the Early Seventeenth Century*, in LAW, LITIGANTS AND THE LEGAL PROFESSION 50, 50-67 (E.W. Ives & A.H. Manchester eds., 1983).

answer questions about the timing, resonance, shape, and implications of publicist and anti-publicist arguments. Why did the anti-publicists' complaints grow in importance and visibility in the latter years of Elizabeth's reign, about fifty years after the humanist justification of legal publication and nearly a century after the first printing of an English lawbook, Thomas Littleton's *Tenures* in 1481? What made plausible both the anti-publicists' dark predictions of faction, commoning, litigiousness, lay misuse of law, and diminishment of the legal profession and the publicists' optimistic prophecies? What, finally, does the debate over legal publishing tell us about larger changes in English legal and political culture?

A. Audience, Acclimation, and the Breakdown in Strategies of Containment

The changing nature of lawbooks and the growth of a lay audience for them in the century before the Civil War provoked a sharper appreciation among anti-publicists of the disadvantages of print. Printing a book made it "public," but typically only a select audience read and used a work. Who these people were, and how they used the books—both in fact, and in the imagination of critics—influenced the perceived social consequences of "publicizing" through the press.

Leaving aside statutes and manuals of local government and court keeping, professional materials (yearbooks, abridgments, compilations of writs, and technical tracts such as Littleton's *Tenures*) comprised the core of the printed legal literature in the early to middle sixteenth century. These lawbooks were difficult for laymen to understand, in part because they served to "recycle" knowledge back into a heavily oral professional world.¹⁹⁸ In comparison to later legal works, they played a relatively greater mnemonic (as opposed to educative) role, reminding lawyers of what they learned by participating in oral exercises in the Inns of Court, by practice and observing courts, and by consulting manuscripts. E.W. Ives has described the late medieval yearbooks in this fashion as the "extended memory" of the legal profession.¹⁹⁹ Commonplaces and abridgments served as prompts to the memory, directing the lawyer to relevant cases and

¹⁹⁸ I have drawn the concept of "recycling" from WALTER J. ONG, *ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD* 119 (1982). On the medieval practice of envisioning books as cues for the memory—a tradition that continued with qualifications through the early modern period—see MARY J. CARRUTHERS, *THE BOOK OF MEMORY: A STUDY OF MEMORY IN MEDIEVAL CULTURE* 8, 16, 30-31, 256 (1990).

¹⁹⁹ E.W. Ives, *The Purpose and Making of the Later Year Books*, 89 *L.Q. REV.* 64, 70 (1973).

authorities. Thomas Littleton's *Tenures* (1481) introduced propositions of law with the formula "it is said that," and modestly advised the reader "that I would not have thee believe, that all which I have said in these books is law, for I will not presume to take this upon me. But of those things that are not law, inquire and learn of my wise masters learned in the law."²⁰⁰ The book imagined itself crystallizing an erudition that rested, primarily and authoritatively, in the oral and chirographic world of the Inns of Court.

Readers of professional lawbooks also required special skills to make sense of what was on the page—knowledge of terms of art, law French and Latin, court structure, conventions of expression and, indeed, of the very purposes served by different documents (yearbooks, cases, writs, and so forth). None of this was intuitively obvious. The opaqueness of professional lawbooks warned off lay interpreters. Contrast Scripture, where the problem faced by the church hierarchy was a text alluringly open, where readers distressingly often failed to square what they read with the Church's position on sacraments and ecclesiastical governance. Bishops had to persuade nonconformists that they had not rightly grasped what they thought they understood. Fitzherbert's *Abridgment*, the yearbooks of Edward III, and the *Register of Writs* put up their own barriers, off-putting, though not impenetrable.

The century between the Henrician Reformation and the Civil War saw the appearance of an increasing number of lawbooks accessible to a literate, but not professionally trained, audience. The trend accelerated after 1600. No hard and fast distinction divided works oriented to a professional audience from those open to a broader, nonprofessional readership. For the sake of establishing a rough, working definition, though, the following characteristics suggest an accessible text.²⁰¹ The more accessible a work, the less it presented documents and information *in medias res*, as did a yearbook or commentary on writs, assuming that the reader already knew the interpretive conventions to make sense of the text. Instead, accessible lawbooks tended to provide an explanation of the purposes of an institution or practice, sometimes with a historical account of its development. Their structure more resembled a narrative than a published commonplace book: The author organized points according

²⁰⁰ THOMAS LITTLETON, *TENURES* 319 (1813) (French ed. 1481).

²⁰¹ For the sake of exposition, I am drawing the distinction too sharply. In practice, most texts fell along a continuum.

to categories widely shared in learned culture (such as the Aristotelian four causes, subject and accident, or genus and species) instead of listing them sequentially without comment in a series of sentence- or paragraph-long abridgments of statutes and cases.²⁰² They were in English (or at least Latin) rather than law French. Abbreviations and terms of art were few or explained. Authors provided clues in prefaces or dedications that they envisioned a wide audience.

A comparison of Richard Crompton's *L'Autoritie et Jurisdiction des Courts* (1594) and William Lambarde's *Archeion: Or, a Discourse upon the High Courts of Justice in England* (MS, 1591; printed 1635) illustrates the difference between books constructed for professional and for broader, educated readerships. The texts were roughly contemporaneous, though Lambarde's was published posthumously, over forty years after Crompton's. Lambarde wrote in humanist-flavored English sprinkled with Latin etymologies and Saxon antiquities; Crompton in law French interspersed with abbreviations and unexplained terms of art. Lambarde dedicated his work to Robert Cecil of Queen Elizabeth's Privy Council; Crompton to Lord Keeper Puckering and the members of the Middle Temple, whose training and company, he says, laid the foundation of his preferment and success. When Crompton discussed the Star Chamber, he described its site, personnel and procedure for securing appearances in one paragraph and then began a march through disjointed points of law organized as in a commonplace book: "Nota que . . .," "Dyer dit . . .," "In le case de" Lambarde, by contrast, explained why Star Chamber existed, who ran it, and how it fit into the constitution and squared with Magna Carta, thereby providing a setting for exploring the powers and jurisdiction of the court. Instead of mimicking the commonplace, which either lacked order or relied on the reader to supply one, Lambarde tied together the history, purpose, and limits of legal rules.²⁰³ In its expository strategy, literary style, and language of composition, Lambarde's work opened up the law to a nonprofessional

²⁰² For representative uses of the Aristotelian four causes as an organizing format, see William West's discussion of the meaning of equity in *The Second Part of Symboleography*, . . . *Whereunto is annexed another Treatise of Equity, the Jurisdiction, and proceedings of the high Court of Chancery* (1627 ed.) or John Dodderidge's employment of the Aristotelian four causes to define terms throughout *The English Lawyer* 87, 98-101, 117-43, 165-90 (1631).

²⁰³ CROMPTON, *supra* note 45, at fols. Aii-Aiii (dedications), 29r-41v (Star Chamber); WILLIAM LAMBARDE, *ARCHEION OR, A DISCOURSE UPON THE HIGH COURTS OF JUSTICE IN ENGLAND* 3-4 (dedication), 48-116 (Star Chamber) (Charles H. McIlwain & Paul L. Ward eds., 1957) (1635).

reader in a way that Crompton's did not, an ambition underscored by the imagined audiences signaled in their respective dedications.²⁰⁴

By the criteria set out above, a handful of works in 1550 aimed at nonprofessional readers: John Fortescue's comparative study of English and French government that explained basic ideas of the common law and the training of the legal profession, *De Laudibus Legum Angliae* (Latin, 1537; English, 1567); Richard Taverner's beginner's manual of the land law, *Institutions in the Laws of England* (c.1540); Thomas Phaer's collection of legal instruments, *The New Book of Presidents* (1543); John Rastell's legal dictionary, *Expositiones Terminorum Legum Anglorum* (c.1525); and Christopher St. German's discussion of the grounds of the common law and collection of cases of conscience, *Doctor and Student* (English ed. 1531).²⁰⁵ By 1640, both the number and diversity of such publications had markedly increased. William Fulbeck and John Dodderidge offered advice on the best way to study law, reflecting on what character traits and educational attainments suited novices for the profession.²⁰⁶ They also considered the close relationship between law and logic, as did the Ramist Abraham Fraunce.²⁰⁷ Readers wanting a synoptic overview of the common law could turn to Henry Finch's *Law, or A Discourse Thereof in Four Books* (1627) or John Cowell's Latin *Institutes* (1605), an attempt to lay out the common law within Justinian's division of persons, things, and actions.²⁰⁸ Cowell brought to his work not only Justinian's categories, but a comparative focus, contrasting the common and civil laws, a project that William Fulbeck (1601) shared.²⁰⁹ Edward Coke published the first of the four volumes of his influential *Institutes* (1628), a sinuous, overstuffed commentary on Littleton, part gloss on the land law and the constitution, part exposition of principles of jurisprudence and interpretation, part learned free-association.²¹⁰ Writers

²⁰⁴ While I have drawn a sharp distinction for expository purposes, Lambarde's work required some constitutional, historical, and legal sophistication to understand, while Crompton's was not impenetrable to all but trained lawyers. The difference was one of degree.

²⁰⁵ To reiterate, I am focusing on lawbooks other than statutes and local government manuals.

²⁰⁶ See FULBECK, *supra* note 123; DODDERIDGE, *supra* note 202.

²⁰⁷ See Fraunce, *supra* note 51.

²⁰⁸ See FINCH, *supra* note 103; JOHN COWELL, *THE INSTITUTES OF THE LAWS OF ENGLAND* (1651) (Latin ed. 1605).

²⁰⁹ See WILLIAM FULBECK, *PARALLEL, OR CONFERENCE OF THE CIVIL LAW, THE CANON LAW, AND THE COMMON LAWS OF THIS REALM OF ENGLAND* (1601-1602).

²¹⁰ See COKE, *FIRST INSTITUTES*, *supra* note 45.

and printers brought out tracts on discrete portions of the law: Thomas Smith on the constitution (1583); Henry Swinburne on wills (1590-91); William West on equity and Chancery procedure (1594); William Lambarde on Kentish gavelkind custom (1596); John Manwood on the law of the forests (1598); Ferdinando Pulton on criminal law (1609); Aaron Rathborne on manorial law (1616); Thomas Powell on court procedure (1623); John Dodderidge on church livings and advowsons (1630); Edward Coke on copyhold tenure (1630); Thomas Edgar on legal rules affecting women (1632); Charles Calthrope on manorial law (1635); and William Lambarde on the historical origins and structure of the high courts (1635).²¹¹ In addition, the press offered John Cowell's law dictionary (1607), Francis Bacon's collection of maxims (1630), Thomas Powell's and Arthur Agard's guides to records (1622; 1631), and a compilation on the law of nuisance, urban customs, and poor relief (1636).²¹²

These books made a difference. Englishmen before the Civil War complained of the confusion and needless opacity of English law and legal literature. Historians looking backward after the achievements of Matthew Hale and William Blackstone have stressed the dominance of chronologically and alphabetically organized works and the rarity of monographs and treatises.²¹³ Yet using the legal literature of 1550 rather than an ideal as a baseline, and looking forward from there rather than backward from Blackstone, one sees a relative increase in the accessibility of legal literature to non-professional audiences. From the latter part of Elizabeth's reign through the Civil War, proportionately more works assumed a readership unfamiliar with their contents and imagined themselves teaching rather than

²¹¹ See THOMAS SMITH, *ON THE COMMONWEALTH OF ENGLAND* (1583); SWINBURNE, *supra* note 178; William West, *Of Chancery*, in *SECOND PART OF SYMBOLEOGRAPHY* (1594 ed.); WILLIAM LAMBARDE, *The Customs of Kent*, in LAMBARDE, *supra* note 93; MANWOOD, *supra* note 45; PULTON, *supra* note 78; AARON RATHBORNE, *THE SURVEYOR* (1616); POWELL, *THE ATTORNEY'S ACADEMY*, *supra* note 45; JOHN DODDERIDGE, *A COMPLEAT PARSON: OR, A DESCRIPTION OF ADVOWNSONS* (1630); EDWARD COKE, *COMPLETE COPYHOLDER* (1630); T[HOMAS] E[DGAR], *THE LAW'S RESOLUTIONS OF WOMEN'S RIGHTS* (1632); CHARLES CALTHROPE, *THE RELATION BETWEEN THE LORD OF A MANOR AND THE COPYHOLDER HIS TENANT* (1635); LAMBARDE, *supra* note 203.

²¹² JOHN COWELL, *THE INTERPRETER* (1637) (1607 ed. suppressed); FRANCIS BACON, *THE ELEMENTS OF THE COMMON LAWS OF ENGLAND* (1630); THOMAS POWELL, *DIRECTION FOR SEARCH OF RECORDS* (1622); ARTHUR AGARD, *THE REPERTORY OF RECORDS* (1631); ARTHUR AGARD, *A BRIEF DECLARATION FOR WHAT MANNER OF SPECIAL NUISANCE* (1636).

²¹³ See Simpson, *supra* note 7, at 636-39; W.R. Prest, *Law and Women's Rights in Early Modern England*, in 6 *THE SEVENTEENTH CENTURY* 169, 169-80 (1991).

reminding, a perspective implicit in the section headings Thomas Powell chose for *The Attorney's Academy* (1623): "Instructions to sue forth a recovery" and "The common exceptions which be given to commissioners are these, viz."²¹⁴ To be sure, the output of alphabetically and chronologically organized legal literature in French grew as well. One only has to think of the nominate law reports of Dyer, Plowden, and Coke. French-language commentaries on writs and procedures continued to sell well among professionals. But by 1640, a Bristol merchant, York doctor, or Kent divine could obtain a greater variety of works written in English and providing background and explanatory material. And these works, as they often boasted in their prefaces, concentrated information in one place to "make this scattered part of learning, in the great volumes of the common-law books, and there darkly described, to be one entire body, and more ready, and clearer to the view of the reader."²¹⁵ An Englishman not privy to the manuscripts and oral traditions of the London-based legal professionals would have had an easier time in 1640 than in 1550 learning about the procedure and duties of the royal courts, the boundaries of political and property rights, and the lineaments of the constitution.

These developments resist numerical measures given the lack of basic information about the distribution of books by geography, occupation, and status, and about the number of copies produced per imprint (for not all imprints ran the full 1500 copies allowed by the 1587 Stationers' Company rules).²¹⁶ Yet a rough—I stress rough—demonstration can be made of the growing accessibility and diversification of English legal publishing by tallying imprint dates of works directed at a general audience for twenty year periods between 1500 and 1640.²¹⁷ "Works directed at a general audience" is a somewhat subjective category, so I have listed in the footnote below the law-books included.²¹⁸ Amending the list would change the rate of ascent

²¹⁴ POWELL, *THE ATTORNEY'S ACADEMY*, *supra* note 45, at 122, 17.

²¹⁵ EDGAR, *Preface*, *supra* note 211, at sig. a; *see also* SHEPPARD, *supra* note 45; WENTWORTH, *supra* note 138; SWINBURNE, *supra* note 178.

²¹⁶ *See* BLAGDEN, *supra* note 86, at 45.

²¹⁷ I have taken the imprint dates out of 1 W. HAROLD MAXWELL & LESLIE F. MAXWELL, *SWEET AND MAXWELL'S LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS: ENGLISH LAW TO 1800* (2nd ed. 1955).

²¹⁸ THOMAS ASHE, *FASCICULUS FLORUM GATHERED OUT OF THE SEVERAL BOOKS OF... COKE; BACON*, *supra* note 212; BRACON, *De Legibus; Brief Declaration of... Nuisance... and Extent of Customs... and Relief of the Poor*; JOHN BRITTON, *BRITTON ON THE LAWS OF ENGLAND*; CALTHROPE, *supra* note 211; COKE, *supra* note 211; COKE, *FIRST INSTITUTE*, *supra* note 45; COWELL, *supra* note 212; JOHN COWELL, *INSTITUTIONS*; CROMPTON, *supra* note 45; JOHN DODDERIDGE, *LAWYER'S LIGHT*;

in the latter sixteenth and early seventeenth centuries, but not the general pattern. To give an example: Sir William Staunford's *Exposition of the King's Prerogative* appeared in 1567, 1568, 1573, 1577, 1568-77, 1590, and 1607. It provided five imprints for the period 1561-1580, one for 1581-1600, and one for 1601-1620. Tabulating the figures (unadjusted) gives the following results:

TABLE 1

1501-1520	1521-1540	1541-1560	1561-1580	1581-1600	1601-1620	1621-1640
3	30	37	42	35	53	49

These figures understate the diversification that occurred between 1580 and 1640. Numerous imprints of four works—St. German's *Doctor and Student*, Littleton's *Tenures*, the *Institutions or Principal Grounds*, and Fitzherbert's *Diversity of Courts*—drove up the imprint figures in the first two-thirds of the sixteenth century. For example, in the period 1541-1560, Littleton's *Tenures* by itself provided nineteen of the imprints and the *Institutions* another twelve, meaning that these two works accounted for thirty-one of the thirty-seven imprints (with St. German and Fitzherbert providing three of the remaining six). The raw figure of thirty seven imprints for that period suggests a greater depth and variety of law printing than in the years 1571-1600, yet that was not the case. Subtracting the imprints of those four works from the data gives the following:

DODDERIDGE, ENGLISH LAWYER, *supra* note 202; DODDERIDGE, *supra* note 211; LORD ELLESMERE, SPEECH ON THE POST-NATI; HENRY FINCH, NOMOTECHNIA; FINCH, *supra* note 103; ANTHONY FITZHERBERT, DIVERSITE DE COURTES; FORTESCUE, *supra* note 137; FULBECK, *supra* note 123; FULBECK, *supra* note 209; FULLER, *supra* note 45; GLANVILL, TRACTATUS DE LEGIBUS; INSTITUTIONS OR PRINCIPAL GROUNDS; LAMBARDE, *supra* note 203; LITTLETON, *supra* note 200; LODOWICK LLOYD, BRIEF CONFERENCE; JOHN MANWOOD, BRIEF COLLECTION; JOHN MANWOOD, *supra* note 45; POWELL, THE ATTORNEY'S ACADEMY, *supra* note 45; THOMAS POWELL, ATTORNEY'S ALMANAC; PULTON, *supra* note 78; JOHN RASTELL, EXPOSITIONES TERMINORUM; JOHN RASTELL, LES TERMES DE LA LEY; RATHBORNE, *supra* note 211; ST. GERMAN, *supra* note 19; THOMAS SMITH, DE REPUBLICA ANGLORUM; WILLIAM STAUNFORD, AN EXPOSITION OF THE KING'S PREROGATIVE; WILLIAM STAUNFORD, LES PLEES DEL CORON (1560); SWINBURNE, *supra* note 178; EDGAR, *supra* note 211; William West, *Four Treatises, in Second Part of Symboleography*, *supra* note 211.

TABLE 2

1501- 1520	1521- 1540	1541- 1560	1561- 1580	1581- 1600	1601- 1620	1621- 1640
0	2	3	23	16	36	42

Resting upon (contestable) judgments about which works were “accessible” and “general,” these figures are hardly Quantified Data, yet neither are they valueless. They reinforce the opinion of contemporaries and the impression gained by eyeballing early modern legal bibliographies that the diversity and scale of law printing increased from the last third of the sixteenth century.

Though lawbook prefaces generally assumed that practitioners and students constituted the bulk of their readership, authors and printers sometimes envisioned, and welcomed, a wider audience. Thomas Powell hoped his *Attorney's Academy* (1623) would establish a “course of compliance between the officers and ministers of our laws and their clients.”²¹⁹ The printer of Nicholas Fuller’s *Argument in the Case of Thomas Lad* (1607) translated the French and Latin terms for the benefit of “the simple and such as be unlearned.”²²⁰ Coke wrote his commentary on Littleton in English “to the end that any of the nobility, or gentry of this realm, or of any other estate, or profession whatsoever, that will be pleased to read him and these Institutes, may understand the language wherein they are written.”²²¹ The compiler of *The Law's Resolutions of Women's Rights* (1632), most likely Thomas Edgar of Gray's Inn, knew that practitioners and the high-status men mentioned by Coke would use his work but “chiefly addressed” it to women. Through his book, “things behooveful for them [women] to know are laid plain together, and in some orderly connection, which heretofore were smothered, or scattered in corners of an uncouth language clean abstruded from their sex, which concealment, because it seemed to me neither just, nor conscionable, I have framed this work.”²²² William Fulbeck could look upon this broadening audi-

²¹⁹ POWELL, *To the Reader, in THE ATTORNEY'S ACADEMY*, *supra* note 45, at [A2], [A3].

²²⁰ FULLER, *supra* note 45, at [3] (comments of printer).

²²¹ COKE, *Proemium, FIRST INSTITUTES*, *supra* note 45.

²²² EDGAR, *supra* note 211, at 403. For other examples of works whose prefaces envision an audience broader than practitioners, see PULTON, *supra* note 78; SWINBURNE, *supra* note 178; MANWOOD, *supra* note 45; R. POWELL, *ANTIQUITY . . . OF THE ANCIENT*

ence with some humor. He introduced his learned dialogue among representatives of the common, civil, and canon law with the musing of a “poor country man” surrounded by neighbors

so full of law-points, that when they sweat, it is nothing but law; . . . when they dream, it is profound law. The book of Littleton’s *Tenures* is their breakfast, their dinner . . . Every ploughswaine with us may be a seneschal in a court baron. He can talk of essoins, . . . and recaptions. And if you control him the book of the grounds of the law is . . . ready at his girdle to confute you . . . So that for a man to be among them [the neighbors], and to have living and want law: is as if a man should have bread to eat, and want teeth to chew it. Which occasions moved me at the first to seek for some skill in law, and amongst other books, I bought [the first volume of] *The Conference of Law* . . .²²³

Satirists assumed that their audiences had at least heard of leading lawbooks. They casually dropped the names of Littleton’s *Tenures*, Perkin’s *Profitable Book*, Kitchin’s *Le Court Leet*, and Fitzherbert’s *Abridgment* in the course of mocking lawyers.²²⁴

The admittedly spotty evidence of booksellers’ inventories and estate records reinforces the impression of a growing, more diverse audience for printed lawbooks. Two rare surviving inventories of provincial booksellers, both from the city of York, provide a test case. A 1538 inventory of York stationer Neville Mores suggests a book market heavily patronized by that city’s cathedral clergy and church lawyers. The eighty-five identified titles include several of the civil and canon law, but none of the common law.²²⁵ In 1616, by contrast, stationer John Foster’s holdings included Fitzherbert’s *Abridgment*, several volumes of Coke’s *Reports*, West’s *Symbolography*, Manwood’s

COURTS OF LEET (1641) at [a] (addressed book to “the sons and servants of farmers, yeomen, and others versed in rural affairs”); ASHE, *supra* note 218, at A4v (Coke’s maxims translated into English for the benefit of “the vulgar sort and less learned of the commonalty”).

²²³ WILLIAM FULBECK, *Introduction to SECOND PART OF THE PARALLEL, OR CONFERENCE OF THE CIVIL LAW, THE CANON LAW, AND THE COMMON LAW OF THE REALM OF ENGLAND* at B2-B3 (1602).

²²⁴ See FRANCIS LENTON, *A Lawyer’s Clerk*, in CHARACTERS, *supra* note 113; LENTON, *A Young Inns of Court Gentleman*, *supra* note 113; JOHN STEPHENS, *A Pettyfogging Attorney*, in ESSAYS AND CHARACTERS, *supra* note 123, at 338 (2d ed. 1615) (at the court leet, the attorney’s mind “be not in the *Dishes*, it is in the *Kitchin*”); THOMAS NASH, LENTEN STUFF (1599), *quoted in* 3 G.B. HARRISON, THE ELIZABETHAN JOURNALS 3-4 (1939); John Taylor, *An Inkhorn Disputation Between a Lawyer and a Poet*, in TAYLOR’S WATERWORK at Glv (1614) (mentioning Littleton, Fitzherbert, Plowden, and Brooke along with a bevy of legal terms of art such as *capias*, *demurrer*, *latitat*, *scire facias*, *praemunire* and *decem tales*).

²²⁵ D.M. Palliser & D.G. Selwyn, *The Stock of a York Stationer, 1538*, in 27 THE LIBRARY 207 (1972).

Laws of the Forest, Staunford's *Pleas of the Crown*, Rastell's *Exposition*, Littleton's *Tenures in English and French*, Fortescue's *Commendation*, Glanvill's *Tractatus de Legibus*, Fulbeck's *Preparative*, St. German's *Doctor and Student*, Staunford's *Exposition of the King's Prerogative*, and Perkin's *Profitable Book*, along with various statutory collections and manuals for justices of the peace, constables, and keepers of manorial and leet courts.²²⁶

While provincial booksellers in Elizabethan and Stuart England like Foster no doubt catered to the rapidly increasing number of local attorneys, solicitors, and minor government officials, contemporaneous estate inventories reveal some evidence of growing holdings by non-professionals. Peter Clark has identified the types of books (Scripture, theology, history, and law) in over 2000 estates in three Kentish towns from 1560 to 1640. The inventories underestimate holdings, in part because records do not survive for all owners, in part because of the carelessness of list makers, and in part because many titles disappear into rubrics like "sundry old books." Law books appeared in one to three percent of the inventories of non-professionals.²²⁷ E.S. Leedham-Green's study of books in probate inventories taken in the vice-chancellor's court of Cambridge University reveals that some of the faculty and fellows, whose professional interests primarily lay in divinity, medicine, and civil law, owned common law works in increasing numbers in the latter sixteenth century. Leedham-Green records 192 inventories between 1535 and 1617. Dividing that total into three groups provides sixty-four inventories taken between 1535 and 1554, sixty-three between 1555 and 1567, and sixty-five between 1568 and 1617. The number of common law books (excluding statutory compilations) recorded in these three groups was, respectively, 15, 16, and 37; including statutory compilations, they numbered 24, 24, and 68. These holdings are illustrated in Table 3.²²⁸

²²⁶ See *Inventory of York Stationer John Foster, Taken November 26, 1616*, in ROBERT DAVIES, *A MEMOIR OF THE YORK PRESS* 342, 342-74 (1988) (1868).

²²⁷ See Peter Clark, *The Ownership of Books in England, 1560-1640: The Example of Some Kentish Townfolk*, in *SCHOOLING AND SOCIETY: STUDIES IN THE HISTORY OF EDUCATION* 95-111 (Lawrence Stone ed., 1976). In particular, see Table 4.5, "References to Book Titles in Inventories of Kentish Townsmen," which "excludes the book lists of professional men (lawyers, schoolteachers, etc.)." *Id.* at 102.

²²⁸ See E.S. LEEDHAM-GREEN, *BOOKS IN CAMBRIDGE INVENTORIES: BOOK-LISTS FROM VICE-CHANCELLOR'S COURT PROBATE INVENTORIES IN THE TUDOR AND STUART PERIODS* (1986). Most of the inventories were taken between 1535 and 1617. A few were taken after 1617, the last in 1760.

TABLE 3

Common Law Books in Cambridge University
Estate Inventories, 1535-1617

Date of inventories	1535-1554	1555-1567	1568-1617
Number of inventories	64	63	65
Number of common law books (excluding statutory compilations)	15	16	37
Number of common law books (including statutory compilations)	24	24	68

The growing representation of common law books in Cambridge estate inventories paralleled the acquisition of such works by university libraries. Colleges that maintained law libraries stocked, overwhelmingly, civilian and canonist works. Yet around the turn of the seventeenth century, common-law books began to appear. Pembroke College and Emmanuel College devoted benefactors' funds for book acquisition to common law works, signaling that they valued them even though not part of the curriculum. Bishop John Williams and William Platt gave common law books to St. John's College, and Archbishop Matthew Parker gave them to Corpus Christi College.²²⁹

²²⁹ The holdings of Pembroke included Pulton's *De Pace*, Dyer's and Plowden's *Reports*, Brooke's and Fitzherbert's *Abridgments*, proclamations and statutes, Littleton's *Tenures* in English, Lambarde's *Eirenarcha*, the *Natura Brevium*, a table to Coke's *Reports*, Kitchin, Staunford's *Plees del Coron* and *Prerogative*, Fortescue, Perkins, Rastell's *Exposition*, St. German, Fleetwood, Smith's *De Republica*, Fitzherbert's *Surveying*, Swinburne's *Wills*, the *Institutions of the Laws*, Brooke's *Cases*, the *Diversity of Courts*, *A Discourse of the Laudable Customs of London*, and an assortment of works of local government for justices of the peace and court keepers. Emmanuel's holdings included statutes, Finch's *Nomotechnia*, Staunford's *Plees*, Swinburne's *Wills*, Smith's *Commonwealth*, and Cowell's *Interpreter*. St. John's holdings included Bracton, Coke on Littleton, Cowell's *Institutes* and *Interpreter*, Crompton's *Jurisdiction of Courts*, Fenton's *Usury*, Littleton, Smith's *Commonwealth*, Swinburne's *Wills*, Brooke's *Cases*, five volumes of Coke's *Reports*, Fitzherbert's *Abridgment*, Dyer's *Reports*, and an assortment of statutes and works of local government. See Alain Wijffels, *Law Books in Cambridge Libraries, 1500-1640*, in 10 *TRANSACTIONS OF THE CAMBRIDGE BIBLIOGRAPHICAL SOCIETY* 359, 383 n.89, 410 n.196, 402 nn.158 & 161, 391 (1993).

The first printed catalogue of the Bodleian library at Oxford records several common law works amid the canonist and civilian books.²³⁰

By 1657, in the midst of the Interregnum, William London's *Catalogue of the Most Vendible Books in England* could portray the gentry at large in addition to lawyers as his customers for common law works.²³¹ Beginning the catalogue with a panegyric on the importance of learning to the social position and governmental responsibilities of gentlemen, London then explained how each category of books he sold—divinity, law, history, chemistry, and so on—benefited this idealized studious gentry. London did not confine the duty of legal study to gentlemen who became lawyers or enrolled in the Inns of Court for a temporary sojourn. Nor did he interpret the humanist dictum that governors must know the law to require only a passing familiarity with statutes, manuals of local government, and the foundational jurisprudential works of Fortescue and St. German. Rather, he set before his gentry the full panoply of common law monographs and commentaries, reports and abridgments. To what extent his salesmanship worked is an open question, and London may have been wooing a market as much as serving one, but the fact remains that he imagined the gentry at large as the potential readership for the whole range of common law works. By contrast, mid-sixteenth century booksellers and printers had identified only practitioners and students as their customers for lawbooks, as in a 1577 Stationers petition criticizing the law patentee Richard Tottell for charging too high prices "to the hindrance of a great number of poor students."²³²

* * * *

If in the century before the Civil War lawbooks became more accessible to non-professionals and more widely owned, the potential readership of such works—the nobility and gentry, and the "middling sort" of divines, merchants, shop keepers, physicians, apothecaries, schoolmasters, successful yeomen and artisans, surveyors, and clerks—also became more adept at using complicated texts. English education improved after the Henrician Reformation with the rise in

²³⁰ Bodleian's catalog included such common law works as Bracton, Britton, Glanvill, *Principia Legum Angliae*, Staunford's *Plees del Coron*, and Swinburne's *Wills*. See THE FIRST PRINTED CATALOGUE OF THE BODLEIAN LIBRARY, 1605: A FACSIMILIE 223, 225, 242, 252, 258, 261 (1986).

²³¹ See William London, *An Introduction to the Use of Books*, in A CATALOGUE OF THE MOST VENDIBLE BOOKS IN ENGLAND sig. G2r-G3r (1657). London addressed the catalogue to the four northern counties of England.

²³² 1 TRANSCRIPT OF THE REGISTERS, *supra* note 81, at 111.

literacy, proliferation of grammar schools and scholarships for the less well-to-do, and expansion in university and Inns of Court admissions.²³³ Englishmen had also become more acclimated to using printed texts in argument. The use of textual authority is a skill that, like other talents, needs to be cultivated and may be improved. Over a hundred years of persistent religious argument from the Lutheran controversies of the 1520s through the Civil War pursued through intensive interpretation of and citation to Scripture, church fathers, commentaries, and printed religious controversialists trained increasingly wide segments of the English population in the art of using textual authority. Published treatises, tracts and sermons; preaching, lectures, prophesyings, classes, and home study with neighbors: These not only taught principles, but taught the means of disputing. Such skills were on nearly constant display from the Henrician Reformation onward, through the political and religious regime changes of Henry VIII to Edward VI to Mary to Elizabeth, through the Elizabethan defense against Catholic polemicists and Protestant separatists and sectarians, and through the debates between champions of the Church and nonconformists over dress, ceremonies, liturgy, preaching, discipline, ecclesiastical jurisdiction, tithes, Sabbath observance, and the basis and limits of episcopal power.

Conservatives who disliked the social effrontery and interpretive naiveté of laymen disputing with ministers feared that law would follow the troubled path of religion, unearned interpretive presumption in one reinforcing it in the other. Indeed, much Elizabethan and early Stuart religious argumentation combined legal and scriptural exegesis, particularly the puritan attack against episcopacy, resistance to High Commission, and the assault on usury.²³⁴ Archbishop of Canterbury Richard Bancroft had little patience for "hot-brained" men

²³³ See Lawrence Stone, *The Educational Revolution in England, 1560-1640*, PAST & PRESENT, July 1964, at 41.

²³⁴ The puritan attack against episcopacy produced the anonymous Presbyterian tract, AN ABSTRACT OF CERTAIN ACTS OF PARLIAMENT, OF CERTAIN HER MAJESTIES INJUNCTIONS, OF CERTAIN CANONS, CONSTITUTIONS AND SYNODALS PROVINCIAL ESTABLISHED AND IN FORCE, FOR THE PEACEABLE GOVERNMENT OF THE CHURCH . . . FOR THE MOST PART HERETOFORE UNKNOWN AND UNPRACTICED (1583), and the Church's reply by RICHARD COSIN, AN ANSWER TO . . . A CERTAIN FACTIOUS LIBEL, AN ABSTRACT OF CERTAIN ACTS OF PARLIAMENT (1584). For resistance to the High Commission, see JAMES MORICE, A BRIEF TREATISE OF OATHS (c.1600); ALEXANDER LEIGHTON, AN APPEAL TO THE PARLIAMENT; OR, SION'S PLEA AGAINST THE PRELACY (1628); HENRY BURTON, AN APOLOGY OF AN APPEAL (1636). A mixed religious and legal critique of usury may be found in ROGER FENTON, A TREATISE OF USURY 71-74 (1611).

who "say the scripture is sufficient as the spirit directs; and so by this means every ignorant ass interprets scriptures according to his hot humors."²³⁵ He found the same spirit loose in the law, for when speaking in support of a subsidy for King James I before the House of Lords, he opined: "[T]he King must be relieved in his necessity. I'll cite no places of scripture for it, for nowadays every man, though he have not read more than the first leaf of Littleton, is able to teach the best doctor of divinity. What will come of it God knows, and wise men may foresee it."²³⁶ Opponents of a 1650 statute mandating English as the language of pleading and legal literature portrayed the disruptions unleashed by the vernacular publication of Scripture as ill-starred precedent for similar efforts in the law. Thus the English Catholic poet Patrick Carey:

Our Church still flourishing w' had seen
 If th' holy-writ had ever been
 Kept out of laymen's reach;
 But, when 'twas English'd, men half-witted;
 Nay women too, would be permitted
 T' expound all texts, and preach.

Then what confusion did arise!
 Cobblers divines 'gan to despise,
 So that they could but spell:
 This ministers to scorn did bring;
 Preaching was held an easy thing,
 Each one might do' t as well.

This gulf church-government did swallow;
 And after will the civil follow,
 When laws translated are:
 For ev'ry man that lists, will prattle;
 Pleading will be but twittle-twattle,
 And nought but noise at bar.

Then let's e'en be content t' obey,
 And to believe what judges say,
 Whilst for us, lawyers brawl:
 Though four or five be thence undone,

²³⁵ Richard Bancroft, Speech in the House of Lords (Apr. 30, 1610), in 2 PROCEEDINGS IN PARLIAMENT, *supra* note 119, at 72.

²³⁶ Richard Bancroft, Speech in the House of Lords (May 5, 1610), in 2 PROCEEDINGS IN PARLIAMENT, *supra* note 119, at 79.

'Tis better have some justice done,
Than to have none at all.²⁵⁷

Restoration royalists, looking back on the decades before the Revolution, saw most clearly a progression from Scriptural to legal casuistry. As the lawyer and antiquary Fabian Phillips remarked, "They that could then misinterpret Scripture, abuse the plain and genuine sense and meaning of all our laws, clearly expressed and fully to be understood"²⁵⁸ For an anti-publicist worried about the social consequences of printed dissemination of law, religious sectarianism and disputation did not just foreshadow what might happen with law. They were a training ground, a schooling, that made unorthodox, factious readings more sophisticated and dangerous.

Compounding the problem were the closer ties developing between the London legal world and the rest of the nation. The number of lawyers in Elizabethan and early Stuart England grew sharply, both in the "upper branch" of the profession (the serjeants, benchers, and utter barristers of the Inns of Court) and the "lower branch" (the court officers, clerks, attorneys, and solicitors). Admissions to the Inns of Court rose from about 100 per year in the 1550s to about 300 per year in the 1620s. Between 1570 and 1640, the four Inns matriculated almost 16,000 students and called about 2800 barristers. Comparison to the early sixteenth century suggests the scale of the increase. Lincoln's Inn recorded 164 bar calls in the five decades between 1520 and 1569, but 628 calls between 1590 and 1639. The four Inns admitted slightly over 1000 in the 1550s and over 2700 in the 1610s. The upper branch reached about 500 members in the 1610s, about five times more than in 1560, and about ten times more than in the early sixteenth century.²⁵⁹ Matriculants at the Inns who did not practice before the royal courts became town recorders, kept manorial courts, solicited causes, or served as local agents for royal commissions. Many others did not become professional lawyers, leaving London after a year or two with fading memories of writs, dancing

²⁵⁷ Patrick Carey, *Ballad to the Tune "I'll Tell Thee, Dick, That I Have Been"* (1651), in 2 MINOR POETS OF THE CAROLINE PERIOD 460, 461 (George Saintsbury ed., 1906).

²⁵⁸ FABIAN PHILLIPS, LIGEANCIA LUGENS: OR, LOYALTY LAMENTING THE MANY GREAT MISCHIEFS AND INCONVENIENCES WHICH WILL FATALLY AND INEVITABLY FOLLOW THE TAKING AWAY OF THE ROYAL PURVEYANCES, AND TENURES IN CAPITE AND BY KNIGHT-SERVICE 25 (1661).

²⁵⁹ See PREST, *supra* note 6, at 6-7; PREST, *supra* note 59, at 5-7, 11, 243-44. Calls to the bar rose from a little over 18 per year in the 1570s to over 50 per year in the 1630s. See PREST, *supra* note 6, at 7.

masters, and Ben Jonson to take up another livelihood or return to their estates, perhaps entering the commission of the peace.

The lower branch of the profession swelled more dramatically. Christopher Brooks has calculated the number of attorneys practicing before King's Bench and Common Pleas at about 200 in 1560, about 1050 in 1606, and about 1750 in 1640. The ratio of attorneys to population steadily improved, rising from one attorney for every 20,000 people in 1560, to one for every 4000 in 1606, to one for every 2500 in 1640. The impact in the localities was dramatic. Between 1560 and 1640, the number of attorneys in Devonshire increased from about ten to fifty-six, in Hertfordshire from about three to twenty-four, and in Warwickshire from about two to thirty. They largely displaced the amateur and semi-professional local lawyers who had drafted documents, kept manorial courts, and served as clerks and minor legal officials in the counties and towns.²⁴⁰

In comparison to the provincial amateurs and semi-professionals, these attorneys had a stronger connection to the London legal world. They served as links between the localities and the national common law and prerogative courts, pursuing cases themselves or soliciting for attorneys and barristers resident in London. As residents of the Inns of Chancery during term time, they mingled with the "upper branch" of the profession and attended the royal courts, developing a sharper sense of the legal arguments current in the capital and an exposure to popular lawbooks. In their growing numbers and in their displacement of provincial amateurs, the attorneys became agents for the deeper penetration of national law into the localities. So, too, did the barristers, increasingly active in town and manorial courts. And so did the partially-trained "dropouts" returning to their families and neighbors with a readier ability to understand and engage in legal argument.

The growth of the legal profession was part of a larger process by which the national law carried in printed books, the law of the London-based common law, prerogative and equity courts, extended both its pragmatic and cultural influence. Some of the main points can be briefly noted. A fourteen-fold increase in common-law litigation between 1490 and 1640 made the gentry, merchants, and the upper

²⁴⁰ I have drawn these numbers and the distinction between the "upper branch" and "lower branch" from BROOKS, *supra* note 112, at 112-15. For a numerical breakdown of the legal profession in the early to mid sixteenth century, see J.H. BAKER, *The English Legal Profession, 1450-1550*, in *THE LEGAL PROFESSION AND THE COMMON LAW: HISTORICAL ESSAYS* 75 (1986) and IVES, *supra* note 112, at 11-21.

strata of the yeomen and artisans more aware of, and dependent on, the royal courts. The common law's aggrandizement of authority at the expense of ecclesiastical, regional and local jurisdictions, and its acceptance of copyhold disputes by the latter sixteenth century, brought more problems to London. The supervision of the justices of the peace and local magistrates at the assizes, along with the oversight of local and urban jurisdictions by Star Chamber and by removal, gave national law a heightened prominence in the countryside, as did the expansion of Tudor monarchical government and parliamentary legislation.²⁴¹

Then there was politics. The common law enjoyed a greater presence in late Tudor and early Stuart political culture than it had fifty years before when the humanists had cheered legal printing. Churchmen and the Court, as well as nonconformists and anti-absolutists, valued knowledge of the common law as a political resource.²⁴² To be sure, legal skill had been an advantage in the endemic struggles between Crown, nobility, Parliament and the church in the early Tudor period. And the latter sixteenth century hardly invented the pursuit of political conflict through legal argumentation or the use of the common law as a touchstone for testing the legitimacy of governmental practice.²⁴³ Yet if the common law had long been politically contested terrain, by the latter Elizabethan period the struggle spread more broadly in the political culture, engaging combatants outside the traditional circles of Court, Parliament and legal profession. Law printing became a more politically problematic act in 1620 than it had been in 1520.

What had changed? First, the Reformation recast the underlying legal framework of disputes about religion pursued in secular courts. Before the Reformation, clashes between the English realm and the

²⁴¹ See generally BROOKS, *supra* note 112, at 51, 88-100; CHARLES MONTGOMERY GRAY, *COPYHOLD, EQUITY, AND THE COMMON LAW* (1963); ERIC KERRIDGE, *AGRARIAN PROBLEMS IN THE SIXTEENTH CENTURY AND AFTER* 54-93 (1969); J.S. COCKBURN, *A HISTORY OF ENGLISH ASSIZES, 1558-1714*, at 153-58, 168-72, 181-87 (1972); PREST, *supra* note 6, at 49; PETER CLARK, *ENGLISH PROVINCIAL SOCIETY FROM THE REFORMATION TO THE REVOLUTION: RELIGION, POLITICS AND SOCIETY IN KENT, 1500-1640*, at 279-84 (1977); MARJORIE KENISTON MCINTOSH, *A COMMUNITY TRANSFORMED: THE MANOR AND LIBERTY OF HAVERING, 1500-1620*, at 326-50 (1991) (analyzing loss of manorial authority to justices of the peace and sewer commissions).

²⁴² I define common law here broadly to include the ancient statutes and charters (such as Magna Carta).

²⁴³ See generally G.R. Elton, *The Rule of Law in Sixteenth-Century England*, in 1 *STUDIES IN TUDOR AND STUART POLITICS AND GOVERNMENT* 260 (1974); BAUMER, *supra* note 14.

Church of Rome highlighted the problem of defining boundaries between legal orders of differing sources of authority and legitimacy. The Reformation's legacy of an Erastian church polity removed Rome's distinct but intertwined legal powers, concentrating attention on English statutes and the common law, particularly when puritans and Catholics looked to them as a check on the bishops and ecclesiastical courts in the latter sixteenth century. Faced with episcopal repression of nonconformists in the middle 1580s, a constitutional wing of puritanism emerged. They joined to long-standing scriptural and historical arguments limiting episcopal power a new set of constitutional arguments against ecclesiastical discipline and High Commission procedure citing common law liberties and Magna Carta. In 1604, to cite one example, their leaders circulated a manifesto teaching ministers legal strategies to use against newly promulgated church canons. The document offered an inventive, if tendentious, reading of the statutes, demonstrating that bishops and the High Commission lacked the power to deprive clergy. If that strategy failed, the manifesto continued, a minister should claim that his benefice was a freehold and try to switch the cause to a common law court.²⁴⁴ The churchman Thomas Rogers deplored the "London Brethren" telling King "James to his head, how the subscription which he calls for is more than the law requires."²⁴⁵ The Jesuit propaganda offensive of the later sixteenth century against the Elizabethan regime also generated dissident readings of the common law. The controversialist Robert Persons took issue with the precedents Coke offered in *Caudrey's Case* in defense of the Crown's system of ecclesiastical discipline. In forty-two aggressive pages of *A Quiet and Sober Reckoning with M. Thomas Morton* (1609), the Jesuit Persons cited Bracton, Staunford, Fitzherbert, the yearbooks, and Coke's own *Reports* to accuse his adversary of persistent misunderstanding and misquotation of English law and antiquities.²⁴⁶

Second, Englishmen resisting Stuart policies found in the common law precedents against unwelcome royal initiatives and tenets of an anti-absolutist political theory featuring strong property rights and

²⁴⁴ See J.N. NEALE, *ELIZABETH I AND HER PARLIAMENTS 1584-1601*, at 222-32 (1957); ROLAND USHER, *THE RISE AND FALL OF THE HIGH COMMISSION 124-48*, 180-211 (1913); *The Puritans' Directions to Avoid the Proceedings of the Bishops* (MS, 1604), in 2 ROLAND G. USHER, *THE RECONSTRUCTION OF THE ENGLISH CHURCH 362-65* (1910) [hereinafter USHER, *RECONSTRUCTION*].

²⁴⁵ THOMAS ROGERS, *Preface* to *THE FAITH, DOCTRINE, AND RELIGION PROFESSED AND PROTECTED IN THE REALM OF ENGLAND [24]-[25]* (1607).

²⁴⁶ See ROBERT PARSONS, *A QUIET AND SOBER RECKONING 500-42* (1609).

constitutional limitations on prerogative. If there was not a continuous opposition to the Crown inhering in a country interest, a parliamentary faction, or a rising class, there was still, to borrow Robert Zaller's apt phrase, a series of "situational" oppositions crystallizing around such grievances as purveyance, monopolies, impositions, the forced loan, billeting, imprisonment at royal command, martial law, and ship money. Each opposition purported to find support in the common law for its case.²⁴⁷ In the most general of terms, reliance on the common law as a restraint on kingly power was not novel. But Stuart absolutist thought worked a change in constitutionalist rhetoric (if less so in practice), enabling royal opponents to valorize the common law as the guardian of constitutionalism itself. This both raised the stakes and allowed anti-absolutists to identify it with the very preservation of liberty and property. Royalists struck back. Ministers seeking courtly preferment preached sermons "to rail upon the fundamental laws of the kingdom," charged a member of Commons in 1610, while barristers such as John Davies and William Noy crafted a common law defense of Stuart policies.²⁴⁸ Though in some tension, these royalist strategies engaged the anti-absolutists on the terrain of the common law, only heightening its importance to the political nation.

Appeals to the common law within Parliament took on a new complexion when the length, specificity, and technicality of the debates were considered. Lawyers arguing for both the Crown and its opponents spent days discussing different lines of precedents, parsing cases, statutes, records, and ancient charters, distinguishing contrary authorities, and counting up favorable and contrary citations as if doing forensic bookkeeping. (John Selden: "In the late arguments made, 7 acts of Parliament are cited on the subject's behalf, besides 11 precedents. . . . And 9 were given in that may seem to be against it, but I see not how in truth they can be against it . . ." ²⁴⁹) The pursuit

²⁴⁷ Robert Zaller, *The Concept of Opposition in Early Stuart England*, 12 ALBION 211, 232 (1980).

²⁴⁸ 2 PROCEEDINGS IN PARLIAMENT, *supra* note 119, at 328. See also J.P. SOMMERVILLE, *POLITICS AND IDEOLOGY IN ENGLAND, 1603-1640*, at 86-111, 145-88 (1986); MARGARET ATWOOD JUDSON, *THE CRISIS OF THE CONSTITUTION: AN ESSAY IN CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND 1603-1645*, at 44-67, 218-73 (1949).

²⁴⁹ 2 COMMONS DEBATES 1628, at 230 (Mary Frear Keeler et al. eds., 1977) (statement of John Selden during debate on the *Five Knights' Case* on April 1, 1628). Herbert Butterfield remarked that proceedings in Commons in the 1620s seemed

of legal authority could lead Parliament into the minutia of documentary provenance. On March 29, 1628, the Solicitor General defended in Commons the Crown's position in the *Five Knights' Case* by citing a report of a 1615 King's Bench precedent. Edward Coke objected to such "apocrypha reports, there's no credit to be given to them. It was done by some young student that did mistake."²⁵⁰ Three weeks later, John Selden pointed out the lack of support for the Solicitor's precedent in English law and then had another go at the hapless student, now accused of conflating three cases into one report, "and nothing is expressed in it as it came from the mouth of the judges otherwise than as his fancy directed him."²⁵¹ Such debates, along with the delegations setting forth from every early Stuart Parliament to search through precedents, the tendency to redescribe political questions as legal ones, and the correspondingly heavy weight assigned legalistic and legal-historical argument, and the fashionable pose of the parliamentary lawyers to submerge themselves in cases and historical *exempla*—"It is not I, Edward Coke, that speaketh it. I shall say nothing, but the records shall speak"—all this distinguished the use of common law argumentation in Stuart national politics from its Henrican and early Elizabethan role.²⁵² In these senses, the common law and its stepchild the ancient constitution had come to occupy a more prominent place in the national political culture.²⁵³

* * * *

Making possible this legalistic turn in political debate was a gentry prepared to follow it. The tripling of Inns of Court admissions after the middle sixteenth century provided more gentlemen, or their brothers and sons, with a legal education. The results can be seen in Parliament, where the proportion of Inns of Court matriculants in

"rather to have resembled arguments in a court of law than debates in a legislative assembly." H. BUTTERFIELD, *THE ENGLISHMAN AND HIS HISTORY* 38-39 (1944).

²⁵⁰ 2 COMMONS DEBATES 1628, *supra* note 249, at 193 (Mar. 29, 1628) (statement of Sir Edward Coke).

²⁵¹ *Id.* at 526 (Apr. 17, 1628). In another vignette: On April 1, 1628, Coke and Selden's allies produced a favorable case out of the manuscript law reports of Judge Anderson, written in the jurist's own hand and brought to parliament by his son. But how could Parliament know if the source was authentic? Coke vouched for the handwriting, claiming to have had a copy of the reports in Elizabeth's reign. John Eliot relayed a guarantee of authenticity from Anderson's son. See 2 *id.* at 229-30 (Apr. 1, 1628). Selden read the full case aloud on the floor of Commons. See 2 *id.* at 354 (Apr. 7, 1628).

²⁵² 2 *id.* at 101 (Mar. 25, 1628) (statement of Sir Edward Coke).

²⁵³ See generally SOMMERVILLE, *supra* note 248; JUDSON, *supra* note 248; POCOCK, *supra* note 6; DAVID UNDERDOWN, *A FREEBORN PEOPLE: POLITICS AND THE NATION IN SEVENTEENTH-CENTURY ENGLAND 19-44* (1996).

that body rose from twenty-six percent in 1563 to fifty-five percent in 1640-1642, likely enhancing its receptivity to legal arguments.²⁵⁴ Although many gentleman students in the Inns left after only a year or two with a shallow education and a vivid memory of London's social attractions, their sojourn in such large numbers helped give the law a greater prominence in lay intellectual life. It reinforced the humanist, and particularly Ciceronian, depiction of legal knowledge as an ornament to a gentleman;²⁵⁵ indeed, a particularly useful ornament given the incessant common law litigation of the latter sixteenth century and the recruitment of gentlemen onto the expanding justice of the peace commissions. Taken as a group, the gentry had become more legally literate between 1520 and 1600 and better able to understand common law argumentation in politics.

The trend embraced more than the gentry. Legal arguments in late Elizabethan and early Stuart national politics tacitly addressed more than the circle of royal advisors, parliamentarians, nobility, upper gentry, and high clerics who counted around 1520, even as the convention remained that courtly and parliamentary debate not suffer debasement in common ears. The fivefold sixteenth-century inflation enhanced the political role of social groups below the gentry: yeomen, successful husbandmen and artisans, professionals and quasi-professionals (such as clerks, apothecaries, and scribes), merchants and shopkeepers.²⁵⁶ It reduced, in real terms, restrictions on officeholding and voting based on static, prescribed levels of wealth and income, lifting a sizable number of middling property owners into juries, civic office, and the parliamentary electorate.²⁵⁷

²⁵⁴ See Stone, *supra* note 233, at 63.

²⁵⁵ See, e.g., GILBERT, *supra* note 27, at 6, 9; BRAHAM, *supra* note 28, at Biiii, Ci-Ciii, Eiii; CLELAND, *supra* note 28, at 95-97, 144-46; Richard Knolles, *Dedication to Peter Manwood*, in THE SIX BOOKS OF A COMMONWEAL WRITTEN BY J. BODIN [iii] (1962) (1606).

²⁵⁶ An index of inflation can be derived by the comparison over time of the prices of basic agricultural products and of an agricultural laborer's "cost of living" (measured by a weighted combination of basic commodities). Between 1500 and 1600, the price of grain increased about sixfold, the price of livestock about fourfold, and the agricultural worker's cost of living over fourfold. See I C.G.A. CLAY, ECONOMIC EXPANSION AND SOCIAL CHANGE: ENGLAND 1500-1700, at 40-41, 49-51 (1984). Between 1500 and 1640, the price of grain increased over sevenfold, the price of livestock over sixfold, and the agricultural worker's cost of living about sixfold. See *id.*

²⁵⁷ See GUY, *supra* note 40, at 416. The qualification for the parliamentary franchise in the counties was set by statute in 1430 at 40 shillings freehold. Inflation eroded the real value of the restriction, qualifying many yeomen and husbandmen for the franchise. A wide variety of wealth and status formulae defined the parliamentary electorate in the boroughs, but here too a general trend towards expansion of the franchise

Their opinions about national law became politically more significant, influencing not only their votes, but their conduct in local and civic offices, their enforcement priorities, and the exercise of perhaps their greatest collective power, the ability to sit still and ignore duties imposed from above. Oppositional political mobilization also targeted these men. In the middle 1580s, puritan leaders looking to Parliament to curtail the bishops' disciplinary authority copied the long-standing government strategy of rallying local supporters to elect sympathetic knights and burgesses. Opponents of royal policies in the early seventeenth century did likewise.²⁵⁸

Professionals, merchants, and successful yeomen and artisans followed the gentry and nobility towards greater legal literacy in the century before the Civil War. They too benefited from the sixteenth-century expansion of educational opportunities at the Inns of Court and in the grammar schools and universities, where students became more adept at textual analysis, a useful skill in understanding legal arguments.²⁵⁹ They provided many, perhaps most, of the rapidly

can be discerned in the middle to late sixteenth century, accelerating in the early seventeenth, particularly from 1620-1640. By the Long Parliament, approximately half of the adult men qualified for the parliamentary vote in the freemen franchises, the most numerous sort, favored by most of the larger towns. The actual electorate always differed from the legally entitled electorate, sheriffs and towns constraining or expanding the franchise according to local traditions and factional politics. Although the Elizabethan and early Stuart nobility, leading gentry, and town oligarchies tried to prevent what they saw as the divisiveness of contested elections, there did appear to be more appeals to the expanding electorate by the puritans in the 1580s and by anti-Court oppositions from the 1590s through the Civil War. See DEREK HIRST, *THE REPRESENTATIVE OF THE PEOPLE?: VOTERS AND VOTING IN ENGLAND UNDER THE EARLY STUARTS* 29-105 (1975); J.H. Plumb, *The Growth of the Electorate from 1600 to 1715*, PAST & PRESENT, Nov. 1969, at 90, 93-103; MARK A. KISHLANSKY, *PARLIAMENTARY SELECTION: SOCIAL AND POLITICAL CHOICE IN EARLY MODERN ENGLAND* (1986) (emphasizing anomalous and disturbing appearances of pre-Civil War elections to nobles and leading gentry).

A 40-shilling freehold also qualified a man for petty (trial) juries at assizes and quarter sessions, so that inflation lifted "a new range of modest property holders" onto the juries, which drew from the yeomen, upper strata of husbandmen, and tradesmen. In practice, hard-pressed sheriffs drafted witnesses, victims, constables, and spectators present at sessions and assizes for jury service when eligible freeholders failed to appear, sometimes in quiet suspension of the 40-shilling requirement. See CYNTHIA B. HERRUP, *THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND* 99-106, 136, 139, 205 (1987).

²⁵⁸ See NEALE, *supra* note 244, at 147-48.

²⁵⁹ Against a received picture that the gentry supplied the bulk of Inns of Court students, Wilfrid Prest found unexpectedly high numbers of nongentry. The sons of the landed elite comprised slightly over half of the matriculants in the decades before the Civil War, and perhaps even less, given status inflation in the records. The sons of

growing number of attorneys.²⁶⁰ And their surprisingly heavy involvement in burgeoning sixteenth-century litigation provided an unwitting legal education of sorts, furthered by the partial migration of copyhold and middling commercial disputes from the manorial and urban courts to the common law tribunals and Chancery.²⁶¹ (One should not overdo the point. There was but a relative shift in legal competency, a situation compatible with ignorance of the common law beyond a few platitudes. Still, from whence sprang Fulbeck's ploughswain talking of essoins and Littleton, his poor country neighbors "so full of law-points, that when they sweat, it is nothing but law"?²⁶²)

The printing press exposed this expanded political nation to a wider range of contrasting legal interpretations than previously available through kinship, clientage, and geographic networks passing along manuscripts and oral accounts, in part by injecting ideas into those networks. Print spread the legal positions of puritans and anti-

merchants, lawyers, clergy, and yeomen predominated among the half (or more) of the student body not recruited from the gentry. See PREST, *supra* note 6, at 87-92.

Lawrence Stone dubbed the vast increase in educational opportunities that opened up in the sixteenth and early seventeenth centuries an "educational revolution." See Stone, *supra* note 233, at 41-80. In some English counties, the number of grammar schools teaching a predominantly classical curriculum increased tenfold in the period 1480 to 1660, drawing students from as far down the social scale as the tradesman, artisan, and copyholder (though excluding unskilled laborers). Small fee-paying private schools and private tutoring in classics by clergy proliferated even more rapidly. Cambridge University matriculations grew from about 150 per year in the 1550s to about 300-400 per year from the 1570s through the Civil War. Social groups below the landed gentry contributed about 60% of the matriculants to the universities, drawing disproportionately from the towns and from trading and professional families. At St. John's College, Cambridge, about one-sixth of the students were sons of husbandmen and plebeians. See *id.*

²⁶⁰ Christopher Brooks studied the social origins of attorneys in the counties of Devonshire, Hertfordshire, and Warwickshire. The records allowed for an "impressionistic picture," not quantitative analysis. None of the attorneys came from families of esquire or high gentry status or from the poor. Rather, they came from a middling range of families, predominantly yeomen or lesser gentry, with a scattering of townsmen, that could not afford to send a son to the Inns of Court but were able to furnish him with a basic education plus £30-80 for training as an attorney. See BROOKS, *supra* note 112, at 243.

²⁶¹ Approximately 70-75% of King's Bench and Common Pleas litigants in the years 1560-1640 were below the rank of gentleman. About a third of Common Pleas defendants were yeomen or husbandmen, about a quarter from the commercial classes (e.g., merchants, small traders, innkeepers, artisans), and about a tenth from the professions. See *id.* at 59-60.

²⁶² No doubt the portrait exaggerates, but it would not work as satire unless it described a recognizable, if more modest, phenomenon. See FULBECK, *Introduction, supra* note 223, at B2r-B2v.

absolutists. Nicholas Fuller's critique of ecclesiastical jurisdictions, Edward Coke's romances about the antiquity of Parliament and the immemorial constitution, Fortescue's, Bracton's and Staunford's limitations on royal power all helped to mobilize "situational" oppositions of varying composition and duration.²⁶³ And the press made more widely available the "raw material" of legal and legal-historical oppositional argument: yearbooks; the register of writs; old classics like Bracton, Glanvill, and Fortescue; tracts on land law; prerogative; crime; the extent of royal prerogative; and other subjects.

How much did the increasing prevalence of printed legal works affect the actual conduct of politics and governance? One can be agnostic, even frankly skeptical, about its influence, yet can still accept that the simultaneous growth of legal publishing and the salience of common law argumentation in an expanded, more legally literate political nation heightened the perceived significance of controlling common law knowledge. For the perception shaped and engendered the debate over legal publication in late Elizabethan and early Stuart England.

* * * *

The cumulative effect of the growing accessibility of lawbooks to a larger, better educated, and more textually adept lay audience, the tighter enmeshing of that readership with the institutions and advocates of the national courts, and the deepening pragmatic and political importance of national law changed the meaning of "publishing the laws of England" between 1530 and 1640. A lawyer contemplating the printing of a legal text in 1530 could minimize in his own mind the dangers attributed to print in the wake of the Reformation by assuming a primarily professional audience imbued with lawyers' interpretive conventions. Though a printed lawbook was "public," he might imagine that only a limited few would take the time and have the patience and skills to understand it. There was, in short, an implied social and political containment of the text.

In other contexts, where this was not true, English intellectuals and governments might resort to more overt ways of cabining knowledge. On occasion Parliament flatly prohibited discussion of contentious issues such as the presence of Christ's body in the sacrament of

²⁶³ See FULLER, *supra* note 45; COKE, *Preface*, *supra* note 30, pts. 3-6, 8-9; COKE, *FIRST INSTITUTION*, *supra* note 45; FORTESCUE, *supra* note 137; BRACTON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* (Latin ed. 1569); STAUNFORD, *supra* note 218.

the altar (1539) and succession to Elizabeth (1570).²⁶⁴ Restricting knowledge to higher-status men was another tactic, as Parliament briefly attempted in legislating that “No women or artificers, prentices, journeymen, servingmen of the degree of yeomen or under, husbandmen nor laborers, shall read the New Testament in English.”²⁶⁵ Scholars repeated Pythagoras’s admonition against novices reasoning in public about knowledge scarcely learned and shallowly understood; and they underscored Plato’s warning that judgment in the arts or governance exercised by those unprepared could imperil a commonwealth, as when the young elevated their opinions over the old, or servants over masters, or private men over magistrates. “What ship can long be safe from wreck,” asked the anonymous author of *A Discourse of the Commonweal of This Realm of England* (1581; MS, 1549), “where every man will take upon him to be a pilot; what house well governed where every servant will be a master or a teacher?”²⁶⁶ In that spirit, Henry VIII commanded by proclamation that no Englishman might dispute about the sacrament of the altar except for “learned men in Holy Scripture, instructed and taught in the universities.”²⁶⁷ Queen Elizabeth ordered the Bible displayed for public reading, but with the proviso that none might “reason or contend.”²⁶⁸ Contrast the lawyer of the early to middle sixteenth century who weighed the likely social and political repercussions of law printing. He could still meet the legal press with equanimity or enthusiasm, could welcome publication without restricting the potential audience and uses of texts, if he imagined that the narrow range of lawbooks and readers ensured that “public” knowledge would be—in practice—the preserve of well-tutored specialists.

²⁶⁴ See An Act for Abolishing Diversity of Opinions in Certain Articles Concerning Christian Religion, 31 Hen. VIII, ch. 14 (1539), in 10 OWEN RUFFHEAD, STATUTES AT LARGE 125-30 (1770); 13 Eliz., ch. 1 (1570), in 2 STATUTES AT LARGE, *supra*, at 583. Intellectuals tried the same strategy. Writing on behalf of Henry VIII’s government in response to the *Pilgrimage of Grace* (1536), Richard Morison called on Englishmen to avoid debating acts made in Parliament and contending positions in religion. On Morison’s pamphleteering, see FERGUSON, *supra* note 9, at 156-57.

²⁶⁵ An Act for the Advancement of True Religion and for the Abolishing of All False Doctrine, 34 Hen. VIII, ch. 1 (1542), in 2 RUFFHEAD, *supra* note 264, at [319]. Parliament repealed this act in 1547 by 1 Edw. VI, ch. 12.

²⁶⁶ SIR THOMAS SMITH (attributed), A DISCOURSE OF THE COMMONWEAL OF THIS REALM OF ENGLAND 30-31 (Mary Dewar ed., 1969) (1581).

²⁶⁷ *Proclamation Prohibiting Unlicensed Printing of Scripture, Exiling Anabaptists, Depriving Married Clergy, Removing St. Thomas à Becket from Calendar* (1538), in 1 TUDOR ROYAL PROCLAMATIONS 1485-1603, *supra* note 40, at 273.

²⁶⁸ *Injunctions Given by Her Majesty* (1559), in 1 TRANSCRIPT OF THE REGISTERS, *supra* note 81, at xxxviii.

By the late sixteenth century this was harder to do. The diversification of lawbooks and audience and the growing penetration and importance of national law, particularly as a political resource, undermined the assumed containment of legal printing and raised the stakes of publication. This context engendered and made more plausible the late Elizabethan and early Stuart anti-publicist critique of the consequences of legal publication: inflamed disputation and faction, vulgarization of knowledge, law drawn into disrepute, credulous readers misled and disingenuous ones made shiftier, and guild mysteries lost. It also, ironically, provided the social predicate for the publicist case. Implicit in the publicist enlistment of law printing in the service of order, political unity, and professional defense was the assumption of an audience as broad or broader than the political nation and expanding along with it. Their depiction of legal knowledge as a salve rather than spur to litigiousness made its publication more desirable amid the legally inflected religious and political arguments and law reform agitation of late Elizabethan and early Stuart England.

I wish to be especially clear about what I am, and am not, arguing. I do not claim that the printing of English law brought on what the anti-publicists feared or the publicists hoped. How legal printing *in fact* affected English law and society is a complex question beyond the scope of this Article. Nor do I assert that the developments charted above necessarily made the anti-publicists' or publicists' views of legal publishing more compelling. As "history of the book" scholarship has repeatedly demonstrated, the publication of a text or the transformation of an audience has multiple, often contradictory, consequences. Which was, crucially, the point. Partisans of the anti-publicists and publicists focused, respectively, on the disruptive and integrative repercussions of law printing, their appeals persuasive if viewed from the proper angle and with the right blinders. The developments discussed in this section did not ratify or invalidate the predictions of either side so much as magnify the contradictory effects of law printing, making it a more salient intellectual problem, driving forward and elaborating the debate. The corrosion of the implied political and social containment of lawbooks pushed anti-publicist doubts to the fore, in turn inducing the publicists to explain the value of legal publishing as professional self-defense, joining this argument to the still vibrant humanist and Protestant idioms for justifying law printing.

B. *Wariness Towards Routine Print:
Censorship, Religious Conformity, and Political Arcana*

Law printing is a subset of printing. Assessment of the audience and use of lawbooks, one of the press's many products, took place against a background of conflicting opinions about the value and risks of printing as a medium. Of that large story, one part is of pressing relevance: the deepening appreciation among late Elizabethan and early Stuart conformist churchmen and absolutists of the unwitting dangers of licit printing. For though the publicists could readily distinguish their law reports and monographs from the treasonous, seditious, and heretical imprints chased from printers' basements and seaports to the pyre, suspicions about the licit press at Court and among the church hierarchy complicated their task while encouraging the anti-publicists.

* * * *

Press regulation is but a part of the regulation of opinion, and it took decades for the government to treat the press as a particularly dangerous way to spread unwelcome ideas. As David Loades has observed, the early Tudor state followed medieval practice in focusing more on the content of prohibited opinions than on the means of transmission. It punished sedition whether delivered through print, manuscript, letters, conversation, or ballads. Although this grouping of print, writing, and speech continued in statutes and proclamations throughout the Tudor and early Stuart period, Henry VIII's campaign against Tyndale's Bible and Protestant tracts proved a turning point, targeting the press as an especially dangerous medium. Henry added an ambitious, though porous, system of pre-publication licensing to the existing regime of post-publication penalties inflicted on all seditious communications.²⁶⁹ The censorship enforced through this sys-

²⁶⁹ See D.M. Loades, *The Theory and Practice of Censorship in Sixteenth-Century England*, in 24 *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY* 141, 141 (1974).

The details of the censorship system changed over time. Queen Elizabeth's Injunctions of 1559 vested licensing power in the Queen, or six of the Privy Council, or the Archbishop of Canterbury and Bishop of London; for lesser publications, members of the High Commission sufficed. The Star Chamber Decree of 1586 reserved licensing to the Archbishop of Canterbury or Bishop of London, except for common law books. See *infra* note 270 for details. The 1637 Star Chamber Order divided up licensing by field of knowledge, sending lawbooks to the chief justices, heraldry to the Earl Marshal, statecraft and history to one of the principal Secretaries of State, and other books to the Archbishop of Canterbury or Bishop of London. See W.W. GREG, *SOME ASPECTS AND PROBLEMS OF LONDON PUBLISHING BETWEEN 1550 AND 1650*, at 51-53 (1956).

tem embraced lawbooks as well as other texts.²⁷⁰

Within this framework of state press censorship, the 1580s stand out as a transitional moment. Government determination to repress dissident publications grew after a decade and a half of pamphleteering by Protestant separatists, by Catholics attacking Elizabeth's legitimacy, and by several waves of Puritans engaged in the controversies over vestments, the *Admonition*, and Archbishop John Whitgift's suspension of nonconforming ministers.²⁷¹ The government's reliance

²⁷⁰ The English government tried, and largely succeeded, in creating a censored and monopolistic legal press. In 1553, the Crown appointed Richard Tottell the first law patentee with the sole privilege of publishing common law books, a right which he and his successors held through the Civil War. The King's or Queen's printer published statutes and proclamations. Like other texts, lawbooks needed to undergo pre-publication licensing, though by legal luminaries rather than the bishops or Privy Councilors. Tottell's 1553 patent allowed royal justices, serjeants or lecturers (readers) in the Inns of Court to approve common law books. The 1586 Star Chamber Decree restricted the power to two of the three chief justices, amended in 1637 to one of the three chief justices or their appointees. On Tottell's patent, see FREDERICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476-1776*, at 54 (1952); for the Star Chamber Decrees of 1586 and 1637, see respectively 2 *TRANSCRIPT OF THE REGISTERS*, *supra* note 81, at 810; 4 *id.* at 530.

In operation, legal censorship was not the separate system the government orders implied. Publication rights and licenses recorded in the registers of the Stationers' Company reveal that a variety of legal officials, bishops, and clerical designees acting in conjunction with lawyers all approved lawbooks. Sometimes legal officials licensed lawbooks, either in their own right or as designees of the justices, as when Chancellor Thomas Bromley approved William Lambarde's *Eirenarcha* (1581), Recorder of London William Fleetwood approved J. Adames's *Order of Keeping a Court Leet* (1585), and Master of Requests Edward Powell approved Thomas Powell's *The Attorney's Academy* (1623). Sometimes clerics licensed common law books, as when Robert Austin, the chaplain to Archbishop George Abbott, approved Richard Crompton's *Causes Belonging to the Star Chamber* (1635). Sometimes clerics called in legal assessors for guidance, as when Thomas Wykes consulted Morgan Jones, who advised approving William Lambarde's *Archeion* (1635) and Charles Calthroppe's *Relation between the Lord of the Manor and the Copyholder his Tenant* (1635). See W.W. GREG, *LICENSERS FOR THE PRESS, & C. TO 1640: A BIOGRAPHICAL INDEX BASED MAINLY ON ARBER'S TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS* 22, 36, 77, 7, 101, 52 (1962).

²⁷¹ See J.N. NEALE, *ELIZABETH I AND HER PARLIAMENTS, 1559-1581*, at 94 (1952). On Puritan pamphleteering, see PATRICK COLLINSON, *THE ELIZABETHAN PURITAN MOVEMENT* 77-78, 139-40, 146, 152-54, 273-75, 391-97 (1967). Elizabeth's Royal Injunctions of 1559 regulating press licensing, a 1566 Star Chamber Decree against "disorders in printing," and six proclamations against the seditious books of Catholics, Puritans, and Brownists led up to the Star Chamber Decree of 1586 imposing more stringent regulation. See 1 AMES, *supra* note 44, at 527; 1 *TRANSCRIPT OF THE REGISTERS*, *supra* note 81, at 322; 2 *TUDOR ROYAL PROCLAMATIONS 1485-1603*, *supra* note 40, at 312-13 (1569), 341-43 (1570), 347-48 (1570), 375-76 (1573), 376-79 (1573), 501-02 (1583), 506-08 (1584). In 1607, the divine Thomas Rogers painted an inaccurate, if revealing, picture of an early Elizabethan England united within against the Catholics, building the church "without noise and stirs," but falling victim in the 1580s to inter-

on the Stationers' Company and on monopoly patentees to keep order within the printing trade created unexpected tensions as newly released apprentices swelled the number of competing presses in the 1570s and 1580s. With many profitable books forbidden as a result of the patent system, struggling printers raided other men's titles or published illicit, high-profit tracts, giving the impression of a trade slipping out of control.²⁷² Proposals for tightening press censorship, common enough early in Elizabeth's reign, came more frequently. In 1580, the lawyer William Lambarde revived an idea floated in the 1566 Parliament to establish a board of "Governors of the English Press," composed of clerics and lawyers, to regulate "the art of printing books . . . now of late time greatly abused."²⁷³ The bishops proposed in 1583 that all printed books, including "treatises that in any way touch the state of the realm or the church," be licensed by Archbishop Whitgift or the Bishop of London.²⁷⁴ Puritans, fearing Whitgift's discipline but aware of the pressure for invigorating censorship, proposed licensing by four ministers and four lawyers, thereby cutting out the bishops, "known affectionate parties in some late differences touching the ordering of Church government."²⁷⁵ Attorney General John Popham drafted a repressive bill for the Parliament of 1584, subjecting printed slander of the "religion here professed or of the laws in force" to praemunire on the first offense and treason on the second. The effort failed on its first reading in Commons, perhaps because members feared the damage Whitgift could do with it to

nal dissension provoked by Jesuit and nonconformist pamphleteering. See Rogers, *Preface*, *supra* note 245, at [5], [10]-[16].

²⁷² See BLADGEN, *supra* note 86, at 66-74; SIEBERT, *supra* note 270, at 40. The conflict between the Stationers' Company and John Wolfe and his confederates was a representative example of the problem. See 2 TRANSCRIPT OF THE REGISTERS, *supra* note 81, at 778-82.

²⁷³ Lambarde's *Act to Restrain the Licentious Printing, Selling, and Uttering of Unprofitable and Hurtful English Books* (1580) revised a 1577 proposal in the State Papers Domestic, which was a copy of a 1566 parliamentary bill. For Lambarde's 1580 bill, see 2 TRANSCRIPT OF THE REGISTERS, *supra* note 81, at 751-53. For background, see Cyprian Blagden, *Book Trade Control in 1566*, 13 THE LIBRARY 287, 290-92 (5th Series, 1958).

²⁷⁴ This memo from Archbishop Whitgift and a committee of bishops (Oct. 1583) has been printed in A COMPANION TO ARBER: BEING A CALENDAR OF DOCUMENTS IN EDWARD ARBER'S TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON, 1554-1640, at 137-38 (W.W. Greg ed., 1967) [hereinafter A COMPANION TO ARBER].

²⁷⁵ *Certain Points to Be Considered of Touching the Petition Made to Her Majesty by . . . the Archbishop of Canterbury* (1584), in 1 THE SECOND PART OF A REGISTER; BEING A CALENDAR OF MANUSCRIPTS UNDER THAT TITLE INTENDED FOR PUBLICATION BY THE PURITANS ABOUT 1593, AND NOW IN DR. WILLIAMS'S LIBRARY 175 (Albert Peel ed., 1915); see also *The Copy of a Letter*, *supra* note 92, at 143-46.

critics of the Church of England.²⁷⁶ Blocked in Parliament, the government issued a Star Chamber Decree in 1586 featuring prepublication licensing by the Archbishop of Canterbury, the Bishop of London, or a Privy Councilor (or in the case of lawbooks, any two of the chief justices). The Decree, like Lambarde, decried the "great enormities and abuses as of late [in the press], more than in time past" that "do rather daily more and more increase."²⁷⁷

Historians have pointed to the 1586 Decree as evidence of greater governmental determination to control the press, and to some extent it was.²⁷⁸ But only to some extent. The Decree did not fundamentally reshape enforcement machinery or substantially heighten the severity of the government's policing of ideas. Along these dimensions, the Decree's significance submerges within the continuities of Tudor and early Stuart censorship. First, its administrative logic was not novel. The Decree's system of prepublication licensing dated back to Henry VIII's 1538 Proclamation and more immediately to Elizabeth's Injunctions of 1559 mandating review of all books except school and university texts by Privy Councilors, bishops, university chancellors, or ecclesiastical commissioners.²⁷⁹ Second, the impetus behind the Decree came less from the government than the Stationers' Company, which expended £80 during two years of lobbying. Most of the Decree's departures from Elizabeth's 1559 and 1566 ordinances strengthened the Company's powers against the swelling number of poachers infringing copyrights and royal patents to the detriment of the wealthier, established printers.²⁸⁰ Third, the Decree did not

²⁷⁶ See NEALE, *supra* note 271, at 95. For Popham's bill, see A COMPANION TO ARBER, *supra* note 274, at 138.

²⁷⁷ 2 TRANSCRIPT OF THE REGISTERS, *supra* note 81, at 807-12.

²⁷⁸ See SIEBERT, *supra* note 270, at 61-63; D.M. Loades, *Illicit Presses and Clandestine Printing in England, 1520-1590*, in TOO MIGHTY TO BE FREE: CENSORSHIP AND THE PRESS IN BRITAIN AND THE NETHERLANDS 9, 21-22 (A.C. Duke & C.A. Tamse eds., 1987) [hereinafter TOO MIGHTY TO BE FREE].

²⁷⁹ Henry's 1538 Proclamation mandated Privy Council licensing, building upon a 1530 Proclamation requiring approval by the ordinary of the diocese for English-language theological works. See 1 TUDOR ROYAL PROCLAMATIONS 1485-1603, *supra* note 40, at 193-97, 270-76. Edward VI reiterated the need for Privy Council licensing in a 1551 Proclamation. See *Id.* at 514-18. For Elizabeth's Injunctions of 1559, allotting licensing authority to Privy Councilors and ecclesiastics, see 1 TRANSCRIPT OF THE REGISTERS, *supra* note 81, at xxxviii.

²⁸⁰ In 1584, the Stationers' Company authorized its Wardens to approach Parliament and the Crown in search of stronger powers to use against recalcitrant poachers. The Decree strengthened the Company's powers vis-à-vis individual printers in the following ways: It restricted publication to the universities and London, forbidding provincial presses far from the Stationers' searches and fines; it prohibited hidden

measurably increase the severity of the government's overall control of printed opinion (of which it was part, along with the law of treason, heresy, sedition, and *scandalum magnatum*).²⁸¹ It presupposed the Tudor and early Stuart Crown's claimed right to confine opinion, in practice within flexible boundaries contracting periodically in moments of political and social unrest, then easing. The swings between worry and inertia, the emphasis on suppressing goads to disorder rather than achieving consistency in standards of censorship were as characteristic of the decades after 1586 as before.²⁸²

presses; it limited the allowed number of apprentices (who would eventually become competitors); it barred new master printers from entering the trade until the Archbishop of Canterbury determined that death and retirement had reduced their supposedly excessive numbers to an appropriate level, and provided that new master printers required the consent of both the Stationers' Court and the Court of High Commission; and it enjoined printers to obey Company ordinances, thereby tacitly putting government authority behind the Company's internal copyright system. In this fashion the Company's wealthier ruling printers enlisted the government in their struggle against competition. Highlighting the Company's interests does not invalidate the state's desire to tighten press censorship so much as qualify the picture of a resolute government. See BLAGDEN, *supra* note 86, at 69-73; BENNETT, *supra* note 20, at 57-64. The Decree can be found in 2 TRANSCRIPT OF THE REGISTERS, *supra* note 81, at 807-12.

²⁸¹ See Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 666-73 (1985).

²⁸² In response to separatist writings and the "Martin Marprelate" tracts, for example, the government cracked down on dissenting Protestant books from 1587 to 1593. Around 1600, fear of a disputed succession to Elizabeth coupled with economic reversals underlay Archbishop Whitgift's order suppressing satires and epigrams, requiring English histories to be vetted by the Privy Council, and prohibiting the publication of plays "except they be allowed by such as have authority." With the successful transition to Stuart rule, scrutiny relaxed. The middle 1620s and middle 1630s marked two more periods of intense concern, as James issued proclamations in 1623 and 1624 ordering stringent observation of the 1586 Star Chamber Decree amid the political and religious turbulence caused by England's inaction as overseas Protestants suffered in the Thirty Years War, and as William Laud, appointed Archbishop of Canterbury in 1633, blocked works inhospitable to his changes in church polity and to Charles I's "personal rule." See FREDERIC A. YOUNGS, JR., THE PROCLAMATIONS OF THE TUDOR QUEENS 210 (1976); 3 TUDOR ROYAL PROCLAMATIONS 1485-1603, *supra* note 40, at 13-17; 1 STUART ROYAL PROCLAMATIONS: ROYAL PROCLAMATIONS OF KING JAMES I, 1603-1625, at 583-85, 599-600 (James F. Larkin & Paul L. Hughes eds., 1973) (1623 and 1624 proclamations) [hereinafter STUART ROYAL PROCLAMATIONS]; 3 TRANSCRIPT OF THE REGISTERS, *supra* note 81, at 316; 4 *id.* at 529-36; PUBLIC RECORD OFFICE, STATE PAPERS DOMESTIC, 12/282/31 (c. Oct. 1601) (unease over succession to Elizabeth reflected in the preamble to a parliamentary bill prohibiting the writing and publishing of books about the title of the Crown); CHRISTOPHER HILL, *Censorship and English Literature*, in 1 THE COLLECTED ESSAYS OF CHRISTOPHER HILL: WRITING AND REVOLUTION IN 17TH CENTURY ENGLAND 34-38 (1985); Blair Worden, *Literature and Political Censorship in Early Modern England*, in TOO MIGHTY TO BE FREE, *supra* note 278, at 50-51; SIEBERT, *supra* note 270, at 142; KEVIN SHARPE, THE PERSONAL RULE OF CHARLES I, at 648, 650 (1992).

If the 1580s, then, did not introduce a new-found severity, scope, or consistency to censorship, it did mark a transition in at least one meaningful sense: a movement, in relative terms, from a more ad hoc (if blunt) policing of publication towards a more systematic review. The 1586 Decree changed the book registration procedures of the Stationers. The Company required pre-publication registration ("licensing") of all works at their Hall, the license serving as a copyright that protected the work against infringement. Company registration was independent of the pre-publication licensing that the Elizabethan Injunctions of 1559 demanded. Although the Company occasionally protected itself by insisting on evidence of governmental licensing before registering a work, they seldom did so before 1586. The Stationers accepted most proffered works upon the approval of their own Wardens, consulting government officials selectively.²⁸³ After 1586, by contrast, the Company changed policy. The Clerk more frequently refused to register books on the authority of the Stationers' Wardens alone, requiring the signature of one of the bishops or officials empowered by the Decree. Sir John Lamb, after examining Company records around 1634, reported that in the decade before the Decree, "many [works] were licensed by the [Stationers'] Master and Wardens, some few by the Master alone, and some by the Archbishop [of Canterbury] and more by the Bishop of London." Felix Kingston, made a Company freeman in 1597, told Lamb that "before the Decree the Master and Wardens licensed all. And that when they had any divinity book of much importance they would take the advice of some two or three ministers of this town [i.e., London]."²⁸⁴ W.W. Greg's review of the Stationers' Clerk's book reinforces contemporary impressions. From 1557 to 1571, the Clerk recorded 1388 entries (about half ballads), of which only fifty mentioned licensing by outside authorities, less than four percent of the total, though Greg suspects underreporting by the Clerk. After 1586, a strong majority of the entries noted official licenses, falling to about half in periods of slackness.²⁸⁵

²⁸³ The Company insisted on licensing in order to collect fees and to prevent the publication of heretical or seditious works, for which Stationers' officials might be held responsible by the government. See *BLAGDEN*, *supra* note 86, at 43-44.

²⁸⁴ See 3 *TRANSCRIPT OF THE REGISTERS*, *supra* note 81, at 690.

²⁸⁵ Unfortunately, Greg does not provide a statistical breakdown of different types of licenses (Company, official, both, neither) for the period after 1586. He gives only qualitative impressions based on his examination of the Clerk's books. He did count new copies entered in the Stationers' records between 1576 and 1640 (e.g., on both sides of the Decree) which reveals 9397 new copies entered: 1813 with no evidence of

It is possible that the Company's registration books after 1586 show a significantly greater percentage of works arriving with governmental licenses because of changes in the Clerk's recording procedures rather than in the practice of authors and printers. Yet Archbishop Whitgift's appointment in 1588 of twelve "correctors" of the press to vet manuscripts in his stead suggests otherwise. Bishops had long delegated review of some works to their chaplains. In part to relieve his workload and in part to spread responsibility should a licensed book later prove controversial, Whitgift expanded and formalized the system, his dozen "correctors" sorting through a more regular and larger flow of manuscripts.²⁸⁶

For the seditious or threatening tract, the machinery of denunciation by proclamation and prosecution by High Commission, Star Chamber, and assize stood ready, operating intermittently after the Decree as before, driven by political calculations. For the unobjectionable work on its way to the press, the Decree heightened the chances of review by the Church or government, perhaps by an agent specifically commissioned for licensing.²⁸⁷ This stands out, for our purposes, as the most salient difference between the porous 1538 and 1559 licensing systems and the more systematized one in place after 1586. The greater determination to scrutinize the innocuous in order to stem the subversive implicated not just the press as a carrier of corrosive ideas but the press as a medium. For in contrast to the episodic pressure imposed upon seditious tracts, this routinization of review, applied to all publication candidates however unobjectionable and to print alone as a form of communication, underscored the risks of the press as a medium. This stance carried an unwelcome implication for the publicists.

* * * *

The 1586 Decree signaled a growing circumspection about the press at Court and among the bishops. There was a tilt toward wari-

a license, 1672 with only a Company license, 439 with only an official license, and 5473 with both a Company and official license. See GREG, *supra* note 269, at 41-52.

²⁸⁶ The announcement of Whitgift's designees can be found in the Stationers' Court book. See RECORDS OF THE COURT OF THE STATIONERS COMPANY 1576 TO 1602, at 28-29 (W.W. Greg & E. Boswell eds., 1930). The bishops appointed new correctors over subsequent decades, their names recurring frequently in the Stationers' registration records. See SIEBERT, *supra* note 270, at 61-62.

²⁸⁷ The government's ambitions ran ahead of its actual effectiveness, which was compromised by its inability to block imported books and eliminate underground presses and by the failure of approximately one-third of published works to undergo the formalities of licensing and registration with the Stationers. See BLAGDEN, *supra* note 86, at 44.

ness. The tighter enmeshing of the licensing system of the Stationers with that of the government better communicated the biases of Privy Councilors and bishops to writers and publishers, a development only reinforced by the 1586 Decree's bestowal upon the Archbishop and High Commission of the power to approve the nomination of all new master printers. The 1580s saw the death or retirement of Privy Councilors and bishops touched by humanist and Protestant optimism about printed pedagogy and their replacement by men quicker to sense threats and police opinion.²⁸⁸ The death of the Earl of Leicester in 1588 following several years of declining influence removed from the Privy Council a patron of English-language publication of the classics, history, and Continental Protestant reformers. The circle of Puritan nobles surrounding Leicester died or drifted into political isolation in the 1580s and 1590s. Church policy followed the lead of "court bishops" and their aides such as John Whitgift, Richard Bancroft, and Richard Cosin who made careers opposing Puritans and aggressively defending the established church in the name of conformity. Whitgift's appointment as Archbishop of Canterbury in 1583 and elevation to the Privy Council in 1586, where he allied himself with the anti-Puritan Christopher Hatton, signaled the political ascent of the conformists. In the opinion of Wallace MacCaffrey, their rise in the 1580s marked a generational divide in the English episcopacy. For they replaced the original group of Elizabethan bishops such as Edmund Grindal and Edwin Sandys, sympathetic to the Marian exiles' eagerness to preach by word and press and tolerant of some limited measure of local variety and lay intellectual initiative within the Protestant national church.

To be sure, the change was one of degree. Matthew Parker and Elizabeth's other early bishops attacked writers and printers behind the *Admonition* campaign (1572-1573) and imprisoned or deprived Puritans who took too great liberties with clerical dress, liturgy, and prophesyings. Yet the court bishops made the drive against nonconformity a central goal, proceeding without the hidden sympathies and

²⁸⁸ The following paragraphs have drawn upon ELEANOR ROSENBERG, *LEICESTER: PATRON OF LETTERS* (1955); WALLACE T. MACCAFFREY, *QUEEN ELIZABETH AND THE MAKING OF POLICY, 1572-1588*, at 80-118, 437-55 (1981); COLLINSON, *supra* note 271, at 146-55, 243-72, 386-87; PATRICK COLLINSON, *ENGLISH PURITANISM* 23 (1983); 1 USHER, *RECONSTRUCTION*, *supra* note 244, at 403-23; NEALE, *supra* note 244, at 280-97. The disciplinarian tilt at Court and among the church hierarchy coincided with the continuing vitality of humanist themes among political writers, in particular, the valorization of an informed citizenry using knowledge in the service of the commonwealth. See generally PELTONEN, *supra* note 46.

twinges of conscience noticeable in predecessors such as Grindal. They “boast and brag of obedience,” complained the Puritan divine Orthodoxos in *A Dialogue Concerning the Strife of Our Church* (1584), “having in their mouths nothing but obedience, obedience, even as if they were obedience itself.”²⁸⁹ With Elizabeth’s assent, Whitgift and his successor Bancroft joined Privy Councilors in equating Puritans with papists as threats to the realm, underscoring the importance of shutting down nonconformist lectures, private meetings, and printed appeals (as in the hunt for the Martin Marprelate network).²⁹⁰ Whitgift’s remarkable letter supporting Bancroft’s appointment as Bishop of London in 1597 revealed episcopal priorities. A quick glance at the protégé’s preaching and academic degrees prefaced the detailed recounting of what interested the senior cleric: Bancroft had by “diligent search” detected the Marprelate presses, helped the Crown’s council prosecute Martin’s agents in Star Chamber, rooted out Thomas Cartwright’s book of Presbyterian discipline, pressed the Star Chamber action against Cartwright, and intercepted the Puritan John Penry’s writings.²⁹¹

What did it mean that the hunting and destroying of presses had become a central recommendation for Christ’s Shepherd? Perhaps not much if one sees the late sixteenth and early seventeenth century bishops as continuing their predecessors’ task of denying the press to Catholics, separatists, and nonconformists in an age of proliferating publication. Yet there is a sense in which the drive against nonconformist ideas and practices, of which the 1586 Star Chamber Decree was a part, undermined the celebratory rhetoric about the press inherited from Foxe and Tyndale. It compromised identification of print-born religious instruction with the Protestant cause, giving reservations about printed religious tutelage a greater cultural salience.

Archbishop Whitgift’s concentration on the potential dangers of preaching and of unsupervised lay religious education deepened these reservations. Ministers following Foxe in extolling the press

²⁸⁹ A DIALOGUE CONCERNING THE STRIFE OF OUR CHURCH 66-67 (1584).

²⁹⁰ Whitgift required subscription to detailed articles designed to expose ministers with reservations about the Book of Common Prayer and used High Commission and its ex officio oath as a weapon against more radical nonconformists, tactics putting 300-400 ministers at risk of suspension and a large handful in prison. Whitgift’s successor, Bancroft, deployed the Church’s Canons of 1604 against nonconformists, depriving about 90 ministers.

²⁹¹ John Whitgift, *Reasons Alleged by the Archbishop of Canterbury for Dr. Bancroft’s Being Promoted to the Bishopric of London* (MS, 1597), reprinted in 2 USHER, RECONSTRUCTION, *supra* note 244, at 366-69.

commonly cast it as a mechanical preacher, granting it by analogy a share in the deep respect preaching the word enjoyed among Elizabethan Protestants. The aging Archbishop of York Edwin Sandys spoke of published sermons and tracts as "a salve to every sore" inflicted by the enemies of the gospel, a way to "re-edify" and "raise and erect the new Jerusalem."²⁹² The translator of Phillippus Caesar's *A General Discourse Against . . . Usurers* (1578) thought that straying Christians "abhorring the sight of godly preachers" might rejoin Christ's flock "by reading secretly the works of some, which they could never be allured openly to hear."²⁹³ But the common depiction of the press as a typographical preacher became a more ambivalent device amid the episcopal campaigns against prophesyings, traveling to sermons outside the local parish, and participation of other than family in-home religious study (Bishop Alymer's "night conventicles").²⁹⁴ These highlighted the disruptive potential of preaching in person and through typographical surrogates and expressed skepticism about the capacity of laymen to pursue religious education outside the supervision of the Church. By the turn of the seventeenth century, conformist divines such as Richard Bancroft and Lancelot Andrewes attacking puritan "popularity" said more about the unwitting disruptions unleashed by preaching and religious publications inviting the multitude to pursue subtle points of doctrine, more about the value of quiescence and the dangers of over-incisive curiosity. Following Richard Hooker's lead, they emphasized the educative value of ceremonies, sacraments, and prayer at the cost of downplaying the word-centered (read: Puritan) focus on preaching.²⁹⁵ All this qualified Foxe's legacy of applause for the ministrations of the mechanical preacher, the press.²⁹⁶

²⁹² EDWIN SANDYS, *Epistle to the Christian Readers*, in *SERMONS* (1585), reprinted in *THE SERMONS OF EDWIN SANDYS* 1, 2 (John Ayre ed., 1842). Sandys delivered his opinions while taking issue with the injunction against "making many books" in *Ecclesiastes* 12:12 (King James).

²⁹³ *Translator's Epistle*, *supra* note 192, at ii.

²⁹⁴ In 1583, Archbishop Whitgift prohibited "all preaching, reading, catechism, and other such like exercise in private places" drawing from more than one family because they were "a manifest sign of schisme." See PATRICK COLLINSON, *THE RELIGION OF PROTESTANTS: THE CHURCH IN ENGLISH SOCIETY, 1559-1625*, at 248 (1982) (quoting Archbishop Whitgift).

²⁹⁵ See PETER LAKE, *ANGLICANS AND PURITANS? PRESBYTERIANISM AND ENGLISH CONFORMIST THOUGHT FROM WHITGIFT TO HOOKER* 128, 162-77 (1988); Peter Lake, *Lancelot Andrewes, John Bucheridge, and Avant-Garde Conformity at the Court of James I*, in *THE MENTAL WORLD OF THE JACOBAN COURT* 113, 114, 123-24 (Linda Levy Peck ed., 1991).

²⁹⁶ Qualified, not eliminated and then within conformist circles. Attitudes toward the press were complicated. The churchman Thomas Rogers championed the public

Indeed, in the decades before the Civil War, conformists began to look with greater sympathy upon the Tridentine Catholic critique of decentralized Protestant theological publication and lay religious study. With "every man . . . printing a catechism, a new model of his own, according to his own private notions," with "every willful opinion, ignorant assertion, and some blasphemous dotages, cast forth by any man that is of our Confession," the simple multitude wavered and doubted in their faith. Numerous fractured and vulnerable targets rose up for destruction by Catholic polemicists blessed with unified doctrine. So Richard Montagu, who further taxed the press with carrying "unnecessary quarrels . . . in question of speculation and obscurity" to "popular ears and capacities . . . unable to comprehend them."²⁹⁷ John Donne agreed, hoping that the fine points of biblical exegesis should not be "served in every popular pulpit to curious and itching ears, [and] least of all made table-talk, and household discourse."²⁹⁸ Charles I's bishop Joseph Hall lamented that errors "that could but creep" before the Reformation "do now fly," and commended silence, pointedly adding that "[w]e might learn of our wise adversaries, that guide the helm of the Roman church."²⁹⁹ The reverberations of this offensive can be heard in the diary of the Middle Temple barrister John Manningham. Attending Dr. Withers' sermon at St. Paul's in November 1602, Manningham was told: "In that he [Christ] took but three disciples it may be collected that all things are not at the first to be published to all men, but first to some few and after to others."³⁰⁰ Manningham's sympathies ran against Dr. Withers', for one month later, in response to an unknown prompting, he wrote: "That opinion which some hold that Paul did not publish his writings till he and they were confirmed by Peter, as the head of the Apostles, is plainly everted by the first and second chapters to the

reading of printed homilies and sermons against Puritan insistence that edification grew from a minister's active preaching in a "lively voice," not his "bare reading." For this polemical purpose, Rogers identified hostility toward learned books and published sermons as a doctrine of the Brownists and Anabaptists. See THOMAS ROGERS, *Article 35: Of Homilies*, in ROGERS, *supra* note 245, at 202-05.

²⁹⁷ RICHARD MONTAGU, *APPELLO CAESAREM* 243-45, 80, 82 (1625); see also RICHARD MONTAGU, *DIATRIBE UPON THE FIRST PART OF THE LATE HISTORY OF TITHES* 2-3 (1621).

²⁹⁸ TODD, *supra* note 35, at 224.

²⁹⁹ CHRISTOPHER HILL, *THE ENGLISH BIBLE AND THE SEVENTEENTH-CENTURY REVOLUTION* 14 (1993).

³⁰⁰ John Manningham, *Diary of John Manningham of the Middle Temple*, in 99 ROYAL HISTORICAL SOCIETY PUBLICATIONS 76 (John Bruce ed., Westminster 1868).

Galatians, where it is apparent that Paul withstood and contradicted Peter."³⁰¹

* * * *

This qualification of Protestant propagandists' celebration of the press received a boost from absolutists' emphasis upon and expansion of the scope of the notion of *arcana imperii* (that secrets or mysteries of the state should only be accessible to the crown's counselors). Elizabeth on occasion forbade public and parliamentary discussion of religious reform, royal succession, and foreign policy, imprisoning those who "meddled" with what was above them. Building on her legacy and on the cultural salience given the concept by the vogue of Tacitean history and *raison d'Etat* statecraft in the late sixteenth century, James and his courtiers elaborated and pushed to the foreground the concept of *arcana*.³⁰² They used it not only to shield and valorize royal policy in Parliament and in the politically important trials of Impositions and Ship-Money, but also to suppress a lawbook, John Cowell's legal dictionary, *The Interpreter* (1607). Cowell gave too high a royalist definition to politically contested keywords such as "subsidy," "parliament," and "prerogative," earning the enmity of the House of Commons and condemnation by James at Parliament's behest.³⁰³ A 1610 royal proclamation banning the work, written by James himself, deplored the "unsatiable curiosity in many men's spirits," the "itching in the tongues and pens" that led them to speculate on the "very highest mysteries in the Godhead" and to "wade in all the deepest mysteries that belong to the persons or state of kings." In the grip of this license, said James in anti-publicist idiom, "men go out of their element, and meddle with things above their capacity; themselves shall not only go astray, and stumble in darkness, but will mislead also diverse others with themselves into many mistakings and errors."³⁰⁴

The royalist language of *arcana* perhaps lent comfort to lawyers, physicians, scientists, alchemists, and artisans unwilling to reveal guild secrets to a prying public; it served, by analogy, as an archetype for

³⁰¹ *Id.* at 109.

³⁰² For background about these ideas, see Ernst H. Kantorowicz, *Mysteries of State: An Absolutist Concept and Its Late Mediaeval Origins*, 48 HARV. THEOLOGICAL REV. 65 (1955); Ginzburg, *supra* note 82, at 28-41; Malcolm Smuts, *Court-Centered Politics and the Uses of Roman Historians, c. 1590-1630*, in CULTURE AND POLITICS IN EARLY STUART ENGLAND 21, 28 (Kevin Sharpe & Peter Lake eds., 1993).

³⁰³ COWELL, *supra* note 212; see also 1 PROCEEDINGS IN PARLIAMENT, *supra* note 119, at 25 (remarks of Mr. Martin to Parliament, Mar. 2, 1610).

³⁰⁴ James I, *A Proclamation Touching D[is]r. Cowels Booke Called the Interpreter* (1610), in 1 STUART ROYAL PROCLAMATIONS, *supra* note 282, at 243.

nondisclosure.³⁰⁵ But it also held a special meaning for the bar. Because of the centrality of common law institutions and concepts to early modern governance, royalist reliance on the notion of *arcana* enriched anti-publicist arguments by suggesting that inappropriate publication of the common law offended royal as well as professional interests. One of the complaints against the civilian John Cowell was his effrontery in writing beyond his professional competence, meddling with the common law “mysteries” at the foundation of the constitution. James made this point the centerpiece of his proclamation, and his counselors underscored it repeatedly in the 1610 Parliament.³⁰⁶ From the Lord Treasurer on behalf of James: Cowell “overcuriously wr[o]te in that subject, which is out of his proper element.”³⁰⁷ From the Lord Privy Seal: “the matter” of Cowell’s dictionary “is too full, too large, too high, for the author to deal with all.”³⁰⁸ From the Lord Privy Seal’s summary of Attorney General Henry Hobart’s speech: Cowell’s “great fault is that in a faculty not his own, he has ventured in such sort as he has; so it cannot be esteemed an error of judgment but presumption.”³⁰⁹

The plasticity of the concept of *arcana* and its spillover effects were not lost on lawyers and parliamentarians treated to lectures on the limits of their understanding. Thomas Wentworth pointedly remarked to Parliament in 1610 that “the King referred us to his speech in print wherein ‘tis said to be sedition to dispute what a king may do; which, if it be, all our law books are seditious, for they have ever done it.”³¹⁰ A *reductio ad absurdum*, certainly, but one that captured the latent implications of the royalist position. For if the common law helped establish the constitutional structures within which monarchs practiced the mysteries of statecraft, might not legal publications delineating constitutional boundaries and private rights, even if not in-

³⁰⁵ It was an archetype in the limited sense that its prominence strengthened those resisting the claim of a public “right” or “interest” in knowing. The fit, however, was not exact, particularly in the style of drawing boundaries. Royalists established hierarchies of high and low persons and knowledges, while guilds and professions distinguished insiders from outsiders.

³⁰⁶ James’s 1610 proclamation condemned writers like Cowell who “freely wade” in the “deepest mysteries of monarchy and politique government.” 1 STUART ROYAL PROCLAMATIONS, *supra* note 282, at 243.

³⁰⁷ Lord Treasurer (Mar. 8, 1610), in 2 PROCEEDINGS IN PARLIAMENT, *supra* note 119, at 29.

³⁰⁸ Lord Privy Seal (Mar. 8, 1610), in 1 *id.* at 189.

³⁰⁹ *Id.* at 185.

³¹⁰ Thomas Wentworth (May 22, 1610), in 2 *id.* at 108.

tionally antagonistic, expose too much for royalist tastes?³¹¹ Solicitor General and courtier Francis Bacon argued "that questions which concern the power of the king and the liberty of the subject should not be textual, positive, and scholastical, but slide in practice silently and not be brought into positions and order."³¹² Lord Chancellor Ellesmere's argument in *Calvin's Case* (1608) rued the popular interest in whether the common law

be *jus scriptum*, or *non scriptum*; and such other like niceties: For, we have in this age so many Questionists; and *quo modo*, and *quare*, are so common in most men's mouths, that they leave neither religion, nor law, nor King nor council, nor policy, nor government out of question. . . . And the end they have in this question, What is the common law? is to shake and weaken the ground and principles of all government.³¹³

In this fashion, the royalist language of mystery could extend beyond its core use in shielding Crown policy to protect lawyers' guild knowledge and implicitly cast suspicion on nonoppositional publicist disclosure.³¹⁴

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Together the royalist stress on political *arcana*, the conformist turn in the church, and the refashioning of censorship strengthened the undercurrent of unease about routine legal printing in late Elizabethan and early Stuart England. The effects were indirect, and it is important to make clear the limits of the argument. *Arcana* rhetoric and the campaign against nonconformity in the church did not have the legal press squarely in mind. The post-1586 censorship regime touched on legal publishing only obliquely by providing lawbooks a

³¹¹ As James I was fond of reminding lawyers and judges: "That which concerns the mystery of the King's power, is not lawful to be disputed." James I, *Speech in Star Chamber* (June 20, 1616), in *THE POLITICAL WORKS OF JAMES I*, at 333 (Charles H. McIlwain ed., 1965). Whether lawbooks posed a danger of exposing the *arcana imperii* became part of the Restoration debate over the regulation of legal publishing. See *THE CASE OF THE BOOKSELLERS AND PRINTERS STATED* (1666).

³¹² Francis Bacon (May 19, 1610), in 2 *PROCEEDINGS IN PARLIAMENT*, *supra* note 119, at 98

³¹³ Lord Ellesmere, *The Speech of the Lord Chancellor of England*, in *The Exchequer Chamber, Touching the Post-Nati* (1608), in *KNAFLA*, *supra* note 7, at 216, 216.

³¹⁴ In his Star Chamber speech of 1616 to the judges, James referred to the common law as a "mystery" in the sense of a guild or trade knowledge. "For though the common law be a mystery and skill best known unto yourselves, yet if your interpretation be such, as other men which have logic and common sense understand not the reason, I will never trust such as interpretation." *THE POLITICAL WORKS OF JAMES I*, *supra* note 311, at 332.

separate tract: licensing by the chief justices rather than churchmen or Privy Councilors; no need to register works with the Stationers since the patentee's monopoly provided copyright protection.³¹⁵ Legal printing did not wilt, but continued to flourish, increasing in scale and diversity in the latter sixteenth and early seventeenth century.

Nonetheless, from the 1580s, the legal press operated in an intellectual climate where conformist churchmen and royalist counselors disparaged lay theological discussions fed by printed religious tracts, placed greater value on conformity, mystery, and silence, and more strongly underlined the latent factious dangers of routine, seemingly innocuous publications. They sharpened concern about printing as a medium.³¹⁶ Conformist divines distinguished between a basic corpus of Protestant doctrine necessary for the people to absorb through preaching or print and the supererogatory "fine points" that distracted believers from the essentials of faith and encouraged disputation. This position was structurally similar to the legal non-publicists' discomfort with revealing the reasons and fictions of the law. *Arcana* rhetoric overlaid these warnings, in particular James's threat after the Cowell affair that vulgar persons prying into matters of state "above their reach" might provoke him to appoint licensers to "look more narrowly in the nature of all" books "concerning our government . . . or the laws of our kingdom."³¹⁷ All this was a matter of emphasis, of stressing half-century old critical *topoi* about print: the press as conveyer of the semblance of knowledge to the impressionable; the press as efficient cause of ill-informed, undisciplined independent thought in religion and law, nurturer of faction and challenges to authority.

The beginning of this process in, roughly, the 1580s coincides with anti-publicist warnings and with publicist allusions to the critique of printing and justification of their own resort to the press. One hears the message, even the accent of conformist and *arcana* rhetoric

³¹⁵ In practice, churchmen licensed lawbooks as well as the chief justices, and the patentee recorded some titles with the Stationers. See *BLAGDEN*, *supra* note 86, at 43-44.

³¹⁶ The disciplinarian trend in the culture of the English church and court after 1585, especially in the "nasty nineties," is the theme of the essays collected in *THE REIGN OF ELIZABETH I*, *supra* note 156. Guy found in that period "an authoritarian reaction from privy councillors and magistrates, whose emphasis on state security, the subversiveness of religious nonconformity, and the threat of 'popularity' and social revolt became obsessional." John Guy, *Introduction* to *THE REIGN OF ELIZABETH I*, *supra* note 156, at 1, 1.

³¹⁷ 1 *STUART ROYAL PROCLAMATIONS*, *supra* note 282, at 244-45.

in the complaints of Recorder of London Anthony Benn: "The speculation of laws and rule belongs not to the common people but simply the obedience thereunto, but as unto the ark of the highest mysteries every tinker will in these days be peeping and not so satisfied will also be prating."³¹⁸ If the disciplinarian view of the press taken by leading churchmen and royalists did not reverse the accelerating pace and diversification of legal publishing, it did invite lawyers to reflect on whether law printing was justified, making a long-present question more pressing and disturbing. Hudson's attack on legal publishing, Pulton's and Powell's forthright defense, and Caesar's, J.L.'s, and Coke's reassurances to critics were all answers to this question, part of a debate whose legacy lay in the apologies for and defenses of going into print offered in late Elizabethan and early Stuart lawbook prefaces. Lawyers printed, but they looked over their shoulder.

C. *Print and Manuscript as Media for Transmitting Law*

Common lawyers retained and conveyed law through the simultaneous use of print, manuscript, and oral tradition. Most legal literature was in manuscript, not print, particularly among professionals practicing in London or resident in the Inns of Court. Elizabethan and early Stuart lawyers, for example, produced about six to twelve manuscript volumes of law reports for every printed one.³¹⁹ In the century before the Civil War, print became steadily more important, while remaining intertwined with manuscript and oral tradition. The growth of the legal press in scale and diversity made legal texts more widely available to non-professionals and put about half of the commons' available written knowledge into print by the 1630s, according to the estimate of John Baker.³²⁰

How did print, as a medium for transmitting law, differ from manuscripts in ways that might excite anti-publicist unease? To begin crafting an answer, consider the interests of the judges, serjeants, and barristers, the "upper branch" of the legal profession, as a guild (at

³¹⁸ BENN, *supra* note 100, at L28/46, fol. 44v.

³¹⁹ J.H. BAKER, *The Dark Age of English Legal History, 1500-1700*, in *THE LEGAL PROFESSION AND THE COMMON LAW*, *supra* note 240, at 435, 446. The last years of Elizabeth's reign, 1590-1603, generated over 200 extant volumes of case reports, copied from about 20 distinct reporters. See David Ibbetson, *Law Reporting in the 1590s*, in *LAW REPORTING IN BRITAIN 74-75* (Chantal Stebbings ed., 1995).

³²⁰ J.H. Baker, *The Inns of Court and Legal Doctrine*, in *LAWYERS AND LAYMEN 274, 282* (T.M. Charles-Edwards et al. eds., 1986).

the cost of temporarily muting the conflicts within that guild). The years between the Henrician Reformation and the Civil War saw great gains in the influence of the common law in English politics and society, a process that print crucially aided, not least by overwriting local, customary, and memorial legal traditions (an important story, but one for another day). Yet at the same time, the press undermined the profession's collective authority over the organization, transmission, and evaluation of common law knowledge (my interest here).³²¹

Manuscript circulation of common law reinforced collective guild control over legal information. Lawyers and students in the Inns of Court routinely copied manuscripts from one another, at times verbatim, at times combining parts of borrowed texts, in the process leaving out sections and adding cross-references, emendations, and questions. Serjeant Arthur Turnour, for example, assembled large volumes of law reports out of the notes of his Middle Temple contemporaries, thoughtfully naming his sources: Common Pleas cases care of Robert Tanfield preceded those of Henry Yelverton, Robert Brown, and Henry Calthorpe, with arguments by counsel, obituaries, and Turnour's own notes interspersed.³²² John Baker has traced the wanderings from hand to hand of Coke's manuscripts that after forty years were published as parts 12 (1656) and 13 (1659) of the *Reports*. Having "passed into general circulation" they "were avidly copied by legal collectors."³²³

None of the manuscript copies collates exactly with any other, because each copyist made different omissions and took his copies in different sequences. Some of the copies were taken directly from Coke's manual, others at second or third hand. . . . John Bradshaw's copy . . . [included] marginal notes (in a second hand) . . . written after Coke's death The copyists naturally left out what Coke himself had printed, and they also left out in varying degrees what they did not consider useful.³²⁴

³²¹ For the sake of exposition, I have opposed the legal guild and laymen and the London legal world and the peripheries. These are ideal types that obscure the many gradations and linkages among the terms. Nonetheless, comparison of (admittedly overneat) ideal types can illuminate differences between center and periphery and print and manuscripts obscured by their continual interconnections in practice.

³²² See ARTHUR TURNOUR, *REPERTOY AND REPORT* (Harvard Law Library Rare Book Room, MSS 104-107).

³²³ J.H. Baker, *Coke's Notebooks and the Sources of His Reports*, 30 *CAMBRIDGE L.J.* 59, 80-83, 80 (1972).

³²⁴ *Id.* at 81-82. Early modern legal manuscript writers often identified the sources from which they copied cases, monographs, speeches, orders, or other texts, perhaps adding marginalia and comments. A few representative examples include: *Reports*,

Lawyers sometimes brought together disparate genres of legal writing on a given topic, creating specialized manuscript compilations: a Star Chamber collection joining a description of the court's purpose with a primer on procedure and an assembly of cases; a Chancery collection assembling William Lambarde's discourse on the royal courts along with orders and speeches by the Chancellors, forms of oaths, suggestions for law reform, royal patents, case reports, and notes on jurisdictional debates between Coke and Ellesmere.³²⁵

Owners of manuscripts had to decide whether to lend them, and to whom, and on what terms, for they were not freely available to all. Borrowers had to decide what to retain, what to cut, and what to re-shape. A number of consequences followed. First, outsiders to the Inns did not enjoy guaranteed access to manuscripts, which were not "public." Although there was some leakage, lawyers tended to confine manuscripts within legal and governmental circles. Indeed, within the Inns, manuscripts circulated within restricted networks of friends, kinsmen, and senior lawyers. T.F.T. Plucknett has noted that drafts of the anonymous, mid-sixteenth-century *Discourse on Statutes*, perhaps written by Thomas Egerton, show no influence of Edmund Plowden's important collection of case reports until its publication in 1571, suggesting that the author was too junior to warrant inclusion in the group favored with Plowden's writings.³²⁶ Second, the power to shape the collective manuscript record of the law was dispersed within the profession. Each human link in the chain of borrowing and transcription enjoyed relatively little control over the aggregate body of circulating manuscripts, but each could exercise some incremental power in his decisions about whether to lend, borrow, or copy, and in his choices about what to include, exclude, or change. Third, the profession, as a collectivity, inculcated conventions of reading and interpretation in its members that guided the amendment of texts and

Lincoln's Inn, MS Maynard 80; *Reports by Thomas Owen*, Lincoln's Inn, MS Hale 80; *Reports by Richard Hutton*, Lincoln's Inn, MS Maynard 14.

John Baker's *English Legal Manuscripts in the United States of America, A Descriptive List: Part II: Early Modern and Modern Periods (1558-1902)* (1990) and his *English Legal Manuscripts, Vol. II: Catalogue of the Manuscript Year Books, Readings, and Law Reports in Lincoln's Inn, the Bodleian Library and Gray's Inn* (1978) provide the sources from which manuscript writers drew their reports, monographs, and compilations. His notes underscore the extent of borrowing and manuscript splicing within the Inns of Court. See also L.W. ABBOTT, *LAW REPORTING IN ENGLAND, 1485-1585*, at 107 (1973).

³²⁵ See STAR CHAMBER MATERIALS (Harvard Law School Rare Book Room, MS 149); CHANCERY MATERIALS (Harvard Law School Rare Book Room, MSS 1034 & 1156).

³²⁶ See T.F.T. PLUCKNETT, *Ellesmere on Statutes*, in *STUDIES IN ENGLISH LEGAL HISTORY* 242, 245 n.9 (1983).

found their way into the manuscript record as queries, notes, cross-references, and marginalia. Of course, one lawyer's improvement is another's corruption, and authors did not always welcome the quilled interventions of their fellows. As William Barlee's manuscript *Concordance* of manorial law traveled to London from Essex in the luggage of intermediaries, it bore a warning:

If any to whose hands these shall come shall detain the same, so as they cannot pass as it is intended, or if ye deface any of these notes with erasures, annotations or interlinings, let such dread that indignation may grow towards themselves from the prince or from her magistrates for whose honor they are written.³²⁷

* * * *

The press, by contrast, undermined collective control of information. Its effects were least noticeable within the Inns, where lawyers and students used printed books in ways that minimized their difference from manuscripts.³²⁸ Consulting both in research, they transcribed sections from one into the other, introducing cases from printed books into commonplaces and manuscript references into the margins of printed works. The printed books owned by Thomas Egerton as a law student in the 1560s still exist at the Huntington Library in California. They contain his notes on cases he heard and read about elsewhere and display the lawyer's characteristic cross-references and "*quere*" and "*nota*" in the margins.³²⁹ The Master of Requests Julius Caesar published a collection of records from his court in 1597, but continued to update the book with manuscript notes of cases, interleaving them with his private copy of the printed book.³³⁰ In this way, lawyers worked into printed books new principles of law and the changing interpretive conventions of the profession.

Updating of this sort was less frequent outside of the London legal world, among the attorneys, solicitors, scribes, minor government officials, justices of the peace, town recorders, country gentry, divines, physicians, and merchants purchasing the growing and diverse number of printed lawbooks. While this burgeoning audience

³²⁷ BARLEE, *supra* note 21, at 1-2.

³²⁸ One important difference was that access to manuscripts rested on the good will of owners, while printed books could be obtained without patronage.

³²⁹ See Louis A. Knafla, *The Law Studies of an Elizabethan Student*, 32 HUNTINGTON LIBR. Q. 221 (1969); as an example, see Lincoln Inn, MS Misc. 94, a gift copy of the fifth part of Edward's Coke's *Reports* (1605), which the recipient covered with law French margin commentary.

³³⁰ See HILL, *supra* note 174, at 235.

supplemented lawbooks with local traditions and recent cases they heard about, they were less likely than London-based legal professionals to criticize and amend texts by consulting a wide range of printed works and manuscripts.³³¹ From the point of view of the legal guild, such readers were doubly problematic. First, they lacked the expository conventions that lawyers absorbed in the Inns of Court and that guided the range of plausible interpretations. Second, they did not know what they were “supposed” to add, subtract, and silently change in printed lawbooks.³³²

The printed text, in other words, “fixed” the law at the moment of publication more decisively outside the London legal world than within.³³³ Consider the reactions of Lord Ellesmere, the Chancellor of England, to Coke’s *Reports*. As the eleventh and final part of the *Reports* emerged from the press, Ellesmere wrote a critique of the series for the Privy Council that contributed to Coke’s fall from office in 1616. Ellesmere noted in one instance that

[w]hile the arguments were even warm in the judges’ mouths the case was likewise warm in the press and published, though there was a writ of error presently brought upon the said judgment in the Exchequer Chamber which yet depends, [and] though by the confidence used by

³³¹ This is, of course, a matter of degree. Surviving justice of the peace manuals, for example, sometimes contain notes on cases and legal points discussed at sessions and assizes and in private conversation. See FELICITY HEAL & CLIVE HOLMES, *THE GENTRY IN ENGLAND AND WALES, 1500-1700*, at 179-80 (1994).

³³² Printed lawbooks often went through multiple editions, with subsequent ones amending and enlarging previous ones—a qualification to the above statement.

³³³ Elizabeth Eisenstein has identified as one of print’s central features its power to fix texts, preventing the losses and accretion of errors characteristic in manuscripts copied and recopied (“textual drift”). She identified textual “fixity” as a “basic prerequisite for the rapid advancement of learning.” In the permanence and accurate reproducibility that print brought to learning was a foundation of scientific progress and a central reason why the Renaissance and Reformation did not fade as had earlier cultural revivals and “heretical” challenges to the Church. See EISENSTEIN, *supra* note 4, at 113-26.

Printing also imposed costs on professions whose knowledge previously circulated in manuscripts and oral tradition. Harold Love found in Coke a reluctance to use print “partly because it involved a sacrifice of control over power-conferring knowledge and partly because printed law took on a fixed, unnegotiable quality.” LOVE, *supra* note 150, at 163.

In this Part of the Article, I have used Eisenstein’s and Love’s suggestions as a starting point, and have asked further: How—by what process—did law printing transfer some measure of guild control over legal knowledge? To whom was power transferred? And with what consequences?

the reporter in setting down the case the party is much discouraged in his prosecution.³³⁴

Of another case, he said: “[M]y Lord [Coke] may seem to have overrun the law. For the law is in a manner stopped by the printed case, and the party is disheartened to prosecute his writ of error.”³³⁵ What did Ellesmere mean by his revealing phrases—Coke has “overrun the law,” and the law is “stopped by the printed case”? On the literal level, he made the nice psychological observation that the publishing of a judicial decision when so few cases were printed suggests finality and disheartens appellants, even though technically they may continue their appeal. But he also meant something broader. Through print, Coke’s *Reports* had “overrun” and “stopped” the law by fixing it in place before the legal profession had incorporated the results of the appeal and of subsequent interpretation.³³⁶ Future readers of Coke’s *Reports* aside from those “in the know” in the London legal world would find only Coke’s text, frozen in time, without the slowly changing, collectively generated apparatus of interpretation available from manuscripts and conversation, without the endnotes and marginalia indicating the results of the appeal, citing to other cases, and suggesting problems and implications in the analysis.

Printing not only “fixed” the law but allowed the author of a published work, like Coke, to project intellectual power better than the writer of manuscripts. As often noted, print’s celerity, lower cost, and reproducibility gave it an advantage over manuscript.³³⁷ But so did its ability to partly dissociate legal knowledge from the interpretive pressure exercised in the London legal world. First, the press reduced the legal guild’s power to set the range of a text’s distribution. A manuscript work spread only if authors allowed borrowing and if

³³⁴ Lord Ellesmere, *The Lord Chancellor Egerton’s Observations upon the Lord Coke’s Reports*, reprinted in KNAFLA, *supra* note 7, at 297, 314-15 (speaking of the Magdalen College Case).

³³⁵ *Id.*, reprinted in KNAFLA, *supra* note 7, at 314. Coke printed a decision in *The Case of the Mayour and Burgesses of Lynn*, 10 Co. Rep. 120r-126r (C.P. 1613), before the case could be appealed on writ of error to the King’s Bench.

³³⁶ Ellesmere, along with Bacon and other royalists, criticized Coke’s consistently narrow interpretations of the scope of the royal prerogative and of ecclesiastical jurisdiction. In this Part, however, I have chosen to concentrate on the consequences of Coke’s *Reports* being printed rather than on their political slant (though, of course, the latter made the former more important).

³³⁷ In the 1620s, stationers charged about £13 for a 400-leaf volume of manuscript law reports, at least 10 times the cost of the printed folios of Dyer’s or Plowden’s *Reports*. See J.H. BAKER, A CATALOGUE OF ENGLISH LEGAL MANUSCRIPTS IN CAMBRIDGE UNIVERSITY LIBRARY at xliiii (1996).

readers went to the trouble and expense of copying. Protectiveness by owners or uninterest by potential readers made a text peripheral, or even stillborn. Publication reduced the guild's ability to block or deflect a work by giving a national market of printers, booksellers, and customers a say in the scope and conditions of the work's dispersion. Second, print reduced the guild's collective influence over the meaning of texts, which it exercised explicitly through textual amendment during the process of recopying and compilation and implicitly through the inculcation of reading conventions. The press undermined this collective authority by concentrating interpretive control at two points: the point of production, where the author or printer shaped what would be printed; and the point of reception, where the reader made sense of the book. Third, printing diminished the bar's control over the assessment of reputation. Evaluating the worth of manuscript legal literature was an intramural affair for lawyers. But readers outside of the London legal world took up printed works with fewer cues from the guild. Unschooled in lawyers' conventions for judging authority, how would they know they were supposed to value the reports of Plowden and Dyer higher than those of Dalison?³³⁸ Did they know that Ellesmere and Francis Bacon had criticized Coke's *Reports*, and if so, could they find the criticisms?

* * * *

In partly dissociating control of legal knowledge from guild control, the press enhanced the power of the author and printer to shape the law, granting them a tacit power of governance unexplained by jurisprudential and constitutional principles. The law printer before the Civil War enjoyed a royally guaranteed patent giving him the monopoly power to select and decline texts (subject to licensing, censorship, intervention by powerful political and legal figures, and market demand).³³⁹ Historians of English legal literature have emphasized how much the record of the common law owed to printers' choices about what to publish and what to omit or add to books.³⁴⁰ The printer's role as midwife in the genealogy of doctrine went along with

³³⁸ For a reconstruction of these conventions, see JOHN WILLIAM WALLACE, *THE REPORTERS ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS* (4th ed. 1882).

³³⁹ The King's printer enjoyed the monopoly right to publish statutes and proclamations, and the crown could grant a special patent to an author to bring out a given work.

³⁴⁰ See WALLACE, *supra* note 338; 6 HOLDSWORTH, *supra* note 4; 2 *THE REPORTS OF SIR JOHN SPELMAN*, *supra* note 20; BAKER, *supra* note 319, at 435-60; Theodore F.T. Plucknett, *The Genesis of Coke's Reports*, 27 *CORNELL L.Q.* 190 (1942); Graham, *supra* note 65, at 6-24.

a de facto power as law reformer and redactor. The sixteenth-century publication of the yearbooks and the statutes helped standardize the corpus by eliminating the textual variation inherent in manuscript transmission. The yearbook printer Robert Redman interspersed comments in the cases and attached cross-references, which fooled Coke, who thought these sixteenth-century additions demonstrated how lawyers cited cases in the fourteenth century.³⁴¹ Statutory abridgments and compilations, no mechanical reproductions, did more. They cut out private acts, omitted laws relating to localities, edited or eliminated preambles, and appended explanatory citations to statutes. Printers and compilers thus guided the exposition of the law.³⁴²

Headings, notes, marginalia, even typesetting guided legal interpretation. In a debate in the 1610 Parliament over the Crown's power to impose import duties, for example, royalists and anti-royalists differed over the better reading of the statute 25 Edward I, ch. 7. Commons member James Whitelocke noted the royalist claim that "the King's restraint from imposing has relation only to staple commodities, viz., cloth, wool and leather, and that the words *no such things* [in the statute] have only reference to them." But, he observed, the "original [manuscript] has no sections (though the printed book be divided into chapters) but is one entire act," and "*such things* must needs be expounded as a relative to the whole plaint."³⁴³ Statutory compilations sometimes added margin references, a star or a pointing hand, to direct justices of the peace to acts of particular interest. This practice established an informal canon of "relevant" statutes, a canon supplementing the one created by justice of the peace manuals.³⁴⁴ A 1604 edition of Glanvill's *Tractatus de Legibus* placed a star in the margin by each section where the text paralleled the *Regiam Majestatem* of Scotland in order to demonstrate the consonance of ancient Scottish and English law, a tactic useful in legitimating the new Scottish-born

³⁴¹ See BAKER, *supra* note 319, at 443.

³⁴² Compilers of printed abridgments implored readers to consult the unabridged statutes when needing the full text of an act, but in reality, as all knew, abridgments typically served as both the starting and ending point. See, e.g., WILLIAM RASTELL, A COLLECTION OF ALL THE STATUTES (1579 ed.); FERDINANDO PULTON, A COLLECTION OF SUNDRY STATUTES FREQUENT IN USE (1636 ed.); T.M., *Preface* to EDMUND WINGATE, EXACT ABRIDGMENT OF ALL STATUTES IN FORCE (1667 ed.).

³⁴³ James Whitelocke, Speech to the House of Commons, (July 2, 1610), in 2 PROCEEDINGS IN PARLIAMENT, *supra* note 119, at 222.

³⁴⁴ See A COLLECTION IN ENGLISH OF THE STATUTES NOW IN FORCE (1594 ed.); T.M., *Preface* to WINGATE, *supra* note 342.

King of England, James I and his desired union of laws between England and Scotland.³⁴⁵ The Restoration royalist lawyer Richard Atkyns, with the benefit of hindsight, underscored the lawmaking power of printers. Defending the revived patent system, he charged that unlicensed printers might alter

the ancient lawbooks, and cast them into a new model of their own invention; that by degrees the state and truth of the good old laws by which men hold their lives and estates, should utterly be lost and forgotten, and new laws framed to fit the humors of a new invented government.³⁴⁶

But more than the organization, the *fact* of printing was a form of interstitial lawmaking. To be sure, John Baker has vigorously warned against overestimating the importance of printed law to barristers disdainful of the frequent textual corruptions of published works and reliant on manuscripts and oral lore, which they used to supplement and correct print.³⁴⁷ A point well taken, yet even among barristers, printed lawbooks provided a convenience, lower cost, and ease of acquisition that the numerous, but unevenly distributed and sometimes difficult to obtain manuscripts could not offer. Published lawbooks provided a shared professional starting point.³⁴⁸ And for attorneys, officials and laymen outside the ambit of the Inns of Court, the starting point was very important indeed. The further from the oral and chirographic resources of the Inns, the more published works set standards and enjoyed a tacit power of governance. Justice of the peace manuals and primers on manorial court-keeping tutored amateur officials, furthering uniformity in practice and expectation—and thus, in a sense, of law—throughout the countryside.³⁴⁹ Coke's *Com-*

³⁴⁵ See *The Printer to the Reader*, in GLANVILL, TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS at iiii-iiiv (1604 ed.). The previous edition, published in 1555, did not have this device. The divine Roger Fenton cited the printer's direction as evidence for the consonance of ancient Scottish and English law. See ROGER FENTON, A TREATISE OF USURY 72 (1611).

³⁴⁶ RICHARD ATKYNS, THE ORIGIN AND GROWTH OF PRINTING 15 (1664).

³⁴⁷ See BAKER, *supra* note 319, at 435-60.

³⁴⁸ David Ibbetson's study of citation practices in the late Elizabethan Inns of Court finds relatively few allusions to private manuscript law reports. The "use of such precedents was very definitely haphazard rather than systematic . . . Careful examination of the arguments in some of the leading cases in the period . . . reveals an enormous preponderance of reliance on printed materials." David Ibbetson, *Law Reporting in the 1590s*, in LAW REPORTING IN BRITAIN 84-85 (Chantal Stebbings ed., 1995).

³⁴⁹ See 2 SIDNEY WEBB & BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT: FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT: THE MANOR AND THE BOROUGH 12 (1908).

plete Copyholder (1630) downplayed contradictions and gaps in the common-law cases about copyhold tenure, suggesting a coherence that eventually became law as the book defined practice among lawyers, stewards, and tenants.³⁵⁰ Even the style of publication induced expectations that helped define constitutional powers. The House of Commons' Petition of Temporal Grievances presented to King James I in 1610, for example, tried to stop an impending compilation of royal proclamations. Commons worried that proclamations, of late more frequent and ambitious, would by degrees "increase to the strength and nature of laws," undermining liberty and inviting arbitrary government:

And this their fear is the more increased by . . . the care taken to reduce all the proclamations made since your Majesty's reign into one volume, and to print them in such form as acts of parliament formerly have been and still are used to be, which seems to imply a purpose to give them more reputation and more establishment than heretofore they have had.³⁵¹

Printing redistributed law between a published foreground and a manuscript and oral background, lending typographical salience and weight to some argumentative possibilities and not to others within the fluid constitution and common law.³⁵² This is only to make explicit one of the reasons that manuscript reports did not attract the governmental scrutiny that Ellesmere and Bacon leveled at Coke's *Reports*.³⁵³ But where did this "authority" come from? Constitutional and jurisprudential theory gave cases, proclamations, and monographs put in print no more credence as the record of custom and precedent, and as the expression of professionally-shared common erudition, than those written in manuscript. It was the underspecification (by modern standards) of constitutional authority in early

³⁵⁰ See GRAY, *supra* note 241, at 94.

³⁵¹ Petition of Temporal Grievances (July 7, 1610), in 2 PROCEEDINGS IN PARLIAMENT, *supra* note 119, at 259. See also Elizabeth Read Foster, *Printing the Petition of Right*, 38 HUNTINGTON LIBR. Q. 81-83 (1974).

³⁵² By the early seventeenth century, lawyers routinely alluded to the assumed prominence of printed law, whether or not they approved of the phenomenon. "Ancient terms or years, after the example of Littleton," wrote Coke, "are to be cited and vouched for confirmation of the law, albeit they were never printed." COKE, FIRST INSTITUTE, *supra* note 45, at 249b (1628).

³⁵³ See 13 THE WORKS OF FRANCIS BACON, *supra* note 82, at 76-82, 85-97 (1872); Ellesmere, *supra* note 334, reprinted in KNAFLA, *supra* note 7, at 297-318. As a contemporary Fleet street doggerel put it: "Coke could cook law books/But he couldn't cook by the books/He could only cook books for Cokes." See CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 390 (1957).

modern England and, hence, the relatively larger role played by the interpretive conventions of lawyers and other political actors in defining the fluctuating constitution that opened space for printers and authors to insinuate “new invented government” through their shaping of legal texts.³⁵⁴

The power of authors and printers to set standards and bring selected legal knowledge into the light carried the corollary power of casting the remaining bulk of common law materials further into the shadows. Early modern lawyers knew that printed books could quell debate and suggest a settled uniformity of opinion, killing off inquiry as readily as furthering it. Francis Bacon, for example, warned that published scientific works claimed for themselves “blighting authority [that] precludes fruitful research.”³⁵⁵ Lawyers who appreciated Coke’s value as an “oracle” also recognized that his reputation dissuaded them from investigating the changing and ambiguous manuscript and oral traditions that he claimed to summarize. William Prynne, in his post-Restoration incarnation as the Keeper of the Records in the Tower of London, published a critique of Coke’s *Fourth Institute*, in which he complained that Coke’s

quotations (through too much credulity, or supineness) are generally received, relied on by a mere implicit faith, as infallible oracles, not only by most young students and professors, but most ancient sages of the law in their arguments and resolutions; yea by many members of Parliament in their debates, conferences, without the least examination of their originals.³⁵⁶

To Prynne, Coke had synthesized and brought to light a complicated tangle of yearbooks, circulating manuscripts, common erudition, and oral tradition, but at the cost of embalming what he displayed. Reliance on printed text allowed the original sources themselves to go unconsulted and slip towards darkness.

³⁵⁴ Restoration royalists implicitly recognized the point in their desire to crack down on “undisciplined” law printing. Richard Atkyns followed Hobbes’s call for the concentration of legal promulgation and interpretation in the sovereign. Atkyns understood the laws as the King’s “property,” not to be published without express permission lest printers introduce innovations and false constructions. See RICHARD ATKYNS, *THE KING’S GRANT OF PRIVILEGE FOR THE SOLE PRINTING OF COMMON LAW BOOKS DEFENDED* 9-11 (1669).

³⁵⁵ ELSKY, *supra* note 184, at 209 (quoting Francis Bacon).

³⁵⁶ William Prynne, *To All Ingenuous Readers, Especially the Generous Students and Professors of the Common Lawes of England, in BRIEF ANIMADVERSIONS ON, AMENDMENTS OF, & ADDITIONAL EXPLANATORY RECORDS TO THE FOURTH PART OF THE INSTITUTES OF THE LAWES OF ENGLAND; CONCERNING THE JURISDICTION OF COURTS* (1669).

Law reformers took advantage of print's unwitting lethality. Francis Bacon submitted to James I a *Proposition Touching the Compiling and Amendment of the Laws of England* (MS, 1616) purporting to leave the "matter of the laws" alone while reforming "the manner of their registry, expression and tradition." Bacon pressed for the rationalized compilation and publication of only the living law, leaving the rest to wither. He advised reprinting in full or summarizing records, charters, yearbooks, and judicial cases, leaving out overruled cases, frivolous questions, repetitious points, antinomies, and "idle queries," which "were better to die than to be put into the books." Reissue the statutes shorn of all obsolete acts, with concurrent laws reduced to one uniform enactment, the new books free of Acts "whereas the case by alteration of time is vanished; as Lombard Jews, Gauls half-pence; etc." These latter statutes "may nevertheless remain in the libraries for antiquities, but no reprinting of them."³⁵⁷ Bacon's strategy took a more partisan turn with Robert Cotton's advice to the statutory compiler Ferdinand Pulton that "some dangerous statutes might not be published."³⁵⁸

* * * *

The multiplication of late Elizabethan and early Stuart monographs ambitious to impose a structure on the common law underscored the threat and promise of the printer's and author's tacit jurisprudential power.³⁵⁹ In response to complaints about the common law's formlessness, uncertainty, and unwieldy bulk, lawyers followed the Continental legal humanists in using the analytic categories of topical logic and rhetoric—the Aristotelian four causes, subject and accident, genus and species—to reduce their subject to order.³⁶⁰ William Staunford's mid-sixteenth-century monographs on crime and

³⁵⁷ 13 THE WORKS OF FRANCIS BACON, *supra* note 82, at 61-71; see also BACON, *A Memorial Touching the Review of Penal Laws and the Amendment of the Common Law* (MS, 1614), in 12 THE WORKS OF FRANCIS BACON, *supra* note 82, at 84-86.

³⁵⁸ KEVIN SHARPE, *SIR ROBERT COTTON, 1586-1631: HISTORY AND POLITICS IN EARLY MODERN ENGLAND* 42-43 (1979).

³⁵⁹ Legal methodizers and reformers of the law's "registry, expression and tradition" liked to insist that they were not imposing a personal or "artificial" template on the law, but were revealing a structure latently there, as yet hidden, like Michelangelo's statue already present within the untouched marble and needing only the creator's hand to uncover it.

³⁶⁰ See Terry Kevin Shaller, *English Law and the Renaissance: The Common Law and Humanism in the Sixteenth Century* 308-09 (1979) (unpublished Ph.D. dissertation, Harvard University) (on file with the author); Knafla, *The Influence of Continental Humanists and Jurists on English Common Law in the Renaissance*, *supra* note 59, at 60-71; Prest, *The Dialectical Origin of Finch's Law*, *supra* note 50, at 326-52.

prerogative began a proliferating tradition of organizing “methodically” under “divisions” a given section of the law (e.g., the law of wills, writs, fines, equity, copyhold, women, and so on).³⁶¹ By the early seventeenth century, ambitious writers tried to sketch the lineaments of the common law as a whole. Prominent examples include John Cowell’s Latin *Institutiones Juris Anglicani* (1605), Henry Finch’s French *Nomotechnia* (1613) and its English translation *Law, or a Discourse Thereof* (1627), and Edward Coke’s four-volume *Institutes* (1628-1644). The very lack of a core common law text akin to the civilians’ *Corpus Juris* enhanced both the freedom of writers to impose a structure and the interest of lawyers in finding one.

The centrality to both law reformers and “methodizers” of eliminating the superfluous and imposing order on the common law made more salient the devolution of control over legal knowledge from the guild, and made more plausible the anti-publicists’ unease with law printing.³⁶² By the early seventeenth century, the guild as a collectivity

³⁶¹ See, e.g., STAUNFORD, LES PLEES DEL CORON, *supra* note 218; STAUNFORD, AN EXPOSITION OF THE KING’S PREROGATIVE, *supra* note 218; SWINBURNE, *supra* note 178; THELOALL, *supra* note 177; West, *supra* note 211; CALTHROPE, *supra* note 211; COKE, *supra* note 211; DODDERIDGE, *supra* note 211; E[DGAR], *supra* note 211; PULTON, *supra* note 78.

³⁶² “Pruning” was the leitmotif of law reformers hoping to trim and recompile the laws or, less drastically and more typically, the statutes. For decades would-be statutory redactors worked variants on Elizabeth’s Lord Keeper Nicholas Bacon’s *A Devise How the Statutes of the Realm Are to Be Ordered and Printed*, a plan calling for 20 committees of four lawyers, led by the judges, to eliminate redundancies and abrogated laws and set the rest into a printed volume “digested into titles.” Nicholas Bacon, *A Devise How the Statutes of the Realm Are to Be Ordered and Printed* (British Library, Harleian MS 249, #20, fol. 117b-118a). Although nothing came of Bacon’s scheme, interest in a printed redaction of the statutes under official auspices continued throughout the latter sixteenth century and into the seventeenth century. The Privy Council revived Bacon’s plan in preparation for the Parliament of 1589 and even appointed committees of lawyers, though without ultimate success. See ELTON, *supra* note 119, at 279 n.4. Committees to redact the penal laws sat in the parliaments of 1584, 1593, and 1621. See Shaller, *supra* note 360, at 308-09; 2 COMMONS DEBATES 72-73 (Wallace Notestein et al. eds., 1935) (1621) (efforts of a committee of lawyers including Edward Coke, Heneage Finch, William Noy, and John Davies to rationalize the penal laws on the advice of Chancellor Francis Bacon); 4 *id.* at 48 (same). For representative comments in favor of statutory redaction, see, for example, PULTON, *Preface to ABSTRACT*, *supra* note 20; COKE, *supra* note 30, at ix-x. For an overview of Elizabethan and early Stuart codification plans, see Shapiro, *supra* note 90, at 428-47.

James I viewed the common law precedents as well as the statutes as obscure and riddled with conflicts, needing to be “purged and cleared.” All “contraries should be scraped out of our books,” he argued, calling for the law to be “reviewed, and reconciled” with the advice of parliament. JAMES I, *Speech of 1609 to Parliament*, in THE POLITICAL WORKS OF JAMES I, *supra* note 311, at 306, 312 (1609).

had surrendered some power over the content and design of lawbooks to individual authors like Coke, Finch, Plowden, Manwood, Pulton, and Sheppard. However lacking in formal jurisprudential or constitutional warrant, authors could transform the law on the ground through the law in the books in a way “not done” in the mid-sixteenth century. Touched by the methodizing impulse and facing a burgeoning readership of law students and lay officials, writers proposed to do just that, not least the would-be reformers and redactors such as Bacon’s proposed commissioners for editing the common and statute laws.

The guild, again considered as a collective, had fewer resources for stopping or deflecting methodizing and redacting of which the majority disapproved. To bring together the points suggested earlier, the press reinforced the implicit, interstitial lawmaking and political power of authors and printers and enhanced their ability to project intellectual authority, especially outside the confines of the London-based barristers. Print created a larger, more diverse audience among whom the guild’s conventions of interpretation and assessment of reputation acted as less of a check, or ratification, on authorial lawmaking. And it cast a shadow over unpublished manuscripts and oral traditions, creating foreground and background distinctions that undermined, though not eliminated, the bar’s collective power to assign weight to different common law texts and arguments.³⁶³

Julian Martin has interpreted Francis Bacon’s scattered suggestions for “pruning” and reordering the law as part of a consistent program of redaction under royal control. Bacon, Martin concludes, wished to transfer a measure of legal ordering—and hence of interstitial governance—from the profession to Crown appointees. JULIAN MARTIN, FRANCIS BACON, THE STATE, AND THE REFORM OF NATURAL PHILOSOPHY 105-40 (1992).

The Church of England’s Canons of 1604 promulgated by Archbishop Richard Bancroft with James’s encouragement provided a lesson in how far a royally sponsored pruning might go. Bancroft sorted through the fragmentary, ill-defined, and sometimes contradictory sources of “constitutional” authority in the Elizabethan church—royal injunctions, Episcopal visitation articles, previous canons, correspondence, and much else—sifting, rejecting, adding, elaborating in order to codify English ecclesiastical practice. In the process of defining doubtful points and closing loopholes for nonconformity, the Canons curtailed the local diversity of the Elizabethan church, possible in part because the multiplicity and imprecision of church law sheltered ambiguities. See I USHER, RECONSTRUCTION, *supra* note 244, at 359-402; 2 *id.* at 273-88.

³⁶³ Print by no means supplanted manuscript and oral tradition as valid repositories of the law. Well into the eighteenth century, lawyers invoked manuscripts or their memories to amend or overturn printed lawbooks, particularly reporters. See, e.g., THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 102-05, 183-85 (James Oldham ed., 1992) (setting aside supposedly inaccurate reports). While the press by no means eliminated the bar’s ability to draw simul-

Consider how many points in the anti-publicist critique of print presupposed that the press would diminish the guild's power to guide and legitimate legal knowledge: the commoning of law; the unveiling of "mystery" undermining the prestige due the carriers of the national legal heritage; and the exacerbation of faction and disputation as legal information spread among a laity unable to understand or judge it and likely to misuse it. If the expansion of legal publishing furthered the common law's authority in early modern England, it came with the price of empowering authors, printers, and readers at the expense of the collective of the guild. The anti-publicists' themes may have resonated with lawyers unhappy at the price.

IV. WHAT WAS AT STAKE IN THE DEBATE: THE "OWNERSHIP" OF THE LAW AND THE COMMONING OF THE COMMON LAW

My elaboration of the professional, intellectual, and political conditions that made plausible anti-publicist apprehensions and engendered the debate over legal publication should not obscure a critical fact: the publicists won. However complicated the foundations of anti-publicist thought, were their fears mere formulaic complaints without effect? The anti-publicists, after all, lacked a discernible program of action and an attainable political goal. They did not aim to eliminate law printing. They did not foresee reversing the growth of the press. And they did not call for a system of control, for the censors and patentees already had imposed one. Warning and sneering, grumbling, publishing with apologies, was the anti-publicist critique anything more than a rearguard action, a local and ineffectual manifestation of the "politique" pessimism about popular tutelage prevalent in latter sixteenth century Europe? In what sense, then, did the debate over legal publishing matter?

First, and most narrowly, the anti-publicists could have retarded the legal press. Might the rate of growth and diversification in law printing from 1580 to 1640 have been higher if anti-publicists had not censured the press and trimmers concluded that the benefits of publication to professional standing and ego did not make up for the disapproval of colleagues, patrons, and clients? A few lawyers, it is clear,

taneously on print, manuscript, and oral tradition, it concentrated in the hands of authors and printers a disproportionate power to set argumentative starting points.

In the long term—a long term measured in centuries—print wore away at the legitimacy of manuscripts and oral tradition as normatively valid repositories of law. Their importance continues to the present day in practice, but they are difficult to legitimate when in conflict with print.

chose manuscript circulation as a matter of principle. Their aversion to print was more than a pose acted as inky hands searched for the *errata*. Hudson's Star Chamber treatise provides a vivid example, as do Matthew Hales's notes and treatises, bequeathed to Lincoln's Inn along with a clause forbidding publication: "They are a treasure worth the having and keeping, which I have been near forty years in gathering They are a treasure not fit for every man's view, nor is every man capable of making use of them."³⁶⁴ Yet such evidence is rare next to the overwhelming majority of English legal manuscripts revealing nothing of their author's opinions about the relative suitability of press and manuscript as media of transmission.³⁶⁵ The mere existence of a document in manuscript rather than print provides little guidance. To what extent did the author's considered distaste for the press, if any, argue for manuscript circulation? And to what extent did practical reasons—lack of general interest in private collections and jottings, desire to avoid controversy and the labor of preparation, low quality (as judged by the author, colleagues, patrons, printers, or licensors), or too few expected sales to justify printing costs?³⁶⁶ From a distance of 400 years, the dampening influence of anti-publicist sentiment remains difficult to gauge, and while it no doubt had an effect, the flourishing of law publishing suggests caution.

Second, the debate over legal publishing complicates the story historians are beginning to tell about the consolidation of lawyers into a "profession" in Tudor and early Stuart England. In collecting the multifarious social and institutional reasons for the "rise of the barristers," Wilfrid Prest noted the emergence in the century before the Civil War of an ideology of public service and wise counsel to justify lawyers' work, wealth, and power. M. Ethan Katsh called attention to the role of printing in standardizing and enlarging legal literature, making the law library a symbol of the specialized knowledge whose mastery supported the bar's comradeship and its public recognition as a distinct and privileged order. The press also supplied the same

³⁶⁴ A CATALOGUE OF THE MANUSCRIPTS IN THE LIBRARY OF THE HONOURABLE SOCIETY OF LINCOLN'S INN at vii (Joseph Hunter ed., 1838).

³⁶⁵ I distinguish judgments about whether a given work deserved publication, for these assumed the propriety of print and manuscript as media.

³⁶⁶ From the point of view of an author and the legal community, manuscript circulation no more suggests distaste for the press than lack of interest in the fax or the internet today implies considered dislike of those media. For a discussion of the complex factors behind authors' prudential judgments about whether to seek manuscript or print circulation, see LOVE, *supra* note 150, at 3-89.

books to lawyers in widely separated areas, suggesting readers' ties to each other wherever located, fostering and coordinating a group identity beyond the ambit of the personal contact and spoken word of the Inns of Court.³⁶⁷ Yet the debate over legal publishing reveals anxieties and contentions within the process of professional coalescence that these historians richly depict. As I argued in Part III.C, the press displaced some measure of control over legal knowledge from the guild as a collective toward individual authors and printers, thereby introducing new inequalities of power through the same medium drawing lawyers together into a profession. The printed books that reinforced a shared identity among lawyers also opened legal literature to lay assessment, assimilation, and evaluation of reputation. If, as Katsh suggests, the law library stood as a symbol of lawyers' specialized knowledge that inclined laymen to accept the bar's interpretive privilege, the act of printing that built up those libraries and extended the common law more deeply into English culture also compromised the formerly less extensive, but more autonomous, realm of guild interpretation. Finally, the persistent skepticism over whether legal publishing hurt laymen in the guise of helping them suggests an important fissure within the ideology of public service that Tudor lawyers articulated.

Third, the debate over legal printing offers a corrective to another story of consolidation advanced in early Stuart historiography: the flourishing of the "common law mind." That phrase, of course, was made popular by J.G.A. Pocock's seminal *The Ancient Constitution and the Feudal Law*. Later scholars have shown that the "ancient constitution" that Pocock saw at the heart of political discourse was in its extreme Cokean version a minority position even among lawyers and was not a necessary foundation for a customary constitutionalism rooted in the common law. But they have nonetheless reiterated the view that the Elizabethan and early Stuart common law provided an influential language, or set of categories, for discussing national politics.³⁶⁸ Supporters and opponents alike of royal policies, economic

³⁶⁷ See PREST, *supra* note 6, at 1-3, 322-26; Wilfrid Prest, *Why the History of the Professions is Not Written*, in LAW, ECONOMY & SOCIETY: ESSAYS IN THE HISTORY OF ENGLISH LAW, 1750-1914, at 300, 300 (G.R. Rubin & David Sugarman eds., 1984); KATSH, *supra* note 4, at 203-17.

³⁶⁸ See POCOCK, *supra* note 6, at 54-55; Brooks, *The Place of Magna Carta*, *supra* note 79, at 57-88; GLENN BURGESS, THE POLITICS OF THE ANCIENT CONSTITUTION: AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT, 1603-1642, at 119 (1993); SOMMERVILLE, *supra* note 248, at 86-111; DEREK HIRST, AUTHORITY AND CONFLICT: ENGLAND, 1603-1658, at 85 (1986).

programs, and church reforms claimed the support of the common law. Parliamentary speeches, notes on State Trials, advice on legal strategies, and opinions on the lawfulness of policies spread through the gentry and increasingly through the "middling sort" via manuscript copying, newsletters, and "separates" (individual transcripts, pamphlets or accounts).³⁶⁹ Puritans, for example, sent from London to the provinces denials of the lawfulness of episcopal deprivation of nonconformists and of the ex officio procedure of the High Commission, suggesting strategies of resistance.³⁷⁰ The Catholic controversialist Robert Parsons disputed Coke's defense of the Crown's system of ecclesiastical discipline in *Caudrey's Case*, the Jesuit citing yearbooks and treatises to rebut Coke point by point.³⁷¹ The Forced Loan provoked a surge of "separates" carrying parliamentary speeches and expositions of statutes denying the propriety of benevolences.³⁷² Invocation of a widely shared "common law mind" explains why disputants thought the parsing of statutes and precedents a persuasive strategy within the political nation. But where does the anti-publicist vocabulary of mystery and "commoning" fit into a "common law mind" implicitly recognizing the appropriateness, or at least unavoidability, of legal tutelage? Read as discomfort with legal explication and dissemination, with legal publicity rather than with print *simpliciter*, the anti-publicists suggest that Courtly and professional acceptance of the common law as a mechanism of governance and source of political legitimacy could coexist with suspicion of the independent judgment invited by common law political argument. Awareness of the costs of appealing to the "common law mind" offers not a denial but another form of qualification to using that historical construct as evidence of a fundamental political consensus underneath surface policy disagreements.

Fourth, and most importantly, the debate over legal publishing signaled a contested transformation underway in the meaning of the common law, a transformation with significant political implica-

³⁶⁹ See Richard Cust, *News and Politics in Early Seventeenth-Century England*, PAST & PRESENT, Aug. 1986, at 60. See generally F.J. Levy, *How Information Spread Among the Gentry, 1550-1640*, J. BRIT. STUD., Spring 1982, at 11; LOVE, *supra* note 150, at 9-22 (on parliamentary "separates").

³⁷⁰ See, e.g., *The Puritans' Directions to Avoid the Proceedings of the Bishops* (MS, 1604), reprinted in 2 USHER, RECONSTRUCTION, *supra* note 244, at 362-65.

³⁷¹ See PERSONS, *supra* note 246, at 500-42. Coke printed his opinion in *Caudrey's Case* in EDWARD COKE, REPORTS, pt. 5, at xv-lxxviii (1826) (1605).

³⁷² See RICHARD CUST, THE FORCED LOAN AND ENGLISH POLITICS, 1626-1628, at 150-85 (1987).

tions.³⁷³ At stake were different answers to the question: in what sense, and to what purpose, was the common law to be “common”? Let me bring together strands from earlier parts of this Article to suggest the centrality of the problem. Between the ascension of the Tudors and the Civil War the common law moved along a continuum, in the realm of perception, from a guild possession towards a national inheritance. This process went hand-in-hand with the debate over legal publishing. Many of the developments engendering the debate helped along the redescription of the common law: the growing dissemination of legal knowledge outside the “framings” of government and the profession; the expansion of lay and professional readerships for printed lawbooks; the envisioning, even welcoming, of a broader, nonprofessional audience for those books; the humanist recommendation of law as a desirable attainment of the gentleman; the growing use of common law categories as a *lingua franca* of governance and political debate; and the importance of common law argumentation in the constitutionalist wing of puritanism, in the resistance to manorial governance, and in the various oppositions to royal policies prevalent after the 1590s, which polemically identified the common law with the defense of liberty and property and with constitutionalism itself. Changes in the communication and use of the common law weakened its late medieval identification as but the course of the royal courts or a national custom effectively committed to guild custody. For the common law was becoming “commoned” along the two interlinked dimensions of knowledge (who knew, could know, and was supposed to know the reasons, fictions, and judgment of the law?) and of ideology (to whom did the common law “belong”?).

It is possible to see the anti-publicists as a backward-looking reaction against the implied national proprietorship and weakening collective professional authority over the uses of legal knowledge suggested by commoning. They appear as a protest against the erosion of guild control over the law, in particular the dignitary loss this entailed, that went hand in hand with the common law’s expanding presence in society and governance. Yet it is also possible to view them as politically *au courant* by emphasizing the congruence, at the level of implicit premises, between themselves and a contrary, absolutist understanding of how the law was to be “common” emerging in the last decades of Elizabeth’s reign and gathering strength among

³⁷³ I am greatly indebted to Prof. Steven Pincus for suggesting connections between the debate over legal publishing and wider political developments.

the early Stuarts. The royalist credentials of such anti-publicists as Julius Caesar, William Hudson, Anthony Benn, and "J.L." (adamant that rude hands not debase the "flower" of the royal prerogative) suggests the connection. So does their rhetoric of "commoning," mystery, and vulgar misappropriation. Indeed, the very success of Tudor statebuilding and widening use of the common law as a *lingua franca* of governance and political argument invited absolutist ambitions as it made more pressing the problem of defining the origins, role, and "ownership" of legal information. As the poet Fulke Greville noted at the turn of the seventeenth century, legal knowledge brought the power to "[r]eform the judge, correct the advocate/Who knowing law alone commands the state?"³⁷⁴

Absolutists were great friends of legal publication on their own terms, dissemination in the voice of command (in proclamations, statutes, commissions, and assize charges) cultivating order and obedience. They were no legal obscurantists. Let fear of the monarch, William Wilymat preached, make the subject more "attentive and diligent" to read the king's law that he may "live in the more obedient subjection, and not through either ignorance or willful obstinateness to prefer his own will before his lawful magistrate's and higher governor's will, or rather before God's will" expressed by the divine vicegerent, the king.³⁷⁵ The subordination of the ideal subject's "will" to his rulers hints at how Wilymat differed from the innumerable Tudor and early Stuart calls for obedience to constituted law that were not "absolutist." For he contemplated the yielding of will as part of a broader effacement of the political personality of the subject. To the magistrates fell the public business of ordering, steering, and reforming the polity. "Private" subjects must not "of their own motion without any calling busy themselves in public affairs, nor intermeddle in the government," nor "take to themselves authority to redress" complaints or suggest improvements, "having their hands in that respect

³⁷⁴ GREVILLE, *supra* note 45, verse 262.

³⁷⁵ WILLIAM WILLYMAT, A LOYAL SUBJECT'S LOOKING GLASS, OR A GOOD SUBJECT'S DIRECTION 25, 59 (1604) (let subjects learn the prince's laws "for otherwise they must needs incur the crime of undutifulness through lack of knowledge, for how can they obey laws which they never saw"). James I called for clearing away the uncertainties and contradictions of the laws through an Act of Parliament and putting them in the vernacular "as plain as can be to the people, . . . for the conforming themselves thereunto." James I, *Speech to Parliament* (1609), in THE POLITICAL WORKS OF JAMES I, *supra* note 311, at 312 (1609).

as it were bound behind them."³⁷⁶ The divine George Webbe's celebration of quietness as a cardinal social and political value ingeniously inverted the images of dissemination commonly applied to positive and natural law, symbolically replacing consciousness of right with aspiration towards retirement. Quietness needs

to be written and made plain upon [t]ables, that who so runs may read it. And surely, it were to be wished, that this remembrance were often preached in our Temples, proclaimed in our streets, written upon our posts, painted upon our walls, or rather engraven with the point of a [d]iamond upon the [t]ables of our hearts, that we might never forget it.³⁷⁷

Webbe and Willymat meant their aggressive political quietism to dampen public opposition to royal policies drawing strength from humanist celebration of the political *vita activa* and a juristic respect for the liberties of the subject and his lawful pursuit of private interest in public *fora*.³⁷⁸

The absolutist understanding of how the law should be "common" entailed a vigorous program of legal pedagogy in the voice of command married uneasily to a suspicious and restrictive bias against publishing the reasons, fictions, and judgments of the law to citizens active in the public realm, upholding liberties and interests through Parliament, courts, and commissions. But keeping legal information from intermeddling subjects in order to bind their hands behind them was no easy matter when humanist and juristic common law writers had long celebrated the ideal of legal competency (while recognizing that only a few, as a practical matter, would attain fluency). "Do not think, Excellent Prince, that all the conquests you are to make be foreign; you are to conquer here at home the . . . too great liberties of your people, the great reverence and formalities given to your laws and customs," Gray's Inn's Christmas revelers of

³⁷⁶ WILLYMAT, *supra* note 375, at 48. See also SIBTHORPE, *supra* note 71, at 33 ("The people must not be busy-bodies to pry into the princes duty, the laity into the clergy's, or the juror into the judge's, but every one into his own."). In the early seventeenth century, royalists' denunciations of the "busybody" emphasized his meddling in statecraft and public affairs as well as his snooping into the doing of neighbors, making more political a traditionally social curiosity. See, e.g., Joseph Hall, *The Busy-Body*, in CHARACTERS OF VIRTUES AND VICES, reprinted in 7 THE WORKS OF . . . JOSEPH HALL 100, 100-01 (Josiah Pratt ed., 1808).

³⁷⁷ GEORGE WEBBE, THE PRACTICE OF QUIETNESS 8 (3d ed. 1618).

³⁷⁸ On the centrality to absolutism of constraining political participation and judgment to the royal court and its authorized agents, see ROBERT ECCLESHALL, ORDER AND REASON IN POLITICS: THEORIES OF ABSOLUTE AND LIMITED MONARCHY IN EARLY MODERN ENGLAND 1-96 (1978).

1594 mockingly advised their "Prince of Purpoole" through the mouth of an absolutist counselor.³⁷⁹ The absolutist style of making the law common had to answer a troubling question at the heart of the debate over publishing law: Did not the English subject have a "right" of access to the inner reasons of his laws?

Familiar absolutist strategies helped explain why not: the assertion of fictive ownership as a basis for control and the transmutation of right into privilege. Underlying absolutist thought in its ideal-typical form, present but compromised in political argument, were two interlinked images instantiating ambitions at once cultural and intellectual as well as constitutional: the "free" monarch as unbounded; and the king as the universal font, the prime mover of society and government throughout history and in the present, the soul animating the otherwise inert polity.³⁸⁰ Well-known are James I's lectures to Parliament and his judges casting monarchy as the originator of the constitution, the principal lawmaker and law interpreter, and the "fountain" of justice, from which flowed rules, magistrates, and judicature as so many rivulets directed at the king's prudence.³⁸¹ The law, preached James's chaplain John Rawlinson, is "the work of the prince: the prince is . . . the image of God digesting and ordering all things."³⁸² The king stood temporally prior to, as in moments of ne-

³⁷⁹ GESTA GRAYORUM 38 (1688) (MS, 1594). James Spedding, the editor of Francis Bacon's papers, argues on stylistic evidence that Bacon was the author of this speech. See Spedding, in 3 THE WORKS OF FRANCIS BACON, *supra* note 82, at 342.

³⁸⁰ See, e.g., EDWARD FORSET, A COMPARATIVE DISCOURSE OF THE BODIES NATURAL AND POLITIQUE 8, 73-74 (1606); WILLIAM WILKES, A SECOND MEMENTO FOR MAGISTRATES 19, 56 (1608); WILLIAM DICKINSON, THE KING'S RIGHT at B1v-B2r, B3r-v, C1-C3, C4r-v, C4v-D1r (1619); WILLIAM PEMBERTON, THE CHARGE OF GOD AND THE KING 49 (1619); ROGER MAYNWARING, RELIGION AND ALLEGIANCE 9 (1627); VALENTINE, *supra* note 71, at 17-18; JOHN DAVIES, *The Question Concerning Impositions* (MS, c.1610-1625), in 3 THE COMPLETE WORKS OF SIR JOHN DAVIES *supra* note 104, at 26, 53.

³⁸¹ So in the first original of Kings, whereof some had their beginning by Conquest, and some by election of the people, their wills at that time served for Law. Yet how soon Kingdoms began to be in civility and policy, then did Kings set down their minds by Laws, which are properly made by the King only, but at the rogation of the people, the King's grant being obtained thereunto.

James I, *supra* note 375, at 309 (1609). On the centrality of lawgiving and judicature to kingship, see also James I, *The True Law of Free Monarchies* (1598), in *The Political Works of James I*, *supra* note 311, at 55. James acknowledged his moral duty to follow the law in a settled kingdom except in times of emergency.

³⁸² JOHN RAWLINSON, VIVAT REX: A SERMON PREACHED AT PAULS CROSS ON THE DAY OF HIS MAJESTIES HAPPY INAUGURATION, MARCH 24, 1614, at 18 (1619); see also WILKES, *supra* note 380, at 19, 56; DICKINSON, *supra* note 380, at B3r-v, C1-C3, C4r-v (the King as Judge is "to be that majesty and architectonical power, which out of its

cessity he stood above, the law. The law had not preceded and enabled his power. As the law flowed from the king, so did mores, fashions, prosperity, and peace, as rays radiated from the sun. Absolutists liked to apply a household model of governance to the polity, the king as paterfamilias. It suggested the natural provenance as well as unconstrained lawmaking power of the father-king while emphasizing his central educative role to his subject-children, forever in their nonage, absorbing the rays of instruction as they avoided giving offense.³⁸³ It reinforced the pervasive sense of unboundedness, the father-king not compelled to account for his actions or reasons to his own people (one purpose of *arcana imperii* rhetoric) as he was not bound to account to foreign monarchs, the Pope, or the Emperor (one purpose of divine right rhetoric). And it had the further advantage of casting the king as the metaphorical "owner" of the realm as the father owned the household, subjects holding property of him.³⁸⁴

own absoluteness sets down a law, and appoints a public measure"); MAYNWARING, *supra* note 380, at 9; Justice Crawley, *Ship Money Case* (1637), reprinted in 3 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON . . . TO 1783, at 1083 (Howell Thomas Bayly ed., 1768-1815); Anthony Benn, *God Before All, and All After the King* (MS, c.1614-1616), at [11] (Bedford Record Office, MS L28/49) (law "is not so regular and positive as that it binds or gives bounds to sovereign power but submits itself to the king").

³⁸³ The image of the monarch as "sun" also suggested that subjects avoid undue scrutiny lest their eyes be seared. The barrister John Davies's hymn to Elizabeth entitled, *Of the Sun-Beams of Her Mind* (MS, 1599), announced: "Great splendor above measure / Is in the mind, from whence you flow: / No wit may have access to know, / And view so bright a treasure." THE POEMS OF SIR JOHN DAVIES 79, 79 (Robert Krueger ed., 1975).

³⁸⁴ By the law of nature the king becomes a natural father to all his lieges at his coronation. And as the father of his fatherly duty is bound to care for the nourishing, education and virtuous government of his children, even so is the king bound to care for all his subjects.

James I, *supra* note 375, at 55.

[The] King is *Dominus omnium bonorum*, . . . the whole subjects being but his vassals, and from him holding all their lands as their overlord. . . . And as you see it manifest, that the King is overlord of the whole land, so is he master over every person that inhabits the same, having power over the life and death of every one of them. For although a just Prince will not take the life of any of his subjects without a clear law, yet the same laws whereby he takes them, are made by himself, or by his predecessors, and so the power flows always from himself.

James explicitly noted that his argument applied to England as well as Scotland. See *id.* at 62-63, 308 (king, as father of the commonwealth, may dispose of his inheritance as he chooses, favoring one child and disinheriting another); see also WILLYMAT, *supra* note 375, at 24, 58-59, 64; FORSET, *supra* note 380, at 98-99; USSHER, *supra* note 99, at 266-75, 301-23, 305-06 (Ussher applied to the English king the glossator's observation about the Roman Emperor: "Note that the emperor is the father of the law; whereupon the laws also are subject to him.").

Together, this cluster of absolutist tropes provided a foundation for anti-publicist appeals. As the fountain and producer of law, the king owned it as he owned the land. Access to the reason of a law understood as royal "property," as the product of the king and his predecessors, meant access to the privacy of the royal mind, an act of unseemly curiosity, of busyness and meddling. It was the student circumventing the educative plan of the teacher-king, the child demanding more than the father was prepared to tell. The king need not reveal—or more to the point be comfortable with others revealing—the inner reasons of a law that through origination, guidance, and proprietorship was "his." A touch of this spirit infused the absolutist campaign against publicity in statecraft and religion as well as law. "And who sees not what confusion would be brought, as well into a family as a state," wrote Bishop James Ussher, "if a son or servant might have liberty to stand upon terms and chop logic with his father, master, or prince, and refuse to yield obedience to their commands until he should see some reason for it?"³⁸⁵ For the unbounded royal fountain and proprietor of the law, disclosure of legal reasons, fictions, and titles was an act of grace, not an obligation; for the subject of law, disclosure was a privilege, not a right.³⁸⁶

To counter this understanding, publicists conjoined support for legal dissemination with counterstories of the origination and ownership of law. First, they contested the image of the royal fountain. Since the thirteenth century, lawyers had described the common law as simultaneously the custom (or course) of the royal courts and the custom of the realm. Between St. German's *Doctor and Student* (1530) and the early Stuarts, they increasingly subordinated the former to the latter, celebrating the origins of their law in functionally beneficial popular behavior. John Davies's identification of the "bare memory of man" as the "register of customs" at the heart of the common

³⁸⁵ USSHER, *supra* note 99, at 349-50. Ussher went on to argue that the law "should be accepted 'as a voice from God, that should command and not dispute.'" *Id.*

³⁸⁶ This way of thinking animated Restoration royalists justifying the reestablishment of the common-law patent system and its accompanying censorship, a campaign that brought to the surface assumptions prevalent among pre-war royalists. Richard Atkyns, for example, distinguished the statutory law devised by the king and people jointly from the "unwritten" common law that was the king's property. As such, it "ought not to be published, or numbered, or interpreted but by authority from him; and the printing thereof is of the king's free pleasure, and not the people's right, and consequently the privileging some to print the law is the king's grace." RICHARD ATKYNS, *supra* note 354, at 11 (1669). On the intellectual continuities between Restoration and pre-war censorship, see WEBER, *supra* note 92.

law gave the fiction a particularly *faux* populist tilt.³⁸⁷ By invoking the customary roots of the common law, publicists made the law “belong” to the people in debates over legal information as in constitutional argument. Second, countering absolutist depictions of the king as the soul of the commonwealth with the law reposed in the breast (*scrinio pectoris*) of this “living law.” Publicists followed Cicero in identifying the laws themselves as the soul of the commonwealth, suggesting that the soul’s animation of the otherwise inert polity required publication of the laws.³⁸⁸ William Lambarde began his charge to the Quarter Sessions at Maidstone in 1596 with the Ciceronian *topos*, proceeding in the next sentence to call for the publishing of laws as the prerequisite for their execution.³⁸⁹ More elaborately, the royalist John Davies defended legal dissemination by mixing this Ciceronian figure with absolutist conceit of the king as “fountain.” Davies cast lawyers as “conduit pipes” bringing “streams of justice” to the nation from the king sitting upon God’s seat administering judgment. A distinct “organ” of the body politic, the legal profession had a special role: insuring that the commonwealth’s law be “communicated unto the people,” lest “the law, which is the soul thereof, produce no effect or operation at all.” To the divine “Jupiter” who gave the law, the lawyers were as “Mercury sent with that heavenly gift, to deliver it over unto mankind.”³⁹⁰ Third, publicists disclaimed royal proprietorship of law. Edward Coke, Nicholas Fuller, and parliamentary anti-absolutists around the turn of the seventeenth century liked to depict the common law as the “birthright” or “inheritance” of every Englishman.³⁹¹

³⁸⁷ DAVIES, *supra* note 104, at 252; see also FULBECK, *supra* note 123, at 173. Thomas Hobbes, writing in a humanistic vein decades before his conversion in *De Cive* and *Leviathan*, located the “esteem and antiquity” of laws in their allowance by the “[j]udgment of the people.”¹ Thomas Hobbes, *Discourse of Laws* (MS, c.1620), in THREE DISCOURSES: A CRITICAL MODERN EDITION OF NEWLY IDENTIFIED WORK OF THE YOUNG HOBBS 100, 119 (Noel B. Reynolds & Arlene W. Saxonhouse eds., 1995).

³⁸⁸ Peter La Primaudaye’s widely read *The French Academy* (4th ed., 1602) was but one of the many early modern attributions to Cicero of the notion of laws as the commonwealth’s soul. See *id.* at 560.

³⁸⁹ See WILLIAM LAMBARDE AND LOCAL GOVERNMENT, HIS ‘EPHEMERIS’ AND TWENTY-NINE CHARGES TO JURIES AND COMMISSIONS 128 (Conyers Read ed., 1962). Coke analogized the reasonable soul in the natural body to the law, the soul of the commonwealth, in the political body. See Edward Coke, *Speech at the Installation of the Eleven Serjeants in the Temple Hall* (1614), Yale University, Beinecke Library, Osborn Shelves, MS fb 60, fol. 457r. For an early example of cojoining Cicero’s image with a program of legal dissemination, see STARKEY, *supra* note 17, at 55.

³⁹⁰ DAVIES, *supra* note 104, at 272-76.

³⁹¹ COKE, *Preface* to REPORTS, pt 5, *supra* note 371, at iv; NICHOLAS FULLER, ARGUMENT IN CASE OF THOMAS LAD R. MAUNSELL 3, 13, 22 (1607); Nicholas Fuller,

These images recurred in appeals for legal publicity. Coke, for example, criticized the Council of the North for keeping secret their instructions, which “were not enrolled in any court, whereunto the subject might have resort. *Sed misera servitus est, ubi jus est vagum, aut incognitum* [But the subject is miserable, where the law is vague and unknown].” With Coke’s evident approval, James I ordered the instructions enrolled “to the end the subject might . . . enjoy the benefit of the laws of the realm, his best birthright.”³⁹² The anonymous, perhaps puritan, author of *The Laws of England* (MS, c.1625-1640) ascribed to the people a right “to the laws of the kingdom, not only those laws which concerned themselves, but likewise those laws which concerned their king, for both were to be known by the people, and in both they had an inheritance, as well as in their king.”³⁹³ Contrasting notions of the origination and ownership of law informed the debate within the committee on printing in the Long Parliament of 1642 over whether the law patentee should retain a monopoly right to publish common law works. According to William Prynne, the patentee claimed that “the king, supreme governor and lawgiver, may commit the printing of the statutes and of lawbooks to whom he pleases.” For printing was “as inherent a prerogative to the Crown as coining of money.” As opposing counsel, Prynne replied that “not the king alone, but the king and parliament are the sole law makers,” and that “private men” compile the treatises of the common law, im-

Speech of June 23, 1610 in the House of Commons, in 2 PROCEEDINGS IN PARLIAMENT, supra note 119, at 152, 152 (June 23, 1610). Bacon employed this image when he wanted to restrain too high-flying a royalist. In the first draft of his letter of advice to the Duke of Buckingham, he remarked:

In the laws we have a native interest, it is our birthright and our inheritance, and I think the whole kingdom will always continue that mind which once the two Houses of Parliament publicly professed, *Nolumus Legem Angliae Mutare* [we will not change the laws of England]: under a law we must live, and under a known law, and not under an arbitrary law is our happiness that we do live.

FRANCIS BACON, *A Letter of Advice* (MS, 1616), in 13 *THE WORKS OF FRANCIS BACON, supra* note 82, at 19. Master of many styles of writing, Bacon, for tactical purposes, revealingly joined the notion of legal inheritance with the anti-absolutist invocation of an ancient common law to constrain prerogative.

³⁹² EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 246 (1644). Coke similarly accused the High Commission of applying a law “*vagum, aut incognitum.*” *Id.* at 332. In the next century, Thomas Wood treated Coke’s Latin maxim as a testament to the importance of legal dissemination, placing it on the title page of his *Institute of the Laws of England* (1722 ed.).

³⁹³ *The Laws of England* (MS, c.1625-1640), cited in JUDSON, *supra* note 248, at 336.

plying that the right of publication should reside in the Stationers' Company "for the common good of them all."³⁹⁴

By the early seventeenth century, praise of legal dissemination had migrated into humanist celebrations of the political *vita activa*, perhaps brought together by the absolutism inimical to both. Barnabe Barnes, for example, organized his *Four Books of Offices: Enabling Private Persons for the Special Service of All Good Princes and Policies* (1606) according to the types of services the active citizen could provide the realm—as treasurers, counselors, judges, and warriors. He conjoined appeals for royal obedience to constituted law, a roster of kings famous for the collection and promulgation of laws (St. Edward the Confessor, Elizabeth, and James), and an honor roll of lawyers who assembled case reports and treatises (Glanvill, Littleton, Fitzherbert, Brooke, Dyer, Plowden, and Coke). Closing his chapter on judging and justice was a reminder of a parliamentary statute in King Edward III's reign making English rather than French the language of pleading "to the end that the people might the better understand what was spoken for and against them."³⁹⁵ Adherents of the ancient constitution as a check on overbroad prerogative also took up the cause of law printing. The anonymous author of *Books of the Common Laws of This Land Not Published* (MS, after 1603) believed that a vigorous program of legal publication would show the existence of common law rules and jury trials before the Conquest and demonstrate that William the Conqueror confirmed the "ancient liberties and customs of England."³⁹⁶

The absolutists' picture of the educator father-king owning the law, along with the suspicion of "publicity" they shared with the episcopal campaign against conformity, transformed the political meaning of the publicist appeal in the process of fostering a significant debate over legal publishing. In its first stage, from around 1520 to

³⁹⁴ William Prynne, *Brief on the Origin of Printing in England on the Issue of the Printers Petition to the 1642 Parliament*, in Inner Temple MANUSCRIPTS (Petyt Collection, MS 511, vol. 23, fol. 14); *Argument Before the Committee on Printing in the 1642 Parliament March 7-14, 1642*, in *A True Diurnal of the Passages in Parliament*, reprinted in MAKING THE NEWS, *supra* note 92.

³⁹⁵ BARNABE BARNES, *FOUR BOOKS OF OFFICES* 130, 137, 160 (1606).

³⁹⁶ *BOOKS OF THE COMMON LAWS OF THIS LAND NOT PUBLISHED* (MS, after 1603), Yale University, Beinecke Library, Law School Deposit, MS G R24.1, fols. 185r-186r. This author's publication program included compilations of British and Saxon laws, the *Leges Henrici Primi*, common law monographs by Hengham and Fleta, royal court and assize reports, and Readings. The document was composed after 1603. It refers to Robert Cotton, knighted in that year, as "Sir."

1580, the publicists were an arm and ally of state-building (or kingdom-building). The Crown, in effect, asked itself, "How can we reinforce and disseminate a national law strong enough to keep in check the many alternative laws operating legitimately in the realm?" The Henrician program of solidifying the kingdom by strengthening national law (statute, common law, and prerogative tribunals) at the expense of regional, franchise, local, and ecclesiastical rivals helped the Rastellians suggest that printed law solidified the unity of the kingdom. They put publicity at the service of royalism. By the later years of Elizabeth's reign the dangers of overmighty subjects and vainglorious seigniorial jurisdictions had faded. The campaign against non-conformity and the stirrings of absolutism brought to the fore a second question, "Whose law was this national law to be?" As this encouraged the anti-publicists, it made the publicists, not necessarily by intention, a carrier and agent of a "constitutionalist" politics.

In the shadow of absolutism, legal publishing came to support, sometimes only tacitly, a view of law as generated by king and subject together and binding both, as constituting the lineaments of the polity and defining the monarch's place within it (rather than flowing from him), as setting standards of accountability for the Crown and its civil and ecclesiastical officials, and as enabling rather than rendering unnecessary the political activity of the community.³⁹⁷ John Rastell, Richard Taverner, Nicholas Bacon, and the office-seeking William Barlee represented the first, kingdom-building stage of publicism; Nicholas Fuller, Barnabe Barnes, the anonymous author of *Books of the Common Law*, and the latter Edward Coke exemplified the second stage. Through allusion to Roman history, Fulke Greville captured poetically the growing linkage of legal dissemination to constitutionalism:

After the infancy of glorious Rome,
Laws were with Church rites secretly enshrined,
Poor people knowing nothing of their doom,
But that all rights were in the judges' mind;
Flavius revealed this snaring mystery,
Great men repined, but Rome itself grew free.

³⁹⁷ See Howell A. Lloyd, *Constitutionalism*, in *THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT, 1450-1700*, at 254, 254 (J.H. Burns & Mark Goldie eds., 1991); ECCLESHALL, *supra* note 378, at 76-125.

Hard therefore it is for men to decree,
 Whether it better were to have no law,
 Or laws kept only as a mystery,
 In their breast, that revenue from it draw.

Again, laws ordered must be, and set down
 So clearly as each may understand,
 Wherein for him, and wherein for the Crown,
 Their rigor or equality does stand.³⁹⁸

Torn from unwilling rulers, law made public restrained otherwise unaccountable power. How different this agonistic sensibility from Rastell's and Barlee's beneficent monarchs and lords smiling over a legal press imprinting "loving obedience."

The debate over law printing, then, helps recast the received picture of absolutism's legal ambitions and effects. Historians have concentrated, understandably, on the constitutional claims of absolutism evident in early Stuart politics (such as divine right, nonresistance, the privilege of taxation outside Parliament, and royal supremacy in law making and interpretation).³⁹⁹ The absolutist disparagement of the popular right to and capacity for knowledge of the law's inner reasons, fostering as it was expressed in anti-publicist unease with licit legal printing, reveals another dimension of absolutism's legal agenda. Perhaps more important, it led to an ironic political *denouement*. For as the Elizabethan expansion of the common law as a forum for settling disputes, as a *lingua franca* and resource in governance and politics, and as a symbol of national identity corroded one of its identities—as the guild's proprietary mystery—the very efforts of absolutists to articulate their own proprietary title with accompanying intellectual paternalism evoked in reaction a countervailing appropriation by publicists.⁴⁰⁰ Defending the right of access to the inner

³⁹⁸ Greville, *supra* note 45, ¶¶ 263, 265, 268. Flavius, a secretary to the censor Appius Claudius Caecus, stole and published a collection of procedural laws assembled by his master. The Romans later styled these the *ius Flavianum*. Along with the Twelve Tables, Flavius's theft was one of the great breaches of the pontifical monopoly of law and, consequently, a challenge to patrician power. See H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 88 (1965).

³⁹⁹ ECCLESHALL, *supra* note 378, at 76-96; J.P. SOMMERVILLE, POLITICS AND IDEOLOGY IN ENGLAND, 1603-1640, at 9-56, 115-88 (1986); MARGARET A. JUDSON, THE CRISIS OF THE CONSTITUTION: AN ESSAY IN CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND, 1603-1645, at 107-70 (1949).

⁴⁰⁰ A reservation and clarification: The common law's identity in the early sixteenth century as the guild's proprietary mystery coexisted with other simultaneous

reasons of the law, valorizing popular proprietorship and the latent constitutionalist implications of legal printing, publicists encouraged an ideological “commoning” of the common law that built upon the antecedent communications “commoning” of the common law achieved through more accessible lawbook design and a broadening of imagined audiences and lay legal literacy. To be sure, the Elizabethan and early Stuart commoning of the common law was, in practice, a limited affair. The lay audience for law remained but a fraction of that for theology or history, bounded by constraints of class, gender, and education. Yet the ideological legacy of the debate over legal publishing exceeded its immediate practical effects by helping refashion the laws of the realm of England as the laws of Englishmen.

identities, such as the course of the royal courts, the general custom of the realm, and the legal, hence cultural, legacy of British and Saxon antiquity.

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