The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature

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One of the curious features of the history of Roman law up to the time of Justinian is the rarity of legal treatises taking the form of monographs concerned with the several branches or divisions of the law.¹ Fritz Schulz explained the lack of monographs in terms of the character of Roman legal science, which he saw as an undertaking that "eschewed legal history, law reform, and legal philosophy, laid stress mainly on case law and problems and was only mildly interested in system and abstraction."² This explanation might well have been written of the common law too, though no

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¹ See F. SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* 257 (1946). Schulz noted the existence of only two monographs in the Hellenistic period, Servius's *De Sacris Detestandis* and *Liber de Dotibus*. *Id.* at 93. The jurisprudence of the classical period, he concluded, "produced hardly any monographs." *Id.* at 257. The exceptions are works on the stipulation by Pomponius and Venuleius; Schulz also listed a number of works whose precise form is not known, some of which may have been monographs resembling modern treatises. *Id.* at 253-57.

² *Id.* at 257. He argued further that failure to develop a monographic literature was one of the reasons why "the stream of classical literature eventually ran dry." *Id.* Remarkable though it may be as a feat of intellectual organization, even the *Digest* of Justinian is crudely arranged and could only have been produced at the end of a long tradition of weakness in systematics. It was not until the eighteenth century that the texts were put into an ordered state by Pothier, *see* note 309 *infra*.

Roman legal science did, of course, produce the form of literature known as institutes, which contained elementary systematic statements of the divisions and principles of the whole of private law. This form of literature appears to have been invented by Gaius in the second century, *see* A. HONORÉ, *GAIUS* xii (1962), and is generally thought to have been the product of the lecture course. Certainly, institutes were teaching books. Other writers followed Gaius's example; among them were Ulpian, Marcian, Paulus, and Callistratus. *See* F. SCHULZ, *supra* note 1, at 156-73. In the end Gaius's *Institutes* were transformed from textbook to statute. The work was updated by Tribonian, Dorotheus, and Theophilus, and published as a pedagogical text with legislative force in 529 A.D. *See* A. HONORÉ, *TRIBONIAN* 189 (1978). In this version, or, as we would say, edition, the Roman literary form of institutes has influenced European legal culture since the medieval period. But in the ancient world Gaius's work never generated monographic treatises in the form of expanded expositions of its parts. Had this happened we should, presumably, never have been given the *Digest*.

doubt one might wish to qualify it in some respects. Yet eventually the common law system did generate and sustain a treatise literature, and in nineteenth-century Britain and America treatises became the typical form of legal writing. This is still true in Britain, but it is remarkable that in the United States the practice of writing treatises has declined significantly. In this article I want to trace the development of the treatise tradition in the common law system, and build on an idea suggested but not fully developed by Schulz's study of the literary activity of the ancient Roman lawyers: the close relation between the forms of legal literature and lawyers' ideas of what they are doing, and of the appropriate way for jurists to behave. More radically, I shall suggest that certain literary forms are closely tied to theories about the nature of law itself, and that this is particularly true of the treatise. Hence, treatise writing flourished in association with a certain type of legal theory, and when that theory fell out of favor the practice diminished in importance.

By the term "treatise" various forms of legal literature might be intended; for present purposes what I have in mind has been clearly identified by Plucknett in his *Early English Legal Literature* (he used the term "text-book"):

The characteristic of the modern English text-book . . . is its method. It begins with a definition of the subject matter, and proceeds by logical and systematic stages to cover the whole field. The result is to present the law in a strictly deductive framework, with the implication that in the beginning there were principles, and that in the end those principles were found to cover a large multitude of cases deducible from them.³

Some subsidiary characteristics also need to be noted. The first is that the treatise is a monograph, purporting to deal only with a single branch of the law that is conceived of as possessing some quality of unity; treatises, like institutional works,⁴ are not comprehensive, though they are similar in other respects. Thus Bracton's *De Legibus*⁵ is not a treatise in my sense; nor are Black-

³ T.F.T. PLUCKNETT, *EARLY ENGLISH LEGAL LITERATURE* 19 (1958). Plucknett claimed that the form was "just about a hundred and fifty years old." *Id.*

⁴ See note 2 *supra*.

⁵ BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (S. Thorne ed. 1968) (1st ed. ca. 1240).

stone's *Commentaries*.⁶ The second is that the treatise involves mainly substantive principles, and I exclude those works whose structure is determined primarily by procedure. Hence Glanvill⁷ is not a treatise, while Stephen on Pleading⁸ is. The third is that the boundary between a good treatise, a bad treatise, and something that is not worth regarding as a treatise at all is indefinite; the treatise is an ideal type, and in what follows I shall not be concerned to notice all works that might, arguably, be viewed as treatises of a sort.⁹

I

For considerable periods of its history the common law system produced hardly any treatises at all. In the medieval period the only one of any significance is Littleton's *Tenures* (ca. 1481),¹⁰ a work whose origin is mysterious; it is possible—though there is no evidence of this—that it originated in lectures. The *Tenures* was hardly more than a tract, comprising approximately 80,000 words of law-French text. Although my main concern is with a later period it is worth pausing to consider this notable book, which has yet to receive full scholarly attention. Dividing the subject matter into three books, it sets out in a systematic arrangement the basic definitions, principles, and distinctions that constituted the substantive law of real property. The first book deals with estates, the

⁶ W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Oxford 1765-69).

⁷ *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* (G. Hall ed. 1965) (1st ed. ca. 1188).

⁸ H.J. STEPHEN, *A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS* (London 1824).

⁹ Bibliographic information in this article is derived from personal examination of the works discussed, or from J. MARVIN, *LEGAL BIBLIOGRAPHY* (Philadelphia 1847), and W. MAXWELL & L. MAXWELL, *SWEET & MAXWELL'S COMPLETE LAW BOOK CATALOGUE* (1925-57). The orthography of authors' names conforms to *THE DICTIONARY OF NATIONAL BIOGRAPHY* (L. Stephen & S. Lee eds., 22 vol. reprint 1937-39), or to E. FOSS, *A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND* (1870).

¹⁰ T. LITTLETON, *TENORES NOVELLI* (London, ca. 1481). This is the earliest printed common law book of which I am aware, although N. STATHAM, *ABRIDGEMENT OF THE LAW* (Rouen, ca. 1481), appears to have been written somewhat earlier, see note 47 *infra*. The most recent translation of Littleton is *LITTLETON'S TENURES* (E. Wambaugh trans. 1903) [hereinafter cited as *LITTLETON*].

So far as institutional works are concerned, there is only one that qualifies, and that is "Britton," which appeared around 1290. This claims to have been written with royal authority, and it is conceivable that it is imitative of the legislative force of Justinian's *Institutes*. The authorship of the work is obscure. The only modern edition is *BRITTON* (F. Nichols ed., Oxford 1865). "Britton" is the first substantial common law text to appear in law French rather than Latin.

second with tenures, and the third, which is much longer,¹¹ and much more complex and advanced, deals with "the rest," loosely linked to what we would call "the concept of title." Though there is some slight mention of uses in the third book, and their protection was by the 1480s fairly well developed, the books are generally confined to the common law. There is no sense in which the work merely systematizes or digests cases; what the books purport to provide is the theory that enables the reader to understand "the arguments and the reasons of the law."¹² Littleton stated his understanding of the "common learning" of the tiny coterie of lawyers whose views constituted the common law.¹³ Actual cases are rarely discussed, though many hypotheticals are, and the author is quite uninterested in providing authority for his propositions—a feature that strikingly differentiates the *Tenures* from many later treatises. Littleton had no imitators in the fifteenth or sixteenth century, in spite of the enormous success it enjoyed. The failure of the work to generate a tradition suggests that it was anomalous and had no relation, so far as is known, to the regular exercises of readings and moots established in the late fifteenth century in the Inns. As to its intellectual basis, I shall say something later in this article.

II

It was the fate of Littleton to become the subject of a distinct literary form, the gloss; the best-known example is Coke's *First Institute*, or *Coke on Littleton*.¹⁴ The text came to be treated as though it were itself law; it was regarded with a reverence approaching that accorded an actual statute.¹⁵ Although there were other works of authority, no other treatise ever achieved this status. It was no doubt Littleton's unique character that explains Coke's extravagant praise: "This book is the ornament of the Common Laws and the most perfect and absolute Work that ever was

¹¹ The third book contains 509 sections as opposed to the combined total of 240 in the first two books.

¹² LITTLETON, *supra* note 10, at 341. This point is from the epilogue, which was perhaps not originally part of the text.

¹³ See generally Baker, *Introduction* to 2 THE REPORTS OF SIR JOHN SPELMAN 123-37 (J. Baker ed. 1978).

¹⁴ E. COKE, *FIRST PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND; OR A COMMENTARY UPON LITTLETON* (London 1628).

¹⁵ See, e.g., R. NORTH, *DISCOURSE ON THE STUDY OF THE LAWS* 11 (London 1824) ("the text of Littleton is accounted law, and no other book hath that authority").

written in any humane science"¹⁶ Placed in its historical context, the *Tenures* is indeed a remarkable work. Not only was it the most successful attempt ever made in the history of the common law to state a single branch of the law as a systematic body of definitions, principles, and distinctions, it was also virtually the first such attempt, and did not rely upon an earlier scheme of arrangement.¹⁷

In the long period between the publication of the *Tenures* and the beginning of the eighteenth century there was a massive increase in the quantity and variety of legal literature. The introduction of printing, coupled with the growth in the size of the legal profession, assisted this development, though for much of the period the printing of common law books was artificially restricted under the system of royal patents.¹⁸ But while attempts were made to write treatises, practically nothing was achieved. The great books of the law in this period, the works of St. German,¹⁹ Fitzherbert,²⁰ Rastell,²¹ Plowden,²² Dyer, Broke,²⁴ West,²⁵ and Rolle,²⁶ are not treatises. In particular, Coke's chaotic writings do not fall into this category, and their success depended not on their literary form, but on the personal authority of their immensely learned author. The typical forms of literature were collections of statutes²⁷ and cases,²⁸ the two authoritative forms. Parasitic upon these were systematizing abridgments of cases²⁹ and statutes,³⁰ in-

¹⁶ E. COKE, *supra* note 14, at v (5th ed. London 1656).

¹⁷ The scheme of the fourteenth-century tract, the *Old Tenures*, which Littleton claimed as his model, see LITTLETON, *supra* note 10, at 340, was quite distinct. See generally Arnold, *Introduction to THE OLD TENURES*, c. 1515, AND THE OLD NATURA BREVIVM, c. 1518, at ii-vi (1974 ed.).

¹⁸ The first of these apparently was obtained by Richard Tottell in 1552. See H. BENNETT, *ENGLISH BOOKS AND READERS* (1952).

¹⁹ ST. GERMAN'S DOCTOR AND STUDENT (T.F.T. Plucknett & J. Barton eds. 1974) (1st ed. London 1530).

²⁰ A. FITZHERBERT, *GRAUNDE ABRIDGMENT* (London 1514-16).

²¹ J. RASTELL, *EXPOSITIONES TERMINORUM LEGUM ANGLORUM* (Longdon 1527).

²² E. PLOWDEN, *LES COMENTAIRES* (London 1588).

²³ J. DYER, *ASCUN NOUEL CASES* (London 1585).

²⁴ R. BROKE, *LA GRAUNDE ABRIDGEMENT* (London 1573).

²⁵ W. WEST, *SYMBOLEOGRAPHY* (London 1594).

²⁶ H. ROLLE, *UN ABRIDGEMENT DES PLUSIERS CASES ET RESOLUTIONS DEL COMMON LEY* (London 1668).

²⁷ See, e.g., T. BERTHELETTI, *A TABLE TO ALL THE STATUTES MADE IN THE TYME OF THE MOST VICTORIOUS REIGNE OF KYNGE EDWARD THE SIXTE* (London 1553).

²⁸ See, e.g., T. ASHE, *PROMPTUAIRE, OU REPERTORY GENERALL DE LES ANNALES, ET PLUSORS AUTERS LIVRES DEL COMMON LEY D'ENGLETERRE* (London 1614).

²⁹ See, e.g., R. BROKE, *supra* note 24.

dices,³¹ formularies³² of various types, glosses³³ on authoritative texts, and expositions of procedures.³⁴ No doubt this generalization can be qualified somewhat. Sir William Stanford's *Les Pleees del Coron* (1557)³⁵ and his *Exposition of the Kinges Prerogative* (1567)³⁶ constitute treatises of a rudimentary sort, and the dedication of the latter makes the point that Stanford was consciously attempting to produce a new type of book and thought that the route for doing so lay through the abridgment of cases, the established form of systematizing literature.³⁷ Sir Matthew Hale's *Historia Placitorum Coronae*³⁸ and *Prerogatives of the King*³⁹ also are exceptions, but were never completed, probably not intended for publication, and only came to be published in 1736 and 1795, respectively.

A striking example of an unsuccessful attempt to progress beyond the abridgment form is William Sheppard's *Actions upon the Case*,⁴⁰ which appeared in 1663. This is a work of 387 pages, whose preface to the "judicious and courteous reader" accurately indicates the character of the book:

a Methodical Collection and Report of the various and manifold Cases that this Subject affords in our Books, wherein you will finde nothing of mine, but the method, or labour of put-

³⁰ See, e.g., W. RASTELL, ABRIDGMENT OF THE STATUTES (London 1533).

³¹ See, e.g., T. ASHE, LA TABLE AL LIEUR DES REPORTS DEL TRESREUEREND IUDGE SIR JAMES DYER CHUVALER, IADES CHIEFE IUSTICE DEL COMMON BANKE (London 1588).

³² See, e.g., FORMULARE ANGLICANUM (T. Madox ed. London 1702).

³³ See, e.g., E. COKE, *supra* note 14.

³⁴ See, e.g., J. RASTELL, THE EXPOSITIONS OF THE TERMS OF THE LAWE OF ENGLAND, WITH DIVERS PROPRE RULES AND PRINCIPLES OF THE LAWE, AS WELL OUT OF THE BOOKS OF MAISTER LITTLETON, AS OF OTHER (London 1563). See also note 80 *infra*.

³⁵ W. STANFORD, LES PLEES DEL CORON (London 1557).

³⁶ W. STANFORD, AN EXPOSITION OF THE KINGES PREROGATIVE (London 1567).

³⁷ I would wish that amongst such plenty of learned men as be at this day some thing were devised to help the students of their long journey . . . which thing might well come to pass after my poor mind, if such titles as be in the great abridgment of Justice Fitzherbert, were by the Judges or some other learned men labored and studied, that is to say, every title by itself, by special divisions digested, or ordered and disposed in such sort, that all the judicial acts and cases in the same might be brought and appear under certain principles, rules and grounds of the said laws.

Id. at iiiii (spelling modernized).

³⁸ M. HALE, HISTORIA PLACITORUM CORONAE (London 1736). For discussion of Hale, see D. YALE, HALE AS A LEGAL HISTORIAN (Selden Society Lecture 1976).

³⁹ M. HALE, THE PREROGATIVES OF THE KING (London 1795).

⁴⁰ W. SHEPPARD, ACTIONS UPON THE CASE FOR DEEDS, VIZ. CONTRACTS, ASSUMPSITS, DECEITS, NUSANCES, TROVER AND CONVERSION, DELIVERY OF GOODS, AND FOR OTHER MALEFEASANCE AND MISFEASANCE (London 1663).

ting together, and setting out the grave and learned Judgments, Resolutions and Opinions of the Eminent and Learned Judges, both of former, and present times therein, where perhaps you may finde some Repetitions of the same things.⁴¹

This reflects a persistent problem of status that confronted the treatise writer in a legal world in which the modern concept of authority, attached peculiarly to judges, had begun to emerge; the text writer, unless he himself is a judge, possesses as an individual no authority derived from office. Consequently his views are important only if they are unoriginal, as Sheppard claimed, and if their authority derives solely from their substance. The preface also indicates the way in which such a treatise essentially evolved out of the abridgment tradition, and the text of the book confirms this. Sheppard starts out boldly in an attempt to state in a systematic way the doctrine embodied not in oral tradition but in the multifarious published cases, and the book begins at a high level of abstraction, with a section entitled "of Actions in General."⁴² This opens with a definition, followed by analytical subdivisions. Twenty pages or so later, Sheppard's inability to arrange his material in a coherent manner has reduced the book to a disorderly abridgment of cases, and by page 202 he has more or less given up. The rest of the book simply contains abbreviated reports of cases; the first 395 are described as "Some choice Cases for the illustration, and confirmation of all that is before said about Contracts and Assumpsits."⁴³ Sheppard's failure is traceable at one level to his lack of analytical skill; he was simply not clever enough at the job. But more generally, it is noticeable that with the exception of Stanford and Hale the ablest lawyers who turned to writing in this period did not select the treatise form as the vehicle of exposition, presumably because they recognized its extreme difficulty. Thus Sheppard at least deserves some credit for bravery.

Lawyers and critics were, of course, fully aware of the disorderly and unmethodical appearance of the common law system.⁴⁴ Insofar as the law was merely an oral tradition preserved and transmitted by those who practiced in Westminster Hall, only long years of direct involvement could produce the belief that the sys-

⁴¹ *Id.* at iii.

⁴² *Id.* at 1-20.

⁴³ *Id.* at 202.

⁴⁴ See generally C. HILL, *INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION* 227-33 (1965).

tem really was rationally coherent. The collapse in the seventeenth century of the collective exercises of learning in the Inns,⁴⁵ the increase in the size of the legal profession, and the proliferation of nonauthoritative printed texts, could only lend support to the suggestion that the common law was no more than an ungodly jumble, as Cromwell is said to have described its major ornament, the law of property. One reaction to all this had been practical. From the fifteenth century onwards lawyers had been attempting to reduce the unwieldy mass of legal materials, sometimes for their own personal use and sometimes cooperatively, by digesting it under titles arranged, for the want of any better system, alphabetically. This generated the abridgments and common-place books, which remained dominant forms of legal literature until the nineteenth century.⁴⁶ The systematizing efforts of the compilers of abridgments could make possible the production of treatise literature based upon an analysis of the material abridged. This was a process quite distinct from that which produced Littleton's *Tenures*, a work that is unrelated to any form of digest or abridgment. Littleton stated the law in a systematic form; he imposed a rational arrangement for which no earlier model existed. William Stanford, on the other hand, saw the route from abridgment to treatise, and attempted to follow it. Less dramatic steps down this road could be and were taken. Once the material is sorted under titles, the obvious next move is to order the material within each title systematically by substance, rather than by a random, chronological, or stream-of-consciousness system. This was not done by Statham (ca. 1481),⁴⁷ Fitzherbert (1514-16),⁴⁸ or Broke (1573),⁴⁹ but was, for

⁴⁵ See generally W. PREST, *THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS 1590-1640* (1972).

⁴⁶ The abridgment tradition has survived in a somewhat modified form in such works as HALSBURY'S *LAWS OF ENGLAND* (4th ed. 1973 to date) and *CORPUS JURIS SECUNDUM* (1937-79) in America, and in comprehensive digests of cases, such as *EIGHTH DECENNIAL DIGEST* (1977-79). See also text at notes 53-54 *infra*.

⁴⁷ N. STATHAM, *supra* note 10. The abridgment traditionally attributed to Nicholas Statham was first printed about 1481 without attribution. A manuscript survives (Ms. 208, Guildhall Library, London) that was completed in 1457 for the Principal of Furnival's Inn, Thomas Segden. I have not examined this manuscript but from its description it appears to be "Statham."

⁴⁸ A. FITZHERBERT, *supra* note 20. Fitzherbert's *Graunde Abridgement* has been studied by Boersma, *Sir Anthony Fitzherbert: A Biographical Sketch and Short Bibliography*, 71 *LAW LIB. J.* 387, 395-400 (1978). See also Graham & Heckel, *The Book that "Made" the Common Law*, 51 *LAW LIB. J.* 100 (1958).

⁴⁹ R. BROKE, *supra* note 24. Sir Robert Broke was Chief Justice of the Common Pleas from 1554 to 1558. His abridgment was published posthumously.

example, attempted by Rolle (1668),⁵⁰ and it represents a further step towards systematization. In its turn, internal subdivision may generate a rearrangement of titles, so that some, previously independent, are demoted to subsidiary status or broken up into more than one title. For example, in Viner's *Abridgement*,⁵¹ within the title "Actions" we have "Actions (Assumpsit)," elaborately subdivided. Some of the subdivisions, "Assumpsit. Plea. Good. And How to be Pleaded in Indebitatus Assumpsit,"⁵² contain material that, in an earlier abridgment, one would expect to find in a separate title dealing with pleading in actions generally. With systematic subdivision may go attempts to state the law by direct exposition, rather than by stringing together digests of cases. If this is attempted, the "authorities" move out of the text and into the notes. Sheppard, as we have seen, tried to do this. The first full abridgment illustrating this process is Bacon's *Abridgement* (1736-59).⁵³ The process culminates either in the splitting up of the abridgment into separate monographs, or alternatively in the legal encyclopedia, of which Halsbury's *Laws of England* (1907-17) is the classic English example, and the *Corpus Iuris* (1914-37), and its second edition, the *Corpus Iuris Secundum*, the American counterpart. An extraordinary feature of this evolution of the abridgment or digest form is the long duration of the process; it is worth noting, in passing, that in Roman law the development took even longer.

An alternative to the attempt to refine the crude structure of the earlier alphabetical abridgments was to react against it and try to construct, by rational analysis, a new comprehensive scheme for systematizing the whole of the law. This feat was first attempted by Hale, and the resulting scheme, his *Analysis of the Laws of England*,⁵⁴ made Blackstone's *Commentaries* possible, for Blackstone built his work more or less exactly on Hale. Hale's *Analysis* in its turn was much influenced by the structure of Justinian's *Institutes*, which were themselves based on Gaius's *Institutes*.⁵⁵

⁵⁰ H. ROLLE, *supra* note 26. Henry Rolle's *Abridgement* may have been the commonplace book that he began as a student. See Baker, *The Dark Age of English Legal History*, in *LEGAL HISTORY STUDIES* 1, 7 (D. Jenkins ed. 1972).

⁵¹ C. VINER, *A GENERAL ABRIDGEMENT OF LAW AND EQUITY* (Aldershot 1742-53).

⁵² 1 *id.* at 378-79.

⁵³ M. BACON, *A NEW ABRIDGEMENT OF THE LAW* (London 1736-59).

⁵⁴ M. HALE, *ANALYSIS OF THE LAWS OF ENGLAND* (London 1713). The work was published posthumously.

⁵⁵ See note 2 *supra*.

Hence Blackstone's *Commentaries* are based on a scheme of arrangement dating back some fifteen hundred years, one designed to give structure to institutional works of a kind foreign to the common law system.

III

The practical approach to the disorderly condition of the law, then, was to tidy it up, to systematize it; no particular theoretical view of the nature of the common law was involved. An alternative and essentially theoretical approach was to maintain that the law was already systematic, however improbable this claim might appear to the uninitiated. This generated a peculiar form of legal literature that predated the rise of the treatise. To explain this I must digress into jurisprudence.

The first major assault on Professor H.L.A. Hart's celebrated *The Concept of Law*⁵⁶ was launched in 1967 by Professor Ronald Dworkin in an article entitled *The Model of Rules*.⁵⁷ In this and subsequent writings and revisions Dworkin boldly—and somewhat improbably—disinterred the belief in the existence and central significance of principles of law, lurking behind and making rational the apparently disorderly and arbitrary process of adjudication. Dworkin's more recent and flamboyant exposition of this view has claimed that there is always, or almost always, a right answer if one cares to dig,⁵⁸ and there is now an elaborate literature on the subject, which pays virtually no attention to the historical pedigree of the theory involved—and the theory, like most things in jurisprudence, is of extreme antiquity.

It is not my concern in this article to discuss the theory analytically, but to relate it to the history of legal literature. So far as the civilian systems are concerned, numerous scholarly studies have already appeared, and as an amateur in that field I can only refer to Professor Peter Stein's brilliant *Regulae Iuris*,⁵⁹ in which he traces the history of the juristic rules, the *regulae*, formulated and collected by the classical Roman jurists through the medieval period into modern times, and investigates the ideas about law

⁵⁶ H.L.A. HART, *THE CONCEPT OF LAW* (1961).

⁵⁷ Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), for a general statement of the theory.

⁵⁸ This thesis is advanced in Dworkin, *No Right Answer?*, in *LAW, MORALITY AND SOCIETY* (P. Hacker & J. Raz eds. 1977).

⁵⁹ P. STEIN, *REGULAE IURIS* (1966).

that were associated with this process. With regard to the medieval common lawyers, they appear to have had little enthusiasm for the self-conscious analysis of what they were doing. Legal method did not interest them; hence the yearbooks are largely devoid of discussions of the nature of the common law or the theory of legal reasoning. There are, however, indications that the late medieval common lawyers had come to accept the idea that the common law was based in part upon what were called *maxims* or principles. This notion finds elaborate expression in Fortescue's *De Laudibus* (ca. 1470),⁶⁰ where the *principia*, *maxima*, or *universalia* of the common law are identified with the *regulae iuris* of the civilians.⁶¹ Indeed, quite a number of the maxims of the common law originated in a collection of *regulae iuris* in the *Digest* of Justinian or in a collection embodied in the *Corpus Iuris Canonici*.⁶² Their use was related to ideas developed in antiquity by Aristotle and Cicero,⁶³ and to general theories of logical reasoning. At least after Fortescue's time, the belief in a set of inner principles of the common law became widespread, and was made even more familiar through the discussion in St. German's *Doctor and Student* of the six grounds (*fundamenta*) of the law of England, which included "dyvers pryncyple that be called by those learned in the lawe maxymes."⁶⁴ These maxims or principles were thought to possess certain special qualities. First, they were ultimate in that they could not be supported by any further arguments or logical demonstrations; hence it was idle to argue with anyone who doubted their validity, and equally idle to attempt to demonstrate a principle by arguments from authority.⁶⁵ Second, they were thought to be self-

⁶⁰ SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* (S. Chrimes ed. 1942) (1st ed. London 1545). Fortescue wrote this book between 1468 and 1471, but it was not printed until 1545. *Id.* at ix.

⁶¹ *Id.* at 21.

⁶² See 2 *CORPUS IURIS CANONICI* 1122-23 (A. Friedberg ed. 1875); P. STEIN, *supra* note 59, at 148-52.

⁶³ The relationship between the ideas of Aristotle and Cicero and the evolution of *regulae iuris* and maxims is discussed in P. STEIN, *supra* note 59, at 26-48. See also Honoré, *Legal Reasoning in Rome and Today*, 4 *CAMBRIAN L.J.* 58 (1973).

⁶⁴ ST. GERMAN, *supra* note 19, at 57.

⁶⁵ The essential ideas are developed by Aristotle under the rubric "First Principles" in his *Posterior Analytics*. First principles are known by intuition. Although they cannot themselves be proven by scientific knowledge, they are an essential prerequisite to such knowledge. ARISTOTLE, *POSTERIOR ANALYTICS* 2.19. These inherent qualities are also present in the late Hans Kelsen's jurisprudential theory, in which the assumed existence and validity of the *Grundnorm* is the essential prerequisite to the pure science of law. See generally H. Kelsen, *GENERAL THEORY OF LAW AND STATE* (A. Wedberg trans. 1945).

evidently rational. Third, they had always been accepted, and thus they were timeless features of a timeless system. Finally, although only skilled lawyers could work out the detached application of principles, even a layman could, by knowing the principles, acquire a general knowledge and understanding of the law. With the belief in principles went the belief that there always was a right answer, and in the fifteenth and sixteenth centuries disagreement among the judges was regarded not as a reason for voting, but as a reason for continuing the debate until answers appeared; hence the interminable argument of great cases over periods of years.⁶⁶

I do not intend to discuss whether the law "really" did rest on principles, but to investigate the relationship between the belief in their existence and the forms of legal literature. The natural reaction to the claim is to ask for a statement of the principles, a request that was sometimes handled rather evasively. Thus in *Doctor and Student* the Doctor is made to remark, "I should like to hear some of these maxims," to which the Student obligingly replies, "A large volume would not suffice to declare them fully, of which maxims however, in answer to your request I shal hereafter shewe the part."⁶⁷ The large volume was not forthcoming; merely twenty-five were offered.⁶⁸ In the seventeenth century, when the somewhat similar claim for the existence of "fundamental laws" was common, Edmund Walker, in the course of Strafford's impeachment, naively asked to be told what they were. Sergeant Maynard crushed him by saying that, "if he did not know that, he had no business to sit in this House."⁶⁹ But no list whatsoever was supplied.⁷⁰ Professor Stein noticed that the earliest English treatise, Littleton's *Tenures*, "was the first exposition of English land law as a system based on principles instead of as a number of disconnected formulae concerning the procedure of real actions."⁷¹ He points out that the author in a number of passages actually uses the terms "princi-

⁶⁶ See Baker, *supra* note 13, at 156-63.

⁶⁷ ST. GERMAN, *supra* note 19, at 59.

⁶⁸ *Id.* at 59-67.

⁶⁹ Quoted in J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 214 n.A (1955).

⁷⁰ One is reminded of the modern jurisprudential theory of a rule of recognition, whose existence is asserted, but never made flesh; that is to say, no attempt is made to formulate specifically any rule of recognition. See H.L.A. HART, *supra* note 56, at 92-107. See also note 65 *supra*. The theory of principles did rather better. Thus St. German did offer at least a short list of maxims, see text at note 68 *supra*, and the theory produced a considerable literature.

⁷¹ P. STEIN, *supra* note 29, at 159.

ple" and "maxim" to refer to basic propositions of law.⁷² It is difficult to be sure that Littleton was, as it were, self-consciously expressing a legal theory in the *Tenures*, but I suspect that Stein is correct for a reason that he does not mention: the absence in the text of any reliance on cases as authorities. Maxims needed neither authority nor support from argument, and none could be provided. Coke put it thus: "Un maxime en ley. A maxime is a proposition to be of all men confessed and granted without prooffe, argument, or discourse. *Contra negantem principia non est disputandum.*"⁷³ Dr. John H. Baker has pointed out that the *Tenures* was called *les grounds de Master Littleton*, so that it was conceived of in the terms Stein has suggested.⁷⁴

But the chief literary expression of the theory of principles produced a form of literature very different from Littleton's *Tenures*, and one that is now quite extinct. In something of the same spirit with which the compilers of the *Digest* had lumped together in title 50 (*De Diversis Regulis Iuris Antiqui*) a disorderly collection of *regulae iuris*,⁷⁵ so common lawyers set about the task of making and publishing and, inevitably, commenting upon, collections of legal maxims. The best-known early example of this form of literature is Bacon's collection of twenty-five maxims,⁷⁶ originally submitted to Queen Elizabeth I in 1597 as a specimen of a general scheme to make the common law more coherent and intelligible to both lawyers and laymen.⁷⁷ Bacon had in mind a general plan for the restatement of English law, but he did not wish to turn the system into a codification or, as he put it, into "text-

⁷² LITTLETON, *supra* note 10, §§ 3, 90, 648; see P. STEIN, *supra* note 59, at 159-60. Coke comments on section 3,

Maxime, i.e., a sure foundation or ground of art . . . so sure and uncontrollable as that they ought not to be questioned. And that which our author here and in other places calleth a Maxime, hereafter he calleth a principle; and it is all one with a RULE, a COMMON GROUND, POSTULATUM, or an AXIOME, and it were too much curiositie to make nice distinctions betweene them. And it is well said in our bookes, "*nest my a disputer lanciaent principles del ley.*"

E. COKE, *supra* note 14, at ff. 10b-11a.

⁷³ E. COKE, *supra* note 14, at f. 67a. See also *id.* at f. 343a. The Latin phrase means roughly that "it is impossible to argue with one who disputes your first principles."

⁷⁴ Baker, *supra* note 13, at 161 n.7.

⁷⁵ See also text and note at note 62 *supra*.

⁷⁶ F. BACON, A COLLECTION OF SOME PRINCIPALL RULES AND MAXIMES OF THE COMMON LAWES OF ENGLAND (London 1630), in ELEMENTS OF THE COMMON LAWES OF ENGLAND (London 1630).

⁷⁷ For descriptions of Bacon's scheme and the various genres involved in it, see 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 485-89 (1936); P. STEIN, *supra* note 59, at 170-74.

law."⁷⁸ A collection of maxims, together with a book of *Institutes*⁷⁹ and a book of *Terms of the Law*,⁸⁰ was to operate principally at an educational level; the main body of the restatement was to consist of abridgments.⁸¹ Bacon's collection was not the first to be published; in 1546 there had appeared *Principia sive Maxima Legum Angliae*,⁸² a short, anonymous work, and in 1618 Ashe produced his *Handfull of Flowers*.⁸³ After the publication of Bacon's *Maxims* in 1630, various other collections appeared, including William Noye's *Treatise of the Principall Grounds and Maximes of the Lawes of This Kingdom* in 1641,⁸⁴ and Edmund Wingate's *Maximes of Reason* in 1658.⁸⁵ Noye's was a small book, originally written in law French; it claimed to be a summary consideration of the whole law, divided into the laws of reason, custom, and statutes.⁸⁶ These three sources constituted the "grounds" of the law of England; the first, reason, was the ground of the common law itself. In the section on the common law are listed a number of maxims under the subdivisions Theology, Grammar, Logic, Philosophy, Political and Moral Rules, and Law Construction. These maxims are then illustrated and explained. Wingate's is a much more considerable work than Noye's; in some 772 pages, it sets out and comments upon some 214 maxims.⁸⁷ Wingate had a legal theory, which

⁷⁸ 13 THE WORKS OF SIR FRANCIS BACON 67 (J. Spedding ed. 1872).

⁷⁹ This was to be "a key and general preparation" to reading the body of the law. *Id.* at 70.

⁸⁰ This form of legal literature originates with J. RASTELL, *supra* note 34, a legal word book that in various forms went through 28 editions between 1527 and 1742, and surfaced in an American reprint as late as 1819. Such works also could be linked to a theory of law. Cf. F. STROUD, A JUDICIAL DICTIONARY (1890), in which a legal word book was assigned a role in achieving the aims of British imperialism: Stroud believed that law was a language, and if the whole British empire spoke the same legal language there would be uniformity of law. In fact, the dictionary was widely used by colonial officers as part of a portable law library, and the work is still current in England.

⁸¹ The remaining book of the restatement was to be a compilation of ancient laws, *De Antiquitatibus Juris*. 5 W. HOLDSWORTH, *supra* note 77, at 488.

⁸² ANON., PRINCIPIA SIVE MAXIMA LEGUM ANGLIAE (n.p. 1546).

⁸³ T. ASHE, FASCICULUS FLORUM OR A HANDFULL OF FLOWERS GATHERED OUT OF THE SEVERALL BOOKES OF THE RIGHT HONORABLE SIR EDWARD COKE (London 1618).

⁸⁴ W. NOYE, TREATISE OF THE PRINCIPALL GROUNDES AND MAXIMES OF THE LAWES OF THIS KINGDOM (London 1641). The sixth edition (London 1792) discusses 48 maxims in 163 pages. The work went through nine editions up to 1821 in England, and three printings in America (1808, 1824, 1845).

⁸⁵ E. WINGATE, MAXIMES OF REASON (London 1658).

⁸⁶ W. NOYE, *supra* note 84, at 1, 18-19 (2d ed. London 1651).

⁸⁷ These include, interestingly enough, as number 147, "None shall take benefit or advantage of their own wrong." E. WINGATE, *supra* note 85, at 568. The ultimate source of this maxim is Ulpian in *Digest* 50.17.134.1 where it appears as "*nemo ex delicto meliorem suam*

he set out in the flamboyant prose of the time:

Not all Lawes that are Just and Prudent ought to be used as *Radii* and *Effluxes* from the Eternal Wisdom, having thus Exemplar Cause and bright Idea in God himself. The mediate Author of these is humane Reason, exalted and purified by Learning and Experience, and enlightened by the Divine Spirit; I presume there is no fear of Sofinians in Law, and that attempts may be made without charges, to discover how the vast multitude of Cases, that Follies, or Passions, or Necessities of men have obliged us to be acquainted with, are all accountable and reducible to some few Theses; which being prime Emanations and General Maximes of Reason, govern and serve for a Clue and Conduct, through the Labyrinth of that perplext variety; Saving us the labour of Chargeing our memories with every particle, then to burden and confound us.⁸⁸

Later works in the same tradition appeared in the eighteenth century,⁸⁹ the most successful perhaps being Richard Francis's *Maxims of Equity*,⁹⁰ which went through five editions in England

conditionem facere potest." The maxim is well known to students of modern jurisprudence, because it features prominently in Professor Dworkin's article *The Model of Rules*, *supra* note 57. Dworkin presents the maxim as an illustration of a principle, his argument being that principles, as contrasted with rules, figure prominently in critical legal decision. The context of this argument is Dworkin's discussion of *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889), where the majority opinion relied on the proposition that

all laws as well as all contracts may be controlled in their operation and effect by general fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own iniquity, or to acquire property by his own crime.

In this case, the principle in question is supposed by the court to be a maxim based on public policy and founded in universal law, that is, natural law. Dworkin's own theory is of course different.

⁸⁸ E. WINGATE, *supra* note 85, at iii.

⁸⁹ The principal eighteenth-century work is the anonymous *FOUNDATIONS AND RUDIMENTS OF LAW AND EQUITY* (London 1749; 2d ed. London 1751); see text and notes at notes 99-100 *infra*. See also 12 W. HOLDSWORTH, *supra* note 77, at 189. Thomas Branch's *PRINCIPIA LEGIS ET AEQUITATIS* (London 1753), containing 2000 maxims, principles or rules, definitions, and "memorable sayings," also was successful. It went into five English editions up to 1824; there also was an American edition in that year. Capell Lofft's *REPORTS OF CASES ADJUDGED IN THE COURT OF KING'S BENCH* (London 1776; 2d ed. Dublin 1790) includes a collection of maxims. Lofft also edited *PRINCIPIA CUM JURIS UNIVERSALIS TUM PRAECIPUE ANGLICANI* (London 1779).

⁹⁰ R. FRANCIS, *MAXIMS OF EQUITY* (London 1727). See generally 12 W. HOLDSWORTH, *supra* note 77, at 188. Francis's book purported to demonstrate that equity was not arbitrary. It lists and comments upon 14 maxims, all of which are in English. Other collections include a considerably larger number. The modern view seems to be that there are only 12.

from 1727 to 1746, and eventually crossed the Atlantic to appear in Richmond, Virginia in 1823. This work was the first printed book on Equity, preceding by ten years the curious work attributed to Ballow.⁹¹ In the nineteenth century the best known example is Broom's *Legal Maxims*, an enormously successful work that ran to ten editions between 1845 and—incredibly—1939.⁹² In the third edition, printed in 1858, Broom comments upon 105 maxims and lists 595, mainly in Latin, though a few are in law French; he arranged them under ten subject categories. Herbert Broom was a law teacher who lectured as Reader to the Inns of Court. He was a prolific author,⁹³ and his book was intended primarily for students, though he hoped it might be useful to the barrister “who may be desirous of applying a Legal Maxim to the case before him.”⁹⁴ Broom had a legal theory; he possessed a view of the place of maxims or principles that he set out in the preface to his *Maxims*:

In the Legal Science, perhaps more frequently than in any other, reference must be made to first principles. Indeed, a very limited acquaintanceship with the earlier Reports will shew the importance which was attached to the acknowledged Maxims of the Law, in periods when civilization and refinement had made comparatively little progress.⁹⁵

In simpler ages reference to these maxims “so manifestly founded in reason, public convenience, and necessity, as to find a place in the code of every civilized nation,”⁹⁶ solved most problems; the complexity of modern life, though reducing the utility of maxims,

See Pound, On Certain Maxims of Equity, in CAMBRIDGE LEGAL ESSAYS 259 (1926).

⁹¹ ANON., *TREATISE OF EQUITY* (London 1737). The 1737 edition appeared anonymously. It was first credited to Ballow in a glossed, two-volume edition edited by John Fonblanque and published in London in 1793-94. Fonblanque purported to rely on “general report,” see 2 *id.* at v-ix. The contemporaneous third edition, published in Dublin in 1792, claims that Sir Geoffrey Gilbert, see text and notes at notes 137-156 *infra*, was the author. The Fonblanque version went through five English editions. It also was popular in the United States, where it went through four editions before Story's treatise, see text and notes at notes 276-285 *infra*, supplanted it.

⁹² H. BROOM, *A SELECTION OF LEGAL MAXIMS* (London 1845). P. HALKERSTON, *A COLLECTION OF LATIN MAXIMS AND RULES IN LAW AND EQUITY* (Edinburgh 1823) is another nineteenth-century work; it was used by Broom. Further examples are J. PHILLIMORE, *PRINCIPLES AND MAXIMS OF JURISPRUDENCE* (London 1856), and J. RAM, *THE SCIENCE OF LEGAL JUDGEMENT* (London 1834).

⁹³ Broom was best known in his time for his *COMMENTARIES ON THE COMMON LAW* (London 1856).

⁹⁴ H. BROOM, *supra* note 92, at ii.

⁹⁵ *Id.* at i.

⁹⁶ *Id.*

has not deprived them of fundamental importance. Some are "deductions of reason" rather than "Rules of law,"⁹⁷ and therefore can only be *illustrated*. Broom implies here that specifically *legal* maxims require support from authority, in order to show their general acceptance, and by way of illustration, qualification, or exception.⁹⁸ Broom's text is not, however, primarily concerned to demonstrate the reception of the maxims by citing authority; this is a subsidiary function. The major eighteenth-century collection, *Grounds and Rudiments of Law and Equity* (1749),⁹⁹ an anonymous work by a Middle Templar, had adopted a similar theoretical position, and attempted by illustrating the maxims through cases to show that the maxims or rules were indeed the basis of judicial decisions. The book, with its 526 maxims, contains "A Collection of Rules or Maxims, with the Doctrine upon them, illustrated by various Cases extracted from the Books and Records, to evince that these *Principles* have been the Foundation upon which the Judges and Sages of the Law have built their *solemn* Resolutions and Determinations."¹⁰⁰ This clearly states the theory of the priority of principles over decisions; the principles were the basis of decided cases, not the reverse. But the rise of the notion of judicial *auctoritas* based on office or status could also lead to the idea that maxims needed proof by the authority of judicial decisions. This, for example, was Francis's idea; his maxims of equity were "Collected from and proved by Cases, out of the Books of the best Authority."¹⁰¹

In theory, collections of maxims could be arranged not by an alphabetical scheme, but by some more rational substantive method, and thereby produce a structure for ordering the law. Indeed, to this day there are portions of legal treatises that could as well be presented as commentary upon maxims—for example, the section of a criminal law treatise on *mens rea*, organized around

⁹⁷ *Id.* at ii.

⁹⁸ *Id.* at i.

⁹⁹ *GROUND AND RUDIMENTS OF LAW AND EQUITY*, *supra* note 89. This work contains short reports of numerous House of Lords cases, and fear of trouble over privilege presumably is the reason for the author's anonymity. The author claimed that his work was superior to that of Wingate, *see* text and notes at notes 87-88 *supra*, and W. PHILLIPS, *THE PRINCIPLES OF LAW REDUCED TO PRACTICE* (London 1662). He faulted the former for being too prolix and containing too few principles, and the latter for being too superficial—and concluded that neither was "fit to be put into the Hands of a young Student." *GROUND AND RUDIMENTS OF LAW AND EQUITY*, *supra* note 89, at iii (2d ed. London 1751).

¹⁰⁰ *GROUND AND RUDIMENTS OF LAW AND EQUITY*, *supra* note 89, title page (2d ed. London 1751).

¹⁰¹ R. FRANCIS, *supra* note 90, title page.

the maxim *actus non facit reum nisi mens sit rea*.¹⁰² Back in the seventeenth century, as Dr. Prest has shown,¹⁰³ logical schemes for methodizing the law (or any other body of learning) enjoyed a considerable vogue, and such schemes could be applied to the maxims of the law in an attempt to produce a systematic exposition of legal principles. The most notable product of this process was Finch's *Law*,¹⁰⁴ posthumously published in 1627, whose arrangement later influenced institutional writers, particularly Thomas Wood¹⁰⁵ and in some degree perhaps Blackstone, but not, apparently, Hale. Finch adopted the practice of setting out the law by first stating "the Maximes and positive grounds of the law,"¹⁰⁶ distinguished typographically in bold-face Gothic; then he added relevant statutory material. This was followed by the "proofes and examples of those Maximes,"¹⁰⁷ which formed the second division, again distinguished typographically. The third section dealt with the royal prerogative as related to the maxim or maxims in question. Before dealing with the substantive law, Finch devoted Book I to what we would call the general part, and he provided an exposition of such basic legal ideas as the law of nature, legal fictions, and positive laws;¹⁰⁸ this includes a statement of general legal principles (set out as maxims) derived from other disciplines, such as grammar, logic, morality, and natural philosophy. Here, for example, appears the maxim that "no man shall take a benefit of his owne wrong," catalogued as a moral rule.¹⁰⁹ Finch's classification of maxims in this manner—by reference to their source—is also found elsewhere. Thus, in Doddridge's *English Lawyer* (1631)¹¹⁰ the sources

¹⁰² *E.g.*, W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 191-246 (1972).

¹⁰³ Prest, *The Dialectical Origins of Finch's Law*, 1977 *CAMB. L.J.* 326.

¹⁰⁴ H. FINCH, *LAW, OR, A DISCOURSE THEREOF* (London 1627). For a full discussion of this work, as well as of Finch's *NOMOTECHNIA* (London 1613), see Prest, *supra* note 103.

¹⁰⁵ T. WOOD, *AN INSTITUTE OF THE LAWS OF ENGLAND OR THE LAWS OF ENGLAND IN THEIR NATURAL ORDER, ACCORDING TO COMMON LIFE* (London 1720). This was a two-volume octavo edition. The basic scheme adopted divides the material into four books: "Of Persons," "Of Estates," "Of Crimes and Misdemeanors," and "Of the Courts of Justice, or, Jurisdiction of the Courts." This arrangement is similar to Finch's scheme, but differs from Blackstone's: "Of the Rights of Persons," "Of the Rights of Things," "Of Private Wrongs," and "Of Public Wrongs." See also note 161 *infra*.

¹⁰⁶ H. FINCH, *supra* note 104, at ii.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1-76.

¹⁰⁹ This is presented as a deduction from the propositions that "The Law favoreth right [and] Hateth wrong." *Id.* at 45-46.

¹¹⁰ J. DODDRIDGE, *THE ENGLISH LAWYER* (London 1630) had been preceded in 1629 by a defective and incomplete version entitled *The Lawyers Light. The English Lawyer* was based in part on Ramist logic. See Prest, *supra* note 103, at 328. Doddridge divided maxims

are logic, natural philosophy, moral philosophy, civil law, canon law, and finally "from Use, Custom and Conversation of Men."¹¹¹ Michael Hawke's *The Grounds of the Lawes of England* (1657)¹¹² is another example; Hawke praises Finch, who, he says, "hath endeavoured [*sic*] and fairely proceeded in reducing not onely the body of our Lawes into a compendious method, but also the grounds and rules of the same into an Academicall order."¹¹³ Finch's methodical scheme for expounding the "body of our Lawes"—what we would call substantive law—was workable and, until Hale produced a better one, the best to be found; nevertheless, his schematic division of maxims by sources, although interesting jurisprudentially,¹¹⁴ was a dead end and could never have formed the basis for either institutional or monographic expositions of the law. The last collection to methodize maxims according to an elaborate scheme was Edmund Wingate's *Maximes of Reason* (1658);¹¹⁵ later collectors of maxims, such as the author of *Grounds and Rudiments of Law and Equity*, returned to an alphabetical scheme.¹¹⁶

Though Broom continued to be edited until 1939, and although maxims still feature in legal exposition, argument, and justification, they are now regarded as slightly comical, and the form of literature directly related to them is dead. It is noticeable that in modern English theoretical works they are hardly ever mentioned as "sources of law."¹¹⁷ The decline in popularity of this form

into those that applied generally throughout the law, and those that applied to only one title. An example of the latter is "*ex nudo pacto non oritur actio*," J. DODDRIDGE, *supra*, at 164, which applied only to contract law.

¹¹¹ J. DODDRIDGE, *supra* note 110, at 161.

¹¹² M. HAWKE, *THE GROUNDS OF THE LAWES OF ENGLAND* (London 1657). In the preface to this work Hawke sets out an elaborate statement of his theoretical approach to the law, and acknowledges his debt to Bacon, Finch, and Doddridge. What are variously called "principles," "maxims," "eruditions," and "grounds," *id.* at iii, constitute "a foundation in Law, upon whose reason the structure of many particular Cases doth stand," *id.* at iv. The only way to combat the prolixity of the law is to expound it by way of grounds or rules and their exceptions, as other sciences are expounded. *Id.* at vi.

¹¹³ *Id.* at iii.

¹¹⁴ In modern analytical jurisprudence there has been much discussion of the extent to which judicial decisions (or other logical conclusions) can be justified by specifically legal reasons; there are various terminologies in which this matter is aired.

¹¹⁵ E. WINGATE, *supra* note 85.

¹¹⁶ There are minor exceptions, such as the collection by Phillimore, *see* note 92 *supra*.

¹¹⁷ They linger on in the appendix to J. SALMOND, *JURISPRUDENCE* 525-31 (11th ed. 1957), and they receive a brief mention in G. PATON, *A TEXT-BOOK OF JURISPRUDENCE* 59 (4th ed. 1972). But even in C.K. ALLEN's *LAW IN THE MAKING* (1927) they are not accorded the status of independent sources of law. (This book, which originated in a series of lectures

of literature is partly explicable in terms of the rise of the treatise, which expounded the law in a way more coherent than was possible by any rearranged scheme of maxims. Three other factors may have been significant. First, it came to be thought improper to invent maxims; one could only collect them like zoological specimens. By their nature they ought to be as established and antique as possible. Hence, the collector was inhibited from attempting a more elegant and satisfactory exposition of the law; he was condemned to unoriginality. Second, maxims had to be in another language, normally Latin, and a text built upon them could not continue to command respect after the fall from dominance of the traditional classical education; stylistically, the use of Latin maxims, once thought elegant, is now a subject for ridicule. Third, the tradition enshrined in collections of maxims was that the entire common law system possessed an intellectual unity. This view gave way to the idea that branches of the law form coherent wholes. Even this latter view is now doubted. Maxims have come to seem not just antique but archaic. The form of literature associated with them has died out, but the legal theory upon which they rested came to find a different form of expression in the treatise.

IV

Plucknett regarded the treatise as essentially a product of the nineteenth century, and suggested¹¹⁸ that when its history came to be written, the great name associated with the genre would be that of Joseph Story, whose first treatise, one of nine, appeared in 1832.¹¹⁹ Story chose bailments as the first branch of the law to expound, and it is not without significance that the same area had been made the subject of an earlier and celebrated treatise by a great scholar, Sir William Jones, whose *Essay on the Law of Bailments*¹²⁰ had first been published half a century earlier, in 1781. As a reviewer in *The American Jurist* pointed out, Story's work was far more comprehensive; he called Jones's book "a mere sketch or

in India in 1926, and is the most elaborate discussion of the judicial process by an English author in this century, is dominated by a theory of stare decisis.) It is hardly surprising to discover that maxims are not discussed in the more recent literature. I doubt whether the revival, in a new guise, of the theory associated with them will generate new collections of legal principles for Dworkin's ideal judge, "Hercules," see R. DWORKIN, *supra* note 57, to rely on.

¹¹⁸ T.F.T. PLUCKNETT, *supra* note 3, at 19.

¹¹⁹ See text and notes at notes 276-284 *infra*.

¹²⁰ W. JONES, AN ESSAY ON THE LAW OF BAILMENTS (London 1781).

outline of some of the most prominent rules of law upon the subject" and claimed that it was "much over-rated."¹²¹ This may be a fair comparative judgment, but Jones did write the first treatise on the subject, and in treatise writing, as in mountaineering, a special significance is rightly accorded to those who achieve firsts and thereby demonstrate that the feat is in fact possible. Actually, a considerable number of treatises were written in the eighteenth century, and it was then that the treatise tradition became established. Yet the new form of legal literature, though it came to supplant the collections of maxims, was nevertheless based on the same theory of the nature of law.

The great legal publishing event of the century was of course the appearance of Blackstone's *Commentaries* in 1765-69,¹²² preceded by his *Analysis of the Laws of England* in 1756.¹²³ The *Commentaries* originated in lectures delivered at Oxford from 1753 onwards.¹²⁴ After 1758 Blackstone delivered these lectures as Vinerian Professor; the endowment of the chair was derived in part from the other major legal publication of the century, Charles Viner's twenty-three-volume abridgment (1741-57).¹²⁵ Blackstone was an institutional work, not a treatise, but its success and the resulting fame of its author must have encouraged the production of monographic literature. Certainly, before his work appeared few monographs of any substance were published. Booth on Real Actions (1701)¹²⁶ hardly counts, as its concern is with procedure, and with archaic procedure at that. Sir Martin Wright's *Introduction to the Law of Tenures* (1730)¹²⁷ is essentially a historical work, written in the spirit of one who believes that law, or at least certain branches of it, can be understood only historically; this belief was strongly held by Blackstone and has permanently influenced text writers. The work itself is not, however, a treatise in any sense. Apart from embryonic works such as Ballow¹²⁸ and Nelson,¹²⁹ we are left with only two treatise writers before Blackstone: Hawkins

¹²¹ 7 AM. JURIST 128, 137 (1832).

¹²² W. BLACKSTONE, *supra* note 6.

¹²³ W. BLACKSTONE, *AN ANALYSIS OF THE LAWS OF ENGLAND* (Oxford 1756).

¹²⁴ See generally 12 W. HOLDSWORTH, *supra* note 77, at 702-37.

¹²⁵ C. VINER, *supra* note 51.

¹²⁶ G. BOOTH, *NATURE AND PRACTICE OF REAL ACTIONS, IN THEIR WRITS AND PROCESS* (London 1701).

¹²⁷ M. WRIGHT, *INTRODUCTION TO THE LAW OF TENURES* (London 1730). There were four English and three Irish editions between 1730 and 1792.

¹²⁸ H. BALLOW, *supra* note 91.

¹²⁹ W. NELSON, *THE LAW OF EVIDENCE* (London 1717).

and Gilbert.

Sergeant William Hawkins (1673-1746) was a Cambridge graduate and an Inner Temple man, and his *Treatise of the Pleas of the Crown* ran through seven editions in the eighteenth century and one in the nineteenth.¹³⁰ Hawkins was able to utilize earlier works, particularly Coke's *Third Institute*,¹³¹ as a quarry. This in part explains the provenance of the work; it belongs to a tradition started by Stanford¹³² and continued by Pulton¹³³ and Coke. But the principal obstacle to institutional or treatise writing is the daunting problem of arranging methodically what is essentially disordered material; given a usable scheme, primarily what is needed is hard work, coupled, of course, with some analytical ability. Hawkins, like Blackstone after him, relied on a scheme devised by Sir Mathew Hale;¹³⁴ in a real sense both works were posthumous products of Hale's analytical skill. The motivation of Hawkins is explained in the preface. He set out "to vindicate the Justice and Reasonableness of the Laws concerning criminal Matters, and to reduce them into as clear a Method, and explain them in as familiar a manner, as the Nature of the Thing will bear."¹³⁵ The "method" was in reality Hale's product, not Hawkins's. A considerable body of tract literature critical of various aspects of the criminal law had appeared by the mid-seventeenth century,¹³⁶ and the generally defensive tone of Hawkins's preface perhaps shows that he was responding to this literature in a general way. But his books can probably be more easily explained as an emanation of the deep reverence for reason associated with the natural law school of thought. Though Hawkins never developed an original theory, his expressed aim places his treatise firmly in a tradition exemplified by many later works; the substantive law expounded is based not

¹³⁰ W. HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* (London 1716-21). Hawkins received his M.A. in 1693 and became Sergeant of Law in 1723. Little is known about him; the article in 9 *DICTIONARY OF NATIONAL BIOGRAPHY* 230 (1939) is slim. He also compiled an abridgment of *Coke on Littleton* and a collection of statutes, as well as a summary of his great treatise.

¹³¹ E. COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CASES* (London 1644).

¹³² W. STANFORD, *supra* note 35.

¹³³ F. PULTON, *DE PACE REGIS ET REGNI* (London 1609).

¹³⁴ M. HALE, *SUMMARY OF THE PLEAS OF THE CROWN* (London 1678) reached its fourth edition by 1694.

¹³⁵ W. HAWKINS, *supra* note 130, at i.

¹³⁶ See D. VEALL, *THE POPULAR MOVEMENT FOR LAW REFORM 1640-1660*, at 127-41 (1970).

so much on authority as on human reason. This is not to say that Hawkins set out to write a speculative work; his writing is severely down-to-earth and practical in character, and the theory rests lightly on his work.

Sir Geoffrey Gilbert's (1675-1726) position in the history of the treatise is far more intriguing and problematical, for although a fair amount is known about his writings they have never been made the subject of a modern study, as they deserve. A considerable corpus of monographic writing is attributed to him, all of it published posthumously. In addition to two collections of reports, monographs on no less than fifteen distinct branches of the law appeared in print between 1730 and 1763.¹³⁷ They dealt with the following subjects, in order of their appearance: Tenures,¹³⁸ Uses and Trusts plus Dower,¹³⁹ Ejectment,¹⁴⁰ Court of Common Pleas,¹⁴¹ Evidence,¹⁴² Devises,¹⁴³ Distress and Replevin,¹⁴⁴ Court of Chancery,¹⁴⁵ Court of Exchequer,¹⁴⁶ Rent,¹⁴⁷ Debt,¹⁴⁸ the Constitution,¹⁴⁹ and Executions plus King's Bench.¹⁵⁰ In addition, considerable parts of Matthew Bacon's five-volume *New Abridgment of the Law*¹⁵¹ (published between 1736 and 1766) were lifted from manuscripts of Gilbert,¹⁵² and in the fifth edition of that work by Sir Henry Gwillim in 1798 a treatise by Gilbert on Remainders was published from one of Francis Hargrave's manuscripts.¹⁵³ A trea-

¹³⁷ In addition, Gilbert may be the author of the treatise on Equity first published anonymously in 1737 and generally attributed to Henry Ballow. See note 91 *supra*.

¹³⁸ G. GILBERT, TREATISES OF TENURES (London 1730).

¹³⁹ THE LAW OF USES AND TRUSTS COLLECTED AND DIGESTED IN A PROPER ORDER FROM THE REPORTS OF ADJUDGED CASES, IN THE COURTS OF LAW AND EQUITY AND OTHER BOOKS OF AUTHORITY TOGETHER WITH A TREATISE OF DOWER (London 1734).

¹⁴⁰ THE LAW AND PRACTICE OF EJECTMENTS (London 1734).

¹⁴¹ HISTORY AND PRACTICE OF THE COURT OF COMMON PLEAS (London 1737).

¹⁴² LAW OF EVIDENCE (Dublin 1734).

¹⁴³ THE LAW OF DEVISES, LAST WILLS, AND REVOCATIONS (London 1756).

¹⁴⁴ THE LAW OF DISTRESSES AND REPLEVINS (London 1757).

¹⁴⁵ THE HISTORY AND PRACTICE OF THE HIGH COURT OF CHANCERY (London 1758).

¹⁴⁶ A TREATISE ON THE COURT OF EXCHEQUER (London 1758).

¹⁴⁷ TREATISE ON RENTS (London 1758).

¹⁴⁸ A TREATISE ON THE ACTION OF DEBT, IN CASES IN LAW AND EQUITY (London 1760).

¹⁴⁹ A TREATISE ON THE CONSTITUTION, IN KING'S BENCH AND CHANCERY (London 1760).

¹⁵⁰ THE LAW OF EXECUTIONS; TO WHICH ARE ADDED THE HISTORY AND PRACTICE OF THE COURT OF KING'S BENCH, AND SOME CASES TOUCHING WILLS OF LANDS AND GOODS (London 1763).

¹⁵¹ M. BACON, *supra* note 53.

¹⁵² Bacon died before reaching "Simony," and the work was completed by Sergeant Sayer and Owen Ruffhead. See J. MARVIN, *supra* note 9, at 85.

¹⁵³ This is explained in the preface to the fifth edition. M. BACON, *supra* note 53, at vii-viii (5th ed. H. Gwillim, London 1798).

tise on both formal and informal contracts (including mortgages) survives in manuscript form as well.¹⁵⁴ Some of Gilbert's works appeared in more than one version, and many appeared unfinished,¹⁵⁵ or without attribution of his authorship. Further investigation might well locate other works by him, or derivations from his writings; I suspect that *A General Abridgment of Cases in Equity* (1732)¹⁵⁶ may be an example. In the absence of a scholarly study of Gilbert's life and work it may be premature to form a view about how or why he came to write so much; so far as I know there is no direct evidence on the question. It is at least probable, however, that Gilbert had been engaged upon a comprehensive encyclopedia of the law, and that the treatises are, as it were, segments of a work of this character developed out of the abridgment tradition. If this conjecture is correct, Gilbert anticipated Halsbury¹⁵⁷ by about two centuries. What induced him to attempt so monumental a work is mysterious indeed.¹⁵⁸

Blackstone was, of course, an institutional writer, not a writer of monographs, and ostensibly he wrote not for lawyers, but for what is now called the intelligent layman—a concept that includes law students at the beginning of their course of study. Now Blackstone, it must be remembered, was essentially a civilian and an academic; his disappointed ambition was to become Professor of Civil Law at Oxford. His principal contact with legal practice dates from after the publication of the *Commentaries*, not before; had he never become Vinerian Professor and published his great work, I think it is safe to say that no one would ever have heard of him as a common lawyer.¹⁵⁹ The *Commentaries* do not arise from the common law. Though the scheme dates back to Hale,¹⁶⁰ nothing remotely resembling them in execution had appeared in the English language before.

We should not forget, however, that in the eighteenth century quite a number of very substantial legal works, presumably in-

¹⁵⁴ Hargrave Ms. 265, British Library.

¹⁵⁵ "It was the hard fate of the excellent writings of the late Chief Baron Gilbert, to lose their Author, before they had received his last corrections and improvements, and in that unfinished state to be thrust into the world, without even the common care of an ordinary editor." M. BACON, *supra* note 53, at iii (5th ed. H. Gwillim, London 1798).

¹⁵⁶ ANON., *GENERAL ABRIDGMENT OF CASES IN EQUITY* (London 1732, 1756).

¹⁵⁷ See text at note 53 *supra*.

¹⁵⁸ Short biographies of Gilbert appear in 7 *DICTIONARY OF NATIONAL BIOGRAPHY* 1204 (1939), and E. FOSS, *supra* note 9, at 300.

¹⁵⁹ See 12 W. HOLDSWORTH, *supra* note 77, at 702-37.

¹⁶⁰ See text and note at note 54 *supra*.

tended for educated laymen rather than specialists, were published in English and appear to have been well received. These works belong to the civil and natural law tradition, though one such work, Thomas Wood's *An Institute of the Laws of England or the Laws of England in their Natural Order, according to Common Life* (1720)¹⁶¹ took as its subject matter the common law. Wood's *New Institute of the Imperial or Civil Law* had first been published in 1704;¹⁶² included in later editions, without acknowledgement, was a treatise on laws in general by Jean Domat.¹⁶³ The *New Institute* was essentially a comparative study "Composed for the Use of some Persons of Quality,"¹⁶⁴ as the intelligent layfolk were then called; Wood claimed in his preface that common and civil law were more similar in substance than was generally appreciated:

But if there is that wide difference between the Common and Civil Laws in their forms of Pleading and manner of Tryal, this is only the stile, practice, and course of the Courts. I contend that there is a mixture in the *Principles, Maxims* and *Reasons* of these two Laws; and indeed the Laws of all Countries are mixed with the Civil Law, which have arrived to any degree of perfection.¹⁶⁵

Baron Pufendorf's *Of the Law of Nature and Nations*¹⁶⁶ appeared in translation in 1710, and again in 1729. In 1722, two years after the publication of Wood's *Institute of the Laws of England*, William Strahan published a translation of Jean Domat's *The Civil Law in its Natural Order: Together with the Public Law*,¹⁶⁷ whose methodizing title had been imitated by Wood. The thinking be-

¹⁶¹ T. Wood, *supra* note 105. Nine later editions appeared between 1722 and 1774. Thomas Wood (1661-1722) was a Cambridge Doctor of Laws and was Rector of Hardwick in Buckinghamshire. His attempt to methodize English law on a civilian basis was anticipated by John Cowell's *INSTITUTIONES IURIS ANGLICANI AD METHODUM ET SERIEM INSTITUTIONEM IMPERIALIUM COMPOSITAE ET DIGESTAE* (Cambridge 1605).

¹⁶² T. Wood, *NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW* (London 1704). The first edition was published anonymously. There were later editions in 1712, 1721, and 1730.

¹⁶³ See note 167 *infra*. For discussion of the relationship between the English civilians and Continental legal writing, see Coing, *Das Schrifttum der englischen Civilians und die Kontinentale Rechtsliteratur in der Zeit zwischen 1550 und 1800*, 5 *IUS COMMUNE* (1975). See generally Coquillette, *Legal Ideology and Incorporation* (pts. 1-3), 61 *B.U.L. REV.* 1, 315 (1981) (part 3 forthcoming).

¹⁶⁴ T. Wood, *supra* note 162, title page.

¹⁶⁵ *Id.* at xi.

¹⁶⁶ S. PUFENDORF, *DE JURE NATURAE ET GENTIUM* (London 1672).

¹⁶⁷ J. DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER: TOGETHER WITH THE PUBLIC LAW* (W. Strahan trans., London 1722).

hind this publication, as explained by Strahan, was that Domat contained "all the fundamental maxims of law and equity, which must be the same in all countries."¹⁶⁸ This is the essential credo of the natural lawyers. The preface to this venture, which must, to judge from the number of later editions, have been successful, contains an elaborate argument for the utility of the work to common lawyers, a number of whom appear in the list of subscribers to the first edition. John Ayliffe's *A New Pandect of Roman Civil Law*, a massive work of scholarship, was published in 1734.¹⁶⁹ Ayliffe follows Wood precisely, even to the point of plagiarism, in his claim for substantive similarity between civil and common law.¹⁷⁰ Ayliffe's book does not appear to have been particularly successful. Jean Jacques Burlamaqui's *Principles of Natural and Politic Law*, by contrast, was received much more enthusiastically; published in a translation by Nugent in 1752,¹⁷¹ it went into numerous other editions—in 1763 and 1784 in England, and in 1792, 1807, and 1830 in America. John Taylor's *Elements of the Civil Law*,¹⁷² an extraordinarily successful work, which went into eight editions between 1754 and 1828, was intended "to Serve for an Introduction to the Study of the Civil Law; or rather, to contain the Principles of Law in General."¹⁷³ It was conceived as offering a scheme of general education that Taylor had devised at the instance of the Earl of Granville for his grandsons, to whom Taylor had been tutor. In this capacity he had been asked "to lay out the Rudiments of Civil Life, and of Social Duties; to enquire into the Foundations of Justice and Equity; and to examine the principal Obligations, which arise from these several Connections, into which Providence has thought proper to distribute the Human Species."¹⁷⁴ Here was a law course designed for the education of gentlemen. In 1754-56 appeared Thomas Rutherforth's *Institutes of Natural Law*,¹⁷⁵ the

¹⁶⁸ *Id.* at vi (2d ed. London 1737).

¹⁶⁹ J. AYLIFFE, *A NEW PANDECT OF ROMAN CIVIL LAW* (London 1734). Ayliffe (1676-1732) was an Oxford Doctor of Civil Law who was expelled from the University and degraded in 1714. His book contains a discussion of the nature of law, *id.* at 5-25, and this includes an attack upon reliance on precedents as opposed to principle and reason, *id.* at 8.

¹⁷⁰ *Id.* at xlvii.

¹⁷¹ The work was translated in two stages: *THE PRINCIPLES OF NATURAL LAW* (T. Nugent trans., London 1748); *THE PRINCIPLES OF POLITIC LAW* (T. Nugent trans., London 1752). Subsequent editions combined the two parts.

¹⁷² J. TAYLOR, *ELEMENTS OF THE CIVIL LAW* (Cambridge 1755).

¹⁷³ *Id.* at iii.

¹⁷⁴ *Id.*

¹⁷⁵ T. RUTHERFORTH, *INSTITUTES OF NATURAL LAW* (Cambridge 1754-56). There was a

only major work on natural law by an English writer in the eighteenth century.¹⁷⁶ All these were scholarly, substantial works, written in stylish prose and available in handsome editions. Nothing comparable had emerged from the common law tradition since Bracton's monumental work five centuries before, which itself had been written with a degree of civilian influence.

After becoming the first Vinerian Professor of English Law in 1758, Blackstone set himself the task of doing for the common law what had already been done for the civil law, and vindicating his new charge as a rational system "built upon the soundest foundations, and approved by the experience of ages."¹⁷⁷ Indeed, while extolling the virtues of the civil law he sounded a note of caution: "[W]e must not carry our veneration so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian. . . . [I]f an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions."¹⁷⁸ A spirit of nationalistic self-satisfaction permeates the *Commentaries*, and it is striking that once English law had been expressed in the language of the scholar and the gentleman, as civil law previously had been, common law legal writing took on a literary character it had previously lacked. The success of Blackstone encouraged the writing of more detailed studies of branches of the law that had been treated only in outline form by the master. Furthermore, the discursive literary style of the *Commentaries*, which sharply differentiated such a work from glosses or lists of maxims, must have furthered the idea that this was the better way to expound the principled science of the law.

In the later eighteenth century a number of significant monographs were published; the two earliest, described as "essays," were Charles Fearn's *Essay on the Learning of Contingent Remainders and Executory Devises* (1772)¹⁷⁹ and Sir William

second English edition in 1779 and an American edition, printed at Baltimore in 1832. As the title page indicates, the work was based on H. GROTIUS, *DE JURE BELLI ET PACIS* (Paris 1625).

¹⁷⁶ A possible exception is William Paley's *PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* (Philadelphia 1788). In eighteenth-century thought the study of law and the study of ethics were not clearly distinguished, and the boundaries between works on natural law, civil law, and moral philosophy were uncertain.

¹⁷⁷ 1 W. BLACKSTONE, *supra* note 6, at 5.

¹⁷⁸ *Id.*

¹⁷⁹ C. FEARNE, *ESSAY ON THE LEARNING OF CONTINGENT REMAINDERS AND EXECUTORY DEVICES* (London 1772). The work went through 10 English editions between 1772 and 1844, and it appeared in an American edition in 1819.

Jones's *Essay on the Law of Bailments* (1781).¹⁸⁰ Both works were of an elegant but esoteric character. Neither Fearne nor Jones came to legal writing through distinction in practice; both were primarily of an academic bent. Though they were different in their range of interests, Fearne being essentially insular, while Jones stood in the natural law tradition, both men believed in the scientific character of law.

Precisely what inspired Fearne at the age of thirty to publish his *Essay* (or earlier, in 1769, his *Historical and Legigraphical Chart of Landed Property in England*¹⁸¹) is obscure, but it may have been an attempt to establish a reputation as a lawyer by capitalizing on the controversy generated by *Perrin v. Blake* (1770)¹⁸² over the Rule in Shelley's Case.¹⁸³ Under his editorship the essay grew from 98 pages in 1772 to 450 pages in 1776; by 1791 the part dealing with contingent remainders alone ran to 558 pages.¹⁸⁴ Fearne's *Essay* was in no sense a condensation of cases; the text stands on its own and the cases are relegated to side note references.

William Jones, who had originally found the study of law repulsive, changed his mind in 1767 after reading Fortescue, and practiced law after 1775 in London until he became a judge in India. Jones's *Essay* was self-consciously based on a system that he thought could be applied to any branch of the whole science of the law:

I propose to begin with treating the subject *analytically*, and, having traced every part of it up to the first principles of natural reason, shall proceed *historically*, to show with what perfect harmony those principles are recognised and established by other nations, especially the Romans, as well as by our English courts, when their decisions are properly under-

¹⁸⁰ W. JONES, *supra* note 120. The book went through four English editions between 1781 and 1833. The first American edition appeared at Boston in 1796. Other "Essays" from this period are R. PRESTON, *ELEMENTARY TREATISE, BY WAY OF ESSAY, ON THE QUANTITY OF ESTATES* (Exeter 1791); and the *Essays* of John Joseph Powell discussed in text and notes at notes 197-204 *infra*.

¹⁸¹ C. FEARNE, *HISTORICAL AND LEGIGRAPHICAL CHART OF LANDED PROPERTY IN ENGLAND, FROM THE TIME OF THE SAXONS TO THE PRESENT ERA* (London 1769).

¹⁸² 4 Burr. 2579, 98 Eng. Rep. 355 (K.B. 1770).

¹⁸³ For biographical information on Fearne, see 6 *DICTIONARY OF NATIONAL BIOGRAPHY* 1138 (1939); 12 W. HOLDSWORTH, *supra* note 77, at 373-75.

¹⁸⁴ Fearne did not live to edit for the fourth edition the portion of the works dealing with executory devises; they were done by John Joseph Powell, and the edition was published in 1795.

stood and clearly distinguished; after which I shall resume *synthetically* the whole learning of *bailments*, and expound such rules, as, in my humble apprehension, will prevent any farther perplexity on this interesting title, except in cases very peculiarly circumstanced.¹⁸⁵

Jones was a linguist of extraordinary ability (he knew sixteen languages and had some acquaintance with twelve more) and an outstanding scholar. Law was but one of his interests; his work on bailments, published when he was thirty-five, was in all probability the result of a purely intellectual interest in trying out a new system of legal exposition. Plans to publish a treatise on maritime contracts and an edition of Littleton never came to fruition, nor did he live to carry out his great scheme of becoming the Justinian of India.¹⁸⁶

Fearne and Jones were followed by a number of treatise writers of varying attainments, the most important being Park, Bayley, Kyd, and Powell. James A. Park (1763-1838) produced his *System of the Law of Marine Insurances*¹⁸⁷ at the age of twenty-five, only three years after he became a barrister. This considerable and innovative work was produced under the patronage of Lord Mansfield¹⁸⁸ and was no doubt written to establish Park in his career. It went into many editions.¹⁸⁹ John Bayley (1763-1841) wrote his *Treatise on the Law of Bills of Exchange*¹⁹⁰ in 1789 at the age of twenty-six; at that point he had not been called to the bar, though he had joined Gray's Inn six years earlier and may have been a special pleader. In its original form Bayley's short book comprised

¹⁸⁵ W. JONES, *supra* note 180, at 4. In the second edition, Jones proposed to continue applying his system:

Should the *method* used in this little tract be approved, I may possibly not want inclination, if I do not want leisure, to discuss in the same form every branch of English law, *civil* and *criminal*, *private* and *public*; after which it will be easy to mould into distinct works the three principal divisions, or the *analytical*, the *historical*, and the *synthetic* parts.

Id. at 4 (2d ed. London 1798).

¹⁸⁶ For biographical information on Jones, see 10 DICTIONARY OF NATIONAL BIOGRAPHY 1062-65 (1939). On his place in intellectual history, particularly in the United States, see Ferguson, *The Emulation of Sir William Jones in the Early Republic*, 52 NEW ENGLAND Q. 3 (1979).

¹⁸⁷ J. PARK, A SYSTEM OF THE LAW OF MARINE INSURANCES (London 1787).

¹⁸⁸ See J. MARVIN, *supra* note 9, at 555.

¹⁸⁹ There were eight English and two American editions between 1787 and 1842.

¹⁹⁰ J. BAYLEY, A SHORT TREATISE ON THE LAW OF BILLS OF EXCHANGE, CASH BILLS, AND PROMISSORY NOTES (London 1789). This book also was popular, appearing in five English and two American editions by 1836.

a collection of principles only, and did not state the cases from which these principles were derived. Unlike collections of maxims, however, it adopted a literary form similar to that of Fearne and Jones; it was a prototypical treatise. Stewart Kyd (?-1811), a controversial political figure, wrote treatises on Bills of Exchange (1790),¹⁹¹ Awards (1791),¹⁹² and Corporations (1793-94),¹⁹³ part of the last work was produced in the Tower while Kyd was awaiting trial for treason.¹⁹⁴ It is not clear why Kyd, who also continued Comyn's *Digest of the Laws of England* in the 1792 edition,¹⁹⁵ took to legal writing. He does not appear to have written in order to establish himself at the bar as a young man, and may have simply needed the money—though one would not wish to dismiss other possible motivations, such as love of scholarship. All these writers were concerned with commercial law, a field much developed under Lord Mansfield's Chief Justiceship. John Joseph Powell (ca. 1755-1800),¹⁹⁶ the remaining important and successful treatise writer of the late eighteenth century, operated in other areas, producing major works on Mortgages (1785),¹⁹⁷ Powers (1787),¹⁹⁸ Devises (1788),¹⁹⁹ and Contracts (1790),²⁰⁰ as well as compiling a collection of conveyancing precedents that was published posthumously in

¹⁹¹ S. KYD, *A TREATISE ON THE LAW OF BILLS OF EXCHANGE* (London 1790). There were further English editions in 1791 and 1798, and American editions in 1798 and 1800.

¹⁹² *A TREATISE ON THE LAW OF AWARDS* (London 1791). Further English editions appeared in 1795 and 1799, and there was an American edition in 1808.

¹⁹³ *A TREATISE ON THE LAW OF CORPORATIONS* (London 1793-94). There was no later edition.

¹⁹⁴ He is not the only legal writer to find himself in such a situation. Baron von Pufendorf started musing about the nature of law and legal sanctions during a term of eight months' imprisonment in Denmark. See *GREAT JURISTS OF THE WORLD* 306 (J. MacDonell & E. Manson eds. 1914).

¹⁹⁵ J. COMYNS, *DIGEST OF THE LAWS OF ENGLAND* (3d ed. London 1792) (1st ed. London 1762-67).

¹⁹⁶ For biographical information, see 16 *DICTIONARY OF NATIONAL BIOGRAPHY* 245 (1939).

¹⁹⁷ J. POWELL, *A TREATISE ON THE LAW OF MORTGAGES* (London 1785). This work appeared in further English editions in 1787, 1791, 1799, 1822, and 1826. There was a Dublin edition in 1791 and an American edition in 1828.

¹⁹⁸ *AN ESSAY ON THE LEARNING RESPECTING THE CREATION AND EXECUTION OF POWERS* (London 1787). Editions appeared in Dublin in 1791 and in London in 1799. Kent deemed this a "very repulsive" work. 4 J. KENT, *COMMENTARIES ON AMERICAN LAW* 322 n.b (New York 1830).

¹⁹⁹ *AN ESSAY UPON THE LEARNING OF DEVISES* (London 1788). There were English editions in 1807 and 1827, an Irish edition in 1791, and American editions in 1806, 1807, 1822, and 1838.

²⁰⁰ *AN ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS* (London 1790). The work was reprinted twice in Dublin, and there were six American editions up to 1825.

1802²⁰¹ and again in 1810. He also edited Fearné in 1795²⁰² and is thought to have been his pupil. He had been admitted to the Middle Temple in 1775 and called to the bar in 1780, but what impelled him towards legal writing is not known. His books, which were well received, expressed the standard theory of the time: law was a science founded upon principle, and the aim of the treatise writer was to "discover the general rules and principles of natural and civil equity"²⁰³ upon which the decisions of the courts were based. Expressing the classic credo of the treatise writers, Powell explained that "[a]ll reasoning must be founded on first principles. The science of the law derives its principles either from that artificial system which was incidental to the law of feuds, or from the science of morals."²⁰⁴

In nineteenth-century England the treatise came to be the typical form of creative legal literature. Although legal periodicals had been in existence for some time, they did not provide an outlet for scholarly writing²⁰⁵ until the *Law Quarterly Review* was inaugurated in 1885, and it is only in our century that they have become quantitatively significant. The other innovation in nineteenth-century legal writing was the collection of leading cases, the first example of which was John W. Smith's *A Selection of Leading Cases on Various Branches of the Law with Notes* (1837-40).²⁰⁶ This type of literature enjoyed considerable favor, and numerous collections appeared before the idea of relating the casebook to a particular method of legal instruction was conceived by Christopher Columbus Langdell at Harvard in 1870.²⁰⁷ Later in the century an attempt to produce a casebook without commen-

²⁰¹ ORIGINAL PRECEDENTS IN CONVEYANCING (London 1802).

²⁰² See C. FEARNE, *supra* note 179 (4th ed. London 1795).

²⁰³ J. POWELL, *supra* note 200, at iii.

²⁰⁴ *Id.* at v.

²⁰⁵ For example, *The Law Journal*, which began publishing in 1803, reported recent cases, statutes, and law books, printed "original communications from correspondents," and provided "useful tables including accurate lists of bankrupts, distinguishing such of them as have obtained their certificates or writs of supersedeas." 1 LAW J. title page. (London 1803).

²⁰⁶ J. SMITH, A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW WITH NOTES (London 1837-40). Nine further editions appeared before 1900, and editions continued to be produced in the twentieth century. An American edition appeared in 1844, and J. MARVIN, *supra* note 9, at 651, notes that "the volumes have been frequently cited, with approbation, by the bench." For other examples, see O. TUDOR & F. WHITE, LEADING CASES IN EQUITY (London 1849-50); O. TUDOR, LEADING CASES ON MERCANTILE AND MARITIME LAW (London 1850); O. TUDOR, LEADING CASES ON REAL PROPERTY, CONVEYANCING, AND THE CONSTRUCTION OF WILLS AND DEEDS (London 1856).

²⁰⁷ See A. SUTHERLAND, THE LAW AT HARVARD 174-80 (1967).

tary, directly modeled on Langdell's *Cases in Contract*²⁰⁸ and intended for the same pedagogical purpose, failed in the sense that the case method never really caught on in English legal education.²⁰⁹ The dominance of the treatise was not affected by these experiments, and to this day in England there is no indication of any decline in the vogue for treatise writing. The continual production of such works, even in fields such as contract law that have been worked over and over for nearly two centuries by a multitude of writers, must reflect a curious stagnation in English private law, or at least in certain parts of it.

Many of the authors of the nineteenth-century treatises are still, in name at least, familiar to all English lawyers (however forgotten they may have become in America), because their works have lived on in "editions," or are still consulted on occasion, or are mentioned in later works that are still consulted. English lawyers still know of Woodfall on Landlord and Tenant,²¹⁰ Sugden on Vendors and Purchasers,²¹¹ Chitty on Contract,²¹² Stephen on Pleading,²¹³ Lewin on Trusts,²¹⁴ Jarman on Wills,²¹⁵ Williams on Real Property,²¹⁶ Blackburn on Sale,²¹⁷ Williams on Personal Property,²¹⁸ Taylor on Evidence,²¹⁹ Mayne on Damages,²²⁰ Fry on Specific Performance,²²¹ Lindley on Partnership,²²² Benjamin on Sale,²²³ Pollock on Contract,²²⁴ Anson on Contract,²²⁵ and Pollock

²⁰⁸ C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

²⁰⁹ See G. FINCH, CASES ON THE ENGLISH LAW OF CONTRACT (1886). This was republished in 1890, and a scaled-down version appeared in 1922 as C. KENNY, A SELECTION OF CASES ILLUSTRATIVE OF THE LAW OF CONTRACT.

²¹⁰ W. WOODFALL, THE LAW OF LANDLORD AND TENANT (London 1802).

²¹¹ E. SUGDEN, A CONCISE AND PRACTICAL TREATISE OF THE LAW OF VENDORS AND PURCHASERS OF ESTATES (London 1805).

²¹² J. CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS (London 1826).

²¹³ H.J. STEPHEN, *supra* note 8.

²¹⁴ T. LEWIN, A PRACTICAL TREATISE ON THE LAW OF TRUSTS AND TRUSTEES (London 1837).

²¹⁵ T. JARMAN, A TREATISE ON WILLS (London 1844).

²¹⁶ J. WILLIAMS, PRINCIPLES OF THE LAW OF REAL PROPERTY (London 1845).

²¹⁷ C. BLACKBURN, A TREATISE ON THE EFFECT OF THE CONTRACT OF SALE (London 1845).

²¹⁸ J. WILLIAMS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY (London 1848).

²¹⁹ P. TAYLOR, A TREATISE ON THE LAW OF EVIDENCE AS ADMINISTERED IN ENGLAND AND IRELAND (London 1848).

²²⁰ J. MAYNE, TREATISE ON THE LAW OF DAMAGES (London 1856).

²²¹ E. FRY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS (London 1858).

²²² N. LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP (London 1863).

²²³ J. BENJAMIN, TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY (London 1868).

²²⁴ F. POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY (1876).

²²⁵ W. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT (1879).

on Tort.²²⁶ Sadly, the most successful of all is possibly the worst of the lot, Archbold's *Criminal Pleading and Evidence* (1822),²²⁷ a work that remains to this day (albeit in a much-edited form) the essential do-it-yourself manual for the English criminal practitioner.

The authors of the nineteenth century were men of varied backgrounds. Some few, such as Archbold, appear to have been primarily legal writers,²²⁸ while others, such as Chitty,²²⁹ were practitioners who were also involved in legal education. Some wrote as young men to advertise themselves,²³⁰ or simply to make ends meet.²³¹ More curious explanations exist with regard to why some lawyers turned to authorship. Leake apparently was encouraged to write after his deafness had ruined his law practice.²³² Woodfall, it is said, broke his leg. In the later nineteenth century the tradition of treatise writing by academics began with Pollock²³³ and Anson,²³⁴ though it is only in recent times that academics have tended to predominate. This is hardly surprising; only since the Second World War has university-based legal education existed on any considerable scale in England.²³⁵

²²⁶ F. POLLOCK, *THE LAW OF TORTS* (1887).

²²⁷ J. ARCHBOLD, *A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES* (London 1822). The fortieth edition was published in 1979.

²²⁸ Archbold was one of the most prolific of the nineteenth-century legal writers in England, although little appears to be known about his life. In addition to his work on criminal pleading and evidence, see note 227 *supra*, he also wrote the *DIGEST OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN ACTIONS REAL, PERSONAL, AND MIXED* (London 1821) and *THE JUSTICE OF THE PEACE AND PARISH OFFICER* (London 1840).

²²⁹ For information on Joseph Chitty Sr. (1776-1841), see 4 *DICTIONARY OF NATIONAL BIOGRAPHY* 266 (1939).

²³⁰ For example, J.F. Archbold (1785-1870) published *A DIGEST OF THE PLEAS OF THE CROWN* (London 1813) before being called to the bar in 1814; Sugden (1781-1875) published his *PRACTICAL TREATISE OF THE LAWS OF VENDORS AND PURCHASERS OF ESTATES* (London 1805) before his call to the bar in 1807. Chitty published *A TREATISE ON BILLS OF EXCHANGE* (London 1799) at the age of 23. See 4 *DICTIONARY OF NATIONAL BIOGRAPHY* 266-67 (1939) (Chitty); 19 *id.* at 152-54 (Sugden); 22 *id.* at 54-55 (Archbold).

²³¹ Toward the end of the eighteenth century, the young John Campbell ghosted a book on partnership for this purpose. See 1 *LIFE OF JOHN, LORD CAMPBELL* 194 (M. Hardcastle ed. 1881). The book is thought to be the work that appeared as W. WATSON, *THE LAW OF PARTNERSHIP* (London 1794).

²³² C. FIFOOT, *JUDGE AND JURIST IN THE REIGN OF VICTORIA* 27 n.3 (1959). Leake is not noticed by the *Dictionary of National Biography*.

²³³ See F. POLLOCK, *supra* notes 224, 226; the works were written while Pollock was Corpus Professor of Jurisprudence at Oxford. For biographical information on Pollock, see W. HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* 279-90 (1938).

²³⁴ See W. ANSON, *supra* note 225. The work was written shortly before Anson was made Warden of All Souls College, Oxford.

²³⁵ In America, law schools developed much earlier, but it was only after the appoint-

Nineteenth-century treatises vary greatly in quality, and at their worst are disorderly, rambling works of condensation not much better than Sheppard's *Actions on the Case*.²³⁶ At their best they are elegantly written and highly systematic, expressing an ideal clearly stated by H.J. Stephen in 1837 in the preface to his treatise on Pleading.²³⁷ Stephen claimed that in no other publication on pleading

has any attempt been hitherto made to develop systematically the *principles* of this science, or, in other words, to explain its scope and tendency, to select from the mass of its various rules such as seem to be of a primary and fundamental kind, and to trace the connection of these rules, and show their bearing as part of a general scheme or system.²³⁸

In order to achieve this "not only novel but difficult"²³⁹ object, Stephen had to "subject the science of Pleading to a new order or arrangement, such as seemed to him best adapted to the exposition of these principles in the clearest light. For that arrangement he [had] no authority to produce."²⁴⁰ Treatises produced in this self-consciously selective and methodizing spirit have come to be distinguished from others that offer a more comprehensive treatment of the case law, the latter being known in England as "practitioners' books." More fundamentally, however, the distinction reflects a contrast between a concept of law rooted in reason, and one rooted in authority. Plainly, treatises written in the spirit of the former offer the treatise writer a more elevated status in the scheme of things. An aim somewhat similar to Stephen's was expressed by Joshua Williams in the preface to his successful book on Real Property (1845); he attempted "to give to each principle its adequate importance—from the crowds of illustrations to present the best."²⁴¹ Pollock, in a typically pompous prefatory letter to Holmes in his book on Torts (1886), claimed that "this is a book of principles if it is anything. Details are used, not in the manner of a digest, but so far as they may seem called for to develop and

ment of Langdell to the deanship at Harvard that the practice of appointing young men to full-time university teaching positions began. See A. SUTHERLAND, *supra* note 207, at 183-91.

²³⁶ W. SHEPPARD, *supra* note 40.

²³⁷ H.J. STEPHEN, *supra* note 8.

²³⁸ *Id.* at viii (3d ed. 1901) (emphasis in original).

²³⁹ *Id.*

²⁴⁰ *Id.* at viii-ix.

²⁴¹ J. WILLIAMS, *supra* note 216, at i.

illustrate the principles."²⁴² So the treatise writers of the nineteenth century, insofar as they consciously embraced a theory of law, inherited and claimed to express the belief that private law consisted essentially of a latent scheme of principles whose workings could be seen in and illustrated by the decisions of the courts, where they were developed and applied. The text writer set out to expound these principles in a rational, coherent manner, as was appropriate to a science.

So far as the form of the treatise is concerned, the most interesting development in the nineteenth century belongs to the history of the codification movement. A number of treatises were written in the form of codes, the code being the next logical step in the process of systematization beyond the discursive treatise. This was attempted by Fitzjames Stephen, Chalmers, and Pollock, and their efforts were imitated by others. The development is in a sense an obvious one. Once the law had been set out in a discursive manner as a methodical scheme of principles, rules, and exceptions, the idea developed that it would be possible to replace the bulk and complexity of these treatises with more concise statements of the main principles, similar in brevity to the old maxims of the common law. Further exposition could be supplied by commentary. This possibility was explored first by Stephen in his successful *Digest of the Law of Evidence* (1876),²⁴³ and in his *Digest of the Criminal Law* (1877).²⁴⁴ In that year Pollock produced his *Digest of the Law of Partnership*²⁴⁵ on the same model; it went into numerous editions. In 1878, Chalmers's *Digest of the Laws of Bills of Exchange*²⁴⁶ adopted the same scheme, as did his *Sale of Goods* (1890)²⁴⁷ and his *Digest of the Law Relating to Marine Insurance* (1901).²⁴⁸ Dicey's *Conflict of Laws* (1896),²⁴⁹ continuously revised by later editors, is perhaps the best known of the works that have perpetuated this format to the present day.

These works were all consciously conceived of as steps toward

²⁴² F. POLLOCK, *supra* note 226, at viii.

²⁴³ J.F. STEPHEN, *DIGEST OF THE LAW OF EVIDENCE* (1870).

²⁴⁴ J.F. STEPHEN, *A DIGEST OF THE CRIMINAL LAW* (1877).

²⁴⁵ F. POLLOCK, *DIGEST OF THE LAW OF PARTNERSHIP* (1877).

²⁴⁶ M. CHALMERS, *DIGEST OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, AND CHEQUES* (1878).

²⁴⁷ M. CHALMERS, *THE SALE OF GOODS* (1890).

²⁴⁸ M. CHALMERS, *A DIGEST OF THE LAW RELATING TO MARINE INSURANCE* (1901).

²⁴⁹ W. DICEY, *A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS* (London 1896).

codification, and were modeled on the form of the Indian codes;²⁵⁰ Chalmers's was the most successful experiment in this genre, inasmuch as his work formed the basis for actual legislation.²⁵¹ With the decline in the interest in codification this form of literature has not increased in popularity, though examples survive in England. On a comparative plane, one should of course note the historical role of the treatise in civil law systems, where the work of the greatest treatise writer, Pothier, did indeed serve as the basis for the civil code.²⁵²

Though the legal theory associated with the treatise tradition is still expressed to this day, there has been, I suspect, a significant decline in the belief that legal principles (or at least some of them) are of universal validity; hence, the link between the treatise and the belief in natural law has become attenuated. This development may be subtly related to the formal status of the treatise in the English theory of precedent, which is that the opinion of a treatise writer generally is not authoritative.²⁵³ There is a convention of formal legal argument that normally excludes the citation of treatises as a mode of justifying assertions about what the law is. Although practice is not uniform in the English courts and is becoming more flexible, it is generally said that the arguments of a treatise writer can be adopted as part of an argument, but not offered as a warrant that the argument is correct; there are exceptions to this in the case of certain "works of authority," such as Hawkins. Although this convention is irrelevant to any assessment of the general influence of treatise writers upon the form and substance of the law, it does reflect the notion that only holders of high judicial office enjoy the power to issue authoritative statements of the law.

One can also point to the generally low status of law schools and legal academics in England as a partial explanation for the English attitude toward treatise writers. Furthermore, many authors were young men and not prestigious figures when they published their treatises (though some became celebrated later in life, either through success in practice, or through a reputation for

²⁵⁰ See generally C. FIFOOT, *supra* note 232.

²⁵¹ See Bills of Exchange Act, 1882, 45 & 46 Vict., c.61; Sale of Goods Act, 1893, 56 & 57 Vict., c.71.

²⁵² See text and notes at notes 308-309 *infra*. For discussion of the influence of Pothier and other civilians on the development of the law in nineteenth-century England, see Simpson, *Innovation in Nineteenth Century Contract Law*, 61 LAW Q. REV. 247, 255-57 (1975).

²⁵³ See A.R.W. CROSS, PRECEDENT IN ENGLISH LAW 194 (1961).

learning acquired by means of their writings). To writers who claimed to be formulating universal rational principles, the lack of personal authority was not particularly significant; it was what they wrote, not the identity of the author, that mattered. But with the decline of this spirit the treatise writer's formal status inevitably declines as well, for what he says then appears to matter only to the extent that it can be supported by judicial authority, or is accepted as correct by the judiciary. He who has no authority himself comes to rely on authority and not on pure reason. This approach is seen already in Chalmers, who, in a preface to his *Digest* of 1878, explained that a proposition of law in such a work (as contrasted with an authoritative code) "merely amounted to a verifiable hypothesis as to what the law is."²⁵⁴ The verification he had in mind was verification by reference to cases. This is the spirit of positivism, which is of course antithetical to that of the natural lawyers.

V

In America the history of the legal treatise took a different course. Law publishing for lawyers began in the late eighteenth century²⁵⁵ with the republication in 1788 of a pair of English works, Buller's *Nisi Prius*²⁵⁶ and Gilbert's *Law of Evidence*,²⁵⁷ and already by the end of the century several English treatises had appeared in American editions, including Park's *Marine Insurance* (1789, 1799, and 1800),²⁵⁸ Kyd's *Bills of Exchange* (1796 and 1800),²⁵⁹ and Jones on *Bailment* (1796).²⁶⁰ So far as institutional works were concerned, Blackstone's *Commentaries* were enormously successful in America; there were American editions in 1771-72 and 1790. In the early nineteenth century the practice of relying on English texts, whether imported or produced in special editions, continued.²⁶¹ J.G. Marvin's *Legal Bibliography*²⁶² refers

²⁵⁴ M. CHALMERS, *supra* note 246, at vi.

²⁵⁵ See generally James, *A List of Legal Treatises Printed in the British Colonies and the American States before 1801*, in *HARVARD LEGAL ESSAYS* (R. Pound ed. 1934).

²⁵⁶ F. BULLER, *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* (New York 1788) (1st ed. London 1772).

²⁵⁷ G. GILBERT, *supra* note 142 (Philadelphia 1788).

²⁵⁸ J. PARK, *supra* note 187 (Philadelphia 1789; 2d American ed. Boston 1799; 3d American ed. Boston 1800).

²⁵⁹ S. KYD, *supra* note 191 (Boston 1798; 2d American ed. Boston 1800).

²⁶⁰ W. JONES, *supra* note 180 (Boston 1796).

²⁶¹ Early law reviews in America devoted considerable space to book notices and reviews, and inevitably much of the material was English. Thus the opening number of one

to innumerable examples of this practice. Thus Joseph Story began his career as a text writer by editing English texts—Joseph Chitty's *A Treatise on Bills of Exchange* in 1808 and 1819,²⁶³ Charles Abbott's *A Treatise on the Law Relative to Merchant Ships and Seamen* in 1810 and 1829,²⁶⁴ and Edward Lawe's *A Practical Treatise on Pleading in Assumpsit* in 1811.²⁶⁵ A work such as J.F. Archbold's *Pleading and Evidence in Criminal Cases*, edited in New York in 1843,²⁶⁶ is described by Marvin as "a standard work of great practical utility in England and America,"²⁶⁷ and J.C. Perkins's 1841 edition of Chitty's *A Practical Treatise on the Criminal Law*²⁶⁸ is said to have had "an extended circulation" and to have been "generally used . . . as the book on criminal law."²⁶⁹

Aside from statutory material and books intended for laymen, the earliest steps toward an indigenous legal literature took the form of publication, in the late eighteenth and early nineteenth centuries, of law reports. The first significant expository work was Zephaniah Swift's *System of the Law of Connecticut* (1795-96),²⁷⁰ making Swift the first American treatise writer. Nathan Dane's *Abridgement*,²⁷¹ published in eight volumes between 1823 and 1829, facilitated treatise writing in America. It was the first attempt to offer American lawyers an alternative to the English abridgments (particularly Bacon's *Abridgement*)²⁷² on which they

review announced that one of its functions would be "to notice all the new *treatises, Digests, & etc.* both English and American." 1 UNITED STATES L. INTELLIGENCER & REV. 1 (1829) (emphasis in original). The *American Jurist* also regularly noted new English publications.

²⁶² J. MARVIN, *supra* note 9.

²⁶³ J. CHITTY, *supra* note 230 (Boston & Philadelphia 1809).

²⁶⁴ See C. ABBOTT, *A TREATISE ON THE LAW RELATING TO MERCHANT SHIPS AND SEAMEN* (2d American ed. Newburyport 1810; 4th American ed. Boston 1829) (1st ed. London 1802).

²⁶⁵ E. LAWES, *PRACTICAL TREATISE ON PLEADING IN ASSUMPSIT* (Boston 1811) (1st ed. London 1810).

²⁶⁶ J. ARCHBOLD, *supra* note 227 (4th American ed. 1843).

²⁶⁷ J. MARVIN, *supra* note 9, at 67.

²⁶⁸ J. CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* (4th American ed. 1843) (1st ed. London 1816).

²⁶⁹ J. MARVIN, *supra* note 9, at 192. Marvin lists 76 treatises on criminal law in America by 1847. Of these only two are wholly American treatises: H. TOULMIN & J. BLAIR, *A REVIEW OF THE CRIMINAL LAW OF THE COMMONWEALTH OF KENTUCKY* (Frankfort 1804) and L. KERR, *EXPOSITION OF THE CRIMINAL LAW OF THE TERRITORY OF ORLEANS* (New Orleans 1806). Neither of them supplanted the imported texts.

²⁷⁰ Z. SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* (Windham 1795-96).

²⁷¹ N. DANE, *A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW* (Boston 1823-29).

²⁷² M. BACON, *supra* note 53. The first American edition, by Bird Wilson, appeared at Philadelphia in 1809; John Bouvier produced a much improved version in 1852. Bacon's *Abridgement* apparently was the favorite with American practitioners. See J. MARVIN, *supra*

had previously been forced to rely. This work, on which Dane had labored for nearly half a century,²⁷³ was a deliberate attempt to supply the want of an American statement of post revolutionary law, and to prevent the fragmentation of the law: "The evil to be feared in our country is, that so many sovereign legislatures, and as many Supreme Courts will produce too much law, and in too great variety; so much, and so various that any general revision will become impracticable."²⁷⁴ The publication of James Kent's *Commentaries*²⁷⁵ between 1826 and 1830 provided an indigenous alternative to Blackstone that was hugely successful. In 1829 Joseph Story, who had been appointed to the Supreme Court in 1811, became the first holder of the chair endowed by Nathan Dane at Harvard, and from 1832 until his death in 1845 he published his remarkable series of treatises, covering Bailments (1832),²⁷⁶ the Constitution (1833),²⁷⁷ Conflicts (1834),²⁷⁸ Equity (1835),²⁷⁹ Equity Pleading (1838),²⁸⁰ Agency (1839),²⁸¹ Partnership (1841),²⁸² Bills of Exchange (1843),²⁸³ and Promissory Notes (1845).²⁸⁴ Had his health not broken down (his death was caused partly by overwork²⁸⁵), further treatises might well have followed. Thereafter in America the treatise tradition was firmly established, and such works were produced on an extraordinary scale.

From Story's time onwards, the production of treatises was associated with organized, systematic legal education, which of course developed much earlier in America than in England, and on a much more impressive scale. This does not mean that the typical treatise writer was a cloistered academic, as the law schools until Langdell's time employed practitioners as professors. But the writ-

note 9, at 85.

²⁷³ See J. MARVIN, *supra* note 9, at 252.

²⁷⁴ N. DANE, *supra* note 271, at xiv.

²⁷⁵ J. KENT, *supra* note 198.

²⁷⁶ J. STORY, *COMMENTARIES ON THE LAW OF BAILMENTS* (Cambridge, Mass. 1832).

²⁷⁷ *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (Boston & Cambridge, Mass. 1833).

²⁷⁸ *COMMENTARIES ON THE CONFLICT OF LAWS* (Boston 1834).

²⁷⁹ *COMMENTARIES ON EQUITY JURISPRUDENCE* (Boston 1836).

²⁸⁰ *COMMENTARIES ON EQUITY PLEADINGS* (Boston 1838).

²⁸¹ *COMMENTARIES ON THE LAW OF AGENCY* (Boston 1839).

²⁸² *COMMENTARIES ON THE LAW OF PARTNERSHIP* (Boston & London 1841).

²⁸³ *COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE* (Boston & London 1843).

²⁸⁴ *COMMENTARIES ON THE LAW OF PROMISSORY NOTES* (Boston 1845).

²⁸⁵ See A. SUTHERLAND, *supra* note 207, at 134. For biographical information, see *LIFE AND LETTERS OF JOSEPH STORY* (W. Story ed. Boston 1851); G. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* (1970).

ing of treatises became the appropriate activity for law professors. With the development of an indigenous treatise literature, often of higher quality than anything available in England, reliance upon imported books, or American editions of such books, became less necessary. Indeed the quality of American treatises produced a reverse movement: not only were they exported to England, but there were in some instances specially produced English editions.²⁸⁶

The establishment of the treatise-writing tradition in America took place in an intellectual climate entirely different from that in England. The treatises dealt of course with the common law, but there had, after all, been a revolution in America, and there was a certain incongruity in the continued use and further reception of a disorderly body of essentially English law, many aspects of which were regarded as extremely objectionable. There was also a deep-seated dislike and distrust of lawyers as a professional class, and the evolution of a legal profession in America was in any event a recent development—one that was by no means generally welcomed.²⁸⁷ The early American legal writers were, in a sense, on the defensive, and for this reason they were anxious to demonstrate that the enterprise in which they were engaged, the exposition of the American common law, was a respectable one. Obviously it would not do for them to present the common law as English judge-made law that Americans for some bizarre reason should continue to respect in spite of the revolution. The Americans wrote in a nationalistic spirit, and inevitably stressed the American character of the law they were expounding, and the degree to which English common law had been rejected or modified in America. On the other hand, the amount of available indigenous material was limited, and they therefore made extensive use of English materials that could not be presented as possessing any authoritative character in America.

The theory of the law that was appropriate to their writings

²⁸⁶ Examples are Story's treatises on Conflict of Laws, *supra* note 278 (Edinburgh 1835); Equity Pleadings, *supra* note 280 (London 1838); Agency, *supra* note 281 (London 1839); Bailments, *supra* note 276 (London 1839); and Equity Jurisprudence, *supra* note 279 (London 1839). His treatises on Bills of Exchange, *supra* note 283, and Partnership, *supra* note 282, were published simultaneously in England and the United States.

American editions of English treatises survived into this century. See, e.g., W. ANSON, *supra* note 225 (5th American ed. New York 1930); Corbin was the editor.

²⁸⁷ See generally P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 99-116 (1965), and for illustration, the material collected in *THE LEGAL MIND IN AMERICA* (P. Miller ed. 1962).

was essentially that of the natural lawyers. The claim that law was a science was a characteristic refrain. Thus in 1832 Professor Daniel Mayes chose "Is law a science, or is it something less dignified?"²⁸⁸ as the topic for his introductory lecture at Transylvania University. Not surprisingly, he concluded that it was the former. A review of his lecture paraphrased what he meant by a science:

When we say that a branch of human knowledge is a science, we mean in general that it is founded on principles inherent in the subject to which it relates. We mean also that those principles serve as a basis whereon we may classify the subjects of that particular branch of knowledge. We mean, further, that such branch of knowledge may be taught by commencing with generals and descending to particulars; and that in practice we do not grope in the dark, but each particular case, as soon as it arises, is illustrated to the eye of the skillful observer, by the clear and steady light of general principles.²⁸⁹

As law was a science based on principles, the function of the jurist was to expound these principles in a systematic manner; in his search for them he might appropriately use any juridical material that came to hand, as sources both of illumination and of illustration. The underlying philosophy is particularly clearly set out in an address by Peter du Ponceau, delivered to students in Philadelphia in 1824:

General jurisprudence is a part of the common law, but its rules and principles are not exclusively to be found in common law writers. That science ought to be studied, particularly in this country, where a light is to be held to the judiciaries of twenty-four different States. Whence is this light to proceed, but from the writings and discussions of liberal and learned jurists? The conflict of opinions will produce truth, and truth at last will find its way everywhere. The law should be treated as any other science; its theories should be scanned, and its defects pointed out; the excellent principles with which it abounds should be confronted with the decisions in which they have been either forgotten or misapplied, and this course should be pursued until the whole system at last

²⁸⁸ *Whether Law is a Science*, 9 AM. JUR. 349 (1833) (review of lecture by Prof. D. Mayes).

²⁸⁹ *Id.* at 349. For further illustration of the dominance of the jurisprudence of the time by this legal theory, see P. MILLER, *supra* note 287, at 156-89.

shall be founded on the basis of universal justice.²⁹⁰

Story in particular wrote in this eclectic spirit, and quotes in the preface to his treatise on Agency the assertion by Sir William Jones that "[w]hat is good sense in one age must be good sense, all circumstances remaining, in another; and pure unsophisticated reason is the same in Italy as in England, in the mind of a Papinian and of a Blackstone."²⁹¹ Jones was indeed something of a favorite in America, for he had in his *Essay*²⁹² pointed the way to a style of treatise writing suited to American conditions, and had enunciated clearly the claim that law must be a science in order to merit the attention of intellectuals.

In this spirit it was possible to ransack not only the English and American sources, but also those of the civilians and natural lawyers for the best law, an enterprise that had the additional advantage of demonstrating the author's erudition, thus contributing to the prestige both of the author and of the task on which he was engaged. Thus in his preface to the *Commentaries on Equity Jurisprudence* Story remarks: "In many cases I have endeavoured to show the reasons, upon which these doctrines are founded, and to illustrate them by principles drawn from foreign jurisprudence, as well as from the Roman Civil Law."²⁹³

Later in the century Joel Prentice Bishop,²⁹⁴ a Boston lawyer who abandoned practice to devote himself wholly to treatise writing, at which he was both prolific and extremely successful, wrote a book, now forgotten, in which he expounded a general theory of the function of the treatise writer. This, *The First Book of the Law* (1868),²⁹⁵ was cast in the form of advice to students: it was subtitled "Explaining the Nature, Sources, Books and Practical Application of Legal Science, and Methods of Study and Practice." Un-

²⁹⁰ P. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 126 (Valedictory Address, Law Academy of Philadelphia, Apr. 22, 1824), reprinted in *THE LEGAL MIND IN AMERICA*, *supra* note 287, at 113.

²⁹¹ Quoted in J. STORY, *supra* note 281, at vi.

²⁹² W. JONES, *supra* note 180.

²⁹³ J. STORY, *supra* note 279, at vi. He made similar remarks in the prefaces to his treatises on Partnership, *supra* note 282, at vi, and Bills of Exchange, *supra* note 283, at vii.

²⁹⁴ For biographical information, see 2 *DICTIONARY OF AMERICAN BIOGRAPHY* 295 (A. Johnson ed. 1929). He established his reputation with J. BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE* (Boston 1852). Bishop wrote extensively on a wide variety of subjects; his best-known other book was his *COMMENTARIES ON THE CRIMINAL LAW* (Boston 1856-58).

²⁹⁵ J. BISHOP, *THE FIRST BOOK OF THE LAW* (Boston 1868).

like the writer of digests, the treatise writer is not concerned merely to catalogue the multifarious "points adjudged"—"deemed by idiots to be the law."²⁹⁶ Instead, his task is to "unfold the rules, the principles, the reasons, which not only governed former decisions, but are to govern subsequent ones."²⁹⁷ These include "inner principles which perhaps not even the judges saw when they decided the cases."²⁹⁸ Indeed the true treatise writer may find, in dealing with a particular topic, that "in all the cases the judges had confused ideas, and their observations are not worth anything."²⁹⁹ The writer must then *discover* the true rule, "and he is just as much entitled to the credit of the discovery, as was Sir Isaac Newton for the *discovery* of the law of attraction in nature."³⁰⁰ In conformity with this theory, which elevates the status of the text writer (and Bishop was an enormously vain man), he ridicules the English attitude toward treatise writers that links authority with judicial status.³⁰¹ The similarity between Bishop's views and those of Langdell is obvious enough and suggestive of derivation.³⁰²

And so, firmly based on a theory, the American treatises poured forth, culminating in the vast works—or the ultimate treatises, as they have been called—of Wigmore,³⁰³ Williston,³⁰⁴ Corbin,³⁰⁵ and Scott.³⁰⁶

VI

The great enterprise in which the treatise or institutional writer is engaged is the methodizing of disorderly traditional or customary law; once the job has been done competently by a Blackstone or a Story, much of its intellectual excitement disappears. Later treatise writers are relegated to the laborious task of reworking the same materials or refining matters of detail, and this is particularly true when the branch of law involved is relatively static. It requires some dramatic change to give rise to a distin-

²⁹⁶ *Id.* at 127.

²⁹⁷ *Id.* at 126.

²⁹⁸ *Id.* at 127.

²⁹⁹ *Id.* at 140.

³⁰⁰ *Id.* at 141.

³⁰¹ *Id.* at 157-58. He also regarded as absurd the English practice of according treatise writers authority only after they had died.

³⁰² See text and notes at notes 207-208 *supra*; text at note 314 *infra*.

³⁰³ J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE (1904-05).

³⁰⁴ S. WILLISTON, THE LAW OF CONTRACTS (1920-22).

³⁰⁵ A. CORBIN, CORBIN ON CONTRACTS (1950-51).

³⁰⁶ A. SCOTT, THE LAW OF TRUSTS (1939).

guished new treatise; an example in England is the production of G.C. Chesire's treatise on property law³⁰⁷ as a reaction to the reforming legislation of 1925, which so altered the law of property that it became practically impossible merely to revise earlier texts. Good treatises will indeed tend to have a conservative effect on the law to the extent that they are successful; thus much of the conceptual structure of modern contract law was fixed by the early nineteenth-century treatise literature. In this way, treatises contain the seeds of their own destruction.

This destruction may also come about in another way. After private law (or indeed any branch of law) has been systematized, the obvious next step is codification, which will confer a special authoritative status upon a particular succinct statement of the principles of the law. This happened in France, for example. There the indefatigable Pothier, after spending many years on the task of putting Justinian's *Digest* into a methodical scheme and some more on a redaction of the customs of Orléans, set about the writing of treatises, starting with his general treatise on the law of obligations in 1761.³⁰⁸ Thereafter he poured them out at a rate subsequently equalled only by Story. It was Pothier's work that made the French code possible, and of course the code supplanted the treatises.³⁰⁹ The similarity between the ideal of the treatise writer and that of the codifier is well illustrated by a remark of Portalis on the aim of codifying legislation: "The function of statutory law is to determine, in broad perspective, general legal maxims, to establish principles from which inferences can be drawn, and not to involve itself in the particulars of individual areas."³¹⁰ In the nineteenth century, both in England and America (but more particularly in the latter), there was a powerful movement for codification but it was largely a failure. In England there remain some flickers of life in the corpse. In America, the most recent expressions of this natural evolution out of the treatise have been the Restate-

³⁰⁷ G. CHESIRE, *THE MODERN LAW OF REAL PROPERTY* (1925).

³⁰⁸ R. POTHIER, *TRAITÉ DES OBLIGATIONS* (Paris 1761).

³⁰⁹ For discussion of Pothier's influence on the draftsmen of the civil code, see 1 K. ZWIEGERT & H. KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 77 (T. Weir trans. 1977). See also *GREAT JURISTS OF THE WORLD*, *supra* note 194, at 464-76.

³¹⁰ "L'office de la loi est de fixer, par de grandes vues, les maximes générales du droit: d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière." J. PORTALIS, *DISCOURS, RAPPORTS ET TRAVAUX INÉDITS SUR LE CODE CIVIL* 8 (Paris 1844).

ments³¹¹ and uniform legislation such as the Uniform Probate Code. Neither in England nor in America, however, can the decline of the treatise tradition be explained by reference to the enactment of comprehensive codes of private law or the natural resultant development of forms of legal literature expounding the codes.

Yet in America, where the common law treatise reached perhaps its ultimate point of development, the genre has by now declined rather markedly from its preeminence. I should like to close with some speculations about why this is so. From the beginning, the treatise in America had to contend with the considerable number of different jurisdictions in which the law was administered, each state potentially possessing its own common law. This obviously presented an obstacle to the exposition of a universal common law by the text writers. Perhaps it was not a fatal obstacle; the writers could still aim to present a rational scheme of private law and hope that it would be received in the various state jurisdictions by virtue of its very intellectual force. The jurisdictional variations were exacerbated by another phenomenon, however: the rising bulk of legal material, particularly law reports. This development in turn went hand in hand with an increased significance attached to reported decisions. As reports became available, they were bound to be used. Even in the early nineteenth century, when the problem hardly existed, the sheer quantity of legal books was a source of continual alarm and complaint. Joseph Story, back in 1821, spoke eloquently of the groaning shelves of the jurists, and lamented that "the mass of the law is, to be sure, accumulating with an almost incredible rapidity."³¹² Over a century later, when the problem had become much more severe, Samuel Williston was to voice the same complaint.³¹³ All this threatened the treatise tradition—how could the systematic writer reconcile his presentation of the law as a coherent set of principles with the shambles accumulating in the law libraries?

³¹¹ Professor Gilmore explains the Restatements as a reaction to the legal realists. See G. GILMORE, *THE DEATH OF CONTRACT* 55-85 (1974); Gilmore, *Legal Realism, Its Cause and Cure*, 70 *YALE L.J.* 1037, 1044-45, 1048 (1961). As a matter of chronology this view is not easy to accept, because the report that led to the initiation of the Restatement project and the establishment of the American Law Institute was written in 1922, see S. WILLISTON, *LIFE AND THE LAW* 310 (1940). Originally there was uncertainty about whether the Restatements should be in treatise or statutory form.

³¹² Story, *An Address Delivered before the Members of the Suffolk Bar*, 1 *AM. JURIST* 1, 31 (1829).

³¹³ S. WILLISTON, *supra* note 311, at 307-09.

A possible reaction to this situation is associated with Christopher Columbus Langdell. Langdell did not invent the idea of legal science, which had been a commonplace of legal thought long before his time, nor did he invent the casebook. He has, however, two achievements to his credit or discredit that can be viewed as relevant to the history of the treatise. First, his version of legal science was one in which, although the principles of the law were to be found in decided cases, "the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for the purposes of systematic study."³¹⁴ This theory, which, as we have seen, may have been derived from Bishop,³¹⁵ and is in any event implicit in the belief in leading cases, enabled the treatise writer to purvey a sort of higher or better law in much the same spirit as that in which the medieval civilians presented the better law of the *Digest*. Such a theory enabled the systematizer to cope with bulk and thrive on diversity. On the other hand, one might maintain that Langdell's other achievement, the case method of legal instruction, was likely to have the opposite effect. The case method created a need for a type of literature that generations of American academics have spent their energies producing: the casebook, or today the collection of cases and materials. Lectures can readily be turned into treatises; casebooks cannot. But although after Langdell's time the production of casebooks and the writing of law review articles (it was during his deanship that the *Harvard Law Review* was founded³¹⁶) came to absorb a considerable output of creative energy, the great American treatises—multivolume works such as Wigmore, Williston, Corbin, and Scott—are products of this century; there is no sense in which Langdell's ideas can be said to have destroyed the treatise.

What appears to me to have had the greatest negative effect on the treatise-writing tradition in America is the realist movement. This movement, ill-defined though it may have been, involved a scepticism and even a cynicism about the significance of legal doctrine in the determination of cases, and it has profoundly affected the attitudes of both those who practice law and adjudi-

³¹⁴ C. LANGDELL, *supra* note 208, at vi.

³¹⁵ See text at note 302 *supra*.

³¹⁶ The first number appeared on April 15, 1887. A. SUTHERLAND, *supra* note 207, at 197-98.

cate, and many of those who teach at American law schools. Judicial opinions cease to be regarded as the expression of some rational scheme of principles, but rather as material to be used to justify and cover with a veneer of respectability arguments or conclusions reached on other grounds. A system of ready access to such material is all that is needed. The professional services,³¹⁷ and more recently the on-line computer systems such as LEXIS and WESTLAW, have arisen to meet this need.

A movement that minimizes the importance of legal doctrine is hardly likely to generate enthusiasm for the work of analyzing doctrine and expounding it as the principled science of the law.³¹⁸ So influential has the realist movement been that today it is possible for lawyers to express genuine incomprehension at the activities of those who, in earlier periods, believed in the validity and importance of such work. Lawrence Friedman, the recent author of the first attempted general history of American law, provides an illustration when he describes with a combination of unconcealed derision and bafflement the activities of the draftsmen of the Restatements:

They took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones. The bones were arrangements of principles and rules (the black letter law), followed by a somewhat barren commentary. . . . The chief draftsmen, men like Samuel Williston and Austin W. Scott of

³¹⁷ The origin of looseleaf services in the United States has been traced to the rise of the federal income tax and its attendant complex regulations. See M. PRICE & H. BITNER, *EFFECTIVE LEGAL RESEARCH* 230 (1953).

³¹⁸ It is of course true that various types of legal literature bearing a passing resemblance to the treatise—"hornbooks," "nutshells," and outlines, for example—are still produced, and there is a considerable market for such elementary student guides to the law that serve as a sort of map to unfamiliar territory. Perhaps works of this kind are of greater practical significance than prevailing legal theory would concede. But the prestige has gone out of writing such works.

A number of more ambitious works that resemble—and in some cases are specifically referred to by their authors as—treatises have been produced in America recently. Arguably some of these works are treatises in a broad sense of the term, although it frequently is possible to exclude them from the definition of the genre derived from Plucknett, see text and notes at notes 3-8 *supra*. Thus J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* (2d ed. 1980), for example, might be viewed as something other than a treatise because it consists of commentary on a body of statutory law rather than a set of deductions from first principles. The same might hold for K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (2d ed. 1978) because of its emphasis on the Administrative Procedure Act; the focus of that work on procedure rather than substantive law would constitute another ground for exclusion.

Harvard . . . were authors of massive treatises in the strict, conceptual, Langdell mold. They expended their enormous talents on an enterprise which, today, seems singularly fruitless. Incredibly, the work of restating (and re-restating) is still going on.³¹⁹

Plainly, this view of the enterprise of methodizing the law is incompatible with the treatise tradition, which sets a special value upon the undertaking that Friedman regards as "singularly fruitless"; in taking this line, Friedman (whom I quote only by way of example) merely reflects a school of thought that is now perfectly widespread.

This school of thought, which adopts a somewhat cynical approach to the claim that the common law consists of a body of principles, and which sees common law adjudication as an arbitrary process, has a long history in both England and America.³²⁰ There is nothing really new about the iconoclasm of the American realists. What is new, however, is the reception of their notions among lawyers, and in this sense the great significance of the realist movement for legal history lies in the recognition that it is possible to have lawyers, and flourishing lawyers, without law in the sense that law traditionally has been understood. Whether this state of affairs is to be regretted or welcomed is debatable, but it is clear that it offers no hospitality to the legal treatise.

³¹⁹ L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 582 (1973).

³²⁰ See generally Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES)* 77 (A.W.B. Simpson ed. 1973).