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CHAPTER

13 Historical Perspectives

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Abstract

This chapter argues that the history of classical jurisprudence can offer a useful stimulus or lead in the development of the New Private Law as it explores the potential of doctrinal reasoning. Two general observations pertain here. The first is that lawyers in both continental and common-law traditions have built on traditional legal heuristics developed in second- and third-century Rome, endlessly adapting and applying these categories in the centuries since. The chapter then uncovers the Roman institutionalist heuristics and suggests that knowledge of these remains desirable for any lawyer seeking to wield legal doctrine as a technique of social decision and ordering. The second major point is that classicism—the deployment of precedent using organizing typologies established by legal tradition—was not always or only a conservative praxis aiming to limit the political authority of the judge. The opposite could be true: classical legal tradition could be highly adventurous, granting jurists the confidence and legitimacy to launch grand experimentation in the ordering and reform of society. Historical jurisprudence was often joined with legal rationalization projects taking the form of treatises, restatements, and codifications aiming to summarize and make available the fruits of past law for modern users.

Keywords: [classical jurisprudence](#), [New Private Law](#), [doctrinal reasoning](#), [lawyers](#), [common law](#), [Roman legal history](#), [classicism](#), [precedent](#), [legal tradition](#), [historical jurisprudence](#)

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IN 1345 a spirited exchange burst forth in the English Court of Common Pleas, at the tail end of a debate as to whether a vested estate in remainder could be proven by deed alone, without any further act establishing ultimate freehold.¹ A single precedent was produced by counsel suggesting the need for a final concord recording admittance to the estate by fine, in the absence of a physical entry. Such a requirement would have shut out the remainderman. The difficult, perhaps unresolvable, theoretical issue underlying this controversy was whether an estate in land should be conceptualized as a set of horizontal relationships,

radiating from a proprietary asset holder with protected possession at one end, and potential trespassers and assignees on the other; or rather as a vertical relationship between lord and tenant standing in a protected personal association, with the tenant swearing fealty and service to the lord, and the lord admitting the tenant to the fee, warranting the subordinate title against outsiders, and controlling assignment of the tenancy by attornment. One of the judges wished to deny the force of the prior case requiring a fine and final accord with the higher lord, which precedent rested on the “vertical” theory; and this led to the following courtroom exchange:

Shareshull (Justice of the Common Pleas or Chief Baron of the Exchequer):

Nevertheless, no precedent is of such force as that which is reasonable.

R. Thorp (Serjeant, senior counsel):

I think you will do as others have done in a similar case, or else we do not know what the law is.

Hillary (Justice of Common Pleas):

Law is at the will of the Justices.

Stonore (Chief Justice of Common Pleas):

Certainly not; law is reason.

p. 212 A twenty-first-century New Private Lawyer transported back to the mid-fourteenth century might wish to applaud all the positions evoked in this debate. Precedent must be given weight to create some fixity in the law, a conventionalist position; but the doctrinal content or rule-making extent of any precedent may be remolded by the court in the light of reason, a natural-law position; or a precedent may even be shaped according to some willed policy, a realist position. Truly, we do not need to favor one of these theories over the other. The concurrent application of precedent, reason, and policy is implicit in all casuistic judgment. In every new case counsel and judges will argue carefully over the correct interpretation and application of preceding authority, and this supposedly encourages the development of durable rules well suited to influence the next run of cases. Lord Mansfield memorably captured the ideal of a “common law, *that works itself pure*,” whereby the reach of precedent is tested empirically through iterative application to cases that tend to be randomly selected by the vagaries of litigation, such that weak or unsuitable ideas will be weeded out.²

There is something missing from this evolutionary model. Even with the best use of reason and finest appreciation of the policies of the law, how are lawyers to extract and adapt useful rules from past cases when faced with new problems? The factual precedents do not announce a guiding rule in abstract or general terms for forward cases, but solve the instant case before the court, tailoring a solution to the facts. A case must be interpreted anew every time it is used as a relevant precedential authority (or distinguished as not binding); and fallible lawyers can misunderstand or distort the weight of the principles announced or assumed by prior decision makers. Mistakes and mutations can creep in to the evolving interpretative chain of doctrine, like damaged DNA, especially where analogies are used from adjacent legal orders.³ Even if the precedents are perfectly understood, it is not the case that rules arising from cases at any level of specification can be mapped onto fresh cases automatically; each new case is “slightly different,”⁴ and so precedents must be fitted to new cases by analogy, involving some external cast of judgment as to why the facts of one unique situation can be aligned with the facts of another. Invoking some external standard favored by the judge risks exactly what Serjeant Thorp identified in his rejoinder to Justice Shareshull: that if judges could freely manipulate the precedents then no one could be sure from moment to moment what the law is.

The solution lay not simply in lawyerly respect for historical precedents but also knowledge of how lawyers came to think about precedents. Historically, the juristic enterprise involved much more than knowledge of past decisions; it also demanded the carving out of interpretative classifications to order the precedents and guide the process of rule application and analogization. Such heuristic ordering is at the core of classical jurisprudence or legal science. New Private Law announces itself as a revival of self-consciously doctrinal tradition, thereby stepping away from the dominant realist or ↪ post-realist mindset of American law, and aligning more closely with English and Continental jurisprudence. But what could it mean to join these older traditions of doctrinal learning? What are the essential qualities of these traditions?

This chapter argues that the history of classical jurisprudence (of both common law and Civilian varieties) can offer a useful stimulus or lead—even a precedent!—in the development of the New Private Law as it explores the potential of doctrinal reasoning. Two general observations pertain here. The first is that lawyers in both continental and common-law traditions have built on traditional legal heuristics developed in second- and third-century Rome, endlessly adapting and applying these categories in the centuries since. It is possible to think about doctrine without knowledge of this deep intellectual history. Similarly, one can speak a language well without knowing anything about its grammar, just as one can play music without knowledge of theories of harmony and rhythm. But understanding the origins and structure of any language can add to the mastery and freedom enjoyed by the user. Much of this chapter will be spent uncovering the Roman institutionalist heuristics and suggesting that knowledge of these remains desirable for any lawyer seeking to wield legal doctrine as a technique of social decision and ordering. The second major point is that classicism—the deployment of precedent using organizing typologies established by legal tradition—was not always or only a conservative praxis aiming to limit (or alternatively, conceal) the political authority of the judge. The opposite could be true. Classical legal tradition could be highly adventurous, granting jurists the confidence and legitimacy to launch grand experimentation in the ordering and reform of society. Historical jurisprudence was often joined with legal rationalization projects taking the form of treatises, restatements, and codifications aiming to summarize and make available the fruits of past law for modern users. Such literatures commonly went with a strategy of extension of jurisdiction, as states and empires enlarged and consolidated their rule. Bringing all residents under a single well-understood system of private law was a potent means of state formation, knitting together subjects within a common polity by use of soft juridical power.⁵ Historical jurisprudence was used in this fashion in the Roman, Napoleonic, Bismarckian, and British empires. Perhaps an exemplar of this trend was the proliferation of texts examining possession and title in nineteenth-century Germany, seeking to resolve the tensions between feudal property forms and industrial and agrarian commodification of land in the long journey to national legal unification.⁶

Historical jurisprudence also underpinned the rise of a scientific treatise tradition in nineteenth-century America and the turn to codificatory restatements in the early to mid-twentieth century, as America became a vast integrated internal market.⁷ Precedential law could also be used in the reverse direction, to create subsidiarities or ↪ autonomous local jurisdictions carved out from within a dominant or hegemonic legal system, as where local lawyers created their own subsystem varying the law emanating from a higher political order.⁸

The New Private Law movement of this century has rather different drivers to the classical legal tradition outlined here. New Private Law has revived doctrinal thinking in order to provide a counterweight to an exaggerated dependence on social science, utilitarian and deontic ethics, and indeed raw politics in the life of private law. Awareness of the historical origins and functions of doctrinal reasoning can only strengthen this revival of Western legal tradition for modern use. In the search for origins it makes sense to seek the earliest beginnings.

I. Roman Roots

Unlike the early legal systems of the Mediterranean and Near East, including Greek, Egyptian, Akkadian, and Hebrew laws, the Romans innovated by developing a jurisprudence largely severed from religious or mythical roots,⁹ perhaps reflecting the demographic basis of earliest Rome as a merger of ethnically distinct villages which needed a neutral, inclusivist civic mythology.¹⁰ Another distinctive aspect of Roman legal culture was the early emergence of a professional caste of jurists, who saw exposition and development of the civil law as a vocation permitting a more reflective and intellectual career than senatorial politics, the magistracy, or military command. By the first century, new men making a vocation out of the law, such as Marcus Sabinus in the reign of Augustus and Tiberius, were writing detailed commentaries on the old *ius civile* being the basic civil claims embodied in the early Twelve Tables. The early jurists also advised the praetorian magistrates in charge of civil justice how to adapt and extend the flow of new formulae, or commissions instructing the lay judges deciding cases. The Praetorian Edict, or amassed collection of formulae, became the second great source of law in Rome, a set of abstract precedents of the type of actions available to all litigants, and like the old *ius civile* this historical text, especially once stabilized by the jurist Julian, attracted dense professional commentary. Sabinus and his contemporary Proculus were avid teachers as well as legal advisers, and each founded schools of professional jurists who vied to have their interpretations of the civil law and the edictal gloss prevail. Sabinus in his edictal commentaries early identified an expository split between property, obligations, and succession claims. Attempts to show philosophical or methodological differences between the schools have been inconclusive, but Peter Stein has suggested that Sabinians tended toward freer interpretation of old texts, while refusing to add to those texts by analogy and equity. Proculians reversed this approach, preferring to stick to literal meanings for old law and then legislate new norms by analogy.¹¹

The professionalism and abstract conceptualism of the jurists reached an early peak in the career of Gaius (c. 130–180 CE), a follower of Sabinus. He took legal history seriously in establishing the meaning and application of the laws, perhaps on the Sabinian view that a genetic understanding of meaning gave the reader a heightened freedom to reconstruct the text. Gaius' historicism was announced in his commentaries on the procedural rules of the early *ius civile*:

Since I am aiming to give an interpretation of the ancient laws, I have concluded that I must trace the law of the Roman people from the very beginnings of their city. This is not because I like making extremely wordy commentaries but because I can see that in every subject a perfect job is one whose parts hang together properly. And to be sure the most important part of anything is its beginning.¹²

Gaius constantly invoked older rules that had been superseded but that had left traces in later jurisprudence. He showed how the issuance of fresh formulae or instructions to judges on a case-by-case basis could serve to adapt existing actions to cover new causes. The mechanisms of change could be divided into three: there could be adaptations by fictions such as assumed or feigned factual pleading or normatively driven reinterpretations of semantic forms; jurists could pile exceptional rules or equities onto existing rule structures; and magistrates might leap over existing forms altogether, creating fresh actions via legislation passed in superior judicatures or assemblies, and so using political authority to drive larger-scale reforms.¹³ Much of Gaius' work can be characterized as legal archaeology, concerned to excavate and understand the historic foundations of the law as a prelude to stating the contemporary rules.

Gaius accordingly used copious historical illustrations in his highly systematized introduction to classical law, known as his *Institutes*, a text developed from lectures at his *studium* in Rome.¹⁴ Here he may have drawn from the classificatory schemes of the natural sciences as well as from the prevalent Stoic philosophy and *ars rhetorica* of his day. Gaius distinguished persons, things, and actions as the master classification,

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partitioning the subjects, objects, and adjectival processes of the law. Lucid subcategories were then carved out from the three main divisions. Persons were divided between freemen and slaves; one then had to investigate the powers and responsibilities of a *dominus* or *pater familias* over subordinates within the household, including women, children of different maturities, and free servants as well as slaves. Political statuses were described ↵ as well as the rights and capacities of foreigners. Things encompassed all valuable assets, whether claimed against persons, over physical objects, or uses thereof. Things or *res* might be classified by the means of acquisition, or by the means of claiming them or enforcing their value. Delictual, contractual, and enrichment claims when viewed as rights to a debt payment or a performance hovered uneasily between assets or things in themselves, and remedies or actions to assert some prior claim or mother right.¹⁵ Succession claims stood outside the categories of persons, things, and actions, or else could be seen as a hybrid combining all three. The sophistication of the Gaian scheme is demonstrated in his discussion of the third, properly adjectival, category of actions or legal methods by which things are claimed:

4.1 It remains to speak of actions. If we ask how many classes of actions there are, the better view is that there are two, real and personal (*in rem* and *in personam*). Those who say that there are four, by including those actions based on wagers (*per sponsiones*) have failed to observe the distinction between species and genus. 4.2 A personal action is one which we maintain when we sue someone who is under an obligation to us from contract or delict—that is, when our assertion is that he ought to give, do, or fulfil (*dare, facere, praestare*). 4.3 A real action is one in which we assert that a corporeal thing is ours or that a right belongs to us, as for instance a right of use or usufruct, a right of way for man or beast, of aqueduct, or a right to build higher or a right to see out. Conversely, a real action can deny that our opponent has such a right. 4.4 Actions being distinguished in this way, it is certain that we cannot claim from another something that belongs to us using the words ‘if it appears he ought to give’. For something which is ours cannot be given to us. You will understand that giving something to us is defined to mean giving in such a way as to make it ours and that a thing which is already ours cannot be made more ours. It is clearly from hatred of thieves, to make them liable to more actions, that it has been accepted that, in addition to their liability to fourfold or twofold penal damages, they can also be sued using this form of claim, ‘if it appears that they ought to give’. This is in addition to the availability against them of the action in which we assert that a thing is ours. 4.5 Real actions are called ‘vindications’. Personal actions in which we assert that something ought to be given to, or done for us are called *condictiones*.¹⁶

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The power of the Gaian taxonomy lay in its fertile heuristics; the categories of subject, object, and action guided the jurists in setting the substantive content of claims, burden of proof, order of pleading, defenses, relevant evidentiary burdens, and the levels of remedy and enforcement appropriate for the claim in question. This sophistication was all the more remarkable considering that this was in large measure a non-state system with strong elements of lay arbitration. The praetors in charge of city justice were guided ↵ by the jurists in issuing formulae and commissioning lay judges to hear cases, but the crafting of the formula ended the public element of the process. Ultimately the system was based on licensed self-help and voluntary obedience to the order of the judge. The final penalty for noncompliance was *infamia*, a removal of civic capacity involving total loss of access to the legal system and its protections that rendered the miscreant close to the status of a nonperson.¹⁷ It is this weak or negative form of coercivity (denial of capacity) that helps to explain the paramount importance of the upstream process of formulaic justice; the jurists did not hear cases and make orders, but carefully set up the process to make sure that lay persons could run the litigations effectively as a system of “civil recourse.”¹⁸

The Gaian taxonomy, known mainly through later jurists’ redactions, proved to be of supreme importance in Western private law, offering a stable genetic code that guided jurisprudence for the next two millennia.

With the recovery of Gaius' classical urtext in the early nineteenth century, it became apparent how Gaius himself placed a high regard for legal history alongside his taxonomical work. If the classificatory scheme provided a static model amenable to analytical elaboration, then the historical work showed a dynamic system evolving pragmatically, even chaotically in reaction to external events and especially to accommodate politically driven legislation. Both sides, the static and the dynamic, had to be mastered.

An important example of chaotic evolution was to be found in the *Lex Aquilia* of circa 286 BCE, an early (perhaps the earliest) plebiscitary statute that codified property damage actions, in the wake of a civil war where armies had destroyed the homesteads and farm capital of opposing populations. Terse rules to improve or replace a failing ancient system of compensation were introduced by the legislation, serving to classify and streamline causal inquiry and to ensure adequate damages awards for destruction or marring of capital by direct means, with careful setting of *quanta* to reflect the changing seasonal values and inventory cost of animate agrarian capital such as slaves and livestock.¹⁹ An annex created a special supercompensatory regime with restitutionary or fiduciary elements to repress wrongful compromise of causes by corrupted legal intermediaries. It is notable that this first great popular plebiscite in Roman legal history concerned itself with a jurisprudence to protect the working capital of peasants in a *latifundia* economy as an emergency measure. These statutory rules were then gradually expanded by juristic interpretation to form a complete system of compensation for direct, indirect, and even pure economic harms, connected however distantly to ↪ destruction or marring of physical things. The jurists had to adduce reasons for each extension of liability, and this required theorization of what a tort system was supposed to do, namely, to distribute due responsibility for the causing of harm. The resulting delictual system outstripped its functions as a measure for repairing war damage, yet its origins in an ancient statute lent it durability as the hallowed laws of the older republican *polis*. Modern delictual or tort doctrine in Western legal tradition still draws its basic conceptual framework of direct and indirect cause and proximate and remote damage from this body of early law.²⁰ Gaius also gave historical accounts of the emergence of actions against theft and the actions to protect the person from assault and insult. The categories of property damage, theft, and insult could overlap, but their separation permitted fine-toothed doctrine to displace the older systems of impeachment before a large popular jury.

Gaius also showed how the contract principles of his time had arisen from three early forms: ceremonial stipulations based on promise, sales based on cash-based exchange, and conditioned transfers of possession. From these rudimentary origins the jurists elaborated fresh categories of contractual liability, first by transforming ritualistic formalities through pragmatic fictions and presumptions, and then by creating an interlocking hierarchy of actions using mixtures of fault and strict liability to uphold promissory expectations, police the quality of performances, and devise defenses. The old contractual practices of the intimate Roman community based on face-to-face transactions were thereby stretched to provide a depersonalized mercantile law for a vast trading empire.²¹ Even in the developed late Imperial law, eyes could be cast back to older precedents to decide the limits of doctrinal expansion. For example, it took legislation (the 472 CE Constitutions of Leo) finally to liberalize the form and vernacular of verbal contracts and permit written notes to substitute for oral declarations, as the old stipulations were tied too securely to Latin ritual invocations to be freed up by juristic interpretation. The law of sale applying a package of rights and duties to buyer and seller had to be maintained as a cash transaction rather than barter at a nominal price, in order to fix who would be buyer and who seller, as the obligations were asymmetric.²²

Roman property doctrine was perhaps the best example of an ancient doctrinal discourse extended by practical lawyers to conquer new terrain. The Roman jurists derived from the early formulaic actions a set of interlocking principles governing the acquisition, transfer, sharing, and extinction of property rights in land, and the various methods of asserting and remedying such rights. At the core lay a conventional *numerus clausus* (closed list) of interests, enumerating *detentio* (bare physical control), *possessio* ↪ (legally protected control), *dominium* (ultimate title and right to control), *usufructus* (life- or term-limited income

and usage), *emphyteusis* (contractually limited physical control), *hypothec* (secured rights to convey but not possess), and *servitudes* (incorporeal right of one owner to do actions on another's property or to restrict use of that other property). There was a parallel list of public and collective goods pertaining to land outside private interests, enumerated as *res nullius*, *res religiosae*, *res communes*, *res publicae*, and *res universitatis*, each with different stinting mechanisms for the relevant membership of the class granted access. Plural private interests were less easily accommodated: ostensible joint holdings found in partnership forms (possibly sole ownerships subject to strong obligational and asset partitioning claims); there could be fiduciary management suggestive of split ownership through the inter vivos *peculium* and the testamentary *fideicommissum*; and there could be plural ownerships of funds or collections of assets, the *res universitatis*. There was, however, nothing resembling the independent entity with assets and capacities separate from the natural persons who participated in it. One surmise is that Romans preferred the model of the sole trader as patrimonial owner, harnessing the energies of contractors, slaves, and family to constitute groups that acted corporately.²³ Turning to creation, transfer, and destruction of proprietary assets, interests could be dealt with under the original and derivative modes of acquisition, enumerated as *occupatio* (physical appropriation), its inverse of *derelicto* (abandonment), *traditio* (informal private transfer), *acceptio*, *confusio*, and *commixtio* (types of annexation and merger), *mancipatio* (formal public transfer), *in iure cessio* (release in court), *usucapio* (acquisition by tolerated use), and *praescriptio* (acquisition by nontolerated use). Settled interests were defended by variants of vindicatory, possessory, injunctive, and damages actions. Once the categories had been established by rationalization of the historical materials, the jurists could hybridize the forms to order assets in the most imaginative ways, while still tying their concepts back to simple anchoring elements. Much of this experimentation happened after Gaius' time, and his descriptions of property are relatively rudimentary but contain the germ of what followed.

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Property forms might be stable at the conceptual level, but the content and function of property rights could shift rapidly in new conditions. With the continuous expansion of the Roman empire after the defeat of Carthage, imperial exploitation of conquered land and reduction of non-Romans to the status of peregrine outsiders, inferior subjects, or even tradable slave capital, risked explosive rebellion of the periphery against the metropolitan core. Here lawyers adapting historical jurisprudence provided essential techniques for maintaining civil peace and the legitimacy of Roman rule. Perhaps the most significant reform was the decision evoked in the *Constitutio Antoniniana* of 212 CE to grant full citizenship and legal rights and capacities on the standard Roman pattern to all territorial subjects of the Roman emperor, whatever their ethnic, religious, or political status, extending beyond the traditional kinship alliance of the Italic tribes.²⁴ This status expansion included full ability to own land as a *dominus* anywhere in the empire, rather than as a mere tenant of the Roman state. The extended availability of *dominium* brought with it liability to pay imperial land taxes that in turn sustained the public order guaranteeing universal property rights, as well as an expanded franchise for military service.²⁵ The great system of classical Severan jurisprudence established by Ulpian and his colleagues in the third century, building on centuries of prior legal development, may be seen as a vast reimagining of legal tradition as a scientific and dialectical discourse available to all, to match the universalization of Roman subjecthood made by the emperor Caracalla in that year of 212. Ulpian's universalism included a remarkable hostility to the institution of slavery, which he saw as an affront to the natural law and principles of Stoic conscience underpinning the civil law.²⁶

Ulpianic jurisprudence in turn provided the foundation of the Justinianic codification of 529 CE known as the *Corpus Iuris Civilis*.²⁷ Justinian commissioned the leading jurists of the Eastern empire to review the entire body of historical legal doctrine and reduce it to a coherent, internally consistent whole that could be given legislative force. Justinian stated in the promulgating statute, the *Constitutio Tanta*, that a key purpose of the legislation was to knit together the newly unified empire under a common rule of law after generations of decline and conflict. Lucid, rationalized, and freely accessible private law was projected as a type of soft power contributing to a single market and military-fiscal state. Justinian appended to his codification a fresh edition of Gaius' *Institutes*, brought up to date to match the newly minted Digest of the law and to

make that codification accessible to new students. The reality after Justinian was rather different in that the provinces persisted in using their own laws, combining local customs with Romanic jurisprudence in an ad hoc mix sometimes known as “vulgar law,” and only resorting to the universal Justinianic *ius commune* to fill gaps or deal with cross-jurisdictional problems. Stubborn local loyalties and entrenched professional habits thus resisted the alignment of the parts of the empire under a single legal code, however excellent the imperial laws might have been.

p. 221 The destiny of the Justinianic codification was not directly to provide a governing science for the late empire, but rather to preserve classical Severan jurisprudence as a resource for fresh building of laws in Europe, with a great flowering of interest in the twelfth-century renaissance. With the Glossators and Commentators, a new era begins, known as the Reception, where the prestige of the old Roman sources was harnessed by new generations of brilliant jurists keen to reanimate legal science. It was discovered ↵ that Justinian’s Digest of classical law, supplemented by the Gaian typology, provided a host of ready-made solutions that could be combined with feudal, communal, and ecclesiastical laws to articulate a new *ius commune*. These were known also as the “Learned Laws” because they were cultivated and disseminated as much by university professors (or learned canonists) as by advocates or attorneys.²⁸

II. The Pandectist Summation

National monarchies displaced local, imperial, and church jurisdiction in the modern period—a transition largely driven by the fiscal imperatives of warfare. Nation-states needed enhanced tax bases and unified markets, and this militated against the loose international system of Learned Laws holding together a complex of interlocking jurisdictions. In the eighteenth century the trend was to use historical jurisprudence amalgamated with a blend of Thomist and secular natural law to create national codes under the authority of a territorial monarch. So we see the formulation of the Prussian (1794), French (1804), and Austrian (1811) codes in the transition from Enlightenment despotism to Romantic nationalism.²⁹ The French code, heavily derived from the Roman-based commentaries and treatises of Robert Pothier (1699–1772), was notably concise and elegant, and was exported across Europe as Napoleon’s empire expanded. With his defeat, an alternative codal tradition grew to prominence in Germany, based on an intense study of Roman classical doctrine known as Pandectism. This Pandectism reacted against the imposition of a foreign legal system by the Napoleonic invader, but it also wanted to escape from the scattered jurisdictions of a divided German territory. These legal nationalists therefore sought a solid juristic basis for a new German law, and they found it in a highly scientific Gaian classicism. Their project was so successful that Pandectists ended up providing the most important commentaries on the French code, annexing the prior French civil law to the German intellectual empire.³⁰

p. 222 The Pandectist movement was launched by luminaries such as Thibaut, Savigny, and Puchta in the early 1800s, and came to be associated with the romantic nationalism and liberalism that culminated in the 1840s. The Pandectist revival of classicism was erudite, detailed, and highly systematic—Gaianism to the nth degree. Pandectism also generated a proud new breed of university jurists, exemplified by Friedrich von Savigny, who with his friend Goethe had refounded the modern German university system with a special mission to study historical law. The Pandectists came to view Roman law as an individualistic system promoting freedom as autonomy within a participatory civil society. Only with the defeat of the liberals after 1848 and rise to domination of Prussia and the Bismarckian state did the lawyers of the movement turn their full energies to ↵ codification as a national unification project, with the earlier social and historical consciousness of the romantic jurists overlaid and replaced by a commitment to arm’s-length market relations governed by harmonized rules. This latter national phase of the movement was led in the later nineteenth century by Planck, Windscheid, and Jhering. This talented group deployed the prestige of

classical Roman tradition to create a single private law and single market for the whole of Germany while respecting the fiscal and political separatism of the component states of the German federation.

The doyen of the later German-Roman Pandectist tradition was Theodor Mommsen (1817–1903). Mommsen received the Nobel Prize in Literature the year before he died, with the Nobel Committee citing him as “the greatest living master of the art of historical writing, with special reference to his monumental work, *A History of Rome*.” Mommsen also wrote massive tomes on Roman constitutional law and criminal law, and with Paul Krueger edited the great modern edition of the *Corpus Iuris Civilis*,³¹ which, together with the paligenetic work of his younger colleague Otto Lenel on earlier classical law,³² forms the bedrock of modern Roman law scholarship. Mommsen’s career exemplified the world view of Pandectist historical analysis, involving intense scrutiny of Roman sources in order to isolate the key themes of private law when recasting the extant German *ius commune* into modern statutory form.

Pandectism amounted to a second Reception of Roman law; and in turn it sparked a counter-reaction from more conservative nationalists of the rival German historical school, led by Brunner, Gierke, Sohm, and Gneist, who focused attention on the family, corporate, guild, and governmental law of non-Roman north European tradition. Thus, legal history of many stripes ultimately contributed to the modern national codification of German civil law, a movement that was completed with the promulgation of the *Bürgerliches Gesetzbuch* (*BGB*) in 1900.³³ The *BGB* went on to serve as a source and framework for civil law across the globe, exceeding even the influence of the French Code Civil. Pandectism also animated English jurists such as John Austin and Nathaniel Lindley in the late nineteenth century, and the commercial lawyers of twentieth-century America, many of whom had family connections to Germany and roots in the German universities; Friedrich Kessler and Karl Llewellyn were the exemplars. The *BGB* was adopted by Meiji Japan, and spread thence to China and East Asia. This global influence has been the ultimate victory of the German historical schools of law, unforeseen by its own practitioners; and behind their victory lies the foundation of Gaius, Ulpian, and Justinian.³⁴

p. 223 Arguably the powerful continental legal-historical tradition just described has now itself slipped into historical memory, canceled by its own victories. It may have been foreseen, even intended, that in a postcodification world, jurists should begin their work with ↪ contemporary interpretations of the relevant national civil code in their search for current answers. Historical study of the formation of the code and the pre-codal legal world therefore tends to be relegated to a domain of specialist scholarship. Some of the leading doctrinalists bring historical tools to bear in the interpretation of modern codified law.³⁵ But classical historical tradition no longer lies at the core of Civilian legal scholarship. With the formulation of the codes, the juristic mission was transformed; building up legal norms through adept use of historical material was no longer the dominant method.

III. Common Law Theory

Peter Birks suggested that in its manner of rule-making the common law more closely resembled Severan Roman jurisprudence than the codified continental systems that built on Justinian's *Corpus Juris*.³⁶ The royal chancery and the judges of England ran a pragmatic yet formulaic writ system harnessing local forensic and enforcement procedures. This separate development may explain why English law did not follow the European continent and take up a full Reception of Justinianic law, but rather preserved its native writ system. It was true that around 1100 there had been a direct infusion of Romanism in the language and content of the petty assizes whereby the royal courts of common law took over supervision of feudal estates by repressing illegal dispossessions. There were other entry points of Romanist ideas in the common law of covenant, of trespass, of servitudes, and nuisance. Henry de Bracton's extensive treatise on the common law, collated in the early thirteenth century, bears witness to the impact of glossatorial Roman law on the imagination of the elite lawyers of that time.³⁷ But there was a limit to influence; all these Civilian injections turned out to be a kind of inoculation, giving some structure and vocabulary to the developing English writ system without completely falling under the sway of Roman concepts and procedures. English lawyers were not interested in codification *tout court*, which was associated with overbearing centralized royal power. They could, however, admit legal change via court deliberations, which included interventions by the Court of Chancery and the High Court of Parliament, where many judges and lawyers sat and took a hand in drafting legislation. In a testy exchange in an early common-law court a judge cut off counsel who was offering an adventurous interpretation of a statute using these telling terms: "Do not gloss the statute for we know better than you; we made it."³⁸ Statutes were thus used to clear up uncertainties and controversies, to extend existing claims, or repress urgent mischiefs.

p. 224 The common law mind was exhibited in the career of judge and jurist Matthew Hale (1609–1676), whose work provided a bridge from medieval to modern legal technique. Hale's contribution came in two seminal works of historical jurisprudence, *A History and Analysis of the Common Law of England* and the *Historia Placitorum Coronæ*, or *The History of the Pleas of the Crown*. The first history, originating probably in lectures at the Inns of Court in London, sets out the evolution of the common law almost entirely in terms of interlocking jurisdictions. Hale observes that the law of persons and things is distributed across a very wide range of writs in different court systems, including courts of Admiralty and church and prerogative courts. He argues that a unified system of substantive rights and wrongs and adjectival remedies emerges very late, with actions on the case for trespass proving a universal action in King's Bench, gathering business into that court. Hale's later work on criminal law is more abstract and rational in method. He innovated by isolating capacity as a subject matter and then expounding the distinct heads of crime as causes of action with structured elements, which could then be compared and general principles extracted. This drive to systematization distinguished Hale's work from the listings of historical writs of actions and detailed exposition of their operation, which had been the bedrock of juristic work by the great lawyers of the earlier eras such as Thomas Littleton and Edward Coke. By acknowledging that families of rules dealing with distinct subject matters could be identified independently of their procedural packaging, Hale quietly transformed English legal discourse.

In Hale's lengthy preface to Rolle's *Abridgment* in 1668, addressed squarely to students, practitioners, and we may surmise, fellow judges, he elevated the common lawyer's respect for settled precedents as the bedrock of the system. Hale acknowledged that reason, logic, and systemization had its place in legal exposition, but warned that explicit pursuit of policy or moralistic reform in curial decision-making should be resisted, since these modes of decision risked individual partiality and self-interest on the part of the judge. Common law doctrine expressed in historical precedent was "settled and known" as the collective thoughts of a dedicated legal community:

The Common-Laws of *England* are not the product of the wisdom of some one man, or Society of men in any one Age; but of the Wisdom, Counsell, Experience and Observation of many ages of wise and observing men. ... [T]he mutations have not been so much in the law as in the subject matter of it.³⁹

p. 225 Hale was reprising ideas promoted earlier by Sir Edward Coke, who stated that “Reason is the life of the law; nay, the common law itself is nothing else but reason.”⁴⁰ But when Coke referred to “The law, which is perfection of reason,” he clearly meant the collective wisdom of the common lawyers working within a normal science, not some natural analytical reason attained by solo ratiocination.⁴¹ He said as much in his reported speech to King James denying the king any personal role as a judge, since the monarch

was not learned in the Lawes of his Realm of England, and causes which concerne the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reason, but by the artificiall reason and judgment of Law, which Law is an art which requires long study and experience, before that a man can attain to the cognizance of it.⁴²

Coke and Hale’s defense of the common law mind was restated in Blackstone’s *Commentaries on the Laws of England* (1765–1769), originating as lectures for genteel students at Oxford seeking a taste of the law outside the hard grind of practical lawyering at the Inns of Court. Blackstone added two new elements to Hale’s method. One was an overtly Institutionalizing ordering of the law, with copious references to the Justinianic system and to later Civilian literatures. The other was to apply the graceful tropes of Enlightenment natural philosophy to justify the moral norms of the law and so make the law more appealing to lay audiences. The impact of the work, especially in America, was incalculable.⁴³

p. 226 Blackstone’s method was less influential in England itself. Practitioners continued to rely on vast digests of cases with cross-cutting headings based on the old registers of writs, organized more or less alphabetically.⁴⁴ Institutionalizing treatises offering scientific organization of a specific legal subject matter were rare, with William Jones’s *Essay on the Law of Bailments* (1781) being a stand-out exception. Most treatises resembled short abridgments, being collections of *rationes* loosely organized around the heads of writ and remedy. Interestingly, a new model of scientific treatise emerged in early nineteenth-century America, where classicism including Roman law was briefly prized as embodying a republican spirit to oppose to English feudalism and status hierarchy. The exemplar was Justice Joseph Story, whose treatises were polished, organized, argumentative, and rational. His work was brought out in English editions and made an enormous difference to expectations of legal literature. However, it was not until the later nineteenth century that a comparably polished English treatise literature appears, with great jurists including Anson, Dicey, Maitland, Pollock, and Salmond writing with an eye on transmission of common law doctrine to the empire in a lucid and commanding form.⁴⁵ Such jurists now tended to be university professors rather than practitioners and were well versed in legal history and relevant branches of philosophy; yet their work basically tracked the thinking of the appellate judiciary, and for all their elegance they eschewed particular heuristics and mostly cleaved to a pragmatic functionalism.

Interestingly this was also the period when analytical jurisprudence began in earnest, as a subdiscipline remote from the textbook tradition, almost as if the heuristic and scientific tradition had been hived off as a specialism. John Austin was the pivotal figure in England, and Wesley Hohfeld a little later in the United States. The legal historians Frederic William Maitland and Oliver Wendell Holmes Jr. were also interested in legal analytics, but both looked to Germanist law and philosophy for ideas and were not much interested in Pandectism. In the past thirty years there has been a quiet Gaian revival in many of the English law schools, led by the charismatic Oxford jurist Peter Birks with his remodeling of the taxonomy of English obligations to include unjust enrichment and also to recharacterize equitable claims on a more scientific pattern.

Yet so far, American jurists have hardly been tempted by the classical traditions of historical doctrine. American legal thinking remains wedded to its pragmatic, realist, and functionalist schools, and while there is much legal history, it is not generally the history of juristic thought, but rather a demonstration of the ideological suppositions, the policy implications and real-world effects of legal decision-making.⁴⁶ This refusal of system arguably places too great a burden on the good sense and good will of lawyers every time they face a fresh decision, and courts the further risk that quickly calculated changes to reach instant solutions will set up fresh problems in adjacent or connected areas of law.⁴⁷ The New Private Law movement has suggested that practical legal reasoning may better be guided by an injection of doctrinal rigor, setting up the issues for decision by harnessing the analytical resources of precedential law. A deeper historical knowledge of the sources of our law can only strengthen this jurisprudential enterprise.

Notes

- 1 Y.B. Hil. 19 Edw. 3, pl.3 (1345); Luke O. Pike, *Year Books of the Reign of King Edward the Third: Years XVIII and XIX*, at 374–379 (Rolls Series 31.B.12, 1905); Seipp No. 1345.003rs.
- 2 *Omychund v. Barker* (1744) 1 Atk. 21, 33, 26 E.R. 15, 23 per William Murray S.-G. (in arg.).
- 3 Cf. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2d ed. 1993). For a case study, see Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRIES IN LAW 355 (2009).
- 4 Cf. David Daube, *Slightly Different*, 12 IURA 81 (1961).
- 5 Cf. Lionel Smith, this volume.
- 6 The two prime texts are Friedrich von Savigny, *Das Recht des Besitzes* [The Law of Possession] (1803), and Rudolf von Jhering, *Der Besitzwille* [The Will to Possess] (1889).
- 7 See generally David Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (2013). Joseph Story and James Kent are the preeminent nineteenth-century figures; a fascinating example of a later historicizing and modernizing treatise is provided by Grant Gilmore, *Security Interests in Personal Property* (1965).
- 8 See, e.g., William A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (1st ed. 1936, 5th ed. 1976).
- 9 See James Q. Whitman, *Long Live the Hatred of Roman Law!*, 2 RECHTSGESCHICHTE 40 (2003).
- 10 See Mary Beard, *S.P.Q.R.: A History of Ancient Rome* 53–89 (2015).
- 11 See Peter G. Stein, *The Two Schools of Jurists in the Early Roman Principate*, 31 CAMBRIDGE L.J. 8 (1972); Tessa Leesen, *Gaius Meets Cicero: Law and Rhetoric in the School Controversies* (2010).
- 12 Dig. 1.2.1 (Gaius) (Alan Watson ed., G.E.M. de Ste Croix trans., 1985).
- 13 This adumbrates Maine's famous trilogy of the engines of legal change—fiction, equity, and legislation—derived from Roman legal history and then universalized: Henry Sumner Maine, *Ancient Law* (1st ed. 1861). See further Peter G. Stein, *Legal Evolution: The Story of an Idea* 23–50 (1980).
- 14 See A.M. Honoré, Gaius, *A Biography* 1–45 (1962).
- 15 See Peter Birks, "Definition and Division: A Meditation on Institutes 3.13," in *The Classification of Obligations* 1–35 (Peter Birks ed., 1997); George Gretton, *Ownership and Its Objects*, 71 RABEL J. OF COMP. AND INT'L PRIV. L. 802 (2007).
- 16 G. Inst. 4.1–5, at 232–233 (Francis de Zulueta ed. & trans., 1946); cf. J. Inst. 4.6, at 128–135 (Peter Birks & Grant McLeod eds. & trans., 1987).
- 17 See Thomas Rübner, "Imperial Cognition Process," in *The Oxford Handbook of Roman Law and Society* 257–269 (Clifford Ando et al. eds., 2016).
- 18 This is to borrow with joyous anachronism the nomenclature of Benjamin C. Zipursky & John C.P. Goldberg, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010). See also John C.P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* (forthcoming 2020). Other methods can be used to describe the nature of "upstream" lawyers' reasoning as setting the conditions for successful dispute settlement in the forensic arena. See, e.g., Andrew S. Gold, this volume; Henry E. Smith, this volume.
- 19 For recent work on the *Lex Aquilia*, see Wolfgang Ernst, *Justinian's Digest 9.2.51 in the Western Legal Canon* (2019); Joe Sampson, "lex Aquilia on wrongful damage to property," *Oxford Classical Dictionary* (2018) DOI: 10.1093/acrefore/9780199381135.013.8261.
- 20 See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 902–921, 953–1049 (1996). We must note a separate Roman pedigree for personal damages, involving repression of public expressions of contempt, outlined in Peter Birks, *The Roman Law of Obligations* 221–246 (Eric Descheemaeker ed., 2016); Peter Birks, *The Early History of Iniuria*, 37 LEGAL HIST. REV. 163 (1969).

- 21 See generally Gyorgy Diódsi, *Contract in Roman Law from the Twelve Tables to the Glossators* (1981); Laurent Waelkens, *Amne Adverso: Roman Legal Heritage in European Culture* 323–356 (2015).
- 22 Cf. G. Inst. 3.141, *supra* note 16, at 196–199.
- 23 See further Henry Hansmann, Reinier Kraakman, & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006); Henry Hansmann, Reinier Kraakman, & Richard Squire, “Incomplete Organizations: Legal Entities and Asset Partitioning in Roman Commerce,” ch. 8, and Andreas Martin Fleckner, “Roman Business Associations,” ch. 9 in *Roman Law and Economics Volume I: Institutions and Organizations* (Giuseppe Dari-Mattiacci & Dennis P. Kehoe eds., 2020); Joshua Getzler, “Personality and Capacity: Lessons from Legal History,” in *Finn’s Law: An Australian Justice* 147–178 (Tim Bonyhady ed., 2016).
- 24 See Dig. 1.5.17 (Ulpianus), in *Digest*, *supra* note 12.
- 25 See Cassius Dio, *Roman History* vol. IX, bk. 78 ch. 9, at 296–298 (Earnest Cary ed. & trans., 1927).
- 26 See A.M. Honoré, *Ulpian: Pioneer of Human Rights* 76–93 (2002); cf. James Q. Whitman, *Western Legal Imperialism: Thinking About the Deep Historical Roots*, 10 THEORETICAL INQUIRIES IN LAW 635 (2009).
- 27 See A.M. Honoré, *Justinian’s Digest: Character and Compilation* (2010).
- 28 See generally Peter G. Stein, *Roman Law in European History* (1999).
- 29 See further Stein, *id.* at 71–132; James Gordley, *The Jurists: A Critical History* 195–274 (2013); Franz Wieacker, *A History of Private Law in Europe* 257–275 (Tony Weir ed., 1995).
- 30 Karl Salomo Zachariä, *Handbuch des französischen Zivilrechts* (1827).
- 31 1872–1877.
- 32 Otto Lenel, *Palingenesia Iuris Civilis* (1889); Otto Lenel, *Das Edictum Perpetuum* (1927).
- 33 See James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (1990); Michael John, *Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code* (1989); Matthias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837 (1990).
- 34 See Helmut Coing, *Europäisches Privatrecht* (1985).
- 35 See, e.g., Zimmermann, *supra* note 20; *Commentaries on European Contract Laws* (Nils Jansen & Reinhard Zimmermann eds., 2008).
- 36 Peter Birks, *English Beginnings and Roman Parallels: Development of Common Law Relating to Early Roman Law*, 6 IRISH JURIST 147 (1971).
- 37 Henry de Bracton, *On the Laws and Customs of England* (Samuel E. Thorne ed. & trans., 1977).
- 38 *Aumeye v. Anon.*, Y.B. Mich. 33 Edw. 1, pl. 82 (1305) (Hengham, J.); Seipp No. 1305.118rs (referring to Statute of Westminster II, c. 2).
- 39 Sir Matthew Hale, *Preface to Henry Rolle, Abridgment des Plusiers Cases et Resolutions del Common Ley*, iii–iv (1668). The abridgments showed the interlocking system of causes of action and suits by listing the *rationes* of judgments across centuries of English law-making. Rolle introduced more subject organization at the expense of detail, laying the basis for more conceptual modern treatise literatures a century later.
- 40 Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary on Littleton* 97b, 80, 138 (1628).
- 41 A.W.B. Simpson, “The Common Law and Legal Theory,” in *Oxford Essays in Jurisprudence: Second Series* 77–99 (A.W.B. Simpson ed., 1973); John H. Baker, *The Law’s Two Bodies: Some Evidential Problems in English Legal History* (2001).
- 42 *Prohibitions del Roy* (1607) 12 Co. Rep. 63, 65; 77 E.R. 1342, 1343.
- 43 See Albert Alschuler, *Sir William Blackstone and the Shaping of American Law*, 144 NEW L.J. 896 (1994).
- 44 Cf. Mike Macnair, “Institutional Taxonomy, Roman Forms and English Lawyers in the 17th and 18th Centuries,” in *Pensiero Giuridico Occidentale e Giuristi Romani* 191–208 (2019).
- 45 Cf. A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981).
- 46 Cf. G. Edward White, *Tort Law in America: An Intellectual History* (2d ed. 2003).
- 47 Cf. Henry E. Smith, *The Persistence of System in Property Law*, 163 U. PA. L. REV. 2055 (2015).