



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 5 | Number 2

Article 3

1989

Particularism and the Struggle for Coherence in the Common Law Literary Tradition

E. P. Krauss

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Civil Law Commons](#), [Jurisprudence Commons](#), [Law and Philosophy Commons](#), [Legal History Commons](#), [Legal Profession Commons](#), [Public Law and Legal Theory Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Krauss, E. P. (1989) "Particularism and the Struggle for Coherence in the Common Law Literary Tradition," *Touro Law Review*: Vol. 5: No. 2, Article 3.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol5/iss2/3>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lrass@tourolaw.edu.

PARTICULARISM AND THE STRUGGLE FOR COHERENCE IN THE COMMON LAW LITERARY TRADITION

E. P. Krauss*

INTRODUCTION

When Soviet legal theorist Evgeny Pashukanis undertook a critical study of bourgeois legality to provide an informed background against which to invent socialist legality for Bolshevik Russia of the 1920's, he came to the endeavor from within the civil law tradition.¹ Prussian "Legal Science,"² which dominated civilian legalism of the late nineteenth and early twentieth centuries, had, as a cardinal principle, an insistence that the structure and method of law be systematic, and explicitly so. Thus, scholarly treatises, codes, and student texts in that legal tradition begin with a "General Part," explicitly setting forth the fundamental premise(s) and analytical methodology whence the subject matter of the remainder of the work is derived. Consequently, Pashukanis had the advantage of critically examining a concept of legality that had been made explicit in its own discourse about itself.

By contrast, the common law ordering of itself — its "General Part" — remains implicit. We have our tradition, with its characteristic discursive style and habit of mind; but, the common law's customary claim of self-evidence from time out of mind is only the ironic expression of an enigmatic general theory of law. In this regard, the history of the common law is the history of a struggle to make explicit that which remains implicit and submerged in the particularism of common law methodology. Throughout this history, the program of explication has been carried on by progressives and conservatives alike. As Duncan Kennedy has observed:

* Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. This article has benefitted from the critical comments of Andy Lichterman, Bob Lilly, and Ljubomir Nacev.

1. See E. PASHUKANIS, *LAW AND MARXISM* (1978).

2. See M. GLEDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 51-54 (1985).

the activity of categorizing, analyzing, and explaining legal rules has a double motive. On the one hand it is an effort to discover the conditions of social justice. On the other, it is an attempt to deny the truth of our painfully contradictory feelings about the actual state of relations between persons in our social world. In its first aspect, it is a utopian enterprise constituting, in E. P. Thompson's phrase, a "cultural achievement of universal significance." In its second aspect, it has been (as a matter of historical fact rather than of logical necessity) an instrument of apology — an attempt to mystify both dominators and dominated by convincing them of the "naturalness," the "freedom" and the "rationality" of a condition of bondage.³

The common law has succeeded as an instrument of apology because it gives the appearance of neutrality. To the extent that such appearance is attributable to standards of professionalism, intellectual rigor in legal education, or "a judiciary of high competence and character and the constant play of an informed professional critique upon its work,"⁴ it is probably illusory. Nevertheless, there are identifiable characteristics of the common law mode of discourse which distinguish it from bourgeois legal systems in the civil law tradition and which pose special problems for theories of law and legalism viewed as socio-historical phenomena. One such characteristic endemic to the common law tradition is its particularism. For eight centuries, lawyers, scholars, and judges within the common law tradition have, at least in part, attempted either to reveal or create a coherent theoretical underlay to common law particularism, or, in the alternative, to demonstrate that a supposed underlying coherence, in reality, does not exist. This paper describes common law particularism and the theoretical struggle for coherence that runs through the literary tradition of the common law.

I. COMMON LAW PARTICULARISM

The body of law that began to be developed during the reign of Henry II (1154-1189) was "common" law insofar as it applied the same rules in common throughout England without regard to regional variations that existed in the local customary courts and manorial courts of feudal lords. From its inception, the common law was a set of rules applied only in a particular jurisdiction — the King's courts. Access to that jurisdiction depended upon the availability of the King's writ.

3. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 210 (1979) (quoting E. THOMPSON, *WHIGS AND HUNTERS* 265 (1975)).

4. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951).

Through the development of the writ system, the common law became a law of actions and remedies. The notion that “without a remedy there is no right” takes on the aura of a self-evident truth. This is no less true today when, under the Federal Rules of Civil Procedure, an action is dismissed for “failure to state a claim on which relief can be granted.”⁵ The difference between old English and modern American procedures in this regard lies in the manner of describing a “cause of action.” In the earlier time, an inquiry as to the nature of a cause of action would be answered by producing an example of the applicable writ and pointing out its particular formal requirements. Now that the writs have been abolished, the answer becomes an exercise imitative of the television commercial that asks: “How do you spell relief?” The answer is likely to include a listing of “elements” and may drag out the weary metaphor of a three, four, or five-legged chair. The “elements,” like the language of the writ, typically will include references to particular parties, particular circumstances, and particular events. Such allegations are the threshold requirement for access to common law procedure; and common law is first and foremost procedural law.

The primacy of procedure over substance in the development of the common law tradition was expressed by Sir Henry Maine: “So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure”⁶ This accounts for the common law’s unique conception of justice. Unlike natural law’s conception of justice, which emanates from the notion of “rights,” or the conception of justice derived from “the legal order of the state” in the civil law tradition, the common law conception of justice is submerged in the principle of fairness, especially fair trial. The adversarial contest that is the essence of common law methodology is staged in accordance with all important procedural rules which legitimate particular outcomes. Generally speaking, if the requisite procedures have been followed, the trial is deemed fair, and justice is served.

Further evidence of the primacy of procedure over substance is found in the division of civil jurisdiction into legal and equitable proceedings. The chancery equity of the common law tradition is abrogational. The substantive rules of equity abrogate the rules otherwise applicable at law and compel precisely opposite results. The general

5. FED. R. CIV. P. 12(b)(6).

6. H. MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1890).

justification for abrogational rules of equity is that the generally applicable rules of law do not apply when they would cause injustice in the particular case. This is very different from "equity" in the civil law tradition which requires the judge to develop the content of general code provisions by analogy in order to "fill in the details" and decide the unaccounted-for case.⁷ A civilian judge, who, based on his conception of substantive justice, decides a case against the generally applicable rules set forth in the civil code, has committed the gravest abuse of the judicial role. Abrogational equity is more than tolerated in the common law tradition: it is actually lauded, precisely because of its conception of procedural justice. Parallel but contrary sets of substantive rules are said to afford the flexibility needed to achieve justice in the particular case, while inflexible rules of procedure insure fairness by making all "non-trivial" procedural errors absolutely fatal.⁸

Thus far, common law particularism has been identified by reference to its emphasis upon the "case." This emphasis is reiterated by the status it accords the principal players within the legal system, and it is confirmed by the folklore that surrounds those figures in the society at large. In the United States, courts are entrusted with supervision of the legal profession, including the professorial ranks, by virtue of their control of legal education and admission to practice. The personnel of the bench and bar, who bring the cases and decide them, clearly come first. The scholars, having no inherent institutional claim to authority, are relegated to a responsive role as restaters and critics of what the courts have done rather than as intellectual leaders of the legal community.⁹ The American legal scholar with ambitions of influencing the course of legal development is more likely to succeed by trying to impress the President in the hopes of receiving a federal judicial appointment, than by writing commentary for consumption by the bench and bar.¹⁰ Within the

7. See Franklin, *Equity in Louisiana: The Role of Article 21*, 9 TUL. L. REV. 485 (1935).

8. Cf. Hay, *Property, Authority and the Criminal Law*, in ALBIONS FATAL TREE 17 (1975). Strict adherence to rules of procedure was one factor which mitigated the effects of the Draconian English penal law of the 18th century. *Id.* at 32-33.

9. A possible exception has been the role of academics in the development of American administrative law. However, criticism of academia's role in this regard tends to confirm the anti-scholastic tendency of the common law tradition. See generally W. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982).

10. Indeed, the process of selecting someone to take the seat recently vacated by Justice Powell suggests that a reputation as a scholar may, at least in some cases, work to the disadvantage of potential candidates to fill openings on the High Court.

legal culture of the common law, the individual legislator hardly rates mention; some of them are not even lawyers.

American folklore reflects this order of legal professional status. We tend to think of legislators as politicians rather than lawmakers, and we are not particularly fond of politicians. To the extent that there is a popular myth about professors, it is probably that they are eccentric and distant as compared with their more "practical" counterparts. The mythical hero drawn from American legal culture is the lawyer as champion of justice and lost causes. Perhaps this image accounts for the vituperative disdain showered on those in the legal profession who do not live up to the mythical ideal. Lawyerly zeal is tempered by judges who are cast in the role of guardians of liberty. The notions that governmental power is the greatest threat to individual liberty, and that judicial protection of individuals' rights is the best defense against oppressive government, are ingrained in the fabric of our constitutional order and pervade popular consciousness as well. It matters little that two centuries ago it was the wealthy few who sought to protect their liberties from the tyranny of the common people.¹¹ Today the ideology of the Constitution is freed from the controversy surrounding its adoption. At present, most Americans respect and admire judges, especially the unsung trial judges they meet when they serve as jurors.

Judicial supremacy is a singular identifying feature of the common law tradition that has achieved its purest form in the United States. Here the judiciary is the final authority on the validity of legislation (a development that has not occurred in England where there is parliamentary supremacy in matters of public law). A principal component of common law particularism, however, is the limitation of the judicial role to the decision of "cases." Both the constitution and "prudential considerations" limit the jurisdiction of the federal judiciary to justiciable cases brought by suitable parties.¹²

The course of legal development in courts of justice proceeds from case to case, following a path of analogy from one set of particular facts to the next. The diffusion of substantive rules of law into the universe of legal transactions is impelled by the particularistic principle that like cases are to be decided alike. The analytical mission in any given controversy is to determine whether the particular situation is the same as or different from another. General principles, as

11. See *THE AMERICAN CONSTITUTION FOR AND AGAINST* (J. Pole ed. 1987).

12. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975).

such, enter into the analysis only when needed to explain particularized conclusions that are less than self-evident.

Submerged in this particularistic morass, the general theory of law remains unstated, hidden by an inherent ambiguity in the term "law" itself. "Law" subsumes both the concept of "the rule of law," which remains implicit, and particular rules of law, which are made explicit in the context of cases. No such ambiguity exists in the civil law tradition where entirely different words are used to express the two ideas: *jus* (*droit, diritto, recht*), and *lex* (*lois, legge, gesetz*). Common law scholarship that deals with the implicit general theory of law is referred to as "jurisprudence," while the term "doctrine" usually refers to case law. Not surprisingly, in the civil law tradition, where the general theory of law is explicit, the general theory is called "doctrine" and the case law is called "jurisprudence."

Common law particularism itself is a consequence, though by no means a logically necessary one, of the unstated general theory of the common law. In reality, that theory is not so well hidden that it cannot easily be revealed. The central significance of this state of affairs, in which the general theory of common law remains implicit, is that no particular explication of that theory has any inherent authority, persuasive or otherwise. In other words, even individual scholarly efforts are particularized.

Arguably, the core concept from which all others in the common law tradition can be derived is "property" (and its analogues: privacy, liberty, and sovereignty). Put somewhat differently, the common law is predicated on the principle that legal persons have arbitrary discretion within their privately ruled or owned domains. The relevant "person" in any particular controversy may be an actual person, a business corporation, a branch of government, the Nation, or any organic entity cognizable in law. The rules of the common law define the boundaries of "private" domains and provide for transactions in which those boundaries are altered or transgressed intentionally, consensually, or fortuitously in the endless variety of circumstances arising in the infinitude of particular cases. The ubiquitous concept of the "legal interest" in contemporary American law articulates the proposition that a discretion that is claimed lies within a domain that is "owned."¹³ Thus, the key to common law consciousness is its *a priori* notion of the discrete individual self as the dominator of a realm.

13. See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

In contrast, the core concept in the civil law tradition is “contract,” or more precisely, “obligation.” The concept of private domain, which is the point of departure in the common law tradition, is derivative in the civil law tradition.¹⁴ In the absence of an obligation to respect property, so the reasoning goes, there can be no “property” in any meaningful sense. The obligation must be freely undertaken, and this presumes an original position in which there is the absolute equality of valuelessness. This is so because, in an original position of inequality, “obligation” is tainted with the possibility of coercion. Simply put, in civilian legal consciousness, transactions create value; in common law consciousness, transactions exchange values. In the civil law tradition, the development is from the general principle of obligation to the particular realization of its meaning. In the common law tradition, the reasoning moves from one set of particulars to another.

In the civilian tradition, the concept of the legal order of the state is derived from the *a priori* notion, “obligation.” The state orders the creative potential of transactions through the medium of legal rules. Thus, at the very highest level of generality, the civilian state is created by social contract in order to theoretically create individual liberty. By contrast, the common law state is created to preserve and protect a theoretically preexisting condition of individual liberty. Both general theories incorporate the tenets of liberalism, and both have proven to be completely compatible with the material conditions of bourgeois social formations. Nevertheless, the ideological, legal, and political variations that correlate with this general legal-theoretical distinction are rather remarkable.

Consider, for example, the liberal ideal of “equality” in civilian and common law societies. The pursuit of equality throughout the history of the common law tradition has entailed ever wider distribution of privileges. The common law itself originated as a privilege of noblemen. The quintessential writ during the first three centuries of the common law was the assize of *novel disseisin*, an action available only to freeholders.¹⁵ Indeed, this action made the distinction between freehold and non-freehold agricultural tenures important for the first time. A consequence of this distinction was the creation of a sort of legal equality between freehold peasants and their feudal lords; and, correspondingly, the more numerous non-freehold peas-

14. See generally B. EDELMAN, OWNERSHIP OF THE IMAGE (1979); Franklin, *A Precis of the American Law of Contract for Foreign Civilizations*, 39 TUL. L. REV. 365 (1975).

15. See D. SUTHERLAND, THE ASSIZE OF NOVEL DISSEISIN 5 (1973).

antry was degraded to a slave-like condition of dependence on their feudal lords.¹⁶ Subsequent legal developments, as diverse as the rise of trespass (available to non-freeholders) and the passage of the fourteenth amendment of the United States Constitution, promoted even greater equality by means of a broader distribution of privileges.

In the civil law world, the events of 1789 are exemplary. Equality was achieved through the confiscation of privileges, thereby restoring the original position of the absolute equality of valuelessness. In the common law tradition, "equality" means the ennobilization of the common people; in the civil law tradition, it means the degradation of the nobility. This is not merely a difference in appearance or in the way history is explained; rather, it is the legal and ideological expression of a political distinction.

Theoretically, the state in the common law tradition is created to protect liberty, while the legal order of the state in the civilian tradition creates liberty. Under either type of legal regime, the advantages of the privileged classes of society are legitimized by law. In the common law tradition, the wider distribution of a particular social advantage merely entails law reform. In the civilian tradition, the confiscation of privileges previously legitimized by the state may well entail reconstituting the state as such. There is not necessarily any specific causal relationship between social change, legal change, and political change. The dynamics of the relationship between social change and political change, however, are different in common law and civil law societies. Variations in legal consciousness are associated with variations in the meaning, and perhaps the function, of the state in different societies.

In the civilian tradition, the state is the focal point of legal theory. Unlike the common law, which reaches back to immemorial custom, a civilian system is erected upon the ruins of an old regime. The embodiment of the new order is the person of a lawgiver, who is the embodiment of the state as well. As the source of law, the state is superior to all other social entities. This fundamental inequality underlies the crucial distinction between public law and private law in the civilian tradition.

A like distinction has been employed in common law discourse through much of its history, but has been applied with varying levels

16. See Franklin, *Bracton, Para-Bracton(s) and the Vicarage of Roman Law*, 42 TUL. L. REV. 455, 462-63 (1968).

of conviction.¹⁷ Far more striking than the distinction between public and private law in the common law tradition is the ease with which these concepts become metaphors for one another. On the one hand, within his home, the head of a household is considered a king in his castle. On the other hand, the government has authority to rule because it is the "owner" of the country,¹⁸ and the boundaries between its separate powers are discussed as if they were as real as a white picket fence around the yard.¹⁹ The interests represented by the state are neatly compartmentalized in the special category called the "public sector," which ultimately is another unique "individual" co-existing in a pluralistic society.²⁰ In other words, common law particularism permeates every aspect of the legal order including the concept of the State.

II. THE STRUGGLE FOR COHERENCE

The origins of the common law can be traced to a series of measures instituted by Henry II during the 1160's and 1170's. This period marks the beginning of a system of royal courts, prescribed rules of procedure, and development of the early writs. By approximately 1187, the first treatise on the common law appeared.²¹ *De Legibus et Consuetudinibus Angliae* was the seminal effort to bring coherence to the miscellaneous assortment of writs available in the nascent royal judicial system of late twelfth-century England. By focusing on the writs, it established the prototype for the great bulk of common law scholarship produced during the next eight centuries.

The other early treatise, which goes by the same name, was produced roughly a half-century later and is attributed to Henry de Bracton.²² Bracton, who served as a judge under Henry III, was trained in canon and Roman law. Consequently, his commentary on the law of England is informed by his Romanism. Indeed, the first volume is a lengthy introduction anticipatory of the civilian "General

17. See generally *Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

18. For a relatively early example of this transposition, see *U.S. v. Kagama*, 118 U.S. 375, 380 (1886).

19. See *Bowsher v. Synar*, 478 U.S. 714 (1986).

20. See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

21. *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* (attributed to Ranulf de Glanvill).

22. The dynamism of the intervening period is revealed by the fact that Glanvill's comprehensive treatment is contained in a single short volume and Bracton's fills four hefty tomes.

Part."²³ Bracton's *De Legibus*, although widely circulated in thirteenth-century England, fell into disuse shortly thereafter.

Bracton's effort was monumental in its attempt to bring order to the entire corpus of English law, but it failed to establish a tradition of scholarly leadership in the development of the common law. There were many reasons for this failure. To begin with, it was written in Latin rather than the language of the English courts, which was French. Second, it appeared during a century of political upheavals that were settled by compromises among the Barons of the realm who were practical men rather than scholars. Moreover, Bracton himself is reputed to have been unaligned during the Barons' War, most likely leaving him without political sponsorship.²⁴ Third, and most important, Bracton's methodology failed to take hold because of the particularism of the common law itself. The ranks of the budding legal profession during the reign of Edward I (1272-1307) preferred the instruction available in practice manuals and the Year Books.²⁵ These sources contained examples of the various writs, explanations of procedure, and reports of actual arguments in particular cases written in French. The failed mission of the *De Legibus* has prompted one historian to conclude: "The obsolescence of Bracton left the common law without systematic exposition for five hundred years."²⁶

A few treatises appeared in the ensuing period, but the Year Books continued to be the most important source of common law learning until well into the sixteenth century. By that time, however, they had become so numerous that their accumulated contents had become an unwieldy mass of particularized data. The only order to the Year Books was the chronology in which they were compiled, and they were not indexed. Lawyers of this era prepared their own summaries of the cases appearing in the Year Books and categorized them according to the kinds of issues and claims involved. This informal pigeonholing of particularized legal learning into generalized categories was formalized in the sixteenth century by Sir Anthony Fitzherbert and others. Fitzherbert's summaries of Year Book cases were organized by subject in a work entitled *Graunde Abridgement*.²⁷ The abridgments of this era, which were widely used by lawyers and law students, fostered a measure of coherence because of

23. Franklin, *supra* note 14, at 464.

24. Lectures by S.E. Thorne, delivered at Harvard Law School (Fall, 1980).

25. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 41 (2d ed. 1981).

26. J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 162 (2d ed. 1979).

27. SIR ANTHONY FITZHERBERT, *GRAUNDE ABRIDGEMENT* (1514).

their use of general categories for accessing information in particular cases. The effort was a modest one though, since the categories themselves were arbitrarily arranged in alphabetical order rather than according to a rational plan. Nevertheless, the process of "abridging" the endless accumulation of case law, which continued for three centuries, was an important precursor to modern digesting as well as more ambitious theoretical endeavors.

The sixteenth and seventeenth centuries were marked by an unprecedented proliferation of legal literature facilitated by the technological innovation of the printing press. Printing was introduced into England in the 1470's, and the first English law book to appear in print was *Littleton's Tenures* (1481), a treatise on estates in land and conveyances. According to Baker, by 1600 there were well over one hundred law books in print, and by 1800 this number had grown to more than 1,500 separate titles.²⁸

Just as the expansion of the store of legal materials prompted the development of abridgments, it also stimulated scholarly efforts at generalization in order to meet the legal profession's needs for access to, and understanding of, the rules of law that were their bread and butter. *Littleton* proved to be exemplary. It so effectively communicated an understanding of the most arcane and recondite common law subject that it became the uncontested leading authority in its field. It literally transformed the particularized mass of contradictory property rules into a more or less coherent "system" for the first time. The book was reissued in numerous editions with annotations by the leading scholars of each successive generation, and it continued to be relied on as authority both in England and in the United States well into the nineteenth century.

The intellectual giant of the common law tradition during the early modern era was clearly Sir Edward Coke. His influence as a judge and commentator was unparalleled at least until the appearance of Blackstone's *Commentaries*²⁹ late in the eighteenth century. His literary legacy is contained primarily in two sets of books: Coke's *Reports* and four volumes of his unfinished *Institutes*.

The *Reports* were chronological compilations of edited cases with commentary prepared during Coke's judicial tenure on the courts of Common Pleas and King's Bench. Such reports, bearing the reporter's name, began to appear in the mid-sixteenth century. At about the same time, the more than two-century-old series of anony-

28. J. BAKER, *supra* note 26, at 151.

29. W. BLACKSTONE, *COMMENTARIES* (1803).

mously edited Year Books was discontinued. This shift probably was related to the rise of commercialism in general, particularly to the development of the commercial law book publishing business. With the advent of mechanical reproduction of legal literature, productive capacity for the first time exceeded demand. The commercial response, then as now, to such a condition was to introduce new marketing strategies to stimulate demand. The law book publishers exploited the prestige of well-known jurists by using their names to sell books (sometimes with neither authorization nor genuine authorship). The direct consequence of this practice was to particularize legal commentary. Despite the absence of any coherent structure in the Year Books, as a whole they were what they purported to be — the common law. By contrast, from the mid-sixteenth century on, published reports, abridgments, and treatises contained the common law according to some particular author. In other words, a space of difference was created between the theory of the common law and the common law as such. This space of difference is a central characteristic of the common law tradition that accounts, in part, for the persistence of common law particularism throughout the modern age.

Coke's *Institutes*, which were commentaries organized by subject matter, are characteristic of a strand in common law scholarship that endeavors to demonstrate an underlying coherence in the fabric of the common law. At times, this strand openly has been hostile to law reform and legal theories that suggest the need for reform. Its methodology is to explain the law "as it is" in order to show that it really has made perfectly good sense all along. Such efforts are typically revisionist insofar as they tend to force the pieces of the puzzle to fit together for the sake of the big picture. This is especially true of Coke's *Institutes* which incorporate many historical inaccuracies in the service of the text's general points.³⁰ Thus, this kind of scholarly endeavor is truly an exercise in generalization, but it is simultaneously an exercise in (self-)denial.

Coke's revision of the common law was highly successful partly because of the immense power of the man's personal reputation. Discrepancies between the *Institutes* and the older authorities were unproblematic except to historians who discovered them centuries later. In earlier times, the truth of the matter was so because Coke so sayeth. More important for the success of Coke's particular brand of

30. Some of the problems with Coke's writings are cited in J. WALLACE, *THE REPORTERS* 165-96 (4th ed. 1882).

legalism was its utility in the settlement of the English Revolution. The idea that the common law was the birthright of freeborn Englishmen was adaptable to the aspirations of a rising middle class in a time of bourgeois social transformation.³¹ One reason for the resilience of the common law in this regard was the very existence of Coke's *Institutes*. They represented and reified an ideological weapon that otherwise would have been no more than an ethereal presence.

The other leading English jurist of the seventeenth century was Sir Matthew Hale. Though not as prolific an author on law as Coke, Hale's work has been profoundly influential. His legal writings are representative of a strand in legal scholarship that self-consciously strives to create a coherent theoretical structure for the common law. Hale's treatise on criminal law, *History of Pleas of the Crown*, was so successful in this regard that it dominated its field without significant challenge from the time of its posthumous publication, in 1736, until the controversial first edition of Wharton's *American Criminal Law* appeared in 1846. Hale's systematization of criminal offenses was so compelling that it appears to have influenced the manner, if not the course, of subsequent development of the substantive criminal law. The anomalous development within the common law tradition of scholarly leadership and a commitment to codification in this field is traceable to Hale's seminal treatise.

The greatest masterwork of all time in the common law literary tradition is clearly Blackstone's *Commentaries*. This was the first attempt at a comprehensive and systematic treatment of the entire corpus of the common law since the thirteenth century. The *Commentaries* began as a series of lectures given by Sir William Blackstone, who, at that time, was Vinerian Professor at Oxford. The first authentic edition was published in four volumes, from 1765 to 1769. The *Commentaries* were written so as to be accessible to a general audience of educated English gentlemen as well as to lawyers and law students, and they were read widely. They achieved their most stunning success, however, among the ranks of the legal profession itself. For about a century, Blackstone's *Commentaries* were the single most important library holding of lawyers everywhere in the common law world, and especially in the United States.

31. See C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE*, 107-59 (1962).

It is impossible to place Blackstone clearly with either of the two strands of common law scholarship previously mentioned.³² On the one hand, the treatment of criminal law in the *Commentaries* incorporates the structure of Hale's system virtually without amendment, and, like Hale, the *Commentaries* strive to be systematic and consistent throughout. On the other hand, Blackstone seems to have accepted and followed Coke's "standpattism" in his uncritical acceptance of the common law as the best of all possible laws. The deftness with which Blackstone managed this embrace of both reformism and conservatism probably contributed greatly to the success of the *Commentaries*. It also accounts for the limited historical role of the *Commentaries* as a marker, albeit a prominent one, along the developmental path of the common law rather than as a driving force or even a signpost indicating future direction. In other words, Blackstone's *Commentaries* were never more than a thing-in-itself; unlike the Constitution of the United States or the Code Napoleon, they were unhistorical text.

Blackstone's *Commentaries* were probably an even more important component of the nineteenth-century American legal experience than they were in England. Its foreign origins insulated American legal culture from specific controversies surrounding Blackstone's point of view on any given issue. Instead, the *Commentaries* were taken as a succinct, authoritative statement of the English common law at a time very shortly before the common law was "received" by the newly independent United States. Controversies on this side of the Atlantic typically took the form of an inquiry into whether prevailing conditions here justified reception of the common law rule according to Blackstone rather than whether Blackstone might be contradicted by other English authorities.

While the authority of Blackstone's pronouncements on English law was little disputed among Americans, the reception of the common law in America was itself a controversial choice. Reception was opposed by the Codification Movement, consisting of an amalgam of labor activists, political reformers, and intellectuals.³³ Though the movement had only very limited success in achieving its stated objective, a codification of American law, it did instigate a reaction which was central to the consolidation of the common law in America and the Americanization of the common law itself.

32. Kennedy, *supra* note 3. Kennedy extensively probes the mysteries of Blackstone's text.

33. See P. MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 239-65 (1965). See generally C. COOK, *THE AMERICAN CODIFICATION MOVEMENT* (1981).

The hostility of the Codifiers to the common law was based on the antidemocratic underpinnings of that legal tradition. They complained that the common law was unwritten law and was, therefore, unknowable and unfair to the ordinary citizen. Its rules were said to be inapplicable because they reflected feudal status in medieval English society rather than the social equality of the American Republic. Moreover, common law rules were announced by judges instead of by the direct representatives of the people in the legislature. A code of laws, it was argued, would be more rational, coherent, and fairer than the common law.³⁴

Led by Justice Joseph Story of the United States Supreme Court and James Kent, retired Chancellor of New York, the common law establishment defended the common law against the assault launched by the Codification Movement. They railed against a supposed parade of horrors that would flow from tyrannical legislatures placed above the law. More importantly, they kept the printing presses busy turning out dozens of treatises on every imaginable legal subject. The object of these treatises was to show not only that the common law was knowable, but, also, that it was the most rational, coherent, and fairest system of law ever devised.³⁵

Thus, the two strands of legal theory in the common law tradition were brought into direct conflict by the Codification Movement of the early nineteenth-century. The Codifiers were impelled by their theory of law to reject the common law in favor of what they viewed as a more rational and coherent approach. On the other side, the treatise-writers practiced the self-contradictory scholarship of denial: they defended the particularistic methodology of the common law by generalizing its concepts in order to demonstrate its "inherent" rationality.

The reaction to the Codification Movement spawned a tradition of treatise-writing that petered out after the turn of the century. A direct legacy of the Movement is more difficult to ferret out. Resorting to positive law as a means to enact social policy was one aspect of the Codifier's program that eventually did take hold. The most impressive beginnings of this sort of legislation are found in the legal

34. See Sampson, *An Anniversary Discourse, 1824*, in *THE LEGAL MIND IN AMERICA* 121, 126-32 (P. Miller ed. 1962); see also Franklin, *Concerning the Historic Importance of Edward Livingston*, 11 *TUL. L. REV.* 163 (1937). One of Livingston's proposals advocated "direct and immediate interaction between lawmaker and judge [and] between theory and practice." *Id.* at 203.

35. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, 257-59 (1977).

systems of the antebellum South.³⁶ This was, to be sure, more of a direct political response to social conditions in slave society than a realization of the ideology of the Codification Movement, although the experience with codification in Louisiana may be assumed to have had some influence on legal development elsewhere in that region.

Draconian Codes governing the behavior and management of slaves were enacted in colonial times, long before the Codification Movement.³⁷ However, the widespread use of such codes and the development of a consistent pattern of enforcement did not become an integral part of the southern legal systems until the later antebellum period. The historical record regarding slave legislation seems clear on three points. First, there was an increase in legislative activity from the 1830's on. Second, though the codes of this later period contained extremely harsh provisions, enforcement in the ordinary course of events generally was lax, with the disciplining of slaves being left to the private prerogatives of slave owners. Third, at times when fears of insurrection ran high, whether founded upon rumors or actual events, the militia was called out and there was strict code enforcement without regard to the preferences of individual slave owners. Thus, forceful intervention by the state into the otherwise purely "private" relationship of master and slave was facilitated by the medium of legislation.³⁸

The late antebellum southern experience with slave legislation constitutes a landmark in the early development of the modern American approach to government regulation of economic activity. The course of events which followed reveals a direct line of development leading up to the so-called "regulatory welfare state" of the twentieth-century. Mobilization for the war effort by both North and South illustrated, if nothing else, the power of central government; and Reconstruction demonstrated the potential for public administration.³⁹ These experiences informed a legislative agenda for social and political reforms, primarily at the level of state government during the latter part of the nineteenth-century.⁴⁰ The beginnings of federal regulation late in this period reiterated the legislative form of

36. See Franklin, *The Eighteenth Brumaire in Louisiana: Talleyrand and the Spanish Medieval Legal System of 1806*, 16 TUL. L. REV. 514 (1942).

37. See A. HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 32-36 (1978).

38. See Krauss, *Historical Vision and Revisionist History: Essays on the Interpretation of Legal Texts*, 12 N. KY. L. REV. 1, 13-16 (1985).

39. See generally E. FONER, RECONSTRUCTION (1988).

40. See generally D. MONTGOMERY, BEYOND EQUALITY (1981).

the lawmaking activity that was going on in the states, although the national political agenda was not necessarily concordant with local reforms. Indeed, then as now, federal regulatory law sometimes was intended to preempt and abrogate state law. The principal point for present purposes is that enactment of public policy during this era increasingly came to be understood as the exclusive province of legislation. It also should be noted that this legislative activity was not an attack on the common law, nor were the resulting laws "codifications" in the methodological sense. Rather, they were legislative "modifications" of the common law, which remained essentially intact.

Despite this increase in legislative activism, the dominant feature of American law at this time was its extreme formalism. The treatises of the earlier era had drawn the outline of a structure that was filled in by the growing body of case law. Hence, many of these treatises continued to be reissued in new editions with updated case annotations. More important than the treatises of the nineteenth-century were the digests, which, at that time, came to be standardized approximately in their present form. To the extent that there was a comprehensive codification of American law, it was compiled by the West Publishing Company, which rose to dominance in the law book publishing business, at least in part because of the success of its digesting system.⁴¹

The methodology of the digests was to extract from an entire corpus of decisional law an array of "squibs" succinctly illustrating

41. The Preface to the Century Digest, published by West in 1897, informs the reader that "[s]o long as precedents carry persuasive weight, the lawyer's library must be founded on good digests of the law reports; and a good digest of *all* the reports will continue to be the supreme desideratum in legal publications." *Preface to WEST'S CENTURY DIGEST* iii (1897). The Preface continues:

The art of digesting has greatly developed within the last ten years, and at the same time the importance of being able to secure quick and perfect knowledge of the authorities on any particular point down to date has, through stress of professional competition, become more vital. There is a demand for a new digest on lines similar to those of the United States Digest, but more perfect in plan and execution. Furthermore, enough time has now elapsed since the beginning of our judicial history to create a body of case-law sufficient in bulk to warrant the making of a digest which, down to a definite date, shall be the permanent and final digest and abridgment of the reports. This body of case-law now includes more than 500,000 reported cases, and is embraced in about 5,000 volumes of "official" and quasi official reports, and nearly 1,000 volumes of Reports, reprints, and "selected cases," besides a great mass of periodicals and miscellaneous legal publications. A digest of these reports will be the key to the judicial decisions of the country down to this time, and must form the initial series of all future digests.

Id. at iii-iv.

the application of common law principles to particular facts. The squibs were arranged by subjects appearing in alphabetical order as in the abridgments of the sixteenth-century. However, the internal ordering of each subject in a digest was thoroughly systematized, unlike the comparatively primitive early abridgments. Later abridgments were more systematic in their treatment of legal subjects, but they became more treatise-like in that they contained extensive commentary on the cases. Digests were different. They claimed no authority other than the authority of the cases themselves, and they offered no self-conscious gloss upon the judicially prepared text. The squibs only purported to represent what the cases stood for, and the digest organized this material into a coherent structure that was intended to facilitate access to the cases themselves. In other words, the digest was a representation of the common law universe; squibs were the elementary particles of which that entire universe was constructed.

The digests came the closest of any form of legal literature to presenting the common law "as it is." Notwithstanding the intricate systematization of legal categories and sub-categories they accomplished, the digests did not entail any coherent theory of the common law capable of articulating "what it is." In providing the legal profession with easy access to the great store of learning contained in the accumulated case law, the digests succeeded in revealing, more graphically than ever before, the great diversity of opinion on any particular point of law. What followed was an intensification of the struggle to impose some sort of coherence on the common law. Those who carried the struggle forward fell into two different, and often, opposed camps. On one side were scholars who believed that thoughtful scrutiny of the diverse opinions would reveal "the better rule," which, once found, could be applied evenly in future cases. The quintessence of this approach is represented by the American Law Institute's (ALI) "Restatement" project.⁴² On the other side were scholars who believed the common law was outmoded and unworkable. They sought coherence beyond the confines of common law discourse and looked, instead, for a rational theory of the institutional arrangements of society that would subsume legal institutions. This approach was exemplified by the American Legal Realist Movement.⁴³ Thus, Realists and restaters each attempted to supply

42. See generally Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367 (1934).

43. See, e.g., McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*, 55 HARV. L. REV. 1077 (1942).

American law with a more rational and coherent theoretical structure, but they differed in their beliefs about how such a structure could be derived.

The expressed intention of the ALI's first attempt to restate American law was a descriptive one — to represent the common law “as it is.” However, the methodology of the restatements necessarily entailed something more. The reporters of the restatements carried the analysis further with respect to particular legal questions, by classifying the diversity of opinion as the “prevailing view,” the “trend,” the “traditional approach,” the “minority position,” and so on. Moreover, the reporters supplied commentary evaluating the historical development, rationale, and instrumental implications of the various positions and, most importantly, made recommendations as to which is “the better rule.” Thus, the restatements contained a distillation of prior law together with a set of concrete proposals for systematic, rationalized legal development. In other words, the endeavor to restate American law had normative as well as descriptive content.

The normative moment in the restatement project has, for the most part, remained an unrealized potential. The methodology of restating and reporting the law “as it is” subverted its higher aspiration to guide legal development to the place where it “ought to be.” Extensive commentary on the various views expressed in prior law had a tendency to preserve the diversity of opinion rather than abolish it. More importantly, the ALI's decision to periodically supplement the volumes with digests of subsequent case law directly undermined the authority of the restatements. This exemplifies the scholarship of denial in its most extreme form: not only is case law deemed to be the source of scholarly invention, it also is endowed with the authority (intellectual as well as political) to overrule the scholarly product. Consequently, the restatements are, at best, authoritative representations of the common law at a particular historical moment. Hence, the need to restate the law for a second time arose within a generation after completion of the first restatement. Ultimately, the restatements have failed to identify a coherent structure in the common law and instead have descended into the particularistic morass of common law discourse.

The American Legal Realist Movement rejected the restaters' premise that “the better rules” could be gleaned from a thoughtful reconsideration of the accumulated case law. Indeed, the Realists rejected the conventional understanding of the common law as a collection of rules. They observed that the reported appellate opin-

ions, which are the primary source of common law rules, elide most of what actually occurs in the development of a case. The Realists, therefore, turned to an examination of legal institutions in an effort to develop operational understandings of their functioning.

This line of inquiry yielded the Realists' conception of law as a decision-making process. Legal institutions were seen as social resources that could be used for resolution of conflicts and other sorts of problem-solving. Thus, in order to assess the rationality of legal processes, it became necessary to view legal institutions as components of larger integrated systems. The defining characteristics of such all-encompassing systems necessarily are located well beyond the boundaries of legal discourse. For example, the Tennessee Valley Authority was created to facilitate better integration of the natural and social resources of a region that was, in the first instance, defined by its geographical characteristics.⁴⁴ Put somewhat differently, the mission of the TVA was to rationalize a naturally occurring "system." Legal institutions, in particular, are called into service to facilitate the rationalization of such systems. Thus, according to at least one brand of Realist thinking, the responsiveness of legal institutions to the demands of technical-rational administration is the ultimate test of the rationality of law.

The American Legal Realist Movement was unconcerned with the coherence of the common law as such. For the Realists, the unstated general theory of the common law did not exist as a thing-in-itself; there was no "brooding omnipresence" or Kantian holy moral legislator. Instead, the struggle for coherence became a struggle to impose an administratively defined coherence on legal institutions. Within this theoretical orientation, the nice distinctions of conventional common law discourse are made subservient to administrative expedience, if not rendered altogether irrelevant. Critics viewed this as rejection of the ethical basis for legal rules, portending that the law ultimately would become whatever you can get away with.⁴⁵

44. The creation of the Tennessee Valley Authority (TVA) in 1933 was pivotal for regional economic development. The Authority's dams, steam plants, and nuclear stations produced the nation's largest stock of electricity. Thus, the TVA was responsible for both supplying much of the rural South with its first electrification and attracting such major industries as the Oak Ridge nuclear plant and the Aluminum Company of America to the area. See Freeman, *Creation, Re-creation, and Turmoil*, 49 TENN. L. REV. 687 (1982); McCarthy, *Keeping TVA Unshackled — A Continuing Struggle*, 49 TENN. L. REV. 699 (1982).

45. See generally Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993 (1939). However, post-Realists endeavored to demonstrate the ethical dimension of law consistently with Realist views of legal institutions. See, e.g., Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954).

This is an extreme statement of the implications of Realist theory which are reflected more subtly in a shift in post-Realist common law discourse. One manifestation of this shift is the increasing tendency to define boundaries between legal categories in terms of a balance of competing interests rather than through the reasoned elaboration of legal rules. The ad hoc balancing of interests on a case-by-case basis routinely takes the form of a naked assertion that one interest has greater weight than another in particular circumstances. Moreover, the practice of ad hoc interest balancing invariably entails consideration of the general implications of particular results with regard to the economy of judicial administration. Thus, modern interest balancing adopts the Realists' process orientation, while simultaneously reasserting common law particularism with a vengeance because the idiosyncratic nature of interests in the context of each particular case will always be unique.

Legal literature of the post-Realist era has been dominated by two sorts of periodical publications: looseleaf services and law reviews. Concomitantly, there has been a decline in the influence of treatise-writers and restaters. The model looseleaf-style newsletter is national in scope and limited by its subject matter, unlike nineteenth-century legal periodicals, which typically were devoted to local or regional coverage of all legal topics. Modern looseleaf publishers employ a small army of legal technicians who extract information on some general topic from the undifferentiated mass of particularized data contained in reported judicial opinions, administrative adjudications, the Federal Register, and similar primary reports of the activities of legal institutions. It boggles the mind to contemplate the breadth of human activity that is reified in juridically significant forms, spewed forth from the legal system, and then rescued from oblivion by editors who neatly compartmentalize each iota so as to facilitate access by the legal practitioner.⁴⁶

Law reviews are the principal vehicles for mainstream scholarly discourse. Whatever other functions these organs may have relative to the pecking order of law students, the hiring criteria of law firms,

46. More than forty years ago, Justice Jackson commented on the inaccessibility of such materials from the person whom they most drastically affect:

To my mind it is an absurdity to hold that any farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. *Federal Crops Ins. Corp. v. Merrill*, 332 U.S. 380, 387 (1947) (Jackson, J., dissenting).

and the career advancement of law professors, the pages of law reviews are the situs of the contemporary struggle for coherence in the common law tradition. There continues to be a brisk trade in books and monographs on legal subjects, but these are often reissues of essays previously published in law reviews. The analytical treatise purporting to be a comprehensive examination of some "title in the law" is still produced, but such scholarship is little more than an atavistic appendage on the body of contemporary legal literature; hardly anyone reads it, and no one considers it authoritative. To borrow a Cardozo epithet, this is scholarship "lanced into the void."⁴⁷

Each major theoretical viewpoint in the post-Realist watershed invariably takes as its point of departure some fundamental insight of the American Legal Realist Movement. Contemporary to the Realist Movement was the school of sociological jurisprudence which made the scientific study of law a branch of the scientific study of society. More recently, the Law and Economics School, and other law and science approaches, have attempted to develop the same basic insight: that legal coherence is derivative of some rational system of thought that is external to legal discourse. More pragmatic scholars have looked to alternative dispute resolution as the rational application of the Realists' insights about the nature of law as process. Others, having noticed the ethical neutrality of Realist thinking, have attempted to supply an ethical basis to theories of legal process. This approach has been developed further by the Rights Theorists. Finally, in the last decade, the emergence of the Critical Legal Studies Movement has turned the eight-century-old struggle for coherence in the common law tradition into a struggle against incoherence. Having assimilated the Realist insight that the common law essentially lacks self-contained coherence, much of the scholarship of this loosely defined "school" endeavors to understand, in social and historical context, the meanings articulated by common law doctrine and seems to take seriously Holmes' admonition to "get the dragon out of his cave onto the plain and in the daylight, . . . count his teeth and claws, and see just what is his strength."⁴⁸

The most significant recent development in the common law literary tradition is technological rather than theoretical or stylistic, though both theory and style shall feel the immediate brunt of this new technology. The introduction of the automated databases, LEXIS and WESTLAW, into the "legal literature" clearly consti-

47. *Irmor Corp. v. Rodewald*, 253 N.Y. 472, 476, 171 N.E. 747, 748 (1930).

48. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

tutes the most dramatic influence brought to bear on the essential character of the common law form of discourse since the advent of printing. Computer-assisted research methodologies signify the triumph of particularism. The capacity to randomly access "key words in context" subverts *all* theories by rendering the intellectual activity of generalizing superfluous. Whether, in forsaking theory, the LEXIS-trained generation of lawyers will lose hold of its claims to legitimacy remains to be seen. What seems clear is that, as that generation matures and assumes leadership of the legal fraternity, it will need to reinvigorate the struggle for coherence in the common law tradition if that tradition is to survive.

CONCLUSION

For the better part of a millenium, both the practical and theoretical literature of the common law has grappled with the uncertainties rooted in common law particularism. During the most recent half-century, this literary tradition has been undergoing change. The approach, previously referred to as "the scholarship of denial," appears to be fading away. Today, few seriously argue that the common law is inherently rational, and self-evidently so. Instead, rationalist claims about law are based on theories about systems, games, markets, human behavior, and psychology. Legal discourse increasingly has assimilated the language and, to a lesser extent, the methodologies of science. Concomitantly, the categories and concepts of traditional common law discourse have become less important, more obscure, and ultimately less meaningful. If, as may be expected, the influence of computerization accelerates the disintegration of traditional common law forms, then the "utopian enterprise" represented by those forms will have reached its final failure, and the effort to discover the conditions of social justice may forever be severed from the processes of legal justice.

