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ARTICLES

ENGLISH JUDGES AND ROMAN JURISTS: THE CIVILIAN LEARNING BEHIND ENGLAND'S FIRST CASE LAW

Thomas McSweeney

This Article looks at a historical problem—the first use of case law by English royal justices in the thirteenth century—and makes it a starting point for thinking about the ways legal reasoning works in the modern common law. In the first Part of the Article, I show that, at its origin, the English justices' use of decided cases as a source of law was inspired by the work civil and canon law scholars were doing with written authorities in the medieval universities. In an attempt to make the case that English law was on par with civil law and canon law, the justices and clerks of the royal courts began to treat cases as if they were the opinions of great jurists, to apply the same types of dialectical reasoning that were used in civil law discourse to those cases, and to work them into systems of authority. They used cases, as the modern common law does; but they used cases to create systems of the kind we usually associate with civil law. In the second Part of the Article, I turn to the modern common law and, using the methods of medieval case law as a mirror, show that the differences between civil law and common law reasoning are more perceived than real. American lawyers tend to view common law as flexible and creative, whereas they view civil law as ossified and hierarchical. This largely stems from the fact that common lawyers focus on the

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judicial opinion as the place where legal reasoning takes place. By integrating other texts, like the student outline and the restatement—which seek to create a harmonious system out of judicial opinions—into the picture of common law reasoning, I show that common law reasoning shares quite a bit in common with civil law reasoning.

I. INTRODUCTION

Common law and civil law are the two major competing families of law in the world today. It is misleading to talk about them as two unities, since each has many individual instantiations in various countries; but lawyers within each family share some basic cultural assumptions. Common law sees itself as an autochthonous development of an individualistic and insular English culture. Civil law sees itself as the direct heir to Roman law. The modern civil law's quintessential texts are codes, which express the will of the people through the legislature and present the law as a coherent system.¹ The common law's are cases, and common lawyers are educated to view case law as a flexible mode of legal development that brings the weight of practical judicial experience to the process of legal change, in contradistinction to the rigidity and deductive nature of the code.²

In this Article, I look at a historical case that collapses the cultural differences between common law and civil law. I show that England's first flirtation with case law in the thirteenth century was not a purely insular, English development, but was actually inspired by medieval civil law. Cases were introduced into the education of clerks in the royal courts—there was no profession of lawyers yet in England—because, to the justices and clerks of the royal courts, they looked similar to the types of authorities one would find in civil law texts. These justices argued from individual cases, as we do in modern common law discourse; but they focused on how they could work the individual cases into a harmonious system, a preoccupation usually associated with the civil law today.

In Parts II and III, I look at the genres of judicial writing in thirteenth-century England. Part II focuses on the plea rolls, the administrative records of the king's courts, and collections of plea roll entries that were made by justices and clerks in the middle decades of the century. In Part III, I turn to the treatise commonly called *Bracton*, which works those cases into a system of law. The authors of *Bracton*, royal justices themselves, thought the justices who decided the cases recorded on the plea rolls were important as personal authorities, and, in this respect, were not so different from modern common lawyers, who ascribe a great deal of authority to their judges.

1. See MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 34–37 (2004) (discussing the French civil law system, in which judges see themselves as mechanically applying the code rather than making law themselves through their decisions).

2. American comparativists often view civil law as overly formalist. See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 107 (1997) (describing the average American lawyer's perception of the European legal culture as formalistic); LASSER, *supra* note 1, at 27–28 (attributing to the traditional American comparative tradition the belief that French civil judicial system is a “bastion of judicial formalism” where codes are applied mechanically); cf. 3 ROSCOE POUND, JURISPRUDENCE 507–09 (1959) (discussing the risks associated with a pseudoscientific legal system).

These authors also placed a heavy emphasis on systematization of the law, an emphasis that they drew from their experience with medieval civil law.

In Part IV, I turn to genres of legal writing in the modern common law and show that, although the common law's identity comes from the judicial opinion—which places the judge as an individual authority at the center of legal development—American common law also produces texts that emphasize the system over the individual. These texts—the student outline and the restatement of law—occupy a far less central space in the imagination of the common law than the case. Where the common law likes to think of itself as an unfolding story told by its judges, it retains, just beneath the surface, the civilian desire for an all-encompassing code without contradictions. *Bracton*, a text that keeps both desires on the surface level, helps us to model this.

II. CASE LAW IN THIRTEENTH-CENTURY ENGLAND

A. *Collecting Cases*

By the middle of the thirteenth century, justices and clerks in the royal courts were collecting records of cases from the plea rolls, their administrative records, and treating them as legal literature. This culture of case collecting became possible only after half a century of professionalization in the royal courts. The twelfth and thirteenth centuries are usually treated as the beginning of the English common law, although the term itself was not employed much at the time.³ In the second half of the twelfth century, coming out of two decades of civil war, Henry II instituted several new procedures for recovering land lost during the anarchy.⁴ These procedures had many of the elements that would become hallmarks of the common law, most importantly the writ to begin litigation and the jury to end it.⁵ Henry experimented with various ways of delivering justice to the counties and established travelling groups of royal justices called eyres—a model his grandfather, Henry I, had used before him.⁶ These new courts and procedures increased access to royal justice so that, by the time of the first court records, we see people from all social strata suing in the king's courts.⁷

By the second decade of the thirteenth century, the royal courts had developed a corps of professional justices. During the reigns of Henry's sons Richard and John,

3. Paul Brand, *Law and Custom in the English Thirteenth Century Common Law*, in *CUSTOM: THE DEVELOPMENT AND USE OF A LEGAL CONCEPT IN THE MIDDLE AGES* 31 (Per Andersen & Mia Münster-Swendsen eds., 2008) (noting that what came to be known as English common law had a variety of labels in the twelfth and thirteenth centuries).

4. See JOHN HUDSON, *THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA 126–29* (1996).

5. See *id.* at 127–34 (discussing the introduction of new administrative procedures including the use of royal writs and recognitions by “lawful men”).

6. *Id.* at 123–26; RALPH V. TURNER, *THE ENGLISH JUDICIARY IN THE AGE OF GLANVILL AND BRACTON*, c. 1176–1239, at 19–21 (1985).

7. See HUDSON, *supra* note 4, at 205–06 (noting that access to the central court was likely expensive, but acknowledging that the royal courts heard cases from “minor men” who owned relatively small amounts of land).

three types of courts had started to take shape: a court that followed the king as he perambulated around his realm (the court *coram rege*), a court that sat more or less permanently at Westminster hall (the common bench), and a series of periodic judicial visitations of the counties (the eyres).⁸ Although the justices assigned to these courts were often great magnates or royal servants in other departments of the administration who spent a minority of their time sitting as justices in the courts, a few justices were recruited in the 1180s and 1190s who would spend virtually their entire careers as justices, a group whom we might call professionals.⁹ Each justice had at least one clerk who kept the justice's plea roll, a record of the cases he had heard.¹⁰ When the justice was a magnate, he might bring his own personal clerk along with him when he sat in the courts.¹¹ With the advent of the professional justices, though, we start to see some long-term clerks who specialize in working as clerks in the courts.¹² Simon of Pattishall's clerk, Martin of Pattishall, served his master for many years.¹³ When Simon retired from the bench in 1216, Martin was elevated to justice.¹⁴ This became a fairly common pattern for promotion to the bench from Martin's elevation until the end of the thirteenth century.¹⁵

It is worth pausing to note that what was happening in the king's courts was separate from what was happening in the universities. Oxford University was brand new at the turn of the thirteenth century, but it already had many masters of law; and law seems to have been taught at some cathedral schools, like Ely and Exeter.¹⁶ These law schools did not teach the law of the king's courts. They taught civil law—the Roman law found in Justinian's sixth-century *Institutes*, *Codex*, and *Digest*, as

8. See TURNER, *supra* note 6, at 65–69, 126–29.

9. See *id.* at 39, 73–75 (discussing the multifarious activities of early justices and the rise of a professional judiciary).

10. *Id.* at 215. We know much more about the clerks of the courts in the late thirteenth and early fourteenth centuries than we do about the clerks in the period I am surveying in this Article. This is partly due to the fact that it was not until 1305 that clerks began to sign the plea rolls they wrote. Paul Brand, *Medieval Legal Bureaucracy: The Clerks of the King's Courts in the Reign of Edward I*, in *THE MAKING OF THE COMMON LAW* 169, 170 (Paul Brand ed., 1992). We do not know precisely how the clerks of the early thirteenth century related to the justices and the courts, whether they were thought to be in royal service or in the service of an individual justice, or how many of them there might have been.

11. See TURNER, *supra* note 6, at 215–16.

12. See *id.* (profiling several career clerks who ultimately joined the judiciary).

13. *Id.* at 210–11.

14. *Id.*

15. See *id.* at 215–16 (“Certainly [serving as a clerk] was not the only route to a judgeship, but it was becoming more and more common as the century progressed.”).

16. See JAMES A. BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS* 111, 237 (2008) (discussing the “talented group of decretists [who] were teaching canon law in schools at Oxford” beginning in the late twelfth century); NICHOLAS ORME, *EDUCATION IN THE WEST OF ENGLAND, 1066–1548* 52 (noting that Exeter had a vibrant cathedral school, but was losing ground to the universities in the early thirteenth century). The evidence that Thomas of Marlborough taught Roman law at Exeter in the early thirteenth century is no longer generally accepted, however. Jane E. Sayers, *Marlborough, Thomas of (d. 1236)*, *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* available at <http://www.oxforddnb.com/view/article/18077>.

reinterpreted by medieval jurists—and canon law, the law of the Church.¹⁷ The two laws were closely related; to obtain a degree in one, a student was required to learn quite a bit of the other.¹⁸ They were both taught according to the scholastic method, to which we will return later.¹⁹

Even if the universities did not teach the laws of England, some of the people who worked in the king's courts had university or cathedral school training in law. The amount of influence that Roman law and canon law exerted on the early common law through these schools-trained justices and royal advisors has been a major point of debate for legal historians.²⁰ Although at times we do find evidence that the people who worked in the royal courts thought of their work as somewhat analogous to Roman and canon law, university training in law was not a requirement or even a usual path to a position in the royal courts.²¹ In fact, there is little direct evidence, apart from a few Roman legal terms in the *Glanvill* treatise of the 1180s, that the people who worked in the king's courts thought of what they were doing as a discrete professional discourse called law, rather than as a type of royal administration.²²

This had changed by the 1220s. In that decade, a justice or clerk in the royal courts began a treatise called *De Legibus et Consuetudinibus Angliæ* (“On the Laws and Customs of England”), commonly called *Bracton* after the royal justice Henry de Bratton, who was once thought to have written the treatise.²³ This treatise placed English law alongside Roman law as a complex legal system. Because of its systematic approach to English law, *Bracton* is often treated as one of the great, foundational texts of the common law.²⁴ It is the largest compendium of English law we have from the

17. See BRUNDAGE, *supra* note 16, at 248 (discussing the teaching of civil and canon law at Oxford and Cambridge); PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 45–47 (1999) (discussing the influence of Justinian's texts on civil law).

18. BRUNDAGE, *supra* note 16, at 233–34, 238; see also *id.* at 234 n.55 (recounting a medieval proverb: “*Legista sine canonibus parum valet, canonista sine legibus nihil*,” or, “A Romanist without canon law isn't worth much and a canonist without Roman law is worth nothing at all”).

19. *Id.* at 248–57. See *infra* Part III.C for a discussion of the scholastic method.

20. For two recent surveys of the literature on the influence of Roman law on the common law, see generally Anne J. Duggan, *Roman, Canon, and Common Law in Twelfth-Century England: The Council of Northampton (1164) Re-Examined*, 83 *HIST. RES.* 379 (2010); and Joshua C. Tate, *Ownership and Possession in the Early Common Law*, 48 *AM. J. LEGAL HIST.* 280 (2006).

21. TURNER, *supra* note 6, at 37–39, 150–52, 231–36.

22. Apart from his introduction, which draws from the introduction to Justinian's *Institutes*, the *Glanvill* author uses the Roman term *proprietas* three times, the term *possessio* once, and the terms *crimen* and *criminalis* about half-a-dozen times. RANULPH DE GLANVILL, *ATTR., THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* 3–4, 6, 132, 171 (G.D.G. Hall ed. & trans., 1965).

23. BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (George E. Woodbine ed., Samuel E. Thorne trans.) (William S. Hein & Co., photo. reprint 1997) (1968–1977) (Latin text Yale Univ. Press 1942) (c. 1220–1250) (hereinafter BRACTON).

24. Pollock and Maitland, in their magisterial work on medieval English law, titled the chapter on the thirteenth century “The Age of Bracton.” 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 174 (2d ed., 1898). The literature on *Bracton* is vast. Although most of it pre-dates Samuel Thorne's re-dating of the treatise, there is much in the literature that has not been superseded. For instance, CARL GÜTERBOCK, *BRACTON AND HIS RELATION TO THE ROMAN LAW: A CONTRIBUTION TO THE HISTORY OF THE ROMAN LAW IN THE MIDDLE AGES* (Brinton Coxe trans., Fred

Middle Ages, the last attempt for several centuries to put the whole of English law into a single text—in this case a *summa*, a genre of legal writing popular in the universities.²⁵ More importantly for the present discussion, it contains 527 references to cases from the plea rolls.²⁶ This has seemed significant to many of the people who have looked at the treatise. Since case law is the basis of common law culture today, cases in an English treatise of the thirteenth century resonate with those of us who have been trained in common law systems. *Bracton* has thus, at times, been held up as the beginning of the Anglo-American case law tradition. One lawyer-historian, speaking at a meeting of lawyers in Hong Kong, called its author (he was apparently unaware that it is currently thought to be the work of several authors) “the father of case law.”²⁷

Bracton is not the entire story when it comes to case law, though. The authors of that text were working within an established case-law tradition. In the 1220s and 1230s a coterie of justices and clerks in the royal courts took the terse and dull administrative documents that recorded the outcomes of cases—the plea rolls—and started reading them as if they contained profound statements of legal principle. They made collections of these case records, at least half a dozen of which existed by the middle of the

B. Rothman & Co. 1979) (1866), places *Bracton* in the context of the development of Roman law and the *ius commune* in Europe, as a text that contributed to that development. The English-language literature on the treatise has tended to focus on two issues: the authors’ political theories and whether they were good Romanists or bad Romanists. See generally ERNST H. KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* 143–92 (1957); HERMANN KANTOROWICZ, *BRACTONIAN PROBLEMS* (1941); H.G. RICHARDSON, *BRACTON: THE PROBLEM OF HIS TEXT* (1965); SELDEN SOC., *SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO* (Frederic William Maitland ed., 1895); H. G. Richardson, *Azo, Drogheda, and Bracton*, 59 *ENG. HIST. REV.* 22 (1944); H.G. Richardson, *Tancred, Raymond, and Bracton*, 59 *ENG. HIST. REV.* 376 (1944); Brian Tierney, *Bracton on Government*, 38 *SPECULUM* 295 (1963); Paul Vinogradoff, *The Roman Elements in Bracton’s Treatise*, 32 *YALE L.J.* 751 (1923); George E. Woodbine, *The Roman Element in Bracton’s De Aquirendo Rerum Dominio*, 31 *YALE L.J.* 827 (1922).

In 1968, the *Tulane Law Review* ran a special issue on *Bracton* to commemorate the 700th anniversary of Henry de Bratton’s death. See, e.g., Mitchell Franklin, *Bracton, Para-Bractons(s) and the Vicarage of the Roman Law*, 42 *TUL. L. REV.* 455, 456 (discussing Bracton’s relevance to modern legal scholarship and describing the scope of modern “Bractonian problems” as vast). Samuel Thorne published a complete edition and translation of the treatise between 1968 and 1977. BRACTON, *supra* note 23. In his introduction to the third volume, Thorne argued convincingly that the major writing on the treatise dates from the 1220s and 1230s, not the 1250s and 1260s as previously thought, and that Henry de Bratton could not have been the author of the earliest parts of the treatise. Samuel E. Thorne, *Translator’s Introduction to BRACTON*, *supra* note 23, at xiii. The major work on *Bracton* since Thorne’s re-dating has been a debate between John Barton and Paul Brand over the dating of the treatise. Compare John L. Barton, *The Mystery of Bracton*, 14 *J. LEGAL HIST.* 1 (1993), and John L. Barton, *The Authorship of Bracton: Again*, 30 *J. LEGAL HIST.* 117 (2009) with Paul Brand, *The Age of Bracton*, in *THE HISTORY OF ENGLISH LAW: CENTENARY ESSAYS ON ‘POLLOCK AND MAITLAND’* 65 (John Hudson ed., 1996), and Paul Brand, *The Date and Authorship of Bracton: A Response*, 31 *J. LEGAL HIST.* 217 (2010).

25. The authors of *Bracton* call the work a *summa* in the introduction and also draw quite a bit of material from the civilian jurist Azo of Bologna’s *summae* on the *Institutes* and the *Codex*. 2 BRACTON, *supra* note 23, at 19, 46, 49.

26. Thomas Joseph McSweeney, *Priests of Justice: Creating Law Out of Administration in Thirteenth-Century England* 6 (July 26, 2011) (unpublished Ph.D. dissertation, Cornell University) (on file with Cornell University Library).

27. T.L. Yang, *Henry de Bracton: The Father of Case Law*, in *LAW LECTURES FOR PRACTITIONERS* 211 (1987); see also Elizabeth Phillips, *Introduction to LAW LECTURES FOR PRACTITIONERS*, at v.

century.²⁸ Their patterns of thought were conditioned by the universities, and they engaged with cases in the same ways canonists and civilians engaged with their authorities, elevating the plea rolls from administrative records to legal literature in the process. By tapping into the languages of authority and legitimacy they found in the schools, the justices and clerks of the English king's courts sought to turn themselves into jurists like the ones they found in Roman and canon law texts, and to make the argument that the type of administrative work they performed was different from, and superior to, the types of administrative work performed by other royal servants: it was law.

Although our modern case law descends from a later tradition of case literature, the law report, there is some continuity between what these justices and clerks were doing and the law report tradition. Modern case law thus bears some relation to the civilian case law tradition of the thirteenth century. The earliest surviving examples of law reports date from the late 1260s and are associated with the rise of the serjeants and attorneys around that time—the first professional, private lawyers.²⁹ Law reports were probably written by a combination of court clerks, practicing lawyers, and aspiring lawyers.³⁰ Unlike the plea rolls, which were written in Latin and contained only indirect discourse, the law reports were usually written in French, the vernacular of the English elite, often contained what claimed to be verbatim quotations from the court proceedings, and named the justices and serjeants who were speaking.³¹ Also, the reports, unlike plea roll entries, often omitted the resolution of the case, creating an aesthetic of debate rather than of authority.³² The differences between these two genres of writing, however, have hidden the possibility that the law reports were inspired by the plea roll collections of the thirteenth century. Indeed, some of the early law report collections masquerade as plea roll collections.³³ The law reports were later collected into year books and are essentially continuous with our modern reporters.

The case collections made by these justices and clerks before the lawyers began to write their law reports have been largely neglected. This is because the history of the case as a literary genre in thirteenth-century England has been long-buried under the weight of the history of *Bracton*. Until the 1970s, the story of case collecting in thirteenth-century England was a relatively simple one: all of the existing case collections had been made in preparation for *Bracton*. In the late nineteenth century, the legal historian Paul Vinogradoff discovered a collection of 2,000 cases from the plea rolls in the British Museum.³⁴ Shortly thereafter, Frederick William Maitland, the

28. The most famous is British Library MS Add. 12269, which has been published as BRACTON'S NOTE BOOK (photo. reprint 1999) (F. Maitland ed., 1887).

29. PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION 63–65 (1992).

30. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 178–79 (4th ed. 2007); see Brand, *supra* note 12, at 68–69 (discussing the use of law reports for legal training).

31. See, e.g., 1 THE EARLIEST ENGLISH LAW REPORTS 33–34 (Paul A. Brand ed., 1996) (c. 1284) (providing an example of a law report of the late thirteenth century).

32. See generally *id.* at 1–36.

33. Cambridge Univ. Lib., Collection of Mixed Latin and French Law Reports, MS Dd.7.14, fols. 237v–247v.

34. See A Letter of Paul Vinogradoff, THE ATHENAEUM (July 19, 1884), reprinted in 1 BRACTON'S NOTE BOOK, *supra* note 28, at xvii (discussing British Museum MS Add. 12,269).

grandfather of common law history, produced an edition of this case collection.³⁵ After finding some overlap between the cases in the treatise and those in this case collection, Maitland decided that it was probably made at the instruction of Henry de Bratton to use in selecting the cases to place in the treatise.³⁶ He therefore dubbed the collection *Bracton's Note Book*.³⁷ *Note Book* in hand, Maitland decided to take his research one step further, and to go back to the plea rolls and find the original case records that were copied into the *Note Book*.³⁸ He found that someone had sidelined some cases, written “*volo*” (“I want this”) next to others, and placed subject headings over others.³⁹ Maitland believed that these were the instructions Henry de Bratton had left for his scribes, telling them which cases to copy into the *Note Book*.⁴⁰ The cases in *Bracton*, the *Note Book*, and the marked rolls all came from the same two justices—Martin of Pattishall and Martin’s own clerk-turned-justice, William of Raleigh. Henry de Bratton, who Maitland believed to be the primary author of *Bracton*, was, in turn, Raleigh’s clerk before he was a justice, and could have had access to the rolls of both Pattishall and Raleigh. Maitland could therefore draw a straight line from marked plea rolls, to the *Note Book*, to *Bracton*.⁴¹ Case collecting in thirteenth-century England was, according to Maitland, all part of a single project and all the work of Henry de Bratton and his small army of clerks.⁴² Case collections and marked rolls were not to be used on their own, but were transitional texts, designed to create a finished work and then to be cast aside. Maitland was humble about his assertions, though, asking at the end of his book that someone prove him wrong.⁴³

In 1977, Samuel Thorne did precisely that. In that year he published the third volume of his edition and translation of *Bracton* and argued, compellingly, that although Henry de Bratton probably wrote some later parts of the treatise, he could not have been its primary author, since most of the work for the treatise was completed in the 1220s and early 1230s, before Bratton had entered the royal courts.⁴⁴ The treatise

35. See Fredrick William Maitland, *Preface* to 1 BRACTON’S NOTE BOOK, *supra* note 28, at vii–ix (discussing the circumstances of Maitland’s publication).

36. *Id.* § 2, at 12–13.

37. *Id.*

38. *Id.* § 7, at 66.

39. *Id.* § 7, at 64–68.

40. *Id.* § 7, at 67.

41. *Id.* § 8, at 71–77.

42. *See id.* § 7, at 63–64.

43. *Id.* § 7, at 116–17.

44. The primary evidence for this earlier date is the treatise’s treatment of the provisions of the council of Merton, which took place in 1236. Thorne, *supra* note 24, at xiii–xvi. The portions of the treatise that discuss those provisions all appear to be in later additions or amendments to the primary text. *Id.* The first chapter of the provisions was inserted into the text midsentence. *Id.* The second was inserted in the middle of a long excerpt from the *Glanvill* treatise. *Id.* The fourth was inserted in a place in the treatise where it contradicts the text that comes directly before it. *Id.* In addition to the evidence from the council of Merton, there are other bits of evidence that point to an earlier date of composition. The treatise contains many writs, all but one of which have limitation dates that were not in force after 1237. *Id.* at xxviii.

There is evidence that the treatise might date to even earlier than 1236. For example, the treatise states that a demandant could bring a writ of novel disseisin not only against the original disseisor but also against his heirs. *Id.* at xxiii. Under later thirteenth-century law, such a demandant would have to bring a writ of entry,

was most likely written by a series of authors, beginning with William of Raleigh and ending with Henry de Bratton, over a period of forty years.⁴⁵ More to our purpose, Thorne also showed that the *Note Book* was not the source for most of the cases in the treatise, and that the marked rolls were probably not used to make the *Note Book*.⁴⁶ The *Note Book*, the marked rolls, and *Bracton* were all separate projects.

If these were separate projects, then there were at least half a dozen independent collections of cases circulating in the early- to mid-thirteenth century. Where Maitland's narrative hid case collecting behind *Bracton*, we can see now that case collecting was a phenomenon that lasted from the early decades of the thirteenth century until at least the 1260s.⁴⁷ There seem to have been several people, forming a circle around Martin of Pattishall and William of Raleigh, who thought that cases were important. But, if the clerks and justices of the courts were not making these collections in preparation for *Bracton*, why were they making them?

Although *Bracton* has obfuscated the existence of the case collection as an independent genre of legal writing, it is a valuable source for understanding how the people who were collecting cases read and engaged with them as texts. The case collections themselves give us little insight into their purpose. None of the existing collections contains any extensive commentary or even an introduction. *Bracton*, on the other hand, is mostly composed of commentary. Although the authors of *Bracton* comment on the role of the case references only briefly, we can learn quite a bit about the role the case references played in the treatise from their placement relative to other parts of the text and by the ways the authors of the treatise introduce them. *Bracton* can thus serve as a sort of key for understanding how the people who were collecting cases in the thirteenth century understood those cases.

Bracton is particularly useful for decoding the plea roll collections because the collections and the treatise were almost certainly made by the same small, but important, group of people. As previously noted, the people collecting cases in the first half of the thirteenth century focused on the rolls of the justices Martin of Pattishall and William of Raleigh.⁴⁸ Pattishall's and Raleigh's rolls would not have been easy to access. They would probably have been available only to their clerks and other people close to them. We know that one clerk in particular had at least some of their rolls in his possession in 1258.⁴⁹ In that year, Henry de Bratton, Raleigh's former clerk and by

because novel disseisin could lie only against the original disseisor. *Id.* at xxiv. Thorne thought that this was the rule by 1230 at the latest, meaning that, unless the author of the treatise took a minority view of this matter, this part of the treatise was written in the 1220s or earlier. *Id.* The treatise also gives two opinions on the issue of whether a free woman who was married to a villein was barred from suing for her land held in free tenure during her husband's life. *Id.* at xxvii. Martin of Pattishall changed the earlier law, barring her from bringing such a suit, in 1227, hinting that people were working on the treatise before and after 1227, again, assuming that that author adopted Pattishall's view of the matter. *Id.*

45. *Id.* at xxxvi.

46. *Id.* at xxxiv–xxxvi.

47. The Collection titled *Casus et Judicia* dates from the 1260s. CASUS PLACITORUM AND REPORTS OF CASES IN THE KING'S COURTS 1272–1278, at lxxv–lxxxiv (William Huse Dunham, Jr. ed., Selden Soc'y No. 69, 1952); Brit. Lib. MS Add. 35179, fols. 36–39.

48. See *supra* note 41 and accompanying text for a discussion of the cases included in *Bracton*.

49. See ROLLS OF THE JUSTICES IN EYRE BEING THE ROLLS OF PLEAS AND ASSIZES FOR LINCOLNSHIRE 1218–19 AND WORCESTERSHIRE 1221, at xix–xx (Doris Mary Stenton ed., 1934) (indicating that Bratton kept

this time a justice himself, was instructed to return Pattishall's and Raleigh's rolls to the treasury.⁵⁰ Bratton could not have been the influence behind the case collecting culture, since some of the plea roll collections and parts of *Bracton* were written before he began working in the courts; but he does provide us with evidence that the case collecting tradition was located in the circle of Martin of Pattishall and William of Raleigh.⁵¹ If the earliest case collections and the earliest portions of the treatise are dated correctly, the project began during Martin of Pattishall's tenure as chief justice, while Raleigh was his senior clerk, continued during Raleigh's tenure, and was further continued by Raleigh's clerks, who included Henry de Bratton and the future chief justice Roger of Thurkilby.⁵² It was this group of maybe a dozen justices and clerks who first thought to collect cases for something other than the bureaucratic facts contained in them, and, more than likely, were the individuals who wrote *Bracton*.

In *Bracton*, then, we can start to understand how the clerks and justices engaged with these cases; as we shall see, they engaged with them in the same way the civilians of their time engaged with the writings of Roman jurists. They show signs that they subscribed to the same peculiar notion of authority as the jurists in the schools, and they used dialectical reasoning to create new legal knowledge. *Bracton* thus raises the possibility that the most "English" of legal institutions—case law—was not a purely English development, but a combination of English administrative practice with civil-law thought. The common law tradition thus may owe its most recognizable type of legal literature to its most important rival: the civilian, or Roman law, tradition.

B. *The Plea Rolls: Unlikely Case Law*

It is rather remarkable that in the thirteenth century English judges began to read, write, and copy cases as if they were a didactic literature, particularly in light of England's case tradition at the time: the plea rolls. Plea rolls at the beginning of the thirteenth century were administrative records. They did not look much different from the pipe rolls—recording payments to and from the Exchequer—or from the somewhat later patent or close rolls, which recorded the king's correspondence.⁵³ There were a few fairly standard forms that plea roll entries could take. Entries recording court appearances to begin litigation or to appoint an attorney might take up only a few lines. We can see some similarities in style among early plea roll entries, as in this fairly typical entry from 1199:

Buckinghamshire—Robert son of David seeks against Lefwine the merchant two acres of meadow with appurtenances in Aylesbury, which David the father of the aforesaid Robert, as he says, gaged to the aforesaid Lefwine for a term which has ended. Alan the son of Lefwine, having been put in his

his rolls from his days as a clerk until they were demanded of him). This is not particularly surprising, since a "judge's personal clerk would naturally have charge of his master's rolls," and "[t]here would be nothing surprising in his possession of a great many at once." *Id.* at xix.

50. *Id.* at xx. Leicester Abbey was instructed to return Stephen of Segrave's rolls at the same time. *Id.*

51. Thorne, *supra* note 24, at xxxi.

52. TURNER, *supra* note 6, at 216–17.

53. M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD: ENGLAND, 1066–1307, at 68–69, 92 (Blackwell Publishers, 2d ed. 1993) (1979).

[Lefwine's] place, seeks the view. Let the view be had. A day is given to him from Easter day in one month: Meanwhile let the view be made.⁵⁴

This entry combines several elements, which could appear in one entry or several. First, we find out where this case arose. The clerk tells us, by way of an abbreviation in the margin, that the case comes from Buckinghamshire. Second, the scribe records Robert's claim for relief. He tells us who the parties are: Robert, who seeks the land, and Lefwine, who holds it. He tells us how much land—two acres—and what kind of land—pasture—the demandant is claiming. Most entries tell us what kind of writ the demandant brought to begin the case. This one does not do so explicitly, although we can guess from the relatively standard form that it takes that Robert brought a writ of right. After the phrase indicating the type of writ, we get a little bit of information pertinent to the case. Robert's father, David, had held the land and had gaged it to Lefwine's father at some point in the past.

All of that is contained in the first sentence of the entry. The second sentence does something slightly different, and could have been included in a second entry if done at a later sitting of the court. It tells us that Lefwine's son, Alan, would be acting in Lefwine's place, as his attorney, and would have the power to bind him. It also tells us about the first action Alan took as his father's representative: he requested that the parties view the land in question. The last few clauses tell us about the process the judges ordered. They scheduled a day for the case to be heard and ordered that the parties view the land before that date.

The entry is very informative, but it does not look much like an opinion by Learned Hand or Oliver Wendell Holmes. Because this is an administrative entry, economy is the aesthetic, and much is left implicit. This entry tells us about the parties and the law only incidentally to telling us about the mechanics of the case. Why did David gage the land to Lefwine? How long ago? What was the term of the gage? How long ago did it expire? What steps did Robert take before he came to court to try to recover the land? What law is applicable to the case? None of these questions are answered in the fifty-three words of the entry. The court is concerned with the bare bones of the case and with what it told the parties at the end of it; it is concerned with what is going to matter when the court hears the case again.

III. THE CASES IN *BRACON*

A. *Cases and Authority*

Bracton contains 527 references to plea roll entries, often indicating where to find the case in the roll itself.⁵⁵ In this Section, I show that, contrary to what earlier scholars have said about the cases, their role in the treatise is as authoritative legal texts.

54. "Buk'.—*Robertus filius Davidi petit versus Lefwinum Mercatorem ij. acras prati cum pertinenciis in Ailesberi, quas David pater predicti Roberti, ut dicit, invadiavit predicto Lefwino ad terminum qui preterit: Alanus filius Lefwini positus loco ejus petit visum inde. Habeat visum. Dies datus est eis a die Pasche in j. mensem: et interim fiat visus.*" 1 CURIA REGIS ROLLS OF THE REIGNS OF RICHARD I. AND JOHN, PRESERVED IN THE PUBLIC RECORD OFFICE 102 (1922) (translation by author).

55. See, e.g., 4 BRACON, *supra* note 23, at 346 (referencing "the end of the roll").

Theodore Plucknett tried to explain the role of the cases in light of what he saw as a “crisis of authority” in the early common law, that judges and clerks in the royal courts were looking for their own equivalent to the decrees of emperors and popes that Roman and canon law used as their authorities.⁵⁶ According to Plucknett, they found their equivalent in writs, not in plea roll entries.⁵⁷ Plucknett believed that the authors of *Bracton* did think of the cases in the treatise as authorities, but, in his opinion, the cases in *Bracton* were “scientific or intellectual authorities” rather than “formal authorities binding upon the courts”; meaning by this that, unlike modern judicial opinions, they were “useful illustrations but not in themselves sources of law.”⁵⁸ According to Plucknett, the authors placed them in the treatise to show how legal doctrines worked in practice, not to bolster the authority of those doctrines.⁵⁹

Fredric Cheyette, in an excellent article on custom in thirteenth century law, argued that the authors of *Bracton* were taking a Roman and canon law approach to the problem of authority, but he took a different position on how the authors solved that problem.⁶⁰ For Cheyette, custom was the key. Cheyette compared discussions of custom in Roman and canon law treatises and in *Bracton* and made an entirely plausible argument that the authors of *Bracton* structured their theory of authority around Roman and canon law doctrines of custom.⁶¹ Custom had a force of its own in the two laws; there is authority supporting the view that even a papal decretal could not override a local custom unless it did so explicitly.⁶² By custom, though, the canonists and civilians did not mean an inchoate set of practices. Custom only obtained legal force when some higher authority gave its stamp of approval to that custom.⁶³ When a court had spoken on a custom, the court’s judgment proved that the custom existed and, at the same time, transformed it into a legal rule.⁶⁴ Customary law, then, is custom that has been approved by the king or pope through his judges.

Custom was not the primary source of law to the canonists or civilians. The primary sources were legislative or juristic: the decrees of popes, emperors and councils, and the opinions of the church fathers and important jurists, the texts that could be found in the authoritative collections of law such as Justinian’s *Codex* and *Digest*.⁶⁵ Cheyette argues that, since English law had no such collections of authority, the justices and clerks who wrote *Bracton* turned to custom to fill in their law; but it was the positive-law custom of the schools to which they turned.⁶⁶ Thus, the cases in

56. T.F.T. PLUCKNETT, *EARLY ENGLISH LEGAL LITERATURE* 24–33 (1958).

57. *Id.*

58. *Id.* at 59, 80.

59. *See id.* at 58–60 (stating that *Bracton* authors drew on the quality of intellectual authority contained in the cases, not any legal formalism).

60. Fredric L. Cheyette, *Custom, Case Law, and Medieval “Constitutionalism”*: A Re-examination, 78 *POL. SCI. Q.* 362, 379–80 (1963).

61. *Id.* at 379–89.

62. *Id.* at 379.

63. *Id.* at 379–82. *Bracton* distinguished between local customs and the more important customs of the royal court. *Id.* at 378, 381.

64. *Id.* at 379.

65. *See generally id.*

66. *Id.* at 377–78.

Bracton serve to prove custom, which in this case means the customs that have the king's approval.

At stake in this debate is whether the cases in *Bracton* are really case law or not. Plucknett thought not.⁶⁷ For Plucknett, the case illustrated a legal point that was fully independent of the case itself. For Cheyette, cases were case law.⁶⁸ They were moments when a body empowered by the king breathed life into a custom and made it a binding rule. I present a third possibility. The cases in *Bracton* were indeed case law of a sort. The authors of the treatise collected cases because they were thinking like civilians and canonists. But they were not using cases because they were statements of custom. They were using them because cases were, in the eyes of the clerks of the courts, the words of great jurists. The authors of the treatise imagined the royal justice as the equivalent of the Roman jurist, a figure they encountered in the *Digest*, a text which recorded the opinions of jurists of the classical period of Roman law.⁶⁹ The authors of *Bracton*, who we can be certain had legal training in the schools, exported this image to the justices they worked with and served. They began to imagine the royal justice not as an administrator, but as a jurist. The plea roll entry thus became important as a place where the jurist-justice's words could be found. It was as juristic opinions, not as proof of custom or as mere illustrations, that the authors of *Bracton* engaged with plea roll entries.

B. Authority Words

It is hard to tell from most of the case references why the *Bracton* authors chose to place those specific citations in their text. A minority of references, though, show us that the authors understood the cases in a very different way than either Plucknett or Cheyette thought. The problem with Plucknett's argument in particular is that it is an argument from absence. As he sees it, the case references in the treatise need not be more than illustrations.⁷⁰ If there is an example to the contrary, however, where the case or the judge can only have been included as an authority, Plucknett's argument from absence is less secure. There are more than a few places in the treatise where the authors indicate to us that the case is more authoritative than Plucknett would have us believe; that they are indeed the authors' English equivalent to decretals or, more to the point, to the opinions of Roman jurists that we find in the *Digest*.

The words that introduce case references are important for understanding the ways that the authors and thirteenth-century readers of the treatise would have understood those cases. Whereas most of the references leave the relationship between case and rule ambiguous, a few show us that the authors of the treatise undoubtedly thought that cases were authoritative texts from which general rules could be abstracted. Unfortunately, the vast majority of case references are introduced by the words *ut* (as) or *sicut* (just as), which give us very little to go on when trying to

67. PLUCKNETT, *supra* note 56, at 80.

68. See Cheyette, *supra* note 60, at 379–81 (noting that “Bracton realized that the rules of English law were to be found in past judgments” and that “‘custom’ was the proper term for it”).

69. PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 43–44 (1999).

70. See PLUCKNETT, *supra* note 56, at 80 (stating that the cases in *Bracton* are useful but not “sources of law”).

understand the function served by the cases. For example, one author tells us “[d]ower may be constituted not only in lands and tenements acquired but in those to be acquired, if they are acquired or fall in during the life of the husband, as [ut] of Easter term in the seventh year of king Henry in the county of Somerset, concerning Emma, wife of William Dacy.”⁷¹ We can break this sentence into two halves, separated by the word *as* (*ut*). The first half states a general rule and the second names a case decided in court. The text tells us that the rule appears in this treatise *as* it does in Emma’s case. But what does that mean? Does the case illustrate the point? Or does it do something more? We cannot tell from this entry. Phrases like “matter may be found in,” “there is matter in,” “as happened,” and “as is shown” carry little more meaning than the ubiquitous *ut*, implying only that the rule stated above can also be found in a plea roll entry.⁷²

In some instances, though, the authors of the treatise introduce case references with normative prescriptions. “Ought” words (from the verb *debere*) are often used in combination with the introduction to the case reference: “And that she ought not to have dower can be found in Hilary term in the seventeenth year of King Henry.”⁷³ The impression the author gives us here is that the case is not merely an illustration of what to do in a particular procedural situation. Rather, the case states a rule that ought to be followed. We have a similar situation with, “*that this is so* you have” or “*that this is so* may be seen,” both of which indicate that there is some normative value behind the statement the author has just made and make the plea roll the locus of that normative rule.⁷⁴ The reader is engaged to seek out the text in which the rule or principle resides, which will show him that “this is so.”⁷⁵

We start to see that the cases must be more than mere illustrations when we move on to the very explicit authority words that introduce some of the case references. In

71. “*Item constitui potest dos non tantum in terris et tenementis perquisitis, sed etiam perquirendis, si perquisita fuerint vel acciderint in vita viri, ut de termino Paschæ anno regis Henrici septimo, comitatu Somersetiæ, de Emma quæ fuit uxor Willelmi Dacy.*” 2 BRACTON, *supra* note 23, at 268 (footnotes omitted).

72. There are some cases, introduced by phrases like “as was done,” “it was said” (*dictum fuit*), and “you have” (*habetis*) that tell us something slightly more than the introductory phrases above. *E.g.*, 2 BRACTON, *supra* note 23, at 94, 238; 3 BRACTON, *supra* note 23, at 123. All three imply actors in a way that the previous examples do not. “As was done” and “it was said” imply that the aforementioned rule comes from the deed or speech of someone in the case that follows. “You have” implies a different sort of actor: the reader. It implies that there is something in the plea roll to be had that is not to be had in the treatise itself, and that the reader may in fact want to have. Apart from giving us some indication that the intended audience of the treatise was composed of people who had access to the rolls—judges and clerks in the royal courts—this phrase hints that, in the case references, there is something that the treatise does not provide and that might be found outside of it. None of these tell us exactly why it is important to know what was done or said or why we would want to have the material from the plea rolls. These types of introductory words need not imply any more than that cases are illustrations. But they do point, first of all, to the need to know what happened in past cases and, secondly, to the importance of reading the plea roll record itself.

73. “*Et quod dotem habere non debeat, inveniri poterit de termino Sancti Hillarii anno regis Henrici septimo decimo . . .*” 3 BRACTON, *supra* note 23, at 361; *see also* 4 BRACTON, *supra* note 23, at 29, 321, 361, 403.

74. “[*Q*]uod ita sit habetis . . .” 3 BRACTON, *supra* note 23, at 371 (emphasis added). “[*Q*]uod ita sit videri . . .” *Id.* (emphasis added).

75. *Id.*

one case, which we will examine in more detail later,⁷⁶ a rule is said to be “*proved* in the last eyre of Martin of Pattishall in the county of Suffolk, an assise of mortdancestor beginning ‘If Ralph of Wadleysham.’”⁷⁷ The author of this passage makes the relationship between the rule and the case explicit in a way he does not in the entries that begin with “*ut*.”⁷⁸ He tells us directly that the case proves the rule. This is not an isolated case. The author uses the verb *probare* to connect the rule to the subsequent plea roll entry forty-six times in the received text of the treatise, that is, in just under nine percent of the entries.⁷⁹

Several cases use *debere* (the *ought* verb) together with *probare* to show us that the case represents the author’s own view. For instance, in one part of the treatise, the author tells us: “And that the warrantor *ought* to be demanded that it may be known what right he has in the two parts, is *proved* [in the roll] of Michaelmas term in the fourteenth and the beginning of the fifteenth years of king Henry in the county of Warwick, [the case] of John the son of Elfric.”⁸⁰ The author follows this with a brief description of the facts of the case, which he ends by saying, “Whereupon it was clear (*manifesta*) that the woman demandant could not have dower, because the heir of her husband had no right in the two parts.”⁸¹ The author states the rule in *ought* terms and then says that it is *proved* by the case.⁸² He then tells us that the result in the case was clear. The text gives us every indication that the rule as stated in the case is the correct rule. In addition to meaning *to prove* or *to approve*, *probare* could mean *to test* in medieval Latin—particularly in the context of trials by battle and ordeal.⁸³ But if *probatur* means “is tested” in this passage, then the author seems to believe that the test had positive results. It is more likely that the word, as the *Bracton* authors use it, means something closer to *prove*. This comes through even more strongly when we are told that it “is proved from the eyre of William of Ralegh” that a person holding land for a term of years may vouch the lord to warrant it, “although there may be an argument [*ratio*] to the contrary.”⁸⁴ The author here seems to doubt the principle the case states, because it is contrary to some *ratio*, which can mean both “argument” and “reason,”

76. See *infra* note 126 and accompanying text for a discussion of the case of Martin of Pattishall.

77. “*Item quod . . . probatur in ultimo itinere Martini de Pateshilla in comitatu Suffolciæ, assisa mortis antecessoris, si Radulfus de Wadlegesham.*” 3 BRACTON, *supra* note 23, at 209 (emphasis added).

78. *Id.*

79. See, e.g., 3 BRACTON, *supra* note 23, at 360 (“[S]ecundum quod probatur in ultimo itinere Martini de Pateshilla in comitatu Lincolnæ . . .”).

80. “*Et quod warrantus exigi debet ut sciri possit quid iuris habuerit in duabus partibus, probatur de termino Sancti Michaelis anno regis Henrici quarto decimo incipiente quinto decimo comitatu Warrewickiæ, de Iohanne filio Elfridi . . .*” 3 BRACTON, *supra* note 23, at 360.

81. “*Et unde ibi manifestum fuit quod mulier petens dotem habere non potuit, quia heres viri sui nihil iuris habuit in duabus partibus.*” *Id.*

82. *Id.*

83. 12 D.R. HOWLETT ET AL., *DICTIONARY OF MEDIEVAL LATIN FROM BRITISH SOURCES: FASCICULE XI, PHI-POS* (2008).

84. “*Et quod ille potest qui tenet ad terminum, quamvis ratio se habeat in contrarium, probatur de itinere Willelmi de Ralegha in comitatu Warrewickiæ, de quadam Sibilla quæ dotem petiit, circa finem rotuli.*” 4 BRACTON, *supra* note 23, at 193 (footnotes omitted).

and yet believes that the case proves the point.⁸⁵ This would be truly odd if he was using the case as a mere illustration of his point.⁸⁶ The case must, therefore, have some authority on its own, apart from the fact that it is reasonable or that it is in line with the author's own opinion; it can help the author overcome his doubts about the rule's rationality. If a case can overcome reason, it must have a strong authoritative power.

C. *Scholasticism and the Dialectic*

Pace Plucknett, we have seen the evidence that the authors of the treatise thought that the cases in it were more than mere illustrations. None of the evidence above, however, would cut against Cheyette's thesis that the cases are authorities in the sense that they give the royal imprimatur to custom, that is, that they confirm and prove custom and, in the process, turn it into binding law.⁸⁷ The cases in the treatise do not read like proof of existing custom, however. The discourses the authors use for talking about cases are instead of the kind that scholars in the universities used to talk about their authorities: scripture, the words of the Church fathers, the pronouncements of popes and emperors, and, most importantly for present purposes, the works of jurists.

In this Section, I show that the *Bracton* authors used cases because they had adopted civilian attitudes about harmony and authority. The twelfth and thirteenth centuries were a time of rapid change in education in Europe; new methods of argumentation were being taught in the cathedral schools and, later, in Europe's first universities. Starting in the twelfth century, scholars began to organize knowledge into systems that were internally coherent.⁸⁸ As the foundation of their systems of knowledge, scholars looked to ancient texts, to which they ascribed a peculiar type of authority. Different texts acquired this authoritative status in different fields. In theology, the Bible, obviously, but also the writings of the church fathers and the *Sentences* of Peter Lombard had acquired this status by the early thirteenth century.⁸⁹ In canon law, Gratian's twelfth-century *Decretum* would become an authority.⁹⁰ In

85. 2 J.F. NIERMEYER & C. VAN DE KIEFT, *MEDIAE LATINITATIS LEXICON MINUS* 1151–52 (2d rev. ed. 2002) (1976); CHARLTON T. LEWIS & CHARLES SHORT, *LATIN DICTIONARY* 1525–27 (photo. reprint 1966) (1879).

86. We see something similar in an *addicio* that must have been added by a later author, because it seeks to distance itself from the *addicio* that comes immediately before it. The author of this later *addicio* claims that the principle that is found in the previous *addicio* is “true according to R. and others. But to the contrary [the roll] of Michaelmas term in the second and the beginning of the third years of king Henry son of king John, in the county of Kent, [the case] of Matilda daughter of Simon.” 4 BRACTON, *supra* note 23, at 274 (“*Et hæc vera sunt secundum R. et alios. Sed contra de termino Sancti Michaelis anno regis Henrici filii regis Iohannis secundo incipiente tertio comitatu Cantie, de Matillide filia Simonis.*” (footnotes omitted)). The author's distancing technique—“according to R. and others”—combined with the use of a case to bolster the other opinion suggests that the author held the contrary opinion and that the case has some sort of normative value in determining what the proper rule should be.

87. Cheyette, *supra* note 60, at 379.

88. CHARLES M. RADDING & WILLIAM W. CLARK, *MEDIAE ARCHITECTURE, MEDIEVAL LEARNING: BUILDERS AND MASTERS IN THE AGE OF ROMANESQUE AND GOTHIC* 85 (1992); R.W. SOUTHERN, *THE MAKING OF THE MIDDLE AGES* 204 (1953).

89. JOHN MARENBN, *MEDIAEAL PHILOSOPHY: AN HISTORICAL AND PHILOSOPHICAL INTRODUCTION* 213–14 (2007).

90. ANDERS WINROTH, *THE MAKING OF GRATIAN'S DECRETUM* 1–2, 191 (2000).

Roman law, it was Justinian's monumental collections: the *Institutes*, the *Codex*, and especially the *Digest*.⁹¹ Medieval scholars read these works because their authors were thought to have had some special light. As A.J. Minnis has pointed out, the scholastic idea of authority was circular: "an [authority] was a book worth reading."⁹² Through a probably less-than-conscious process, the collective community of scholars had ascribed worth to particular authors, much in the same way we create and perpetuate literary canons today. No one questioned that Justinian was an authority.

According to the scholars of the thirteenth century, authorities should, ideally, not conflict with each other. Jurists in the civil and canon law faculties emphasized the harmony of authorities. The book that established canon law as an academic discipline in the universities, Gratian's *Decretum*, was titled, in full, *The Concordance of Discordant Canons (Concordia Discordantium Canonum)*.⁹³ Gratian took seemingly contradictory decrees of councils and popes, along with statements of the church fathers, and not only placed them beside each other but offered solutions to the contradictions.⁹⁴ Indeed, in the civil law, this kind of thinking about the foundational texts that were at the center of legal training—Justinian's *Institutes*, *Digest*, and *Codex*—was aided by the fact that the *Digest*, the most studied of the three in the medieval universities, explicitly said in its prologue that it did not contradict itself:

Nothing contradictory will claim a place for itself or be found in this book, if anyone will examine the reasons for the difference with a subtle mind. But something new or secretly placed will be found, which dissolves the complaint of dissonance and introduces another nature, fleeing the bounds of discord.⁹⁵

To see how this system worked, let us look at one case where Gratian, in his *Decretum*, takes several authorities that seem to conflict and creates a harmonious set of doctrines out of them. In his thirty-sixth *causa*, Gratian highlights a major issue in the law of marriage: the question of whether the man who commits *raptus*—an act which, at the time, primarily referred to carrying a woman off without her father's permission—can later marry the woman he has abducted. To discuss this issue, Gratian lines up a series of authorities interspersed with bits of commentary explaining how they relate to each other. In his first string of authorities, Gratian quotes three church councils, letters written by the popes Symmachus and Gregory the Great, and the writings of Jovinian, all of which say explicitly that the ravisher cannot marry his victim.⁹⁶ One would think that Gratian wants his reader to come to the conclusion that

91. STEIN, *supra* note 69, at 46.

92. A.J. MINNIS, *MEDIEVAL THEORY OF AUTHORSHIP: SCHOLASTIC LITERARY ATTITUDES IN THE LATER MIDDLE AGES* 12 (Edward Peters ed., 2d ed. 2010).

93. GRATIANUS, *CONCORDIA DISCORDANTIUM CANONUM (DECRETUM)*, in *CORPUS IURIS CANONICI* (E. Friedberg ed. 1879); see also JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW* 47 (1995).

94. See BRUNDAGE, *supra* note 93, at 47–48 (noting that Gratian's purpose was to "reconcile differing canonical traditions and prescriptions into an intellectually consistent and unified system").

95. "Contrarium autem aliquid in hoc codice positum nullum sibi locum vindicabit nec invenitur, si quis subtili animo diversitatis rationes excutiet: sed est aliquid novum inventum vel occulte positum, quod dissonantiae querellam dissolvit et aliam naturam inducit discordiae fines effugientem." DIG. (Justinian, Constitutio Tanta, 15) (translation by author).

96. GRATIANUS, *supra* note 93, at C.36 q.2 c.1–6.

such a marriage is forbidden; but Gratian's commentary at the end of this string of six cases tells a different story. Gratian distinguishes these cases and tells us that they apply to a specific circumstance. He contends that, in all of these cases, the marriage was forbidden because "the ravisher did not wish to marry the woman he carried off," although there is no textual basis in any of them for this interpretation.⁹⁷ Gratian thus avoids open disagreement with these authorities. He simply tells us that they do not say what the reader might, at first glance, think they say: that a ravisher cannot marry the woman he abducted. In these cases, he did not want to marry her, and thus he could not be forced to. Therefore, the cases are not directly pertinent to the question of whether the ravisher *can* marry the woman he has taken away from her father.

After these six authorities, Gratian presents another authority without comment—an authority who seems to represent his opinion. Gratian gives us a quote from Jerome, who said that "there are three legitimate marriages written about in scripture," two of which are marriages between a ravisher and his abductee.⁹⁸ Following this, he presents three more texts. The first describes the case where the father consents to the marriage, and, in agreement with Jerome, posits that such a marriage is legitimate. Gratian does not comment on this text.⁹⁹ The second, a short text from Ambrose on payments to the woman's father, which says that the couple will remain married, likewise elicits no comment from Gratian.¹⁰⁰ The third, a text from the Council of Meaux, is more troubling for Gratian, and he writes a commentary on it that is longer than the primary text.¹⁰¹ The council initially said that if there are any ravisher-ravishee couples who have not, at the time of the council, already been wed, they should be separated immediately and not be allowed to marry in the future.¹⁰² The council then made a small concession, holding that such a couple, if they had both done public penance and if "age has driven out incontinence," could marry. The council heavily qualifies its permission, however, stating, "in this we have not constituted a rule, but . . . we observe what is rather more tolerable," hardly a ringing endorsement for such a marriage.¹⁰³ The council tells us that the general rule here is that the couple cannot marry, with the proviso that under certain special circumstances they can. Gratian turns the reasoning of the council on its head, however, when he titles this text, "Licit marriages are conceded to the ravisher and the woman carried off after penance," focusing his attention on the limited permission granted in the second half of the text rather than on the blanket prohibition in the first half.¹⁰⁴ Where the council laid down a general rule that such a couple could not marry and a limited set of conditions under which they could, Gratian understands the permission to marry as a general rule, and the penance requirement as a minor condition placed upon that rule.

97. "His auctoritatibus evidenter datur intellegi, quod raptor in uxorem rapta ducere non valet." *Id.* at C.3 q.2 post c.6.

98. *Id.* at C.36 q.2 c.7.

99. *Id.* at C.36 q.2 c.8.

100. *Id.* at C.36 q.2 c.9.

101. *Id.* at C.36 q.2 c.10.

102. *Id.*

103. *Id.*

104. *Id.*

Gratian does not continue his streak of selective reading, however, when he arrives at a text from the Council of Aachen, which says explicitly that men who have carried off women cannot marry them “although they have afterwards come to agreement, or given dower to them, or have accepted marriage with the consent of their parents.”¹⁰⁵ He does not find a way to reconcile this opinion with Jerome’s. According to Gratian, “this authority does not prejudice the authority of Jerome,” though, since Jerome’s opinion “depends on the testimony of divine law.”¹⁰⁶ Unsure of how to reconcile the texts, Gratian takes the easy way out and simply says that the Council of Aachen was wrong.

Brian Tierney uses this passage as an example of a place where Gratian chooses one of his authorities over others.¹⁰⁷ The medieval law faculties did not follow their authorities blindly and did at times feel free to reject certain texts in favor of others, as Gratian does here.¹⁰⁸ But although Gratian clearly prefers Jerome’s rule and selects it over all of the other authorities in this passage, this is not what he tells us he is doing.¹⁰⁹ Gratian instead tries to convince us that all of these authorities—except, of course, the Council of Aachen—come to the same conclusion on the general point that, ordinarily, a ravisher may marry the woman he has stolen from her family. If Gratian did feel free to choose his rules based on the substance, not the source, he did it in a way that showed his respect for the source as an authority. He could not simply say that Jerome was right and the other *auctoritates* were wrong. He instead did his best to reconcile them, even when it is fairly obvious to the modern reader that the passages do not say what he wanted them to say.

This process of reconciliation serves an important function in Gratian’s text, beyond showing that authorities do not conflict: it creates new knowledge. Gratian never tells us explicitly what he thinks the answer is. He clearly thinks that Jerome’s opinion is correct, that such a couple can wed, but he does not reject the other texts. Rather, he reads them as exceptions or qualifications to the general rule. These ancient *auctoritates* can be made to accord with Jerome and can help us to flesh out what Jerome means. The first series of authorities show us that although the ravisher *can* marry the ravishee, he cannot be forced to do so. The Council of Meaux shows us that the couple must do penance before they wed. By bringing the texts into harmony with each other, Gratian creates new legal rules out of what appeared to be an irreconcilable mess of contradictory opinions.¹¹⁰

Gratian wrote in the mode of reconciliation, the mode in which scholastic lawyers were most comfortable, and used it to refine legal rules. Although legal authorities could be wrong, scholars in the law faculties strove to find a way in which all of the authorities that spoke on a particular point could be right and to thus create a workable

105. *Id.* at C.36 q.2 c.11.

106. *Id.*

107. Brian Tierney, “Only the Truth has Authority”: The Problem of “Reception” in the Decretists and in *Johannes de Turrecremata*, in *LAW, CHURCH, AND SOCIETY: ESSAYS IN HONOR OF STEPHAN KUTTNER* 69, 79 (Kenneth Pennington & Robert Somerville eds., 1977).

108. *Id.* at 80–81.

109. *Id.* at 79.

110. See STEPHAN G. KUTTNER, *HARMONY FROM DISSONANCE: AN INTERPRETATION OF MEDIEVAL CANON LAW* 10–12 (1960).

system of law out of a cacophony of texts. This creation of new knowledge out of old authorities was not unique to Gratian. Hand in hand with the scholars' emphasis on harmony was their use of the dialectical method. As early as the 1150s, John of Salisbury complained that dialectic was taking over in the schools to the detriment of rhetoric and grammar (the other two parts of the *trivium*, the first round of studies in medieval schools).¹¹¹ Where rhetoric seeks to convince the speaker's audience to adopt the speaker's own opinions, dialectic seeks to find truth by putting two people with differing viewpoints in conversation, with the ultimate goal being a synthesis between the two initially divergent viewpoints.¹¹² One of the major teaching methods in the universities, the *quaestio*, pitted apparently contradictory authorities against each other and challenged students to reconcile them.¹¹³ Medieval scholars thus used dialectical reasoning to reconcile the opinions of authorities that seemed to conflict with each other and to bring harmony to the system.

Medieval dialectic used authorities as a starting point. Contrary to popular belief, it was not Sir Isaac Newton who first said that we are dwarfs standing on the shoulders of giants. It was rather a phrase John of Salisbury attributed to his teacher Bernard of Chartres in the twelfth century, and described the twelfth- and thirteenth-century attitude toward scholarship.¹¹⁴ The authorities studied by the medieval schoolmen constituted the foundation of knowledge, but they were a foundation that could be built upon because, as John said, "we can see more and farther than our predecessors, not because we have keener vision or greater height, but because we are lifted up and borne aloft on their gigantic stature."¹¹⁵ By working out the apparent contradictions of the fathers, the jurists, or the Bible, medieval scholars were able to see farther and lead people to a greater understanding of old knowledge. By positing that the system had to be a harmonious whole and resolving the cruxes of apparent conflict, scholars actually innovated, creating an interesting dynamic between authority and creativity, just as Gratian had done in expounding on the ravisher's marriage.¹¹⁶

Dialectical reasoning was not just an epistemological strategy. It was, at the same time, a didactic strategy. It was an efficient way to teach because it pointed out the problems in a particular field. Peter Abelard, in his *Sic et Non* ("Yes and No"), for instance, juxtaposed snippets of writings from the church fathers that seemed to conflict with each other.¹¹⁷ But he also provided students with a guide for using dialectical reasoning to reconcile texts with each other so they could use *Sic et Non* as a

111. JOHN OF SALISBURY, *THE METALOGICON OF JOHN OF SALISBURY: A TWELFTH-CENTURY DEFENSE OF THE VERBAL AND LOGICAL ARTS OF THE TRIVIMUM* 93–95 (Daniel D. McGarry trans., Univ. of Cal. Press 1955) (c. 1159).

112. *Id.* at 102.

113. See MARENBOON, *supra* note 89, at 160.

114. JOHN OF SALISBURY, *supra* note 111, at 167.

115. *Id.*

116. SOUTHERN, *supra* note 88, at 206–07.

117. PETER ABAILARD, *SIC ET NON: A CRITICAL EDITION* 89–104 (Blanche B. Boyer & Richard McKeon eds., 1977).

sort of workbook.¹¹⁸ Peter Lombard likewise wrote his *Sentences* in order to create a shortcut to the major problems in theology.¹¹⁹ His goal was to show where the authoritative texts conflicted so that students could find them quickly without spending a lifetime poring over volumes of the writings of the fathers, looking for apparent contradictions to reconcile.¹²⁰ Dialectic was a way of getting to the heart of the matter.

The quintessential product of this type of thirteenth-century thought was the *summa*, a text which sought both to point out the major areas of debate within a field and to reconcile the various opinions in order to present the whole of that field's knowledge as a coherent system.¹²¹ Its logic assumes that the system of authorities is complete and contains everything necessary for any situation that might arise, much as the modern civil law code does.¹²² In fact, the authors of *Bracton* relied heavily on the *summae* of the Bolognese civilian Azo and called their own work a *summa* in imitation of Azo.¹²³

D. Cases and Dialectical Reasoning

There are several case references in *Bracton* that show that the authors of that treatise were thinking like university trained civilians and canonists. They were treating cases from the plea rolls—particularly those of Martin of Pattishall and William of Raleigh—as authorities and using those authorities as a base on which to build a legal system. They used dialectic to reconcile cases to each other and to show that the legal system was in harmony. Although the dialectical reasoning in the treatise is not always as sophisticated as that in the most learned civil and canon law *summae*, the authors of *Bracton*, justices and clerks of the royal courts, thought of themselves as using the same tools as the people in the universities.

Bracton's tractate on the assize of darrein presentment¹²⁴ contains an *addicio*¹²⁵—which shows signs of being the work of more than one author—that references two cases of Martin of Pattishall:

118. See MARENBNON, *supra* note 89, at 160–61 (observing that what Aberlard did with his *Sic et Non* was to work contradictory texts into “debates with discussion,” using this format to build arguments for his own “preferred” solution).

119. PETER LOMBARD, *THE SENTENCES, BOOK 1: THE MYSTERY OF THE HOLY TRINITY 3–5* (Giulio Silano trans., Pontifical Inst. of Mediaeval Studies 2007) (c. 1158).

120. *Id.*; SOUTHERN, *supra* note 88, at 207–08.

121. SOUTHERN, *supra* note 88, at 204–05.

122. *Id.*

123. 2 BRACTON, *supra* note 23, at 19, 46; SELDEN SOC., *supra* note 24, at 2.

124. Assizes were procedures of proof in the royal courts made by a group of people—called an assize, recognition, or, sometimes, a jury—sworn to tell the truth of the matter. R.C. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 51–53* (1959). Darrein presentment was one of what were called the petty assizes. *Id.* at 330. If two people claimed the right to present a priest to the same church, one of the claimants could acquire a writ of darrein presentment from the royal chancery ordering the royal courts to look into which of them had made the last presentment to the church. *Id.* at 330–31. The *tractate* can be found at 3 BRACTON, *supra* note 23, at 205–44.

125. The *addiciones* are portions of the text that its editors, Woodbine and Thorne, identified, through their analysis of the manuscript traditions, as having been added at some point after the exemplar manuscript from which all of the existing manuscripts descend was put into its final form. Thorne, *supra* note 24, at xviii. They were then added into some manuscripts of *Bracton*, sometimes marked with the word *addicio* and

That in the eyre, in all assises . . . an essoin lies, and after the essoin a resummons, and after the resummons another essoin of absence on the king's service, provided the essoined person has his warrant by writ of the lord king, is proved in the last eyre of Martin of [Pattishall] in the county of Suffolk, an assise of mortdancestor beginning 'If Ralph of Wadleysham.' [But this could well be for this reason, because the tenant was resident outside the county and in the service of the lord king.] But the contrary may be found in the county of Kent [in the roll] of the eyre of Martin of [Pattishall] in the eleventh and the beginning of the twelfth years of king Henry, in Michaelmas term, that no resummons lies in the eyre.¹²⁶

The *addicio* starts by telling us how many delaying tactics a litigant being sued by an assize can use if he is being sued before the king's justices in eyre.¹²⁷ The author tells us that one can use an essoin, a resummons, and then a second essoin, and that we know this because it "is proved in the last eyre of Martin of [Pattishall] in the county of Suffolk, an assise of mortdancestor beginning 'If Ralph of Wadleysham.'"¹²⁸ By referencing that case as proof, the author signals to us that we know this is the proper procedure to follow because it has been handled this way before: the case proves the rule. But this was not the only way this type of case had been handled before, and it was not even the only way it had been handled by Martin of Pattishall. As the author of the *addicio* tells us, "the contrary may be found in the county of Kent [in the roll] of the eyre of Martin of [Pattishall] in the eleventh and the beginning of the twelfth years of king Henry, in Michaelmas term, that no resummons lies in the eyre."¹²⁹ The author thus presents us with two contradictory cases. If we are to follow previous practice, which case should we choose?

One of the authors of the treatise tried to solve this problem. He added a second *addicio* between these two cases, which is set in brackets above. Immediately following the first of these two cases, this author seeks to explain the reasoning behind the first case, telling us that the reason why there was a resummons in the case "could well be . . .

sometimes placed in the margin. *Id.* It is very difficult to date the *addiciones*, as some of them contain material that would have been archaic by the 1230s and others contain materials that could not have been placed in the treatise before the 1250s. *Id.* It is possible that some of them are material that was removed from the treatise during the editing process and then put back into the text at a later date and that still others are accretions to the text. *Id.* In this case, we have not only an *addicio* but an *addicio* within an *addicio*, marked off by brackets.

126. Translated from:

Item quod in itinere aliquando iacet essonium et post essonium resummonitio et iterum post resummonitionem essonium de servitio domini regis, dum tamen essoniatus warantum habeat per breve domini regis, præter assisam ultimæ præsentationis, quæ excipitur ex certa causa et necessitate in omnibus assisis, probatur in ultimo itinere Martini de Pateshilla in comitatu Suffolciæ, assisa mortis antecessoris, si Radulfus de Wadlegghesham. Sed hoc bene potuit esse hoc ratione, quia tenens forte manens fuit extra comitatum et in servitio domini regis. Contrarium tamen inveniri poterit in comitatu Cantie de itinere Martini de Pateshilla anno regis Henrici undecimo incipiente duodecimo de termino Sancti Michaelis quod in itinere nulla iacet resummonitio.

3 BRACTON, *supra* note 23, at 209 (some alterations in original) (footnotes omitted).

127. The eyre was an itinerant royal court that visited the counties periodically, often to the terror of the residents of the counties. HUDSON, *supra* note 4, at 123–26.

128. 3 BRACTON, *supra* note 23, at 209.

129. *Id.* (first alteration in original).

. because the tenant was resident outside the county and in the service of the lord king,” implying that perhaps the first case cites not a general rule of procedure at the eyre, but an exception to that rule.¹³⁰ In other words, the two cases can be reconciled if we accept that there were some peculiar circumstances in the first case.

This *addicio* within an *addicio* was probably written by a different author than the one who wrote the initial *addicio*, which seems to be complete on its own. It is clumsily worked into the text, giving us the solution to the problem before it tells us what the problem is; it explains how the two cases can be reconciled before we even know there is a second case that contradicts the first. We are probably, then, dealing with two cases originally added by an author of the 1230s and an explanation of these cases added at a later date. This later author seems to have been troubled by the inconsistency between the cases.

We see this again when an author uses a case about dower to prove a point slightly different from that in the case. He tells us that, if a woman claiming dower from a deceased man proves her marriage to that man in an ecclesiastical court, but “an impediment supervenes, such as war or the like, so that the judgment cannot be put into effect, and before she comes to the court the tenant dies, in the war perhaps,” she can recover against the new tenant.¹³¹ The author goes to some pain to put this case in very unspecific terms—the impediment is a war, “or the like,” and the tenant dies in the war “perhaps”—making it sound like a general rule rather than a case that happened in real life.¹³² He gets very specific, though, when he tells us that this was “as [in the roll] of the eyre of the bishop of Durham and Martin of [Pattishall] in the county of York in the third year of King Henry, [the case] of Muriel the wife of Hugh de Hammerton,” a case for which, unfortunately, there is no surviving record to tell us how closely it conforms to the facts presented in the treatise.¹³³ One might suspect that in a case of this kind, being heard in the third year of King Henry (1218/1219), a supervening war would have been less than theoretical, and that the tenant who was keeping Muriel from her dower had been a victim of the war between King John and the barons following the issuance of Magna Carta, which had just ended in September of 1217.¹³⁴ And yet the author wants the case to sound very general, as if this fact pattern is the basis of a rule that can apply to many different cases.

The author uses this case to produce an analogy, even if it is not a very profound one: “[b]y analogy [*per simile*] it appears that if a woman claims someone as her husband and the decision is in her favour and not appealed, if the man dies before the judgment is put into effect she will obtain dower without further proof.”¹³⁵ The author

130. *Id.*

131. “[*E*]t cum mulier in veniendo sit cum inquisitione versus curiam supervenit impedimentum sicut guerra vel huiusmodi, quod iudicium non poterit executioni demandari, et antequam ad curiam pervenerit moritur tenens in guerra forte . . .” 3 BRACTON, *supra* note 23, at 376.

132. *Id.*

133. “*Ut de itinere episcopi Dunelmensis et Martini de Pateshilla in comitatu Eboraci anno regis Henrici tertio, de Muriella quæ fuit uxor Hugonis de Havertona.*” *Id.* (first and third alteration in original).

134. W.L. WARREN, KING JOHN 256 (1978).

135. “*Per simile videtur quod si mulier petat aliquem in virum, et sententia lata fuerit pro muliere et ab ea non sit appellatum, si vir moriatur ante executionem iudicii ipsa sine alia probatione dotem obtinebit.*” 3 BRACTON, *supra* note 23, at 376 (footnotes omitted).

essentially restates the case without the supervening impediment, but it is significant that the author writes as if he is analogizing from one case to another, *per simile*, even if his analogy seems an obvious observation on the case. The case is not merely a specific set of facts, but a rule that can be applied to other cases.¹³⁶

We have seen one instance where the authors of the treatise use a case as the foundation for a new rule and another where they create a rule in the process of reconciling two contradictory cases. We see them using cases as the foundational authorities for a system of law. One of the authors shows his concern for the system very clearly, in a series of case citations where he tries to reconcile several contradictory opinions. This author tells us that when a tenant loses a case brought by writ of right by his default he may still correct his default and recover the land “until he has so put himself on the grand assise that the four knights have been summoned to choose twelve, according to some, and according to others until the twelve have been chosen.”¹³⁷ There is an *addicio* in the text at this point, the author of which tries, without success, to resolve the problem. He is troubled by this contradiction among the ancients: “[b]ecause of the disagreement of the ancients [*veteres*], nothing certain may be held as to what ought to be done if the default is made when the four knights have been summoned to choose [etc.], since some say one thing and some another.”¹³⁸ The lack of consensus among the ancients makes it impossible to deduce a single legal rule from these cases. To try to resolve the problem, the author adduces two cases from the rolls, one from the sixteenth year of King Henry and one from the fourth and fifth years, each of which “proves” one side.¹³⁹ For the latter case, he says that “several other cases are in accord with this,” perhaps indicating that this case represents the stronger of the two opinions, although he falls short of telling the reader that this is the rule to follow.¹⁴⁰

This passage shows us that the case’s authority does not come from the date of the decision. Later cases do not necessarily trump earlier ones. Otherwise the case from King Henry’s sixteenth year would be the controlling doctrine, and the case from the fourth and fifth years of Henry, with which many cases were apparently in accord, would be irrelevant. The author seems to have some sense that more cases are better, since he tells us that many cases are in accord with this earlier case. The fact that the case from the fourth and fifth years of Henry represents a trend does not settle the matter to the justice’s satisfaction, though. He still thinks that “nothing certain may be held” concerning this point of law.¹⁴¹ The author of this passage thus asserts the principle that authorities, in this case the royal justices, should be in harmony with each other even as he is forced to admit that that the harmony breaks down in this instance.

136. See 4 BRACTON, *supra* note 23, at 225 (referencing a case for a principle concerning heirs and then citing an additional case for the principle that “what is said of an heir ought to be applied to a successor”).

137. “[I]ta quod quatuor milites summoniti fuerint ad eligendum duodecim secundum quosdam, et secundum alios quousque duodecim electi fuerint.” 4 BRACTON, *supra* note 23, at 154.

138. “Propter dissensum vero antiquorum non poterit teneri aliquod certum quid fieri debeat si defalta facta fuerit cum quatuor milites sint summoniti ad eligendum, cum quidam dicant sic quidam contrarium.” *Id.* (third alteration in original) (footnote omitted).

139. *Id.*

140. “Et ad hoc concordant plures alii casus.” *Id.*

141. *Id.*

E. *The Justice's Authority as an Individual*

Bracton, like the texts of the medieval and modern civil law, was a text concerned with systematizing the law and working out its apparent contradictions. If *Bracton's* version of the dialectic and the modern common law share one thing in common, however, it is the emphasis on the justice or judge as an *individual* authority. Where the modern civil law emphasizes the system over the individual and the modern common law emphasizes the individual over the system, *Bracton's* account of English law kept the two in balance.

We have seen that the authors introduced cases in ways that show they were authorities. Words like “prove” show us that the authors thought that the relationship between text and case references was that of postulate to proof. Additionally, at least one of the authors used the dialectical method of the schools to show his reader that cases do not conflict.¹⁴² Dialectical reasoning arose out of a very particular idea of *auctoritas* that was popular among medieval scholars, a type of *auctoritas* that was at once collective and individual. “The fathers” or “the jurists” were, as a bloc, correct, and their statements formed a system of thought that was self contained and internally consistent. At the same time, however, each individual father or jurist had his own authority, which might make sense only with reference to the body as a whole, but which was nevertheless a type of personal *auctoritas*. In *Bracton* we find a tension between language that emphasizes the justice as an individual and language that emphasizes his place among a collective body of justices, the same sort of tension we find in Roman and canon law. The case was, on the one hand, an expression of an impersonal system of law. But on the other hand it was an expression of the individual authority and learning of the justice who decided it.

Just as most of the cases are hidden behind the uninformative “*ut*,” most of our judges are hidden behind impersonal, passive statements. In most plea roll entries the justice hides behind the clerk’s “*consideratum est*” (it is considered), which tells us only that the case has come to some kind of decision, not who made that decision.¹⁴³ Less than half of the cases in *Bracton*—204 out of 527—give the names of the justices who sat in the case. More often the authors cite only the term and year of King Henry’s reign: “as [in the roll] of Easter term in the seventh year of king Henry in the county of Devon.”¹⁴⁴ These types of entries were probably useful for readers of the treatise who also had access to the rolls. Several such entries include the words “in the roll,” suggesting that this whole case reference may be merely a way of referencing a

142. See *supra* notes 130–36 and accompanying text for a discussion of an attempt by the authors of one of *Bracton's* tractates to reconcile two seemingly contradictory cases by framing one case as an exception to the rule.

143. This passive tradition of case law seems to have been part of the culture of the royal courts in England and Normandy, since we have collections of cases taken from the rolls of the Norman Exchequer that generally begin with “*judicatum est*” (it was judged). Huntington Library MS 1343, for example, includes a collection of cases from the Norman exchequer and a late thirteenth-century copy of the Norman treatise called the *Summa de Legibus in Curia Laicali*, which is also glossed with cases from the exchequer. Most of these cases begin with the words “*judicatum est*.”

144. “*Ut de termino Paschae anno regis Henrici septimo comitatu Devoniae.*” 4 BRACTON, *supra* note 23, at 225 (alteration in original).

document, not of ascribing authority.¹⁴⁵ Just as 21 U.S. 389 will take you to the 389th page of the 21st volume of the United States reporter, “of Easter term in the seventh year of king Henry in the county of Devon,” will take you to the appropriate roll to find your case.

We might deduce then that authority comes from the case itself, not from the actor behind it. We might go in another direction entirely and say, along with Cheyette, that the authors did care about where the authority came from, but that the important part was that the point in question had been decided in the king’s court. Who made that decision was much less important than the fact that it had been confirmed in the court and given the king’s *imprimatur*. Yet something more active and personal is lurking behind these phrases. We should not read too much into the passive construction, for instance, because the passive voice was more highly regarded in medieval Latin than it is in modern English. We cannot, therefore, assume from the lack of an actor in the introduction to the case that the authors did not have one in mind.

Although the treatise does give us hints that its authors thought of authority as being in some way collective, there are also strong indications that they thought of authority as individual. Conflict between the justices is apparent at several other points in the treatise. The “some say . . . others say” (*quidam dicunt . . . alii dicunt*) formula that appears in so many scholastic texts makes its way into *Bracton*.¹⁴⁶ Sometimes the authors resolve these disputes, either with their own solutions or that of some judge.¹⁴⁷ William of York, whose cases, oddly enough, never appear in the treatise, acts as an arbiter of law for the author or authors. In one part of the treatise, an author tells us that “[i]f the eldest [son] dies in the lifetime of the father, some say that no mention need be made of him as though he had never been in existence,” before an *addicio* intervenes to say that this is “according to some, which is not true.”¹⁴⁸ A few lines down, another *addicio* informs us that there are others, not just the author, who hold the opposite opinion, as “there are some who say, and it is true, that mention must be made of a son who has died in the lifetime of his father, the view of William of York.”¹⁴⁹ In another *addicio* where the author complicates the primary text by admitting that “so [the rule stated above] seems to some, but to others the contrary seems true,”¹⁵⁰ he resolves the dispute by saying that this new, contrary opinion “was the opinion [*ratio*] of William of York, and it is good [*bona*].”¹⁵¹

William of York is not the only justice whose opinion seems to matter on its own. Martin of Pattishall—not surprisingly, since his cases are the most frequently

145. 2 BRACTON, *supra* note 23, at 52.

146. *See id.* at 388, 403, 424, 432.

147. *Id.* at 251 (providing an example of a case where the author resolves competing opinions by arguing that the latter opinion would create an absurd result).

148. “*Si antenatus in vita patris moriatur, dicunt quidam quod nulla de eo fieri debet mentio, ac si numquam esset in rerum natura secundum quosdam, quod non est verum . . .*” 4 BRACTON, *supra* note 23, at 173 (footnotes omitted).

149. “*Sed sunt quidam qui dicunt, et verum est, quod de filio mortuo in vita patris oportet facere mentionem secundum Willelmum de Eboraco . . .*” *Id.*

150. “*Ut quibusdam videtur, sed aliis videtur contra . . .*” 2 BRACTON, *supra* note 23, at 367.

151. “*Et hæc fuit ratio W. de Eboraco et bona.*” *Id.* *See also* 3 BRACTON, *supra* note 23, at 66 (providing an example of a rule that is true “*secundum W. de Eboraco*”).

referenced in the treatise—is featured prominently apart from his cases. One author, probably Pattishall’s clerk, William of Raleigh, tells us what Pattishall was accustomed to do in certain types of cases. For example, when “boundaries [were] destroyed or completely altered the lord Martin took an assise as of a free tenement, not as a trespass. For he used to say that one could not commit a more harmful disseisin than by destroying boundaries completely, or by moving or removing them.”¹⁵² Raleigh uses the things Martin used to say and do as sources of authority similar to cases in several places in the treatise.¹⁵³ In another part of the treatise, we are told what “is better, according to Martin.”¹⁵⁴

In addition to his cases and sayings, other texts of Martin of Pattishall are quoted and referenced in the treatise, apparently as models for what future justices should do. His consultations to the ecclesiastical courts on issues of jurisdiction are preserved in two places. On one occasion an author signals that Pattishall’s words are authoritative and definitive by using the “ought” language often used to introduce cases: “When the ordinary has received the letters of the lord king, he ought to proceed to hold the inquest in this way, according to the consultation of Martin.”¹⁵⁵

Royal writs occasionally appear in the treatise as the words of royal justices. When we do, very occasionally, see writs introduced with authority words of the type that the authors use for cases, an individual justice is the driving force behind that authority. For instance, when a widower without children is unlawfully holding his dead wife’s land against the interests of his wife’s heir—when, in other words, he is trying to claim curtesy when no curtesy is due to him—“the heir is aided by the writ drawn by William of Raleigh for Ralph of Dodescumbe.”¹⁵⁶ A heading introducing a writ at another point in the treatise reads, “Writ on the constitution of Merton, which was then provided by William Raleigh, then justiciar.”¹⁵⁷ Statutes appear only occasionally in the treatise. Although statutes in the thirteenth century were written in the voice of the king, in the treatise they are often ascribed to judges as well, and can even appear in the same format as cases. One heading, very similar to the one introducing William of Raleigh’s writ above, reads, “Of the constitution of Merton by William of Raleigh, then justiciar.”¹⁵⁸ It seems that statutes, like writs and cases, were

152. “*Dominus tamen Martinus assisam cepit de divisis corruptis vel mutatis omnino sicut de libero et non sicut de transgressione. Dicebat enim quod non potuit quis magis iniuriosam facere disseisinam quam de terminis demoliendis omnino vel corrupendis in parte vel amovendis . . .*” 3 BRACTON, *supra* note 23, at 128 (footnotes omitted).

153. Martin of Pattishall is not the only justice whose “sayings” are recorded. At one point the author of an *addicio* says that a particular doctrine having to do with curtesy “was wrongful according to Stephen of Segrave,” and that “[h]e used to say that this law was misunderstood and misapplied.” 4 BRACTON, *supra* note 23, at 360 (footnote omitted).

154. 3 BRACTON, *supra* note 23, at 122.

155. “*Ordinarius cum litteras domini regis acceperit secundum consultationem Martini procedere debet ad inquisitionem faciendam, hoc modo.*” *Id.* at 373 (footnotes omitted).

156. “[C]onsulitur heredi per tale breve per Willelmum de Ralegha formatum pro Radulfo de Dodescumbe . . .” 4 BRACTON, *supra* note 23, at 362 (footnotes omitted).

157. “*Breve de constitutione de Mertona secundum quod tunc provisum fuit per Willelmum de Ralegha tunc iustitiarium.*” 3 BRACTON, *supra* note 23, at 180.

158. “*De constitutione de Mertona per Willelmum de Ralegha tunc iustitiarium.*” *Id.* at 179.

important to the authors of the treatise because they are places where one can find the justice's words.

The examples above are not cases, but they do show us that the authors of the treatise thought that some justices were important as individual authorities, not simply as cogs in a legal machine. The authors legitimize the good opinions of the text by noting they come from specific justices like William of York and William of Raleigh. Martin of Pattishall's consultations, speeches, acts, and advice served as models for future judicial action. Judicial writing, in all its forms, is important to these authors as a source of authority.

If justices can speak as individuals, they can also disagree with each other, and the authors of the treatise at times have to rely on the greater individual authority of one justice over that of another, as in the case of serjeanties: the treatise authors tell us that, since they are not military fees in the same sense as a fee held by knight-service, the chief lord has no right to the marriage or wardship of the heir to a serjeanty;

[b]ut the contrary may be seen [in the case] of an abbess of Barking, among the pleas which follow the king in the [seventeenth] year of King Henry before William of Raleigh, who recovered the wardship and marriage of the heir of one of her tenants who held his tenement [in serjeanty] in the manor of Barking by the service of riding with her from manor to manor; [a result] Stephen of Segrave did not approve.¹⁵⁹

Here, William of Raleigh, who was most probably deeply involved with one stage of the writing of the treatise, is put in opposition to both the author of this passage and to Stephen of Segrave, whose opinion lines up with the author's own.

Robert of Lexington rarely fares well when he appears in the treatise. At least one of the authors must have seen him as something of a dunce among the English judiciary, since he is "corrected" twice: Once, when he held that an assize *utrum* could lie in a case involving a cathedral or convent, he was corrected "of Easter term in the fifteenth year of the reign of king Henry," which, although the author does not tell us this, was a certification to the bench at Westminster, meaning that he was essentially overturned.¹⁶⁰ The second time, the hapless Robert ruled that a question of bastardy should be sent to the bishop's court, even though the alleged bastard's father had recognized him as legitimate, "a ruling which was revoked and corrected by [per] Martin of Pattishall."¹⁶¹ Cases like the ones where Raleigh and Pattishall correct Lexington give us tantalizing glimpses at what might be hiding behind the impersonal *ut* of all those other cases cited in the treatise. We see, just occasionally, a human being proving, correcting, revoking, or denying a principle of law.

The authors of *Bracton* thought the cases contained in the plea rolls were authorities in the same way medieval scholars understood the words of the jurists in the

159. "*Contrarium tamen habetur de quadam abbatissa de Berkinge inter placita quæ sequuntur regem anno regis Henrici—coram Willelmo de Ralegha, et quæ recuperavit custodiam et maritagium de herede cuiusdam tenentis sui, qui tenebat tenementum suum in manerio de Berkinge per servitium equitandi cum ea de manerio in manerium, quod quidem S. de Segrave non approbavit.*" 2 BRACTON, *supra* note 23, at 113 (emphasis added) (some alterations in original) (footnote omitted).

160. 3 BRACTON, *supra* note 23, at 331.

161. "[Q]uod quidem revocatum fuit et correctum per Martinum de Pateshilla." 4 BRACTON, *supra* note 23, at 300.

Digest to be authorities. Justices were treated as individuals with authority, just as they are in modern common law. But their individual authority was counterbalanced by an emphasis on the individual as part of a system, an emphasis they acquired from civil law. The justices' writings could be used as the basis for new knowledge, created through dialectical reasoning. The authors of *Bracton* were the dwarfs standing on the shoulders of the giants who had written these cases earlier in the century.

IV. CASE LAW, MEDIEVAL AND MODERN

Even if there is something of a debate in the United States right now about whether case law is actually very important in modern law, about whether statutes and administrative regulations have superseded cases as the place where most legal change happens, and whether the case is adapting to look more like the statute and the regulation, case law is still undoubtedly the basis of common law culture.¹⁶² To the American lawyer, common law is a law that grows organically, induced from real-life cases, not a law deduced from general principles. This kind of thinking pervades the system. It provides common lawyers with one of their primary arguments for the superiority of common law over civil law, its main competitor in the world today. Civil law, which sees itself as the direct heir to Roman law, places the code, not the case, at the center, and makes the judge the servant of the legislator's will.¹⁶³ The common lawyer usually presents the civil law as too rigid, too bound to the words of a code that, despite its claims to be all-encompassing, could not possibly contain a solution for every legal issue that could arise.¹⁶⁴ The common law, on the other hand, is a flexible system that refines itself over time.¹⁶⁵

For example, in *Comparative Legal Traditions: Texts, Materials, and Cases*, a casebook for use in American law classes, there is a definitive split in the way the two legal systems are described.¹⁶⁶ According to the authors, the defining features of the civil law are "a particular interaction in its early formative period among Roman law, Germanic and local customs, canon law, the international law merchant, and . . . a distinctive response to the break with feudalism and the rise of nation states, as well as by the peculiar role it has accorded to legal science."¹⁶⁷ The tone is neither laudatory nor condemnatory, although the role the civil law accords to legal science is described as "peculiar."¹⁶⁸ But, for the most part, this definition merely describes the common features of civil law systems as the authors see them.

162. Justice Scalia, in particular, has argued that case law is now subordinate to statute law and that, as a result, the case method should largely be abandoned in favor of teaching methods that focus on statutes. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 4–10 (1997); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1455–56 (1995).

163. LASSER, *supra* note 1, at 168–74.

164. *Id.*

165. *See id.* at 28.

166. MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS, AND CASES ON THE CIVIL AND COMMON LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, GERMAN, ENGLISH AND EUROPEAN LAW* (2d ed. 1994).

167. *Id.* at 44.

168. *Id.*

The authors' description of the common law, however, strikes an entirely different tone:

English common law evolved from necessity; the law was rooted in centralized administration of William, conqueror at Hastings. A single event, the 1066 Norman Conquest, was the progenitor of this tradition, its foundation a unique, "unwritten" constitution and the recorded, but orally rendered decisions of an extraordinarily gifted and respected judiciary. The harmony of a homogeneous society, tested by internal stresses but free of foreign invasion for nearly a millennium, aided an orderly development of legal institutions. Focusing on the resolution of specific, current issues, English law developed insulated from the continental reception of Roman law, and the later emphasis on codification. As Pollock has said, English laws "grew in rugged exclusiveness, disdain[ing] fellowship with the more polished learning of the civilians."¹⁶⁹

The common law is the "unique" product of "the harmony of a homogeneous society" that was "free of foreign invasion," which allowed it to develop "insulated" (in the literal sense) from civil law influence.¹⁷⁰ The language here does not merely describe an insular, English development, it celebrates it, so that when Pollock's quote comes in at the end to suggest that the civil law was "more polished" than the common law, it sounds more like a point of national pride than a real concession to the civil law. Common law is a triumphal law, the product of a "conqueror."¹⁷¹ It is also a flexible, pragmatic system developed by "an extraordinarily gifted and respected judiciary," which was concerned with the "resolution of specific, current issues."¹⁷² This description highlights the fact that it is *judges* who move the law forward with special attention to the needs of the time. Enter case law.

So much of the American lawyer's identity is bound up in the idea that American law is based on cases partly because law schools still teach using the case method instituted by Christopher Columbus Langdell at Harvard in the late nineteenth century, a method that has made its way into popular culture through John Jay Osborn's novel *The Paper Chase* and the film and television series based on it.¹⁷³ Even the most statute- and regulation-based areas of law, such as administrative law and tax law, are generally taught through cases that explain those statutes and regulations.¹⁷⁴ The judges who write the cases know that they are writing for a larger audience than the parties before them. They are writing for their peers on the bench, in the legal profession, and, potentially, if they explain a point of law particularly cogently, for first-year law

169. *Id.* at 438. The two descriptions may very well have been written by different authors and this may partially account for the difference in tone. I do not mean to disparage an excellent casebook, only to point out the very different ways we, as common lawyers, perceive the common law and the civil law.

170. *Id.*

171. *Id.*

172. *Id.*

173. See generally Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQUIRY 691 (1995); JOHN JAY OSBORN, *THE PAPER CHASE* (1970); *THE PAPER CHASE* (Twentieth Century Fox 1973); *The Paper Chase* (CBS television broadcast, 1978–79, Showtime television broadcast 1983–86).

174. See, e.g., SANFORD M. GUERIN ET AL., *PROBLEMS AND MATERIALS IN FEDERAL INCOME TAXATION* (7th ed. 2008).

students.¹⁷⁵ Even if we were to posit that cases are not the major source of law for the American common law system, they would still be an important part of the common law's culture. And even if lawyers do not use cases all that much, they think that they do, and they think that knowledge of cases is what defines their profession.

Because of this emphasis on the case as part of common law culture, there has been much written about case law and how it operates.¹⁷⁶ Many of the models used to describe common law reasoning focus on the writing judges do in published opinions. Ronald Dworkin, for instance, has likened common law reasoning to a chain novel, in which several authors are asked to each write one chapter of a book in succession, so that the first author writes the first chapter and then hands it off to the second, who must write the second chapter using the first as the basis for his story.¹⁷⁷ The second author thus has room for creativity, but he is also constrained by what the first author has written.¹⁷⁸ In Dworkin's estimation, the second author's duty is to make the novel the best novel it can be given what the first author wrote, not to cast aside what the first author wrote and write a better novel. He does this according to the "aesthetic hypothesis": the author writes the new chapter or opinion based on what will make the best novel or the best system of law, according to the author's own view of what is best.¹⁷⁹ Dworkin's image does a good job of describing how the relationship between change and fidelity to authority can be dynamic in a legal system. His chain novelist is an author whose creativity comes into the work in several ways. He must build upon what has been written by his forebears and must use his own idea of what makes the best system when he does so. But the final product does not come entirely from his individual genius; it is the product of a tradition.

Dworkin's model presents the common law as an unfolding story told by the judge. One might ask, however, if judicial writing is actually the most relevant site where legal knowledge is created in the common law. I would suggest that the power of Dworkin's model to explain the way the common law system works is limited by the fact that it treats only half of the work we expect cases to do in the American common law.

The case plays two important roles in the Anglo-American common law, and those roles, although not completely distinct, are different in some ways. First, as Dworkin rightly points out, the case is a vibrant method to effectuate legal change. But when we look at this other major site where cases are important to the common law, the classroom, we see a different type of dynamic. The didactic and epistemological strategies that take place in the law school classroom are just as important to the

175. See Schauer, *supra* note 162, at 1472.

176. See generally Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1 (2010); Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decision*, 21 LAW & SOC'Y REV. 325 (1987); Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777 (1990); Ryan M. Moore, Comment, *I Concur! Do I Matter?: Developing a Framework for the Influence of Concurring Opinions*, 84 TEMP. L. REV. 743 (2012).

177. RONALD DWORIN, A MATTER OF PRINCIPLE 158–62 (1985) [hereinafter MATTER OF PRINCIPLE]; RONALD DWORIN, LAW'S EMPIRE 228–38 (1986) [hereinafter LAW'S EMPIRE].

178. LAW'S EMPIRE, *supra* note 177, at 234.

179. MATTER OF PRINCIPLE, *supra* note 177, at 149.

creation of common law culture as the case law created in the courtroom: judges are, after all, formed in this environment. It is also a more democratic space than the judicial opinion. Whereas the judicial opinion privileges one particular actor—the judge—the law school classroom is a space where professors, future lawyers, and future judges use cases to learn the law and, more importantly, to create legal knowledge. I would suggest that the types of reasoning that go on in the law school classroom can be more usefully modeled by the medieval dialectic than by the chain novel.

The classroom is a space where the opinions produced by judges are refined from long documents into short, abstract rules. The process actually begins before the student is ever assigned a case to read. As Frederick Schauer has pointed out, “appellate opinions are *not* the primary teaching vehicles in American law schools—that role is served by severely edited appellate opinions as they appear in casebooks.”¹⁸⁰ When the student reads the case, she further refines it by abstracting a holding, a legal rule, out of it. The case, which may be very long even in its edited form, is transformed into a single sentence. The professor then challenges the student with hypothetical cases that usually alter the facts of the initial case progressively, by small degrees, until it becomes more difficult to justify the application of the holding from the present case to the new set of facts. The hypothetical presses beyond the bounds of the opinion, to places where the rule that the student and the professor have refined from the opinion pushes up against other rules in other cases. It encourages the student to try to reconcile competing rules, to distinguish them from each other in principled ways, and to decide whether the rule in this case should be applied in a more marginal set of facts or whether a competing norm should take over.

Midway through the semester, the emphasis shifts from refining rules out of cases to organizing those rules into a system of knowledge. Around their fall break, law students usually begin to work on a different type of legal-literary project: the outline.¹⁸¹ This document forces the student to take the rules she has abstracted from cases and to organize them into a rational system marked off by sections and subsections. In the process, the student makes something that looks more like a civil law code, or possibly a medieval *summa*, than a judicial opinion. Medieval *summae* often came out of the teaching process. Students and teachers at times compiled their disputation notes into texts that were meant to circulate as independent texts; Thomas Aquinas’s theological text *De veritate* was simply a classroom disputation that he wrote in book form and his *Summa Theologiae* is a long series of *quaestiones*.¹⁸² In the modern American law school, outlines have similarly come to stand on their own as literature, but they occupy a very different space than the systematic works of medieval law. Lawyers and professors write outlines for commercial consumption, but they are not considered high scholarship like their medieval counterparts. Law professors, with a few exceptions, tend to regard them as the law school equivalents to CliffsNotes, a

180. Schauer, *supra* note 162, at 1472.

181. See John Henry Schlegel, *Damn! Langdell!*, 20 LAW & SOC. INQUIRY 765, 767 (1995) (describing how students instinctively turn to outlining to organize the material they learn). Of course, the student might also buy a ready-made outline.

182. MARENBNON, *supra* note 89, at 216–17.

shortcut to learning that is no replacement for the hard work of making an outline on your own.¹⁸³ Nevertheless, some future historian of legal education in the early twenty-first century might argue that their importance is out of proportion to the regard the legal academy pays them. As of 1994, Emanuel's was selling 150,000 study aids per year.¹⁸⁴

The American Law Institute has turned the legal outline into a type of text that the academy does hold in high regard. The ALI's restatements of the law were originally intended "to present an orderly statement of the general common law of the United States."¹⁸⁵ The reporter for the original Restatement of Property, William Draper Lewis, expressed his concern that "the ever increasing volume of the decisions of the courts, establishing new rules or precedents, and the numerous instances in which the decisions are irreconcilable, taken in connection with the growing complication of economic and other conditions of modern life, [were] increasing the law's uncertainty and lack of clarity," a statement worthy of Justinian himself.¹⁸⁶ Lewis feared that this lack of clarity would "force the abandonment of our common-law system of expressing and developing law through judicial application of existing rules to new fact combinations and the adoption in its place of rigid legislative codes, unless a new factor promoting certainty and clarity can be found."¹⁸⁷ According to Lewis, the very thing that makes the common law flexible, its nature as a law that grows organically out of the decisions of judges, like Dworkin's chain novel, also makes it disorganized and unmanageable. It was out of fear that the common law was becoming an unworkable system and that something needed to be done to harmonize the cacophony of competing opinions that the ALI began the process of restating the common law.

The process was one of harmonization, much like the process we have seen in texts like *Bracton* and Gratian's *Decretum*. The resulting restatements look much like civil law codes. Indeed, Benjamin Cardozo recognized the similarity between the new restatements and the texts of the civil law when he described the new restatements as "something less than a code and something more than a treatise."¹⁸⁸ Ironically, in their drive to preserve the flexibility of the common law and to prevent the advent of "rigid legislative codes," the ALI created something that looks distinctly code-like.¹⁸⁹ Both Lewis and Cardozo show their ambivalence to the judge-made and judge-centered rules of the common law: the Hurculean judges of Dworkin's chain novel are absent from the restatement, which speaks in a unified voice. Saving the common law, to the ALI, meant systematizing and depersonalizing the common law. It bears another

183. See Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 642 (1997) (explaining that law professors discourage use of purchased outlines). *But see* Eric E. Johnson, *A Populist Manifesto for Learning the Law*, 60 J. LEGAL EDUC. 41, 45 (2010) (asserting that study aids are akin to treatises and wondering why professors discourage them).

184. Sheppard, *supra* note 183, at 641.

185. William Draper Lewis, *Introduction to RESTATEMENT (FIRST) OF PROPERTY*, at viii-ix (1936).

186. *Id.* at ix; *see* DIG. (Justinian, *Constitutio Deo Auctore*, proem.) ("We have found, however, the whole course of the law, which has descended from the founding of the city and the Romulean times, thus to be confused, so that it is stretched out to infinity and is not confined within the capacity of human nature.")

187. Lewis, *supra* note 185, at ix.

188. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 9 (1924).

189. Lewis, *supra* note 185, at ix.

resemblance to both the case and to the scholastic disputation: the restatement moves law forward. In fact, the reporters often consciously adopt rules that are not currently in the majority, but which instead reflect a trend in the jurisprudence that the reporters favor.¹⁹⁰

Both the outline and the restatement organize the law; and the restatement, at least, pushes the bounds of legal knowledge. The major difference between Dworkin's judge deciding a case and the legal scholar or law student producing a restatement or outline is that while Dworkin's Herculean judge¹⁹¹ is creating a document that presents itself as dynamic and moving law forward, the authors of the latter two documents present the law as static. They give us a snapshot of the law at a particular time, transformed from real-life cases into abstract rules, which are neatly organized into conceptual categories. They support their static structure with references to cases. Students include references to cases in their outlines; reporters include discussion of the relevant case law along with the abstract rules they have drawn out of that case law. The restatement and the student outline are surely designed to fit to some kind of aesthetic principle, but the principle operates in a different way than it does in the chain of cases, where the judge is tasked to fit his analysis into a line of authority. The student outline and the restatement are thus documents that play the kinds of roles the scholastic *quaestio* and *summa* played in the Middle Ages. They create harmony out of authority and, in the process, present us with a different type of dynamic between continuity and change in the common law than we would perceive if we focused only on the work done by the judge in writing the opinion.¹⁹²

Comparing and contrasting the cases in *Bracton* with these models allows us to better understand how the outline, the restatement, and *Bracton* all work as texts. *Bracton* highlights the individual authority of the justice that would, many centuries later, become a hallmark of the common law. It also highlights the systematic nature of the law that is still a hallmark of the civil law. Both tendencies are on the surface in the text. In the modern American common law, both tendencies exist, but the tendency towards systematization is largely buried beneath the image of law as an unfolding story told by judges. If we turn away from the positivist discourse about the common law that focuses on the authoritative statements of law found in judicial opinions and towards the documents created by law students and professors, then the modern common law's modes of knowledge-production-through-writing look a lot more like the medieval dialectic than they do like Dworkin's chain novelist. Scholars in the medieval universities put their authorities in opposition to each other in order to push the boundaries of authority and create new rules out of old ones. They asked questions and, in the process of answering them, organized legal knowledge into a coherent,

190. See, e.g., Herbert Wechsler, *Introduction* to RESTATEMENT (SECOND) OF CONFLICT OF LAWS, at vii (1969) (explaining the *Restatement's* sensitivity to standards rather than "dogma").

191. As a thought experiment, Dworkin creates an "imaginary judge of superhuman intellectual power and patience" named Hercules. *LAW'S EMPIRE*, *supra* note 177, at 239.

192. Mitchel Lasser has shown how the analysis of a legal system can be enriched by looking to the types of literature a legal system produces beyond those that carry the force of law. For instance, Lasser discovered a "hidden discourse" in the preliminary texts that the French *Cour de Cassation* uses to create judicial decisions. *LASSER*, *supra* note 1, at 47.

internally consistent system.¹⁹³ The student outline and the restatement of law similarly use the debates that the case book raises to organize the field into a coherent system. The medieval civilian emphasis on the harmony of the system, which was new to English law in the thirteenth century, seems to be with us today as well. When we look at documents other than cases, Anglo-American common law looks much less insular than it does when we focus on the defining feature of common law culture. Common law then becomes part of a common, Roman-inspired, Western legal culture.

V. CONCLUSION

Case law is culturally important to the common law today. But does it separate the common law from the civil law? England's first case law was inspired by civilian thought, and even today the types of epistemological work that are done in common law and in civil law are essentially the same. They share a common ancestry in medieval scholastic law, which bequeathed to both legal families an emphasis on law as a harmonious system of rules and concepts. Medieval scholars talked of their work in terms of bringing harmony to the system they had received from antiquity. When they reconciled texts, the assumption was that the truths they were drawing forth were already latent in the ancient texts, which must form a coherent and harmonious system.¹⁹⁴ Of course, they created new thought by reconciling certain texts with other texts, but the idiom of progress was one of refinement, not of originality. As one might expect with a dwarf standing on a giant's shoulder, the lion's share of the focus was on the giant, not on the dwarf.

Of course, to say that the differences between common law and civil law (medieval and modern) are more in the perception than in the practice does not make those differences any less real. The metaphors we use to talk about what we do are important. The harmonization that was at the center of medieval scholastic legal texts is alive and well, but it is more central to the civil law than it is to the common law because of the different emphases present in the two systems. In the modern civil law, which adopted the medieval emphasis on harmony and system as its primary textual aesthetic, this work takes place in the code—a very privileged space. The harmonization, synthesis, and systematization that were the hallmarks of medieval scholastic legal texts like *Bracton* take place in the modern common law, only less overtly in the privileged space of the judicial opinion and more so in the largely ignored space of the student outline and the more honored, but still peripheral, space of the restatement. The fact that common law and civil law do the same type of work in different spaces, both physical and literary, is important to the way they develop. Mitchel Lasser has shown, for instance, that although the French *Cour de Cassation* and the United States Supreme Court both make formalist and policy-based arguments in formulating new legal rules, they do so in very different spaces, and that difference affects the arguments themselves.¹⁹⁵

193. See SOUTHERN, *supra* note 88, at 204–05 (describing how written summaries of knowledge are used to fuel new explorations).

194. See MINNIS, *supra* note 92, at 14 (noting that scholars did not compete with authoritative texts but rather studied, assimilated, and imitated them).

195. LASSER, *supra* note 1, at 15.

What looking beyond the cases to the types of texts that common lawyers write around cases does show us, though, is that there is a common core to Western *legal* discourse, whether it is in common law or civil law. This discourse assumes that law is a system, not merely a collection of rules and commands, and that that system should strive towards harmony. In this sense, the medieval dialectic has left its mark on all of Western legal thought, and the common law and the civil law are both heirs to the medieval Romanist and canonist tradition.