occurred at critical times in Roman and American law and how leading jurists, whether they were advisors or judges, were important architects in developing the methodological framework within which the tension between logic and experience was mediated. This effort at any time in any society demonstrates one meaning of law—the process, in Gilmore's words, "by which a society accommodates to change without abandoning its fundamental structure."[16] Professor Stein has advanced our understanding of this process and illuminated the instrumental role legal players assume in times of change. We are in his debt.

[16] G. Gilmore, *supra* note 13, at 14.

Stein, Logic & Exp. in . . . 59 B.U.L. Rev. 433, 439 (1979)

1.

The title, of course, recalls the famous Boston lectures on *The Common Law* by Oliver Wendell Holmes, Jr., in which he said, "The life of the law has not been logic; it has been experience."[1] Holmes was not denying that logic has a place in the common law; rather he was arguing that it should not have too great a place—that law is not a set of mathematically certain rules. Too much emphasis on the systematic aspects of law is dangerous, but that does not mean that those aspects should be eliminated altogether. As Holmes said:

> It is something to show that the consistency of a system requires a particular result, but it is not all. . . . The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law . . . cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[2]

The lectures on *The Common Law* took place in 1881. Two years earlier, in 1879, Holmes had been reading Rudolph von Jhering's great work on the Roman law.[3] There is a passage in that work which expresses the same point in remarkably similar terms to those of Holmes. Jhering says:

> This desire for logic that turns jurisprudence into legal mathematics is an error and arises from misunderstanding law. Life does not exist for the sake of concepts but concepts for the sake of life. It is not logic that is entitled to exist but what is claimed by life, by social relations, by the sense of justice—and logical necessity, or logical impossibility, is immaterial. One could have considered the Romans mad, if they had ever thought otherwise, if they had sacrificed the interests of life to the dialectics of the school.[4]

Whether or not Holmes, consciously or unconsciously, had Jhering's passage in mind, we can only guess.[5] What is significant is that when they made such similar statements they were writing of different laws. Jhering was writing of Roman law; Holmes of the common law.

The most remarkable feature of Roman private law is the fact that it developed without any revolutionary interruption over a period of a thousand years. The customary law of a primitive tribe in Central Italy in 500 B.C. was very different from the sophisticated law of the Byzantine

[1] O.W. Holmes, The Common Law 1 (1881).
[2] *Id.*
[3] M. DeWolfe Howe, Justice Oliver Wendell Holmes, II: The Proving Years 152 (1963).
[4] Der Geist des römischen Rechts (1852); French translation—that used by Holmes—by O. Meulenaere, 4 L'Esprit de Droit Romain 311 (3d ed. 1888). There is no English translation of the complete work, although an English version of the preface was published by B.T. C[rump] in 4 Va. L.J. 453 (1880).
[5] M.D. Howe, *supra* note 3, at 155 (citing another passage of Jhering, but not referring to the one quoted).

Empire in 500 A.D.; yet the seeds of the latter are readily recognizable in the former. The only other legal system whose development is documented in such detail over such a long period is the Anglo-American common law. One of the main reasons for such continuity in the two systems is that when they each were reaching maturity they adopted similar mechanisms of development, and in addition they were each subject to a tension deriving from the contrasting forces of logic and experience. This is the theme that I propose to illustrate.

When we think of civil law systems today, we think of coherent bodies of rules purportedly deduced from general principles and arranged systematically in codes having fixed and authoritative texts. These texts can be interpreted in new ways, but the formulation remains the same. By contrast, the common law appears more as a set of rules inferred from decisions in particular cases. This legal formulation is always provisional in its continual restatement through the broadening or narrowing of terms as new cases arise. The rules are working hypotheses which await testing by the courts. In this respect, the ancient Roman law resembles the common law much more than it does the modern civil law. To the continental observer, ancient Roman law and modern common law share the same baroque or disorderly appearance.[6] It is true that our knowledge of Roman law derives from the sixth-century codification by the Byzantine Emperor Justinian and that the texts as authorized by Justinian have been regarded from medieval times as having quasi-biblical authority. But the most important part of that codification, the Digest, is an anthology of extracts from the writings of jurists of the much earlier classical period—roughly the first two and a half centuries of the Christian era. It was during the classical period that Roman law reached its highest point of technical development, and when we speak of the inner similarity between Roman law and common law, we refer to the law of that earlier time.

II.

Where does this similarity reside? The most important resemblance is that both the classical common law and the classical Roman law were action-oriented rather than right-oriented. Legal discussion in those systems was not in terms of whether a party had a right which the law would protect, but in terms of whether there was a recognized form of action which fitted the facts of the case, what the limits of that action were, and so on.

During the classical period, a Roman action was divided into two stages. The first stage, held before an official magistrate, the praetor, was designed to settle what the issue between the parties was—to categorize their dispute in legal terms. The parties then chose a private citizen to be a type of single juryman, the *iudex*, to conduct the second stage. The *iudex* heard the evidence, listened to arguments on behalf of the parties and decided the issue referred to him by the praetor. The praetor's instructions to the *iudex* were set out in a memorandum called a formula, which told the *iudex* in what circumstances he was to condemn the defendant and in what circumstances he was to absolve him. In the edict which the praetor issued on taking up office, he published the formulae of the standard actions, from which the parties in a typical case would select an appropriate one for themselves. In a novel case, however, the praetor could grant a new formula if he felt the case justified it. A formula was thus similar to the English writ issued by the Chancery[7] and the praetor's edict was something like the English *Register of Writs*.[8]

The odd feature of the formulary procedure was that neither the praetor nor the *iudex* nor even the advocates who represented the parties were professional lawyers. However, at each stage of the proceedings there were legal experts, the jurists, ready to advise on the legal implications of what was proposed. The jurists had no formal role to play in the legal drama, yet the actors' constant requests for their advice evidenced their intimate connection with the day-to-day administration of the law. It was the jurists' concern with actual problems put to them by praetors, *iudices* and litigants which gave them the opportunity not only to expound the law but also to change it.[9]

Thus Roman law, like English law, was developed by legal experts concerned with its application rather than by legislators. Just as the judges who developed the common law shared a common professional background, so the Roman law was in the hands of a similarly small, closely-knit group of men from upper class backgrounds who shared the same social values. Admittedly the advice of a Roman jurist was never a binding precedent like the decision of an English judge, but the opinion of a jurist who had acquired a recognized authority would carry great weight. The

[6] H. Peter, Römisches Recht und Englisches Recht (Sitzungsberichte der wissenschaftlichen Gesellschaft an der J.W. Goethe Universität Frankfurt/Main, Band 7, Nr. 3), *reviewed by* Stein, 38 Tijdschrift voor Rechtsgeschiedenis 585 (1970); *see* Pringsheim, The Inner Relationship between English and Roman Law, 5 Cambridge L.J. 347 (1935).

[7] H. Peter, Actio und Writ (1957), *reviewed by* Nicholas, 9 IURA 235 (1958) *and by* Stein, 24 Studia et Documenta Historiae et Iuris 335 (1958).

By virtue of the Statute of Westminster II (1285), the Chancellor could vary slightly the forms of the writs in order that justice might be done. Those in the Chancery made much use of this power, so that later the Chancellor became regarded as an official who could do justice when the common law afforded no remedy. The common law courts could, however, quash new writs of which they disapproved. 1 W.S. Holdsworth, A History of English Law 397 (7th ed. 1956).

[8] The Register, a compilation of the forms of original writs most generally in use, was not official but developed out of collections made by anyone—private person or Chancery official—who cared to undertake the task. Thus the authorship of the Register of Writs remains largely in doubt. Particularly in view of the Chancellor's power to issue new writs supplemental to the existing forms, it was an "extremely variable and shifting collection." T. Plucknett, A Concise History of the Common Law 276 (5th ed. 1956).

[9] Schiller, Jurists' Law, 58 Colum. L. Rev. 1226, 1227 (1958); Schiller, The Nature and Significance of Jurists' Law, 47 B.U.L. Rev. 20, 27 (1967); *see* L. Vacca, Contributo allo studio del metodo casistico nel diritto romano (1976), *reviewed by* Stein, 24 Labeo 57 (1978).

traditional Roman jurist's view, like the traditional English judge's view, was that law was not something created, but rather was a set of permanent and unchanging customary rules that were part of the heritage of the people. These rules were mostly unwritten and were revealed and declared by experts only when the occasion required it. Legislation was at first treated as the declaration and clarification of what had always been the law. Even when it was recognized that legislation and praetorian control of remedies created new law, there was still a tendency to talk of the law as something unalterable.

However, the procedure in Rome, as in England, provided that at the point of final decision the interpretive views of the legal expert should be tempered by lay experience. Like the common law jury, the Roman *iudex* provided an input of nontechnical experience of life. This experience was harnessed in both systems through the use of standards.[10] Standards are specially appropriate for application by laymen since they are not formulated absolutely but are relative to time and place and circumstance. They call not for technical knowledge but for a judgment of conduct based on common sense about common things. The counterpart of the English standard of reasonableness was the Roman standard of good faith—*bona fides*. For example, when the main commercial contracts like sale, hire and partnership were first made enforceable, the content of the obligations which they imposed on the parties was determined by the standard of good faith. When a dispute arose over such a contract, the praetor's formula instructed the *iudex* to condemn the defendant to whatever sum he ought, in good faith, to pay the plaintiff. The phrase enabled the *iudex* to permit any defense or counterclaim which he thought affected the matter. The jurists monitored the application of the standard and, by following court practice, they gradually enunciated a series of duties. These duties included those that the good faith standard, required by the contract of sale, imposed on the seller and buyer respectively. They advised the *iudex* of these duties, but he had the last word on their application in a particular case.

Another feature of the formulary procedure was that it provided scope for the introduction of equity when the law became too strict. In England law and equity were administered by separate courts, whereas in Rome they were both administered by the praetor.[11] Despite this procedural unity, the Romans distinguished clearly between the traditional *ius civile*, based on custom and codified custom, where the praetor's formula enforced established law, and the *ius honorarium*, which owed its origin to new remedies introduced by the praetor on the advice of the jurists. For, as we have noted, the praetor could grant a new formula, or modify an existing formula, on his own authority.

An early example of praetorian equity was based on the recognition

[10] P. Stein & J. Shand, Legal Values in Western Society 93 (1974).
[11] *See* Buckland, Praetor and Chancellor, 13 Tul. L. Rev. 163 (1939).

that those who seriously enter into transactions should have their intentions fulfilled, even though they have failed to comply with the particular forms prescribed by the law.[12] The praetor recognized that the legal forms for transferring property were instrumental rather than ends in themselves. He could not change the law and validate an informal transfer, but he could protect the intended beneficiary by granting him appropriate relief. Thus, where a buyer had received that which he had bought without observing the appropriate form of ownership transfer required by the law, and the seller—who was still the owner at law—attempted to recover it, the praetor gave the buyer a special defense to the seller's action. If the buyer lost control of the property, the praetor gave him an action to recover it based on the fiction—which the *iudex* was instructed to assume—that the buyer had held it for the period necessary for him to become owner by prescription.

On the other hand, when the parties' intentions were vitiated by fraud, duress, or mistake about a fundamental element in the transaction, the praetor would refuse to enforce a transaction, even though it was valid according to law. Provided the requisite form had been complied with, the old law looked no further. It treated the legal obligation as deriving from the form. However, the praetor gave a defense to the victim of fraud or duress, if the other party tried to enforce the transaction, and he treated a transaction vitiated by mistake as void *ab initio*. Later he allowed the victim *restitutio in integrum*, which was a decree restoring a prejudiced party to the position he had been in before the tainted transaction took place, notwithstanding that the transaction had satisfied the requirements of the law. If the praetor had used this power of ordering *restitutio* too enthusiastically, he would have undermined public confidence in the law and its forms. It is a testimony to the restraint of praetors and of the jurists who advised them that the power was only exercised in certain limited classes of cases and then only after the praetor himself had investigated the circumstances and satisfied himself of the truth of the complainant's allegations.

The result of the Roman legal development by juristic advice was similar to that of the common law development by judicial decision. Both produced a chaotic jumble of rulings, and those who sought to discern a rational structure beneath the intractable mass of legal opinions often looked in vain. This was the stage reached by English law in the early part of the nineteenth century. Jeremy Bentham and his follower, John Austin, drew attention to the uncertainty and unpredictability of English case law and argued in favor of its codification, or at least its systematic restatement on orderly principles.

III.

It is a situation similar to the nineteenth century English debate on the form of the law which in my view provides the key to one of the mysteries

[12] P. Stein & J. Shand, *supra* note 10, at 97; Stein, Equitable Principles in Roman Law, in Equity in the World's Legal Systems 75 (R. Newman ed. 1974).