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LEGAL SYSTEMS

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Codes  
- Civil Law  
- Intl Law  
- Private Law

ALAN WATSON

The Importance of "Nutshells"

If I were asked to make a very short list of the main events in western legal history I would choose: the flowering of Roman private law until the end of the so-called classical period around 235 A.D.; the codification of Roman law between 528 and 534 by the Byzantine emperor, Justinian I; the Reception of Roman law in western Europe (and beyond) from the late eleventh century onwards; the development of English common law into a recognizable system; and its spread overseas in English-speaking territories, especially North America; the European codification movement from the eighteenth century onwards, most notably the French *Code civil* of 1804, and its influence on Codes in Europe and Latin America. In all of these the role of "Nutshells" was of vital importance.<sup>1</sup>

Indeed, although I use the term "Nutshell," I am thinking of something even more restricted in scope. In what follows I will use that term to designate books written as teaching manuals (whether in a law school or for home study) for beginning law students or to instruct non-lawyers in the elements of the law: books, at that, with a wide scope, covering at least the whole of private law. Such Nutshells are less detailed than many in West's celebrated Nutshell Series. Nutshells are also valuable student aids for examination preparation, but that aspect will not be stressed here.<sup>2</sup> Nutshells even come to be statute law (with, of course, wider implications) and, as such, are prominent in modern law.

The facts that I wish to present are obvious and, indeed, known, and they would be denied (I believe) by no scholar in the fields. But they are under-emphasized, and not considered together. When the facts are put together, they present an (almost) unbelievable picture.

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I wish to dedicate this paper to Professor McKnight for many years of friendship.

1. This paper developed from earlier writings of mine. From references to these, readers will be able to find the secondary literature and fuller argumentation.

2. I have to take this approach because at some times and places, for instance classical Rome and early Byzantium, we do not know much about the role of examinations in legal education, and at other times and places, for instance the seventeenth century in much of Europe, there was no formal training in the local law.

My claim is that modern legal systems, common law and civil law alike, and their spread over many territories in several continents, are inconceivable without the input of Nutshells often written in far-off times and in far-away places.

I also want to show that the history of Nutshells vividly illumines themes that I have pressed for decades.<sup>3</sup> First, they demonstrate the easy transmissibility of legal rules, institutions, concepts and structures from one society to other, very different, ones. Second, they indicate the frequent longevity of such rules, institutions, concepts and structures. Third, their very success is attributable to the lack of interest by governments in law-making, or in inserting particular messages into their legislation.<sup>4</sup> Fourth, likewise, the importance of private Nutshells is evidence of the state's lack of concern for communicating law to its subjects. Fifth, they show that in large measure law does not emerge in any real sense from a society in which it operates.

#### I. CLASSICAL ROMAN LAW

Roman private law has been and is the most admired secular system in the western world.<sup>5</sup> On that there is no disagreement though scholars may differ as to whether the innovative last century and a half of the republic, or the refining principate until a little after 235 A.D., is to be treated as the high point. Such differences of opinion are not significant and, in any event, one period of time shades into another. What does matter is that, for all the praise heaped on it, Roman private law developed in a most lopsided way.

The main vehicles of legal change were the jurists to whom also much of the development of the praetors' Edict must be credited. The praetors were high elected officials and among their duties was control of the courts. The Edict was notice of how they would act in that role. Technically they could not legislate, but in practice they could make whatever changes in the law they wished. For historical reasons which need not be discussed here, those who were interested in law won prestige from their fellow jurists and other influential persons by interpreting the law. Because of the jurists' social and political connections with such people as became praetors, the praetors could issue their legal innovations in the form of very short clauses, leaving the jurists to create the substantive law. The nature of Ro-

3. For these themes, see, e.g., Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd ed. 1993); *Roman Law and Comparative Law* (1991).

4. The fact that great legislators, such as Justinian and Napoleon (and Atatürk) issue Nutshells as statute law is no evidence that legislatures in general are interested in law-making. They themselves insert no particular message in their law: see Alan Watson, *Failures of the Legal Imagination* 47ff. (1988).

5. For what follows on Roman law see Alan Watson, *The Spirit of Roman Law* (1993). Lack of system is discussed in chapter 10.

man actions which were in the hands of the praetors demanded that the scope of each be sharply marked off from the others. In discussing such demarcations, the jurists created wonderfully clear concepts. That is their main claim to fame.

But it must be emphasized that for the unpaid jurists law was not a profession or even a part-time job, but a hobby. Certainly, it was a hobby with political and social implications and rewards, but it was a hobby nonetheless. Law gave leisured gentlemen something to do — and, after all, one must do something — but only interpretation and the clarification of concepts brought prestige. Hence the emphasis on these. No such prestige was attached to reforming or systematizing the law; therefore the jurists were just not interested in law reform or in systematics, or, usually, even in what transpired in court.

It is difficult to exaggerate just how unsystematic, and generally disorganized, Roman law was in the way it was set down. There was only one basic system of courts, that of the urban praetor, but there were two strands of legal development; one was the so-called *ius civile*, civil law, deriving from the *Twelve Tables*, a code of the mid-fifth century B.C., subsequent legislation and juristic interpretation; the other was the Edict and juristic input. Whenever there was a conflict, edictal law prevailed because the court was the praetor's court.

The first book to treat civil law *generatim*, 'by types,' was that of Quintus Mucius Scaevola, *Ius Civile*, which is in no sense a Nutshell. Its contents related to topics set out in the *Twelve Tables*, subsequent legislation that related to these same topics, and edictal provisions that could be attached to such topics. Though one can explain historically the reasons for this concentration, the result is quite simply a mess. For a provision to be inserted into the *Twelve Tables* there had to have been a specific reason such as innovation. Hence whole areas of law that existed even at that date were missing, including the central contract of *stipulatio*, dowry, and the ways of acquiring ownership apart from prescription. Thus, although there was much subsequent legislation on personal guarantees, the whole subject is omitted from Quintus Mucius because such guarantees involved a *stipulatio*. Mucius deals with the *lex Aquilia* on damage to property because it partly replaced provisions in the *Twelve Tables* covering injuries to slaves. But the *lex Cincia* on gifts and the *lex Laetoria* on fraud on minors are excluded because the *Twelve Tables* had no provisions on gifts or minors. On the other hand, purely edictal creations such as sale and partnership are dealt with in the *Ius Civile*, the former because it could be attached to *mancipatio*, a formal mode of transferring ownership, the latter because it could be attracted to the old *ercto non cito*, the common ownership that automatically occurred when an inheritance was not divided up. But other praetorian

innovations such as hire, which has affinities with sale, and the remaining consensual contract of mandate, are not treated, because there was nothing in the *Twelve Tables* to which they could be attached.

The next major treatise on the civil law — again not a Nutshell — was that of Sabinus in the early empire and it followed much of the unsatisfactory arrangement of Mucius, and it also dealt with or omitted the same topics. But between Mucius and Sabinus had occurred a significant development. When no ordinary civil law or edictal action existed but the praetor came to believe one was appropriate, he would grant an *ad hoc* remedy, and this practice became regularized. When the *ad hoc* remedy was close to a topic dealt with in the commentaries on the civil law, it would appear there despite its origins.

Sabinus' *Ius Civile* in its turn became the source of the commentaries — not Nutshells — of Pomponius, Ulpian and Paul on the civil law, books that are, indeed, entitled *ad Sabinum*, 'on Sabinus.' Mucius' unsatisfactory arrangement continued, and important, relevant, topics continued to be omitted.

At the same time as they were composing their commentaries on the civil law, jurists were writing commentaries on the Edict. Since the Edict contained all the civil law remedies as well as praetorian innovations, all of the civil law might have been dealt with in them. In fact, several outstanding civil law topics, such as the *lex Aquilia*, the *vindicatio*, the action for ownership, and the *condictio*, the action for restitution, find their principal home in the commentaries on the Edict. This further brings out the jurists' lack of interest in systematization. No classical jurist ever wrote a commentary putting together civil and praetorian law. And it must again be stressed that there was, in fact, only one law.

But the main proof of absence of systematization is not in the continued separation of conjoined entities, but the lack of any real arrangement in the Edict. Clauses appear haphazardly, at times perhaps in the order of when they were introduced, at times because of the power of attraction of some pre-existing clause. The Edict was put into its final redaction in the second century by the great Julian on the instructions of the emperor Hadrian. Theodor Mommsen comments: 'This order, or disorder, is that of Julian's Edict.' The disorder can still be seen in large measure in the appalling arrangement of Justinian's *Digest*. It is no wonder that Jean Domat (1625-1696) devised his own arrangement for his great work, tellingly entitled 'Les lois civiles dans leur ordre naturel,' 'The Civil Laws in their Natural Order,' or that Robert Pothier (1699-1772) produced a version of the *Digest* with the texts organized in a different order, together with relevant texts from *Code* and *Novels*.

To this lack of system there is one, and only one, exception, namely Gaius' *Institutes*, the Nutshell, a beginner's textbook, written around 161 A.D.<sup>6</sup> It is he who says "All the law we use pertains to persons, things or actions," and who adopts that now famous arrangement in his book. He is the first and only classical jurist to combine the material of civil law and Edict to make a coherent whole. It is Gaius who has a law of persons that includes the law relating to slaves and freedmen. It is he who arranges contracts in four groups in accordance with the manner in which they are formed. He, and he alone, treats the delicts as a unit: in the *Digest* in contrast, damage to property still appears in D.9.2, while the civil wrong of theft is far away, in D.47.2. It is Gaius who organizes contract and delict together, with some other forms, as the law of obligations. Finally, so far as appears, Gaius alone deals with procedure as a unit. He may well, in fact, be given the credit for separating procedure from substantive law.

Gaius had no impact on juristic writing. Long after his day, Ulpian and Paul continued to write on civil law and Edict separately, and to have an incoherent arrangement for each kind of commentary. Gaius was a Nobody. We do not even know the rest of his name. To the best of our knowledge, he was referred to only once, by one jurist. Pomponius calls him "*Gaius noster*," "my friend Gaius." Not surprisingly, modern scholars have often thought that this reference is a Justinianic interpolation.<sup>7</sup> Gaius was a Nutshell writer.

But in accordance with the proper nature of Nutshells, Gaius' *Institutes* was an enormous success with students. More fragments from it have been found on papyri than from any other classical law book. And it deserved its success. Its structure, and the structure of no other law book, allowed the beginner to learn the law easily. But its success in the following few centuries was just the start.

## II. JUSTINIAN'S CODIFICATION

Nothing in the foregoing section should be taken as meaning that from the vantage-point of hindsight I am criticizing the abilities of the Roman jurists. On the contrary, I am well aware of the limitations of the human imagination, and of the difficulties in intellectual progress. As a group, the Roman jurists possessed extraordinary talent: but it was a talent used for interpreting and conceptualization, not for systematization. Nor am I blaming Sabinus for following

6. The *Regulae Ulpiani* has a system based on Gaius, but it is widely believed not to be the work of Ulpian; see, e.g., Tony Honoré, *Ulpian* 111ff. (1982), and the works he cites. If it is by Ulpian, then even more significant is the lack of systematization that is so evident in Ulpian's commentaries *ad Sabinum* and *ad edictum*.

7. But Gaius had become well recognized before 426, the date of the so-called Valentinian Law of Citations: C.Th. 1.4.3; cf., Alan Watson, *Legal Origins and Legal Change* 225ff. (1991).

Mucius; or Pomponius, Ulpian and Paul for following Sabinus. We are all blinkered by what we know.

The massive codification of Roman law made by the Byzantine emperor, Justinian I, is another example of great work performed by blinkered men. What has come to be called the *Corpus Juris Civilis* was never planned as a unit. Instead, the effort was piecemeal.<sup>8</sup>

Justinian was named co-emperor by his uncle, Justin, on 1 April, 527, and became sole emperor on Justin's death on 1 August of the same year. On 13 February, 528, Justinian sent his order to the senate for the preparation of a new *codex*. The purpose was to make available in a convenient form the legal rulings of the emperors, which were still relevant. Law reform was not intended. The general order is that of the Edict, and Justinian's *Code* is divided into twelve books, each of which is further divided into titles.<sup>9</sup> Since the arrangement of the Edict is quite unsystematic, so is that of the *Code*. More than that, within each title the rescripts are arranged not by theme or by importance but chronologically, thus making it difficult for students to find and learn the law. Justinian insisted on that arrangement; oddly, not just because of its lack of system but because each rescript that is included now derives its authority from being in the collection, not from its original promulgation. The date of promulgation should be quite irrelevant. The *Code* was published on 7 April, 529.

Only some time after the promulgation of the *Code* was the scheme devised to issue the *Fifty Decisions* and other constitutions to resolve disputes in the law. The *Fifty Decisions* has not survived as a separate entity (nor has the first *Code*) because of the publication of a revised, second, *Code* which replaced them, and was issued on 16 November, 534. Still, it and the other constitutions were Justinian's vehicle for the reform of the substantive law.

To me it does not seem possible to determine whether the *Fifty Decisions* was promulgated as a preliminary to collecting and concentrating the classical juristic texts, or was conceived of earlier on its own. However that may be, there is ample evidence that the *Code* was issued some considerable time before the plan emerged to collect and abridge juristic texts. The order for this work, now usually known as the *Digest*, was issued on 15 December, 530. The completed *Digest* was issued on 16 December, 533. It is in fifty books, almost all of which are further subdivided into titles. The overall arrangement is again the miserable one of the Edict. Within each title, there is rather more order than in the *Code*, but in large measure it is

8. Cf., e.g., Herbert F. Jolowicz & B. Nicholas, *Historical Introduction to Roman Law* 478ff. (3rd ed. 1972).

9. At least, that is the organization of the second *Code*, which is a revised version of this *Code*.

very mechanical, depending mainly on the point of time at which the compilers read the book from which the extract was taken. As H. Jolowicz and B. Nicholas say, "except in the first few titles, there is no attempt at a scientific order."<sup>10</sup>

Quite separately from the *Code* or *Digest*, Justinian conceived the notion of issuing a textbook for, literally, first year students. Justinian's *Institutes* was an afterthought. It is not clear whether the orders for its preparation were given before the *Digest* was complete — § 3 of its *proemium* claims that the *Digest* was finished — but at least they were given before its promulgation. The *Institutes* were published on 21 November, 533, and both it and the *Digest* came into force as statute law on the same date, 30 December, 533.

Justinian makes his aim for the *Institutes* very plain in J.1.1.2.:

It is very much our view, as we begin our exposition, that the law of the Roman people can most conveniently be set forth, if the individual elements be stated first in a light and elementary manner, the more careful and precise exposition following thereafter. If, following a different course, we were from the outset at once to burden the (as yet) immature and unready mind of the student with a multitude and a variety of matters, one of two things would happen: either we would cause him to abandon his studies or we would lead him — with great toil on his part and often with lack of confidence (which frequently affects students) — with greater delay to the standard which he could have attained earlier, if led there by a gentler path without great labour and diffidence.<sup>11</sup>

10. *Historical Introduction*, p. 483.

11. There are mistranslations of the text in *Justinian's Institutes*, transl. by P. Birks and G. McLeod (1987):

*Iura populi Romani*. "Roman law." But 'Roman law' is *ius Romanum* or *ius Romanorum*. *Iura populi Romani* is "law of the Roman people" which has, I think, a very different emphasis.

*multitudine ac varietate rerum*. "A huge number of distinctions." I would prefer something like "a multitude and a variety of matters." The Latin contains more than they give.

*duorum alterum aut desertorem studiorum efficiemus aut cum magno labore eius* . . . "Half of them would give up. Or else . . . at the cost of toil and tears . . ." This seems a mistranslation for something like "One of two things would happen; either we would cause him to abandon his studies or with great labor he . . ." *Duorum alterum* by itself could mean "one of two people" or "one of two things" but their translation cannot take account of *aut* . . . *aut*, "either . . . or." This seems to be a place where they have changed the punctuation of the Latin which they print — as they do, without saying so—to *Duorum alterum aut desertorem studiorum efficiemus*. *Aut*: But this punctuation is ruled out by the first *aut* which they simply ignore. . . "and tears" in their translation corresponds to noting in the Latin. Though this is the most recent translation of Justinian's *Institutes* into English, it must always be used with caution.

Now we truly have in Justinian's *Institutes* "Law in a Nutshell," a teaching manual for first year students which was also published as the law of the land.

But the direct and most important source of this work, as Justinian himself reports in his *proemium*, § 6, was the *Institutes* of "Gaius noster", "our own Gaius." Nutshell writer in second century Rome elevated to emperor's special friend in sixth century Byzantium.

The arrangement, classifications and even substance of Justinian's *Institutes* are very much those of Gaius' *Institutes*. This is so true that there even exists a modern edition of Justinian's *Institutes* that marks with a different typeface the passages taken from Gaius,<sup>12</sup> as well as a modern translation of Gaius' *Institutes* that marks with a different typeface the passages borrowed by Justinian.<sup>13</sup> This must raise a question to which there is no answer. The *Institutes* was an afterthought to the *Code* and *Digest*. Without such a model as Gaius, would the thought ever have occurred to Justinian to publish an elementary textbook as law? Would there ever have been Justinian's *Institutes*, in whatever form, if there had not been Gaius' *Institutes*? There is no answer, but it is the fact that the question can be raised that is significant. On another matter there can be no doubt. Without Gaius' *Institutes*, the classifications and arrangement of any Justinianian work would have been very different. It is to be remembered that in its systematization Gaius' *Institutes* was unique before Justinian. His compilers could scarcely have hit upon the same scheme by choice or chance. But it is through that scheme that the law students of Justinian's day would be introduced to law, and these classifications and arrangement would dominate their thinking all their lives.

P. Birks rightly stresses the incoherent arrangement of the *Code* and *Digest*, and the systematic organization of the *Institutes*.<sup>14</sup> He continues:

The role of the *Institutes* was to give the student a coherent framework. Once his mind was formed, he could expand this or that section at will. There was no need for the rest of the law library to be systematic.<sup>15</sup>

Birks apparently fails throughout to realize that the *Corpus Juris* was not planned as a unit, and that the *Institutes* was an afterthought. But all the more does the passage by him bring out the achievement of Gaius, and the importance of the *Institutes* for subsequent legal history.

12. John B. Moyle, *Imperatoris Justiniani Institutionum Libri Quattuor* (5th ed. 1912).

13. William M. Gordon, & O. F. Robinson, *The Institutes of Gaius* (1988).

14. In Birks and McLeod, *Justinian's Institutes* pp. 8ff.

15. *Justinian's Institutes*, p. 16.

### III. THE RECEPTION

From the later eleventh century to the codification movement of the eighteenth century the most important event in western legal development was the celebrated Reception of Roman law. This occurred slowly, over a long period of time, at different times in different places and with different degrees of intensity. But what emerged was everywhere the same: a system of private law that is recognizably modern; a system with a considerable input from Roman law; on substance; more especially, on structure; above all, on concepts.<sup>16</sup>

The difficulty of the transformation of what was basically customary law into modern systems has often been stressed. John P. Dawson emphasizes:

Watson evidently considers that this is not the occasion to outline again, as part of the "making" of modern civil law, the strenuous and concerted effort of medieval minds to comprehend and adapt to their own needs the massive legacy in law from antiquity. He does not try to describe the enormous intellectual investment of the glossators or the creative work of their successors, the commentators, led by Bartolus and Baldus. These were the interpreters through whom Roman law was made available to the societies of western Europe. The demands on those who sought to understand and make use of this complex literature certainly did not diminish with the passage of time, for its volume increased steadily. It was a formidable compilation of book learning whose transmission and elaboration were almost necessarily functions of learned men, most of them sponsored by universities.<sup>17</sup>

The account of the effort needed to comprehend Roman Law is both acceptable and accepted. But Dawson also claims:

Yet in Watson's account of the subsequent influence of Roman law on the "making" of modern "civil law systems," the Roman jurists recede from the prominent, indeed the predominant, position that most modern students of Roman law would assign them. Their place is taken, strangely enough, by the *Institutes*, the elementary handbook for beginners that was included as part of Justinian's *Corpus Juris*.<sup>18</sup>

He misunderstands my position, I believe,<sup>19</sup> but that need not detain us here. The issue for us now is different, but it is laid bare by the two quotations from Dawson. Given the complexity and lack of sys-

16. See, e.g., Alan Watson, *The Making of the Civil Law* (1981).

17. Review of Watson, "Making of the Civil Law," 49 *U. Chi. L. Rev.* 597 (1982).

18. *U. Chi. L. Rev.* 596.

19. See Watson, "Legal Change: Sources of Law and Legal Culture," 131 *U. Pa. L. Rev.* 1126 (1983).

tem of both *Digest* and *Code*, which have never been denied, how could the medieval jurists and their successors have made use of Roman law, if the *Institutes* had not existed? ✓

The first printed edition of part of the Justinianian oeuvre was not of the *Digest* nor of the *Code*, far less of the whole *Corpus Juris Civilis*, but of the *Institutes* alone, by Peter Schoeffer at Mainz in 1468. The *Institutes* became both the gateway to knowledge of the law, and also the organizing instrument of the developing systems. There was nothing else that could have served these purposes. At the very least, without the *Institutes*, the Reception would have been incomparably more difficult, hence much slower, and it would have occurred in a very different way. But in fact Justinian's *Institutes* existed and was the basic text for beginning law students throughout Europe for hundreds of years, and gave them their concepts and structures.<sup>20</sup>

The culmination of the Reception before codification was the publication of, quite literally, hundreds of *Institutes* of local law throughout western Europe, especially in the seventeenth and eighteenth centuries. Like Justinian's *Institutes* they had the purpose of introducing the young to law. It was not just that they appropriated (in most cases) the title of *Institutiones*, but in the main they followed the classifications and arrangement of Justinian's *Institutes*. In general, but not inevitably, they had other features in common. First, in length and in detail of treatment they are very similar to Justinian's *Institutes*. Second, they deal only with legal topics that are dealt with in Justinian's *Institutes*. Third, they do deal with all topics dealt with in Justinian's *Institutes*, with the frequent exclusions of criminal law and procedure.<sup>21</sup>

Their importance was manifold. They portrayed the local law with a coherent structure, when frequently there was no structure. Again, because of their nature they tended to fill gaps in the local law with Roman law, and even to downplay the extent of local law. At the least they portrayed the local law from a Roman perspective. What has to be emphasized here is the relative paucity of other comprehensive works on local law. Lastly, they could have an enormous impact on training the young. This was especially the case where, as was common, there was no formal education in the local law; there was often no other guide.

One of the earliest and most famous of local *Institutes* was Hugo Grotius' *Inleidinge tot de hollandsche Rechtsgeleerdheid*, written be-

20. The argument is not that Justinian's *Institutes* was the cause of the Reception, or that the Reception would equally have occurred if the *Institutes* alone had existed, but only that the Reception would not have occurred or would have been very different if the *Institutes* had not existed.

21. For a general account, see Watson, *Making of the Civil Law* 62 ff. They do, of course, have mediaeval forerunners.

tween 1619 and 1621, and published in 1631. This was written for the education of his sons. The largest local *Institutes* that I know, and also among the furthest removed in structure from Justinian, is the most famous book on Scots law, Lord Stair's *Institutions of the Law of Scotland*, written in the early 1660's, and published in 1681. I believe that it was in response to, and in some measure in reproof of, this that Sir George Mackenzie published his *Institutions of the Law of Scotland* in 1684.<sup>22</sup> It is not only that Mackenzie published so shortly after Stair, chose the same title, and never refers to Stair expressly, but that his book is the shortest local *Institutes* known to me. Moreover, he says:

that if any Man understands fully this *Little Book*; Natural Reason, and Thinking, will easily supply much of what is diffused, through Our many volumes of Treatises, and Dictionaries; Whereas the studying those, would not in many years give a true Idea of Our Law; and does rather distract than instruct. And I have often observed, that more *Lawyers* are ignorant for not understanding the first Principles, than for not having read many Books; As it is not much ryding, but the ryding in the known road, which brings a Man to his Lodging soon, and securely.

"Ryding in the known road" seems to mean following the known arrangement of Justinian in a way that Stair did not. Significantly, it was the tiny Nutshell of Mackenzie, "*Little Book*" as he emphasizes, and not the large Stair, that became the text for teaching Scots law for many years to come.<sup>23</sup>

#### IV. BLACKSTONE AND ENGLAND

One land that did not succumb to the Reception was England. There was considerable borrowing, but England never took the *Corpus Juris* or part of it as the law of the land or of direct and highly persuasive force.<sup>24</sup> English law was based on case law and statute.

For various reasons it is difficult to build up law on the basis of cases, but it is especially hard to make the law systematic because there is no organizing principle. English judges avoided (and avoid) discussing hypothetical cases, hence different but related situations were not taken into account. Thus, it was hard to build up or set out clearly and adequately the topic of law under consideration, say, warranties in sale, harder still to develop the branch of the law to which

22. See Watson, "Some Notes on Mackenzie's *Institutions* and the European Legal Tradition," 16 *Ius Commune* 312 (1989).

23. For this I am indebted to John W. Cairns' as yet unpublished paper, "Mackenzie's *Institutions* and Law Teaching in eighteenth century Scotland," of which a summary appears in 7 *Journal of Legal History* 86 (1986).

24. For a preliminary attempt to explain the non-Reception in England see Watson, "The Evolution of Law: Continued," 6 *Law and History Review* 553 (1987).

Wrong! - natural law.

the topic belonged, such as sale, and harder still to build up the wider category to which the branch of law belonged, such as contract, and impossible to create a general structure. Without something more, law resting on cases is nothing but an amorphous mass.

But English statute law was, and is, notoriously unsystematic. Edward VI (1537-1553) wanted overlapping statutes to be brought together, and made plain and short. The Lord Keeper, Sir Nicholas Bacon (1509-1579) produced "a short plan for reducing, ordering and printing the Statutes of the Realm." James I. (1566-1625) expressed the wish that some unsatisfactory statutes be reviewed and reconciled, and contradictions removed. Francis Bacon (1561-1626), when he was Attorney General, wanted "the reducing of concurrent statutes, heaped one upon another, to one clear and uniform law." Severe criticism continues of the unsystematic nature of English statutes.<sup>25</sup>

To create a system became the task of text-book writers, and especially of Nutshell writers. A striking example is John Cowell, *Institutiones Iuris Anglicani*, 'Institutes of English Law.' This was published in 1605, and is perhaps the earliest of the Institutes of local law. It was modelled entirely on Justinian's *Institutes*. It contains every title in Justinian, with exactly the same heading; and there is no title that is not found in Justinian. The book was popular, but its structure was too remote from the reality of English law to have much impact on subsequent writers. Sir William Blackstone described the arrangement as "forced and defective."<sup>26</sup>

But the English Gaius — as he is often called<sup>27</sup> — who cast English law into a structure that was systematic, largely satisfactory, and both usable and used as an organizing principle was Blackstone himself in his *Commentaries on the Law of England* (first published from 1765 to 1769). My friend, Joe McKnight objects here, saying "Yes, but, Blackstone is not a Nutshell writer in the sense that Gaius and Justinian are." Joe was thinking of the length of the *Commentaries* which is considerably greater than that of Gaius and Justinian, and of the use of Nutshells in preparing for examinations. To that I would respond that for me what makes a Nutshell is its introductory nature, the generality of the treatment, and the overall absence of detail. With regard to the length of treatment of private law, the main subject of local *Institutes*, Blackstone is not out of line. That is treated in book one only from page 410 to 437 in the first edition, and

25. For more detail and references see Alan Watson, *Sources of Law, Legal Change, and Ambiguity* 77 (1984).

26. Preface to his *Analysis of the Laws of England* (1st ed. 1756). For more on Cowell's *Institutiones* see Watson, "Justinian's Institutes and Some English Counterparts," in *Studies in Justinian's Institutes in Memory of J.A.C. Thomas* 182 (P.F. Stein & A.D.E. Lewis eds. 1984).

27. See, e.g., Milsom, "The Nature of Blackstone's Achievement," 1 *Oxford Journal of Legal Studies* 1 (1981).

in book two. By far the greater part of book one deals with what the Romans would have regarded as public law, book three deals primarily with civil procedure, and book four with criminal procedure. In Justinian's *Institutes*, private law occupies three and a half of his books.<sup>28</sup>

In terms of the audience to which the *Commentaries* was directed, it fully deserves the title of Nutshell. The published work derives from Blackstone's lectures at Oxford. The advertisement for the course of lectures, which was published at Oxford on 23 June 1753, has: "This Course is calculated for the Use of such Gentlemen of the University, as are more immediately designed for the Profession of the Common Law; but of such others also, as are desirous to be in some Degree acquainted with the Constitution and Polity of their own Country." The lectures were designed as a one year introductory course for those thinking of becoming lawyers, and also for gentlemen who had no such intention. In his Introduction to the *Commentaries* Blackstone stresses their usefulness for "our gentlemen of independent estates and fortunes."

Though he was also much influenced by Matthew Hale,<sup>29</sup> Blackstone in his *Commentaries* adopted the fundamental structure of Justinian's *Institutes*. But he altered the balance in accordance with the realities of English law.<sup>30</sup> Details of his systematization are not needed here, but S.F.C. Milsom says of his articulation of English law: "I believe that what he did was immensely difficult, that it was a turning-point in the development of Anglo-American law, and that it has its place in a longer and wider history."<sup>31</sup> For Daniel Boorstin, "While Blackstone had violated the spirit of the common law by confining it in a system, he had provided for the first time the means by which any literate person could grasp the large outlines of his legal tradition."<sup>32</sup> Anyone inclined to doubt the difficulty of understanding English law without the systematization of Blackstone (and other institutional writers) should try to make sense of the law as set out in such distinguished works as S.F.C. Milsom, *Historical Foundations of the Common Law*<sup>33</sup> or John H. Baker, *Introduction to English Legal History*.<sup>34</sup>

28. See also Cairns, "Blackstone an English Institutist: Legal Literature and the Rise of the Nation State," 4 *Oxford Journal of Legal Studies* 318 (1984).

29. *The Analysis of the Law*, first published in 1713.

30. See now Watson, *Roman Law and Comparative Law* 166 ff.

31. 'Blackstone's Achievement,' 4.

32. *The Americans: The Colonial Experience* 202 (1958).

33. (2nd ed. 1981).

34. (2nd ed. 1979).

Blackstone

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□ cite.

## V. BLACKSTONE AND AMERICA

That the *Commentaries* had an enormous impact on the development of American law is well-known. I will let Gareth Jones speak for all.

It was not until the middle of the eighteenth century that the common law began to take root in the colonies; and after the Revolution, in some states such as New York, its future was obviously not assured. Blackstone's *Commentaries* played a considerable part in establishing the common law before and after the Revolution. In the colonies trained lawyers were few and tended to practice in the larger towns. Law books were expensive so that even second-hand legal advice was hard to come by. The *Commentaries* filled these gaps and provided a rounded picture of the common law and its institutions. In its four volumes there was enough hard law to satisfy the appetite of the profession and enough elegant exposition to attract the literate. For the colonist the great merits of the *Commentaries* were their comprehensiveness and their lack of subtlety. The answer to most of his legal problems could be found there, and the relevant principles of law were stated in terms which left little doubt as to their scope and application.<sup>35</sup>

Great though G. Jones claims the influence to be, I think he rather understates the impact of Blackstone's *Commentaries*. The success of English common law in America is virtually unthinkable without it. How was an American to find the law, in the absence of Blackstone, in the morass of cases? Cases in which rules of law, principles of law, structures of law, were not set out, and in which no system of law was apparent. At the beginning of the Republic there were no reports of the cases of any State. These reports emerged sporadically and often left unreported many important cases.<sup>36</sup> Admittedly, attorneys had other short books on English law that they could use, notably Edward Coke,<sup>37</sup> Francis Bacon,<sup>38</sup> and William Bohun.<sup>39</sup> But the arrangement of Coke's *Institute* — note the name — is notoriously disordered,<sup>40</sup> Bacon expressly claims in his preface that he has not digested "rules into a certain method or order;" and Bohun's book is a

35. *The Sovereignty of the Law* xviii (1973).

36. See, e.g., the complaints in the prefaces to 1 Bay (South Carolina); 1 Nott & McCord (South Carolina).

37. *Institutes of the Laws of England*. The first volume, *Commentary on Littleton*, was published in 1628.

38. *Elements of the Common Law of England* (1630).

39. *Institutio Legalis*. The second edition appeared in 1713.

40. See, e.g., Alfred W. E. Simpson, *Biographical Dictionary of the Common Law* 120 (1984).

manual of procedure. In any event, in general, law books were scarce.<sup>41</sup>

One may readily postulate that without Blackstone law would have developed by more use being made of State legislation which, in any event, was not inconsiderable. But this legislation would have strayed further from English law. We should not forget that continental European civil law was found attractive in the years of the early Republic.<sup>42</sup>

Indeed, that the *Commentaries* was needful is indicated by the fact that it was used at all. Blackstone was offensive to many in America for his Tory views, and his anti-republicanism. Thomas Jefferson severely criticized him more than once. Yet until the publication of James Kent, *Commentaries on American Law*, which began in 1826, Blackstone's *Commentaries* was the law book in America. Of course, the *Commentaries* which spawned so many American editions was not the same as it was in England. Beginning with the edition published by Robert Bell in Philadelphia in 1771-1772, it was altered to meet the American market. With the publication of George Tucker's edition in 1803, Blackstone's monarchism was defanged. Blackstone, England's *Gaius*, was also America's Nutshell.

It is easy to forget just how popular Blackstone was in the early U.S. But the figures are startling. I count published in America at least 21 normal English editions, 94 editions with American notes, and 55 editions of abridgements.

Almost as an addendum to Blackstone in America, I want to bring in, in passing, a minor strand in American legal history; Roman law. Both in cases and in writers such as James Kent and Joseph Story references to Roman law, including Justinian's *Digest* and *Code*, are not uncommon. But there is a twist. Frequently it can be shown that the American citator has taken his reference to the *Digest* or *Code* at second-hand, and has not looked at the original.<sup>43</sup> No doubt he has done the same in other instances without leaving fingerprints. As apart even from this pécadillo judicial opinions reveal, American knowledge of Roman law was limited to Justinian's Nut-

41. See Daniel J. Boorstin, *The Americans* 200 (1968); Pole, "Reflections on American Law and the American Revolution," 50 *Wm. & Mary Q.* 124, 142 (1993). For holdings see William H. Bryson, *Census of Law Books in Colonial Virginia* (1978); Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries, 1700-1799* (1978).

42. See, e.g., Perry Miller, *The Life of the Mind in America* 164 ff. (1966); Stein, "The Attraction of the Civil Law in Post-Revolutionary America," 53 *Va. L. Rev.* 403 ff. (1966); Hoeflich, "Roman Law in American Legal Culture," 66 *Tul. L. Rev.* 1723 ff. (1992); Helmholz, "Use of the Civil Law in Post-Revolutionary American Jurisprudence," 66 *Tul. L. Rev.* 1649 ff. (1992).

43. See, e.g., Watson, "Chancellor Kent's Use of Foreign Law," in *The Reception of Continental Ideas in the Common Law World 1820-1920* 45 ff. (Mathias Reimann ed. 1993).

shell whether in the American edition of Thomas Cooper (first published in 1812), or with the European commentaries (for beginners) of Heineccius (1681-1741) or Vinnius (1588-1657). Nutshells rule again.

#### VI. THE FRENCH *Code Civil*

The last main event in western legal development that I set out at the beginning of this paper was the codification movement in Europe from the eighteenth century onward, and notably the French *Code civil*. Historians, in assessing the contribution of juristic writings to the *Code* stress Jean Domat and Robert Pothier. But their influence was often at second-hand. The Nutshell writers who derived from them are often overlooked.

The honor of determining the arrangement of the *Code civil* is now often given to a book which until recently was little known, François Bourjon's *Le Droit commun de la France et la coutume de Paris réduits en principes, tirés des lois, des ordonnances, des arrêts des jurisconsultes et des auteurs, et mis dans l'ordre d'un commentaire complet et méthodique sur cette coutume: contenant dans cet ordre, les usages du châtelet sur les liquidations, les comptes, les partages, les substitutions, les dimes, et toutes autres matières*, ("The Common Law of France and the Custom of Paris, reduced to principles drawn from the laws, ordinances, the decisions of jurists and authors, and put in the order of a complete and methodical commentary on that custom: containing in this order the usages of the law-court in Paris on winding up, accounts, divisions, entails, titles, and all other matters"), first published in 1743, whose third and final edition appeared in 1773. A comparison by André-Jean Arnaud of the provisions of Bourjon, *Droit commun*, and of the *Code civil* shows that the three books of the *Code* correspond closely in arrangement to the first three books of Bourjon.<sup>44</sup> This is most easily seen in the major arrangement. Thus in both cases the title of the first book is "Des personnes (persons)"; for the second book, Bourjon has "Des biens (things)," the *Code* has "Des biens et des différentes modifications de la propriété (things and the various modifications of ownership)"; for the third, Bourjon has "Comment les biens s'acquierent (the acquisition of things)," the *Code* has "Des différentes manières dont on acquiert la propriété (the different ways of acquiring ownership)." Although Bourjon's work is in six books, the contents of the last three fit into the general structure of the *Code civil*.

Arnaud also makes a direct comparison of contents: the feudal matters in Bourjon do not appear in the *Code civil*, since feudal inci-

44. *Les Origines doctrinales du code civil français* 159 ff. (1969). See also René Martinage-Barranger, *Bourjon et le code civil* (1971).

dences and distinctions had been abolished; whereas in addition to what is in Bourjon, the *Code* contains only one title (I.8) on adoption, a subject that was introduced into French law by Napoleon (but which existed in Justinian's *Institutes*); one (II.2) on property; and one (III.3) on the general theory of contract.

Bourjon's *Droit Commun*, in two large folio volumes, is perhaps just too large to merit the appellation of Nutshell.<sup>45</sup> But there does exist another work which does undoubtedly deserve the title of Nutshell and which is closer in the arrangement of the chapters of its four books to the actual arrangement of the individual provisions of the *Code civil*. This is Gabriel Argou, *Institution au droit français*, first published in 1692 and which reached its eleventh edition by 1787, two years before the *French Revolution*. Here we have, I believe, the prime source of the structure of Napoleon's *Code civil*. Given the enormous popularity of Argou's *Institution* as a novice's first book, as evidenced by its longevity and number of editions, this cannot be a matter for surprise.

But Bourjon and Argou are not the only candidates for the honor of being responsible for the structure of the *Code*. Christian Chêne<sup>46</sup> produces strong arguments on behalf of J.-J. Julien, *Elemens de jurisprudence selon les lois romaines et celles du Royaume* (1785). Julien was the teacher of Portalis, the most celebrated of the drafters of the *Code*, and his *Elemens* is again a Nutshell.

The uninitiated may be taken aback that scholars may proffer alternative works as the structure of the *Code civil*. The answer is that Bourjon, Argou and Julien, like most local *Institutes*, have considerable similarity of structure because they are modelled, directly or indirectly, on Justinian's *Institutes*. Indeed, more than one such work may have been in the minds of the drafters of the *Code*.

But Napoleon's statutory Nutshell, based on an actual Nutshell, was to spread round the globe. The first steps in the reception of the French *Code civil* were the direct result of Napoleon's own conquests. Later, the *Code's* own accessibility as a Nutshell did the trick. But that is a story that need not be set down again.<sup>47</sup>

#### VII. CONCLUSIONS

I am now at the end of the main part of my essay, and I hope I have made good my claim. I am aware that I have oversimplified — there is much more to the role of Nutshells — but I have not exaggerated. It was a Nutshell that provided the only systematic structure in classical Roman law.<sup>48</sup> A statutory Nutshell, based on that one, pro-

45. Joe McKnight insists it is much too large to count as a Nutshell.

46. *L'Enseignement du Droit français en Pays de Droit écrit (1679-1793)* at 302 (1982).

47. See, e.g., Alan Watson, *Making of the Civil Law* 121 ff. (1981).

vided the only systematic part of the Byzantine compilation of the emperor Justinian I. Without that Nutshell, the Reception of Roman law would have been both a great deal more difficult and would have been very different. Blackstone's Nutshell created a system that did not exist in the labyrinthine swamp of English law. That Nutshell greatly facilitated, probably even enabled, the acceptance of English common law in the U.S. Another, French, Nutshell, ultimately rooted in Justinian's Nutshell, gave the basic structure to Napoleon's *Code civil*. In that form of a legislative Nutshell, French law was accepted in many other countries. Law in a western world without Nutshells would be unrecognizable by us.

But why, one must ask, have Nutshells played so important a role? A first part of the answer is that private Nutshells have filled a void caused by the lack of interest on the part of governments and the principal subordinate law-makers to systematize the law, far less to communicate it in an approachable form. At Rome, the government did not give the law a systematic structure by legislation, neither praetor nor emperor sought to organize the Edict rationally, jurists, despite their huge commentaries on the civil law and Edict, never sought a sensible amalgamation of the strands of the law or to rearrange the disorder of their predecessors. The compilers of Justinian's *Codes* and *Digest* neglected to reform the structure. In England, the legislature never set out the law in an orderly fashion, nor did the judges demand and execute an arrangement of their decisions. In addition, one should be aware that apart from their achievements in Nutshell writing, the authors tend to be insignificant figures. All that is known about Gaius comes from his writings; Blackstone, apart from the *Commentaries*, would be an obscure figure in England. Argou does not merit a mention in the multi-volumed *Dictionnaire de Biographie Française*.

A second part of the answer is that in a complex society, the law is complicated. It can be readily understood only if simplified, and the interactions of the various branches of the law, and the structures of the law become apparent only after this simplification.

A third part is that Nutshells introduce beginners to law. As a result they determine forever the pattern and parameters of the lawyers' thought. Indeed, they usually have no challenge to meet.

#### VIII. NUTSHELLS AS LAW

But I am reluctant to end. The fundamental and central importance of Nutshells is not restricted to the few main events of western legal development. The need for them surfaces over and over again, in one guise or another, in one place or another. They often occupy

center stage. Two final examples may suffice, where a Nutshell became the main law of the land.<sup>48</sup>

Some of the Boers, who had trekked north from the British Cape Colony from 1835 onwards, declared a sovereign republic, Transvaal, across the river Vaal, on 9 April, 1844. A constitution, the Thirty-three Articles, was issued in the same year. Article 31 provided that "Hollandsche Wet," "Dutch law" was to be the basis of the law in so far as it did not conflict with legislation, "but only in a modified way, and in conformity with the customs of South Africa and for the benefit and welfare of the community." Bijlage 1, Appendix 1, of the *Grondwet*, constitution, of 19 September 1859, clarified the meaning of "Hollandsche Wet." In the absence of legislation, Johannes van der Linden's *Rechtsgeleerd practicaal en koopmans Handboek* was to remain ("blyft") the law book of the state.<sup>49</sup> If a matter was not dealt with, or not clearly enough, Simon van Leeuwen's (1626-1682) *Het Roomsche-Hollandsche Recht*, and Grotius' *Inleidinge* were to be binding. The use of all three was to be made in accordance with article 31 of the Thirty-three Articles.

Van der Linden's book, commonly known as the *Institutes*, has for its full title, *Rechtsgeleerd practicaal en koopmans handboek, ten dienste van regters, praktizijns, kooplieden, en allen die een algemeen oversich van rechtskennis verlangen*, 'Legal, practical and merchant's handbook, for the use of judges, practitioners, merchants, and all who require a general overview of legal knowledge.' It was written not for South African, but for Dutch use, and was published in Amsterdam in 1806. It is, indeed, a Nutshell, in three short books, "hardly more than an elementary guide."<sup>50</sup> For the importance of Nutshells it is significant that Van der Linden's book and the Nutshells of the two

48. In this section I distinguish between Nutshells written by private individuals which later became law, and Nutshells originally produced as statute law.

Joe McKnight reminds me of the success of Ignacio Jordan de Asso y del Rio and Miguel de Manuel y Rodriguez, *Instituciones del derecho civil de Castilla*, first published in 1771. This was prescribed as a basic textbook in the Spanish Universities and was much used as a guide to law in the Spanish colonies. It was translated by Lewis Johnston, one of the British judges in Trinidad, and published in London in 1825 under the title *Institutes of the Civil Law of Spain*. This translation was inserted into Joseph M. White, *A New Collection of Laws, Charters and Local Ordinances of the Governments of Great Britain, France and Spain, Relating to Concessions of Land in their Respective Colonies together with the Laws of Mexico and Texas on the Same Subject* (1839). It was from Asso and Manuel in this form that Texans in the 1840's drew their knowledge of Spanish law.

49. There has been controversy over the force of "blyft," but there seems no evidence that the book was legislatively adopted earlier: see, e.g., H.R. Hahlo and Ellison Kahn, *The Union of South Africa* 21 n.60 (1960). The term may simply indicate that in practice Van der Linden had already become the law book. Bijlage 1 is conveniently reproduced at p. xiii of Simon van Leeuwen, *Censura Forensis Part 1 Book V*, translated by Margaret Hewett (1991).

50. W.J. Hosten and others, *Introduction to South African Law and Legal Theory* 183 (1977).

other jurists were preferred over the Dutch *Burgerlijk Wetboek*, civil code, that had come into force in 1838.

The subtitle should not mislead. How can a law text be intended for the use of judges and practitioners on the one hand, and for merchants and all who want an overview of the law on the other? There is no doubt that this is a Nutshell; indeed, it is among the shorter. Perhaps the reference to judges is mere persiflage. Alternatively, Van der Linden is priding himself on providing the law up-to-date: he was, it should be noted, the editor of the *Groot Plakaatboek*, the large collection of the decisions of the States-General of the United Netherlands; he published a *Supplementum*, bringing the first eleven books of Johannes Voet, *Commentarius ad Pandectas* up-to-date; and in 1807 he drafted a civil code that never came into force.<sup>51</sup> His Nutshell was translated into English three times,<sup>52</sup> and served as a Nutshell for generations of South African students. It was used as a legal, not a historical, text.<sup>53</sup>

The second example is the Byzantine *Hexabiblos*, 'The Six Books,' which was the work of Harmenopoulos, a judge in Thessalonika, and which was published around 1345. More than once this has been called "a miserable epitome of the epitomes of the epitomes," or in our terminology, "a miserable Nutshell of Nutshells of Nutshells."<sup>54</sup> Whatever its merits or demerits, the *Hexabiblos* had a considerable impact on the law of Greece and the Balkans in general.<sup>55</sup> A decree dated 23 February 1835 enacted that the *Hexabiblos* should be in force as the law of the Kingdom of Greece, subject to contrary custom or the practice of the courts, until a civil code could be promulgated.<sup>56</sup> The Greek civil code came into force on 23 February 1946.

#### IX. NUTSHELLS AND SOCIOLOGY OF LAW

A standard feature of the influence of Nutshells is that often it occurs late and in another land, even another continent. This fact makes me wonder about the accuracy of such statements as:

51. See, e.g., H.R. Hahlo and Ellison Kahn, *The South African Legal System and its Background* 560, 563, n.9 (1968).

52. By Henry Juta (1897; 5th ed., 1906, students' abr. ed. (1920); by J. Henry (1828); G.T. Morice (1914; 2nd ed. 1922).

53. See, e.g., C.J. de Wet, *Die ou Skrywers in Perspektief* 176 (1988); the (unpublished) Minute Book of the University of Cape Town, for 12 March 1859; *S.A. College Calendar of 1895-96*. Van der Linden seems not to have been a prescribed book at the University of Cape Town after 1919. I am deeply indebted to Margaret Hewett who supplied me with information not available in this country.

54. See, e.g., by Panagiotis Ioannou Zepos, *Greek Law* 32 (1949); Jolowicz & Nicholas, Introduction, 504.

55. See, e.g., Zepos, id.; Konstantinos D. Kerameus & P. John Kozyris (eds.), *Introduction to Greek Law* 6 (1988).

56. In practice, Pandectist law was influential.

Every legal system stands in a close relationship to the ideas, aims, and purposes of society. Law reflects the intellectual, social, economic, and political climate of its time. It also reflects the particular ideas, ideals, and ideologies which are part of a distinct "legal culture" — those attributes of behavior and attitudes that make the law of one community different from that of another, that make, for example, the law of the Eskimos different from the law of the French.<sup>57</sup>

Of course, changes are made at the time of adoption. Blackstone's account of constitutional matters in monarchical England could not fit republican America. Since the Boers had trekked because they feared blacks would be given equal political rights, Dutch law could fit only "in conformity with the customs of South Africa." But that law texts written in a very different place and very different time can be recycled so readily suggests problems for views that "Law reflects the intellectual, social, economic, and political climate of its time." In what sense does Gaius' *Institutes* reflect the society of pagan Rome and with some modifications, Christian Byzantium? Or is it that it did not reflect conditions at Rome, was exceptional and not law, but by happenstance (I suppose) was a reasonable mirror image of conditions in Byzantium four centuries later? And if Van der Linden's book accurately states Dutch law, was the "intellectual, social, economic, and political climate" of Holland in 1806 basically that of the Transvaal in 1859? Whom are the authors of such views trying to kid?<sup>58</sup>

To return to Justinian's *Institutes* for a moment. Of course, it is true that the substance of the law is not identical with that set out by Gaius. But I would defy anyone to produce from the body of the work one scrap of evidence that the *Institutes* is in any way indicative of the specific religious, political, economic or social conditions of early Byzantium. Christianity is not even mentioned. If the *Institutes* had mirrored Byzantine conditions, it would have been influential in the west only with difficulty.

Moreover, even when the Nutshell is fundamentally changed, the old, distant, original may still leave tracks which affect the more recent law. Otto Kahn-Freund, as a German refugee to England, has declared his surprise at the poor development of the English contract

57. Steven Vago, *Law and Society* 3 (1981). Such assertions are commonplace: a strong example is Lawrence M. Friedman, *History of American Law* 695 (2nd ed. 1985).

58. There are other factors that indicate that law does not particularly reflect the society in which it operates. See, e.g., Alan Watson, *Roman Law and Comparative Law* (1991) especially 97 ff., 122 ff., 182 ff., 201 ff., 221 ff., 245 ff., 266 ff.; Joseph Story and the Comity of Errors (1992); *Legal Transplants: an Approach to Comparative Law* (2nd ed. 1993).

of employment. This he found dealt with in books on 'Domestic Relations,' and he blames the treatment of the subject on Blackstone who treated 'Master and Servant' as part of the law of persons. This is possibly curious as Kahn-Freund says, but it is much more curious that it is the first subject Blackstone deals with in the law of persons. Why does he do so? The answer is that he is following Justinian's *Institutes* which has at *J.1.3pr* "The principal distinction in the law of persons is that all men are either free or slaves," and then deals with slavery. For Blackstone, the English analogue with slaves was employees, hence 'Master and Servant' is the first topic in the law of persons.<sup>59</sup>

#### X. DESPERATELY NEGLECTING NUTSHELLS

Various factors, both general and particular, explain the failure to recognize Nutshells as being among the paramount factors in legal development.

Scholars regard Nutshells as beneath notice. The second quotation from Dawson is indicative. Scholars also generally work with one legal system, and are unaware that a particular feature in that system is prominent in many others, and has a general significance. Those scholars, and there are many, who believe law develops from societal conditions cannot accept the importance of Nutshells, or they would have to change their field of study. Typically, Nutshells have an impact elsewhere and later than their place and time of writing.

Among particular factors, students of classical Roman law admire it, see it against the backdrop of the later *Corpus Juris Civilis* and its subsequent success. They are barely conscious that only Gaius gave a systematic structure to the law. Continental legal scholars emphasize jurists who are regarded (rightly) as innovative, such as Bartolus, Cuiacius, Donellus, Domat, Pothier and Savigny, and seldom read institutional writings. Most English legal historians are insular, and do not place Blackstone in a European context. American legal historians are skeptical of the role of legal doctrine so downplay the role not only of Blackstone, but also of other writers, even of non-Nutshell authors, such as Joseph Story.

#### XI. THE FUTURE?

Someone may now ask about the impact of today's Nutshells. But as, I am told, Yogi Berra said, "To predict the future is difficult because it hasn't happened yet."<sup>60</sup> I doubt if the Roman Gaius and the contemporary jurists who ignored him ever dreamt that in another

59. For more detail see Watson, *Roman Law and Comparative Law* 207 ff. (1991).

60. At this point I am relying on information supplied by an esteemed colleague, not upon direct examination of the primary sources. I am aware of the risk. Student editors please note: I am teasing.

four centuries his *Institutes* would be the basis of a Byzantine textbook as statute law. Despite Justinian's high claims for his codification, I suspect that not even he envisaged the success of his *Institutes*. Could anti-republican, archetypical Englishman, Blackstone have foreseen the role he was to play in republican America? And what about Argou, van der Linden, or Harmenopoulos?

The most that can be said is that among writings of American academics that may affect future law on a broad scale, perhaps elsewhere, Nutshells have little competition.<sup>61</sup> Certainly Casebooks cannot fulfil that role: they are insufficiently systematic and do not set out the legal rules. Nor can standard Law Review Articles: nuggets of information are hidden in a mountain of pages, the articles are chosen for topicality by inexperienced students who cannot judge, and, besides, they play virtually no role in legal education. In contrast Nutshells play a central, unrecognized, part in legal education. It is they that are addressed, in the words of Justinian in the opening allocution, "to the young desirous of legal knowledge."<sup>62</sup>

61. I leave out of account the publications of the American Law Institute which are a very different enterprise.

62. The approach of American professors to teaching first year law students is diametrically opposed to that of Justinian.