LEGAL CLASSIFICATION AND THE SCIENCE OF LAW

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. . . competent classification is essential to intellectual advance, and irresponsible classification leads to endless confusion.

W A Sinclair, *The Traditional Formal Logic.*

. . . a doctrine of classification . . . seeks to indicate the principles which should serve as a guide in classifying objects scientifically.

J N Keynes, *Formal Logic.*

Much has been written on the classification of law. For this we are indebted to the civil law tradition. Very little has been written on the classification of the English common law,[1] however; and still less done by way of its formal classification.[2] In this, as in so many other ways, English and continental jurisprudence are very different.

I THE CONTEXT OF CONCERN FOR CLASSIFICATION IN THE COMMON LAW

Sir John Salmond[3] complained that insofar as "English law possesses no received and authentic scheme of orderly arrangement", common lawyers have shown themselves to be "too tolerant of chaos". This is so, despite ". . . the opposite extreme . . . of attaching undue importance to the element of form. . . . In the classification of legal principles the requirements of practical convenience must prevail over those of abstract theory".

Another and more impersonal explanation for the lack of classification in English law had already been attempted by Sir Henry Maine. He saw the common law's lack of classification to arise from its reliance on legal fiction as an instrument of social change.

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1 J D Andrews, "The Classification of Law" (1910) 22 Green Bag 556; S Amos, *The Science of Law* (2nd ed 1874); K Gareis, "Systematic Classification of the Law" (1911) 23 Green Bag 180; K Gareis, *Introduction to the Science of Law: Systematic Survey of the Law and Principles of Legal Study* (3d rev ed 1968); J Hall, *Readings in Jurisprudence* (1938) 578; Sir Thomas E Holland, *The Elements of Jurisprudence* (13th ed 1924); J A Jolowicz, *The Division and Classification of the Law* (1970); G W Keeton, *The Elementary Principles of Jurisprudence* (1949) 225-452; A Kocourek, "Classification of Law" (1934) 11 NYULQ Rev 319; F Pollock, "Divisions of Law" (1894) 8 Harv L Rev 187; R Pound, *Jurisprudence* (1959) vols i-v, R Pound, "Classification of Law" (1924) 37 Harv L Rev 933; Sir John W Salmond, *Jurisprudence: or Theory of the Law* (1902); Gareis' *Introduction to the Science of Law* belongs to the civil tradition. It is included because of its effect on American jurisprudence. If by its content and approach one were to judge it to be a work of continental jurisprudence, then so also must this judgment befall the work of not only Kocourek, but also Hohfeld in analytic jurisprudence. The result is to further reduce the bibliography of Anglo-American jurisprudence on the classification of common law.

2 See Amos, Gareis, Kocourek, Pound (op cit).

3 Op cit Appendix III, The Divisions of the Law 532.

In *Ancient Law*[4] Maine thus wrote of legal fictions that "... they are the greatest of obstacles to symmetrical classification", and "[i]f the English law is ever to assume an orderly distribution, it will be necessary to prune away the legal fictions which, in spite of some recent legislative improvements, are still abundant in it". Some twenty-three years later, in his last chapter of *Early Law and Custom,*[5] Maine was to advert again to the relationship between legal classification and law reform. Writing, admittedly on classifications of legal rules at large and referring to Roman law in particular, he was to contrast these two related concerns of legal theorists. "It would seem, in fact," so he wrote, "that in the seventeenth century, which was a great juridical era, theories of legal classification took very much the place of those theories of law reform which so occupied the minds of the last generation of Englishmen. The continuous activity of legislatures is an altogether modern phenomenon; and, before it began, an intellect of the type of Bentham's, instead of speculating on the possibility of transforming the law into conformity with the greatest happiness of the greatest number, or with any other principle, speculated on the possibility of rearranging it in new and more philosophical order."

As a matter of integrative jurisprudence we may find that both Salmond and Maine's apparently conflicting views are right. The common lawyer's tolerance of chaos and unconcern for classification are explained by the role of legal fictions in redressing the evils of the formulary period of development in English law. The evils of the writ system were those in which the claims of abstract logic prevailed over the development of remedial justice. The breakthrough from a static to a progressive society was achieved first gradually by legal fictions then more explicitly and exponentially with equity and legislation. In the centuries-old and relatively continuous evolution of English law the common lawyer has learnt by bitter experience to be more tolerant of chaos than his continental neighbour.

Maine's observations enlighten a common concern of those who in continental jurisprudence profess a science of law, and those who in the common law pursue an active policy of law reform. It may be that once the underlying concerns denoted by the different vocabularies are more thoroughly understood, Anglo-American and continental jurisprudence may be seen to have more in common. It is not the purpose of this paper to unfold this mutuality, however, but rather to delineate what, despite it, seems to persist as a real distinction. It still remains the case that for almost all that has been written and done on the classification of law, we are indebted to the civilians for whom the science of law has always been a reality – and this in its own right very differently from the pursuit of law reform in Anglo-American jurisprudence.

Every science depends on taxonomy. This concerns itself with the propriety of nomenclature and the principles of classification. In being founded on taxonomy every science thus ensures for itself the objectivity of its findings and the unequivocality of their communication. Correlatively, every scientific advance entails taxonomic consequences.

4 (1861, World's Classics ed 1954) 23.
5 (1883, 1891) 362.

It follows from the close concern of any science with classification that those convinced of there being a science of law are committed to account for its classification. This explains the initiative of civil lawyers in undertaking the classification of law. An unfortunate corroboration of this explanation is the corresponding lack of initiative among common lawyers to engage in the same endeavour. The result is to put the profession and practice of common law at risk in many of its vital undertakings. These include legal education as well as law reform — neither of which can be satisfactorily undertaken without competent legal classification. Such are the consequences of being without a science of law.

For the most part common lawyers expressly disclaim the existence of anything resembling a science of law. The work of Amos,[6] awarded the Swiney Prize in Jurisprudence by the Royal Society of Arts in 1884 (the ranks of prizemen already graced by Maine and since by Holland, Pollock, Maitland, Salmond and Vinogradoff) is now largely forgotten. And Holmes' famous dictum on the life of the law being not logic but experience is so misquoted[7] out of context as to become an infamous excuse for all sorts of unscientific slovenliness. It follows from this antipathy towards there being any science of law that common lawyers rarely experience more than an oblique concern for classification.

Any common law concern for classification is usually expressed by no more than an aside to some more intentional endeavour. Anglo-American jurisprudence on the classification of law thus emanates only as a by-product of commentaries on the administration of legal education,[8] the arrangement of law libraries,[9] the revision, reprinting, and compilation of statutes,[10] the codification of legislation,[11] the indexing and digesting of law reports,[12] and the publication of encyclopaedic works of law.[13] In no such case is any account taken of this concern for classification being a province of jurisprudence. The vast literature of western jurisprudence explicitly on the classification of law is thus the contribution of European rather than Anglo-American jurisprudence. In the English-speaking world,

6 Op cit.

7 For a reappraisal of its proper context see J W Hurst, *Justice Holmes on Legal History* (1964).

8 Eg Report of the Committee on Legal Education (HMSO 1971) (the Ormrod Report): P Lader, "Experiments in Undergraduate Legal Education: The Teaching of Law in the Liberal Arts Curriculum of American Colleges and Universities" (1973) 25 J Legal Education 125; A D Grunis, "Legal Education in Israel: The Experience of Tel-Aviv Law School" (1975-76) 27 J Legal Education 203; A D Grunis, *Legal Education in Australian Universities* (Australasian Universities Law Schools Association 1977).

9 The best example is E M Moys, *A Classification Scheme for Law Books* (1968).

10 Ruffhead's Statutes (1764); Revised Statutes of the United States (1875); United States Statutes at Large; Public General Acts and Measures (HMSO); New Zealand Statutes Reprint 1908-1957.

11 United States Code; Bill of Exchange Act 1882 (UK); Sale of Goods Act 1893 (UK); Criminal Code Act 1893.

12 English Reports; United States Supreme Court Reports; Federal Digest; National Reporter System; New Zealand Law Reports (Digest of Cases 1861-1963).

13 *American and English Encyclopaedia of Law* (1896-1905); *Halsbury's Laws of England; American Jurisprudence. Halsbury's Laws* gave expression to Stanley Bond's conviction in the feasibility of codifying English law: see *Butterworths: Yesterday Today Tomorrow* (1977) 4-7.

legal education, law librarianship, the reprinting and codification of statutes, the indexing of law reports and encyclopaedic commentaries are among the various tails which endeavour to wag the dog, and for the lack of a dog thereby fail to be wagged at all.

This is the context in which the classification of law is most often ignored as a function of jurisprudence in common law countries. It is hardly surprising that Dias in his *Bibliography of Jurisprudence*[14] is unable to mention this topic at all. The classification of law is, after all, a non-issue of Anglo-American jurisprudence. The consequence is interesting, however, in that Dias must next go so far as to index[15] what little there is by way of Pound's leading article[16] on the classification of law under "Positivism". What this says is not so much against Dias as it is against the state of, and concern for classification in Anglo-American jurisprudence.

It is true that there are a number of exceptions to the dearth of Anglo-American jurisprudence on the subject of classifying law. Pound's leading article is one. Amos[17] and Jolowicz[18] are others. Indeed Keeton considers that "one of the main functions of jurisprudence is to analyse and classify the general principles of law". He accordingly devotes several chapters of his *Elementary Principles of Jurisprudence*[19] to this endeavour.

These exceptions aside and notwithstanding our explanation of the common lawyer's repudiation of legal science, it is odd that the classification of law has excited so little explicit commentary in Anglo-American jurisprudence. This sense of oddity is conveyed first by our near-awareness of the essential significance of legal classification to enlighten and resolve controversies at such diverse ends of the legal spectrum as legal education and the codification of legislation. Indeed, wherever any concept of law is mooted, or more especially is taken or thought to be taken for granted in the context of any controversy, it is most often by reference to the principles of classiciation and their application to the matter in hand that the dispute is most simply resolved.[20] It accordingly follows that if concern for classification will resolve disputes, the same concern expressed earlier may avoid disputes. It is odd therefore that the common lawyer is apt to ignore this means of avoiding and resolving disputes; or is it the case that the adversarial system which depends on disputes militates against any more abstract means of their avoidance and resolution?

A greater and related oddity pervades jurisprudence at large. Despite the vast output of juristic writing (albeit almost entirely European) on the classification of law, there is no corresponding concern in either European

14 (3rd ed 1979).
15 Idem, 448-242.
16 Pound, "Classification of Law" op cit.
17 Op cit.
18 Op cit.
19 Op cit at 225; Chs XVII-XXIX.
20 The issue of slavery, for example, depends simply on where one draws the line between the law of property and persons. In the same way writes van Rensselae & Potter, "Land, like Odysseus' slavegirls, is still property. . . . The extension of ethics to this third element in human environment is . . . an evolutionary possibility and an ecological necessity." *Bioethics: Bridge to the Future* (Prentice Hall 1971) v.

or Anglo-American literature for the philosophically prior question of classifying jurisprudence. If the classification of law be truly the function of jurisprudence then the jurist must surely be called to account first for the classification of his own subject.[21] The lack of concern for classification at least in common law can thus be blamed on a philosophically prior lack of concern for jurisprudence. With Anglo-American jurisprudence the fault lies in omitting the task of classification almost altogether from its province.

It is true that the province of jurisprudence has been both determined and redetermined.[22] This has been done, as needs be done for the purposes of any formal classification, at first discursively. Jurisprudence especially requires as much discourse round about as within the province of law. This is the fundamental significance of Stone's redefinition of jurisprudence as "the lawyer's extraversion".[23] It is an interdisciplinary[24] description vigorously opposed by adherents to the civil law tradition. They see jurisprudence as "the science of law". The present attempt to identify the context of concern for formal taxonomy and classification, and beyond that, to establish the principles of their methodology for both common law and Anglo-American jurisprudence is a first step towards integrating the apparently conflicting views of jurisprudence as that province is differently seen by common lawyers and civilians.

It is true that with the aid of Stone's redetermination of jurisprudence Keeton has already set about the explicit task of its classification. He has been able to do this, however, only from differing standpoints.[25] One result of this implicit relativity in classifying jurisprudence from such standpoints as time, the number of legal systems used by way of comparison, and the science by virtue of which law is examined, is that each purported classification falls short of being exclusive and exhaustive. As a matter of logic, none is classification at all, but only an arrangement.[26] Attempts by jurists to classify their own discipline of jurisprudence are thus fewer in number, less explicit, and less rigorously argued through than are their attempts (almost entirely by civilians) to classify substantive law. However this comes about, whether by the oversight of one's own subject induced by the very act of participating in it (a *subjectivity* in the essential sense of the word), or by a desire to avoid controversy among one's close colleagues (the compromise of colleagiality), is likely to be *ad hominem* and somewhat, but by no means entirely, beside the point.

The classification of jurisprudence is a more important matter than the above *ad hominem* reasons for avoiding it suggest. Because the classifica-

21 This need not be true, however, if jurisprudence is one level on a hierarchy of types, in which it befalls some other province of enquiry to classify jurisprudence. This could make for specialisation.

22 J Austin, *The Province of Jurisprudence Determined* (1832).

23 J Stone, "The Province of Jurisprudence Redetermined" (1944) 7 MLR 97, and *Legal System and Lawyers' Reasonings* (1964).

24 See Keeton op cit at 6 who attributes this to C K Allen, *Law in the Making* (3rd ed) 52. This reference is incorrect, but see Allen, op cit (7th ed) at 31-33 on "Megalomaniac Jurisprudence" and his work *Legal Duties* (1931).

25 Keeton, op cit at 6-7.

26 See Kocourek, op cit especially at 322-348 on collections, arrangements and classifications of law.

tion of law (when undertaken at all) is seen to be a function of jurisprudence, the classification of jurisprudence underlies the classification of law. Accordingly, many latent sources of controversy in jurisprudence (especially those concerning the classification, and thus in turn also the concept of law) may be enlightened and perhaps even ended by more strenously-objective attempts to classify jurisprudence itself. Besides, it is only fair and rational to apply the same rigorousness of argument to one's own enterprise as one attempts to enforce on others.

The classification of jurisprudence signifies more, however, than the merely domestic task for jurists of setting their own house in order. As already indicated, it is a wider issue of both practical and theoretical importance. As a philosophically prior matter it underlies legal classification and so determines the classification of law libraries, the conduct of law reform, the compilation of bibliographies, and the arrangement of textbooks, besides also the teaching and study of law. These are not just pedagogic asides, but central issues. The way in which law libraries are classified, laws reformed, bibliographies compiled, and textbooks arranged has a reintensifying and cloning effect on our perception of the universe of legal discourse and the way in which our own legal system and other legal systems are constituted.

The theoretical importance of classifying jurisprudence is even greater. Without any explicit concern for making jurisprudence comply with the methodology of classification, then the way in which law libraries are classified, laws reformed, bibliographies compiled, and textbooks arranged will be at the best arbitrary and artificial (bearing no relation to the real classification of the subject) and at the worst surreptitiously imbued with the school of jurisprudence to which one belongs, if not also one's purely personal view of law. In so far as schools of jurisprudence fiercely conflict, and purely personal views of law may be ill-informed, thoughtlessly conceived, inexperienced, or subconsciously entertained, they will be scholastically untenable. The degree to which this subjectivity manifests itself will be directly proportional to the degree the task fails to correspond to the methology of classification. Thus a proponent of the historical, economic, sociological, or any other school of jurisprudence who classifies a library, reforms the law, compiles a bibliography, or devises a course of legal study without giving express concern to the methodology of classifying jurisprudence – the subject whose function it is to classify law – will be at risk. The likelihood is that he will be led to propound a subjective and therefore very partial truth.

Law libraries, to choose the most obvious example, are fundamental to the most elementary study of law. The old Anglo-Saxon task of the doomsman in finding the law is now carried out in the law library instead of under the oak tree. The new meeting place is nevertheless very much still a moot. The law library is the source of counter-argument no less than argument. The court is but an extension of the library. Unless the law library is clinically neutral and objective in its collection and classification of legal resources it will pre-empt the law – indeed pre-empt the court. The law librarian's responsibility is little less than that of the judge. As the lawyer's most basic tool or instrument, the way in which the library can be bent by faulty or partial views of the legal system, and in particular by a failure

to find and implement within it a methodology of legal classification, is of the utmost yet rarely explicit concern. The institution of the Anglo-Saxon law moot, by subsequent specialisation and differentiation into the library as a repository of law, and the court as a means of decision has diverted our attention almost entirely from the task of finding to the responsibility of deciding the law. Yet what we find frequently determines what we decide; and what we decide will in turn be recorded and reposited for us in future to find. The law library remains the common ground for both opposing counsel as well as judges. The Anglo-Saxon law moot lives on in the library as much as in the court. How the library works in terms of what its librarian collects and how he arranges and classifies his collection is crucial to the legal process and our concept of law. Not only what's there, but what's held on stack, out on loan, sold off as obsolete, or is perpetually having to be replaced as a result of being lost or stolen reflects our own concept of law as much as this ongoing laser-like process of reflection between what we find and what we decide intensifies and reinforces our original conception. However partial, our first view of law is bound to be reinforced by the way we arrange our library shelves.

It may be that the human element in jurisprudence makes some degree of partiality inevitable. A greater measure of impartiality will be obtained in legal matters, however, by taking a more explicit account of problems of classification. One of the principal functions of jurisprudence is its search for objectivity in the understanding of law. It achieves this most often by means of generality and abstraction. In the same way both the practical and theoretical importance of legal classification will be more objectively understood by an appreciation of its underlying logic. The remaining aim of this article, having already indicated the context of concern for classification in common law, is to identify the principles of this underlying logic. By way of demonstrating their applicability to the classification of law and jurisprudence, we shall conclude by considering some persistent questions of law and jurisprudence which a methodology of classification conducted more explicitly in terms of these principles will enlighten and help to resolve. These persistent questions arise from arguments over how the physical architecture, layout and bookholdings of law libraries can best fulfil their highly aspirational functions; how the statute-user will best be served by changed methods of legislative composition, publication and law reform; and how the diverse schools of legal thought and jurisprudence can be expressed without injustice to each other in a teaching situation. These are persistent questions widely and vociferously debated as substantive issues, but this paper does not risk adding to, far less joining in that debate. Instead, these persistent questions shall be merely touched upon, lightly as asides to the underlying logic of classification, as if to show that their real relationship to that logic exists in respect of the form rather than the substance of law. It is hoped that the reality of this formal relationship will come through more by delicacy of touch than it could by adding to the heavy-handed substantive argument surrounding the persistent questions of law libraries and legal education, statute-law deficiencies and law reform.

II THE UNDERLYING LOGIC OF LEGAL CLASSIFICATION

At the outset we need to note that the term classification is ambivalent. We may set about classifying a single entity such as a collection of legal materials or juristic writings into their kindred parts. This task is analytic. On the other hand we may regard the collection not as a single entity but as a multitude of several things which require to be related to each other as constituent parts of a common entity in consequence of their classification. This task may be seen to be synthetic. Sometimes the logician will distinguish between the two processes, referring to the first as division and the second only as classification, but each is no more than an aspect of an identical enterprise.[27] However differently the one enterprise is seen, the aim is the same, to ascertain and formulate the kinship by which constituent parts relate to each other in making up what we recognise to be a single whole.

The logic underlying the process of classification is a logic of division. That this logic of division in its rigorously dichotomal form is relevant as a means of avoiding and resolving legal problems is already well documented.[28]

We have already noted the ambivalence of the term "classification". The term "division" is even more ambiguous. Division may be physical, metaphysical, verbal, logical *(stricto sensu)* or dichotomous. These various meanings ought to be identified before trying to examine the principles of division that underlie the process or lead on to a higher logic of classification. This will be done, first as far as possible in a commonsense way, and secondly in the more specialised context of professing the relevance of these principles for law and jurisprudence. For the sake of simplicity however, their identification will be brutally made at the expense of many attendant philosophical speculations — such as for example that we may consider all the various meanings of division to be reducible to the metaphysical.

A physical division is one that can be actually made. It is an instance of possible partition. The logician Keynes[29] gives the example of dividing a watch into its case, face, hands, and mechanism as may be done when it is physically taken to pieces. A law library may be similarly divided into its staff, space, readers, and books. A page of legislation may be divided into unprinted margins and text. A legal training, physical enough in so far as it involves the expenditure of time, effort, and money, may be divided into keeping terms and passing examinations. Our intellectual preoccupation with what lies at stake beyond these physical divisions often dulls the edge of our imagination to them. We assume their triviality. The same intellectual preoccupation, in the context of disagreement over their

27 "Division and classification are the same thing looked at from different points of view; any table presenting a division presents also a classification. A division starts with unity and differentiates it; a classification starts with multiplicity, and reduces it to unity, or at least to system." E E C Jones, *Elements of Logic,* 123, quoted in J N Keynes, *Studies and Exercises in Formal Logic* (3rd ed MacMillan 1894) 466.

28 B N Lewis, et al, *Flow Charts, Logical Trees and Algorithms for Rules and Regulations* (HMSO 1967); see also N J Jamieson, "Swinging from Logical Trees" (1974) New LJ 1096 and 1120 for its applicability to legislative composition.

29 Op cit 462-463.

adequacy as physical means to highly aspirational ends, makes us hyperconscious of them. Thus the same physical division between white margin to printed text, no more than subconsciously perceived by judges in construing statutes, may evoke an extreme hypersensitivity in law reformers anxious to perfect the psycholinguistics of the statute book.

Psycholinguistics, which takes account of such apparently trivial physical divisions as that between the black printed text and marginal white of the legislative page, affords an explanation of metaphysical division which may be helpful for us now to follow through in a legal context. In reforming the statute book one aim of psycholinguistics is to find out what ratio of typescript to residual white will be most conducive to communication of the statutory text. What is the optimum margin? What leeway can be allowed for indenting provisos, paragraphs, and subparagraphs so as to ease their recognition as distinct legislative forms indicating different legislative functions?

To investigate the effect on legislative communication of differently sized pages, different types, different fonts and other printing devices entails an account of their qualities. Whereas physical divisions are, or by being actually carried out can be made absolute, metaphysical divisions are always comparative and therefore conceptual. To continue with Keynes' commonsense example of a watch, its metaphysical division involves accounting for such qualities (not things as in physical division) as its size, shape, and the substance of its composition. These qualities are understandable only by comparison with the qualities of some other object or fixed standard of reference taking its place.

What is called verbal division or the distinction of terms arises from the same work or expression being used in different senses. To avoid being trapped into arguments at cross purposes or which arise *ignoratio elenchi* we learn to be specific in our use of such ambiguous or equivocal words as "Statute Book" or "legislation". The expression "Statute Book" we discover early on to be something of a legal fiction. This is especially so in any non-textual drafting scheme depending on the common law for doctrines such as that of implied repeal. Even in professedly textual systems what appears to be written in the so-called Statute Book depends on the common law for its construction and interpretation. We learn that this Statute Book is more conceptual than to admit of the physical division that we may apply to any book of statutes, tearing the pages out one by one.

In the same way if we regard the essence of legislative endeavour to be substantive innovation we shall fall foul of those who allow of declaratory legislation and especially those who see law reform to be, as its name implies, reforming rather than changing the law. Of course such terms as law, right, justice, and jurisprudence are even more equivocal. A large part of Hohfeld's task was to draw verbal divisions in the lawyer's use of the term "right". Sometimes it is helpful to begin jurisprudence by drawing out verbal distinctions — so long as we do not mistake verbal divisions of law and justice to resolve real issues, and so end up by thinking ourselves to have defined jurisprudence when we have no more than begun to identify the use of words as tools.

In beginning with physical and so far dealing with metaphysical and

verbal division we have moved from a consideration of the concrete to the abstract. As we continue to account for logical division *(stricto sensu)* and division by dichotomy this sense of abstraction intensifies. We begin to be able to identify the elements of a formal logic applicable to division. This is especially so with the rigorousness of dichotomy to which all logically perfect division is reducible. It depends on the so-called laws of thought that a thing is what it is, cannot both be what it is and what it is not, but must be either one thing or the other. Because division by dichotomy is now a commonplace of two-valued logic in flow charts, logical trees, and computer technology[30] we need not follow its ramifications for law in this paper. What is far more at issue here is to identify the principles of logical division on which to found or develop a logic or legal classification.

The logic of division underlying the process of classification may be briefly summarised according to several principles.[31] The first is that of consistency. To comply with this principle, the logical division of any subject into its constituent parts must proceed on the same basis throughout the division. In the classification of jurisprudence therefore, it would not offend this principle (however unenlightening the result) to divide the subject into parts pertaining to common law, equity, and legislation, for each part has the same basis in being a source of law.[32] On the other hand any attempt to classify jurisprudence into divisions dealing, some with sources of law and others with relations to other disciplines, would be no more valid than to classify mankind into English, Irish, Scots and the insane.[33]

The second principle of logical division requires that all the constituent parts resulting from the division of any subject equal the subject as an undivided whole. This is the principle of adequacy. It follows that whenever any attempt at the classification of jurisprudence, whether into its various schools or into its relationships with other disciplines or otherwise howsoever, results in some part of jurisprudence being unaccounted for, the process of division which results in this remainder is invalid for inadequacy. It is not the case that this invalidity is restricted only to the embarrassing remainder. Invalidity cannot be compromised in such a fashion. Instead, the entire attempt at classification is void, because it is the process of division that has given rise to the remainder. It is in that process, therefore, that the fault lies. For this reason, all attempts at classifying jurisprudence which result in remainders, are, when relied on, not just worthless but misleading. Any such misplaced reliance overlooks the logic by which the failure of the attempt at classification is to be found

30 See n 28 ante.

31 For elementary accounts see A Sinclair, *The Traditional Formal Logic* (Methven, 5th ed 1951), 89-96, and A A Luce, *Teach Yourself Logic* (English Universities Press 1958) 31-32.

32 See for example Allen's treatment of law in *Law in the Making* according to the sources of law in custom, precedent, equity, and legislation, and similarly G W Paton, *A Textbook of Jurisprudence* (1946) on the sources of law.

33 The satirist may utilise the breach of any one of these or other principles of logic to communicate opinions and outlooks. Even the scholar is allowed to exaggerate the truth in order to tell it: see HLA Hart, *The Concept of Law* (1961) 2, 232. Exaggeration is a permissible component of the rhetoric of exposition.

in and perhaps throughout the extent to which the attempt is apparently successful. Indeed, it is this apparent success which most foils our future attempts at making the classification of jurisprudence a reality.

The third principle of logical division requires the process of division to result in distinct groups or categories. This is the principle of distinctiveness. To divide jurisprudence into classical, medieval, modern, and perhaps also contemporary jurisprudence may result in categories which are sufficiently distinct to comply with this principle. In any case the distinctiveness of each historical period (for history is the common basis by which this classification achieves consistency), can be drawn quite exactly. One need only define each period by reference to the dates on which it begins and ends to reach the ultimate measure of precision.[34] By achieving this sort of formal validity with chronological precision, however, it may be felt that we have only exchanged enlightenment for exactitude.

III A Cautionary Note Before Drawing Conclusions From Formal Analysis

There is need for a cautionary note. A grave risk lies in seeking the precision of formal logic for law and jurisprudence. A sense of insecurity, whether due to lack of study or experience in the subject (a shortfall of experiential jurisprudence) or to academic diffidence or general indecisiveness (a deficiency in psychoanalytic jurisprudence) may tempt us to search for unwarranted exactitude, and lead to our importing into law and jurisprudence a spurious precision at the expense of those subjects. Scholarship requires no less decisiveness in dealing with ideas, as soldiering does from those in action.

It is precisely because all attempts at classifying any subject thereby aim to understand the subject that it is crucial neither to seek nor ascribe any higher standard of precision to the logical division of law and jurisprudence than those subjects admit. This is especially true of jurisprudence with its characteristic width of generality and intensity of abstraction. In jurisprudence, as in ethics, Aristotle's advice[35] on precision should be foremost: ". . . we must be content to attain as high a degree of certainty as its matter admits." It is worthy to remember of jurisprudence, whether we conceive of it to be a science or some more innocent source of wonder, that it is, as Aristotle[36] also reminds us of ethics, a practical matter. What we think about law not just influences, but determines our life as lawyers. Jurisprudence is pragmatic. To endow it with a spurious precision will effect an evil interference with lawyerlike behaviour, for the end of jurisprudence as of ethics is not just knowing but doing. The risk of undue precision in legal theory gives rise in legal practice to that dogmatic form of behaviour known as legalism.

34 To make a chronologist out of any historian is of course to make the tail wag the dog.

35 Ethics, for Aristotle, is a branch of politics, and "[i]n studying this subject we must be content if we attain as high a degree of certainty as the matter of it admits": Aristotle, *The Ethics of Aristotle* (Penguin 1955) 27.

36 ". . . the end of [politics and in turn ethics] is not *knowing* but doing": ibid at 28.

The risk of legalism in mind, it will be helpful to summarise more precisely the principles of logical division before concluding this paper with an account of the advantages we may expect to accrue to common law and Anglo-American jurisprudence from formal attempts at their classification. First, to be any sort of division at all, logical division must go beyond mere enumeration. We may collect and possibly even arrange items by no more than enumerating them, but any attempt at their classification involves some sort of division. Secondly, whether defined as the separation of a genus into its constituent species or the analysis into smaller groups of the extension of a given term, the issue is one of discovering the kinship within the genus of the constituent species or the kinship of the smaller groups *within* the extension of the given term. In being concerned to discover and precisely identify the inner relations of kinship within any group, classification is essentially intraspective. It is this concern with kinship by which the *membra dividentia* (dividing members) must be co-extensive with the *totum divisum,* thus requiring the entire membership to be accounted for and on the same ground or principle of division *(fundamentum sivi principium divisionis)* throughout so as to result in distinctive and mutually-exclusive dividing members.

We can appreciate the consequences of adhering to these principles in our pursuit of a formal classification of law and jurisprudence by outlining the advantages to be derived from the logically rigorous classification which results from them. Although this paper concludes with a summation of these advantages this is but by way of encouraging many new beginnings to be made in the overdue enterprise of classifying common law and Anglo-American jurisprudence.

IV The Consequences Of Legal Classification For Persistent Questions Of Law And Jurisprudence

1 Explicit attempts at the formal classification of law and jurisprudence will expose the extent to which our underlying concepts of law and ideologies of justice subconsciously affect and prejudice our abilities to organise law libraries, engage in law reform, and provide for legal education.

2 Our extended awareness of what was subconscious motivation will prevent the reinforcement of those underlying influences by the legal institutions we establish and operate.

3 In being prerequisite to definition,[37] the formal classification of law and jurisprudence will lead on to higher levels of legal and juristic enterprise.

4 By enabling definition, we shall be provided with a verification process of our attempts at classification.

5 Old and hide-bound arguments of law and jurisprudence can be elucidated by recourse to formal concerns instead of substantive issues. The common lawyer's extraversion by way of jurisprudence may prove to be one and the same thing as the civilian's intraversion by way of

37 "Classification, therefore, is often called extensive or denotative definition": D L Evans et al *Elements of Logic* (Brown 1957) 66.

a science of law.[38] In the same way the intension and extension of any terms are required "to fit like a glove". Whether one follows the model of invagination by which the civilian's science of law is merely the common lawyer's jurisprudence turned inside out excites further examination. What counts is that only by the formal classification and definition of common law and Anglo-American jurisprudence can we particularly identify the difference between the two traditions of common and civil law and their respective jurisprudence.

In all these and other ways this paper ends only by provoking many new beginnings.

38 See J P Dawson, *The Oracles of the Law* (1978) 148-262 for Germany's Commitment to Legal Science. Consider Frederick the Great's intervention in Miller Arnold's case (1779), the talk of Europe as would be the later Dreyfus case, as an instance of the way in which the established legal process can be turned inside out, or outside in, depending on one's view of the invagination.