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LAW ON THE INSTALLMENT PLAN

*Bruce W. Frier**

ULPIAN. By *Tony Honoré*. Oxford: Clarendon Press. 1982. Pp. xii, 303. \$59.

The theme is inviting. About two-fifths of Justinian's *Digest*¹ is attributed to the voluminous writings of a single man: Domitius Ulpianus, a jurist of the early third century A.D. (p. 47). Let us suppose, what few would deny, that the *Digest* is by far the most influential work in Western legal history; then, through the *Digest*, Ulpian has a fair claim to being the most influential of all jurists in that long and distinguished tradition.

We would like to know more about the man and his life, but our reach may exceed our grasp. Scholars once firmly believed that Ulpian was murdered during an uprising of the Praetorian Guard in 228 A.D.² Then, in 1966, a scrap of Egyptian papyrus provided conclusive evidence for redating his death to 223 A.D.³ The experience chastened many legal historians. Viewed in the cold light of day, Ulpian's writings yield little useful autobiographical detail; it was not the manner of Rome's jurists to provide such information in their works. The allusions to Ulpian in other sources are often difficult to interpret, if not outright mendacious. Caution has therefore become the order of the day.⁴ But in *Ulpian*, Tony Honoré⁵ has thrown caution to the winds.

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1. The *Digest* [hereinafter cited as D.] is cited from 1 *CORPUS IURIS CIVILIS* (T. Mommsen & P. Krueger 11th ed. 1908).

2. E.g., Honoré, *The Severan Lawyers: A Preliminary Survey*, 28 *STUDIA ET DOCUMENTA HISTORIAE ET IURIS* 162, 166 (1962); see also *id.*, at 207 ("His murder took place in 228, probably in October.").

3. 31 *THE OXYRHYNCHUS PAPYRI* Papyrus No. 2565, at 102-04 (1966). For a discussion of this revision, see Modrzejewski & Zawadzki, *La Date de la Mort d'Ulpian et la Préfecture du Prêtoire au Début du Règne d'Alexandre Sévère*, 45 *REVUE HISTORIQUE DU DROIT FRANCAIS ET ÉTRANGER* 565 (1967); see also *ULPIAN*, pp. 8, 40-41.

4. Syme, *Fiction about Roman Jurists*, 97 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, ROMANTISTISCHE ABTEILUNG* 78, 101 (1980) ("From first to last, vigilance is enjoined."). Syme's article enlarges on an earlier one cited in note 44 *infra*.

5. Regius Professor of Civil Law, Oxford University.

I. HONORÉ'S HYPOTHESIS

The public career of Ulpian spanned the reigns of five Roman Emperors: Septimius Severus (193-211), his son Caracalla (211-217), Macrinus (217-218), Elegabalus (218- 222), and Alexander (222-235). As Honoré reconstructs his background and career (pp. 45-46), Ulpian was born into a family of scholars from Tyre, sometime before 172 A.D. "His early career is obscure, but may have been closely connected with the imperial family and Papinian" (p. 45). Honoré argues that Ulpian was attached to the court of Severus as secretary *à libellis* from March 202 until about May 209, and that in 209-21 he probably accompanied Severus on the Caledonian expedition. Then Ulpian turned abruptly to writing. Honoré believes that the first five books of Ulpian's *ad Edictum* date to early 211, and virtually all the rest of his works to the years 213-217 under Caracalla and Macrinus, as a systematic project inspired by the extension of Roman citizenship to all free inhabitants of the empire in 212.

After 217, Ulpian no longer wrote. According to Honoré, he perhaps served as a lesser prefect under Elagabalus until being expelled from Rome late in that reign. Under Alexander in 222 he rapidly rose to "a supervisory position over the praetorian prefects Flavianus and Chrestus, as a sort of *corrector reipublicae*. Perhaps in August he had them killed and succeeded as sole prefect" (p. 46). The murdered prefects were succeeded first by Lorenus Celsus and Aedinius Iulianus, and then by Didius Marinus and Domitius Honoratus. "These appointments may have been occasioned by the rioting between praetorians and citizens of Rome which lasted three days and nights in 223. About August 23 [Ulpian] was attacked by the praetorians and killed, at the instigation of Epagathus, the efforts of Alexander and Mamaea to protect him being of no avail" (p. 46).

Of Honoré's many biographical assertions about Ulpian, the most startling is that almost all of Ulpian's works were written in five years, from 213 to 217. Honoré believes this quite literally. Under Ulpian's name there comes down to us excerpts from some twenty-six separate works, comprising about 240 "books" (papyrus rolls). Of these, scholars have long supposed that about five works (of seventeen books) are not by Ulpian.⁶ Honoré believes that only six of the remaining 223 books were written before 213 A.D. All the rest (217 books, plus three more from which nothing survives (pp. 104, 182)) were first written in the fateful quinquennium.

Honoré goes on to argue that during this period Ulpian set himself a rigid writing schedule: one book per week (p. 160).⁷ During

6. Chapter 4 ("Spurious Works"), pp. 106-28, contains additional citations and evidence.

7. Cf. p. 141 ("[O]n average, he set down each week about 12,000 words or the equivalent of thirty pages of modern print."). The notoriously facile novelist Anthony Trollope managed only 10,000 words per week. J. POPE-HENNESSY, ANTHONY TROLLOPE 166 (1971).

the first 8 1/2 weeks of the year (from 1 January to 28 February), he produced short treatises; the next 25 1/2 weeks (1 March to 25 August) were taken up with his massive commentaries on the Praetor's Edict and on the *Ius Civile* of Massurius Sabinus. Then Ulpian went on an eight-week "harvest holiday" (26 August to 21 October). The final ten weeks of each year (22 October to 31 December) he spent on medium-sized treatises. Through this regimen he managed to write exactly forty-four books per year, for a total of 220 in the quinquennium (p. 160). Furthermore, Honoré attempts to identify each year's output.⁸ For example, the major commentaries: in 213, 215, and 217 Ulpian wrote books 6-31/1, 31/2-56/1, and 56/2-81 *ad Edictum*, respectively; while in 214 and 216 he wrote books 1-26/1 and 26/2-51 *ad Sabinum*, respectively.⁹ Since the module for major commentaries called for 25 1/2 books in as many weeks, Honoré believes that Ulpian simply stopped writing at the end of the allotted work stint, regardless of whether there was a natural break in subject matter. But on New Year's Day, 218, he laid down his pen for good, never to write another word.¹⁰ Five glorious years of work: no colds, no playing hooky. And then it was over.

Honoré admits, and produces evidence to show, that "[i]n practice, . . . Ulpian probably followed the schedule only approximately" (p. 161). But he insists: "The schedule set out is designed . . . to show how, at the beginning of each year, the literary tasks for the year were planned. . . . What we can hope to discover is, in broad terms, what was composed in a given year, and approximately at what season" (p. 162). Further, so he argues, "[t]he resistance to such suggestions is coloured by romanticism" (p. viii).

It is my opinion that *Ulpian* is methodologically unsound throughout, and that the reason for rejecting Honoré's hypothesis is not a "romantic" presumption that Ulpian could not have written more than 2.5 million words in just five years (though that feat would have been Olympian), but rather Honoré's inability to prove his exotic hypothesis with convincing evidence.

II. STYLOMETRICS

Ulpian, like other recent books by Honoré,¹¹ uses as its main

8. Pp. 187-88, where the schedule is summarized.

9. Pp. 150-53. Honoré's reasons for supposing this curious back-and-forth between commentaries are murky. Honoré, p. 152, believes that D. 24.1.32.27 (Ulp. 33 *ad Sabinum* (hereinafter cited as *ad Sab.*)) is a reference to D. 23.1.9 (Ulp. 35 *ad Edictum* (hereinafter cited as *ad Ed.*)), but in fact no reference is intended, since Ulpian has "always" (*semper*) held the view in question.

10. P. 33 ("There is no evidence that he wrote anything further.").

11. T. HONORÉ, *EMPERORS AND LAWYERS* (1981); T. HONORÉ, *TRIBONIAN* (1978). Alan Watson has been a persistently critical reviewer. See Watson, Book Review, 94 *LAW Q. REV.* 459 (1978) (reviewing *TRIBONIAN*); Watson, Book Review, 50 *TJDSCHRIFT VOOR RECHTSGES-*

method "the analysis of the style of texts with a view to determining their authorship" (p. viii). The core of the present book is the second chapter on "Ulpian's Style" (pp. 47-85). Here Honoré, making use of a computer-based concordance he helped to devise,¹² gives lengthy lists of words or expressions that Ulpian uses and other jurists do not, or that Ulpian uses much more frequently than other jurists. The lists make for dull reading (the chapter has 773 footnotes), but unquestionably establish certain distinctive marks of Ulpian's style.¹³ For example, Ulpian has a strong proclivity to use the future tense of verbs (pp. 65-67); he also accounts for eighty of the eighty-six *Digest* instances of *aequissimus* ("very fair or just") (pp. 78-79) and all sixty-four instances of *proinde et si* ("accordingly if") (p. 54).

It should be noted, however, that determining what is distinctive about Ulpian's style is not quite the same thing as discussing Ulpian's style itself, for style consists not only of the distinctive but also of the regular. The latter subject is entirely ignored by Honoré¹⁴ — an omission that proves to be crucial. In another regrettable omission, Honoré makes no effort to discuss Ulpian's style in relation to nonlegal authors. Indeed, the whole discussion does not take place on any elevated philological plane. Occasionally it descends to bathos, as when Honoré argues that Ulpian's frequent use of *calliditas* ("guile") shows "he specially disliked craftiness, and thought of himself as a candid person" (p. 76). One might as easily conclude the opposite. Despite the apparent denseness of chapter 2, the distinctive Ulpianic vocabulary isolated by Honoré is not great in proportion to the total number of the jurist's surviving words. I closely examined the surviving fragments from two large samples of text: books 76-81

CHIEDENIS 409 (1982) (reviewing EMPERORS AND LAWYERS); Watson, Book Review, The Times Literary Supplement, Feb. 18, 1983, at 164, col. 1 (reviewing ULPIAN).

12. T. HONORÉ & J. MENNER, CONCORDANCE TO THE DIGEST JURISTS (1980) (available on microfiches).

13. The lists are, however, by no means complete. For example, *versari male in* ("to misbehave concerning") is Ulpianic, D. 1.12.1.7 (Ulp. 6 *ad Ed.*); D. 26.10.3.8 (Ulp. 35 *ad Ed.*); D. 1.12.1.7 (*de officio praefecti Vigilum* (hereinafter cited as *de off. praef. Vig.*)), although Honoré does not list it. On the other hand, Honoré includes numerous words or expressions that occur only once in Ulpian but not elsewhere in the jurists. To what extent are such usages *per se* distinctive, granted that forty percent of the *Digest* comes from Ulpian? For Honoré's discussion, see p. 49. Finally, the reader should be warned that a large number of the *Digest* references in chapter 2 are erroneous; a sample of references in fifty footnotes revealed a five percent error rate.

14. Cf. p. 48 ("The style of an author is constituted by those marks of his writing which not merely distinguish him from others but also pervade his work and cohere with one another."). This eclectic definition is slippery enough to allow some contradictory judgments. Compare p. 82 ("Zest is the quality which infuses Ulpian's mind . . ."), with p. 242 ("Intellectual excitement is missing."). For more adequate attempts to define style, see THE CONCEPT OF STYLE (B. Lang ed. 1979).

of Ulpian's commentary *ad Edictum*¹⁵ (ca. 10,000 words); and the ten-book treatise *de officio Proconsulis*¹⁶ (ca. 8,500 words). In the former case, Honoré's stylistic remarks touch on about 2.5% of Ulpian's words; in the latter case, only about 1.9%. So only about one word in every forty to fifty is recognizably "Ulpianic." Honoré further states that "[i]t is rare to find as many as thirty lines without a characteristic expression" (p. 87). In fact, both of my samples (and particularly the second) turned up numerous such passages, some extending for pages. What then is the value of so restricted an analysis of style?

In the rest of his book, Honoré uses the results of this chapter for two main purposes: first, to distinguish genuine works by Ulpian from those falsely attributed to him; then, to date Ulpian's genuine works on the basis of style. Honoré devotes two chapters to showing that distinctively Ulpianic vocabulary is confined to the canon of genuine works, but absent from other works which have long been thought to be by other authors.¹⁷ The observation on which this demonstration rests is stated at page 50: Ulpian's "style is exceptionally clear, uniform, and of a piece." That is to say, pronounced uniformity of style becomes a touchstone for distinguishing genuine from spurious. Presumably Honoré's demonstration was not intended to be controversial. But the careful reader will already observe warning signals that all is not as it should be.

Take, for example, the so-called *Epitome Ulpiani*.¹⁸ This short work is clearly not by Ulpian himself, but some have thought that it derives, at least in large part, from Ulpian's writings. Honoré thinks otherwise (pp. 106-11). He contends that "there is no strong argument for supposing that the compiler made use of Ulpian's work" (p. 111) and that "the compilation, whatever its period, is entirely derived from sources other than Ulpian" (p. 108). Honoré's stylistic evidence is admittedly ambiguous; the *Epitome* repeatedly uses at least one favorite phrase of Ulpian, *ut puta* ("as for instance"), as well as words or expressions associated with other authors. But let that pass. In 1968, Lothar Müller produced a computer-based study of the *Epitome*; he argued that it had a strong, indeed overwhelming, stylistic resemblance to Ulpian's *ad Edictum*.¹⁹ Honoré, who knows

15. The fragments are reassembled in 2 O. LENEL, *PALINGENESIA IURIS CIVILIS* 860-884 (1889).

16. *Id.* at 966-91.

17. Chapter 3 ("Genuine Works"), pp. 86-105, and chapter 4 ("Spurious Works"), pp. 106-28.

18. Pp. 106-11. The standard edition is F. SCHULZ, *DIE EPITOME ULPIANI DER CODEX VATICANUS REGINAE* 1128 (1926).

19. L. Müller, *Analyse der Tituli ex Corpore Ulpiani* (Cologne 1968) (dissertation). The study is summarized in Müller, *L'Ordinateur et les Textes de Droit Romain*, 1970 *REVUE INTERNATIONALE ORGANIZATION FOR ANCIENT LANGUAGES ANALYSIS BY COMPUTER* No. 4, at 65-80. I am grateful to Frau Dr. Römer of the Institut für Altertumskunde, Cologne, for supplying me a copy of Müller's thesis. To the best of my knowledge, nothing comparable has

Müller's work only from a half-page abstract,²⁰ states, with no further explanation, that it is "unconvincing" because it proceeds "without an adequate range of criteria" (p. 109 n.40a). But the truth is that Müller used not a smaller range of criteria, but rather wholly different criteria: not flashy words and expressions, but rather much humbler and more universal indicators of Latin style, such as mean length of sentences, word order, propensity to end sentences with verbs, and so forth. These stylistic features have two characteristics: first, they can be exactly quantified; second, they tend to occur unconsciously, and hence are regular, idiosyncratic, and all but immune to imitation. The method is far from simple or foolproof, but it is today considered a much more reliable means for stylometry than the impressionistic method used by Honoré.²¹

Honoré, to be sure, has no interest either in technical discussions of stylometry or in previous scholarly experience in this field.²² The fact is perhaps less significant when he is dealing with works that most scholars would concede are not by Ulpian. But the situation changes in succeeding chapters,²³ where Honoré tries to date Ulpian's output almost solely on the basis of style. Whereas before he had assumed a stylistic uniformity, now he argues that Ulpian's distinctive style underwent detectable evolution during the five-year period 213-217. No more difficult and demanding task can be imagined. It is at this point that Honoré's book begins to slide toward complete subjectivity.

Again, one example suffices: the ten-book treatise *de officio Proconsulis*, from which numerous fragments survive. Its references to external events are inconclusive for dating purposes.²⁴ Honoré

been written on Roman legal sources. Cf. A. SCHILLER, ROMAN LAW: MECHANISMS OF DEVELOPMENT 67 (1978).

20. 19 IVRA 197-98 (1968). This source is miscited in Honoré's bibliography. See p. 290.

21. See W. FUCKS, MATHEMATISCHE ANALYSE VON SPRACHELEMENTEN, SPRACHSTIL UND SPRACHEN (1955); A. KENNY, THE COMPUTATION OF STYLE (1982); F. MOSTELLER & D. WALLACE, INFERENCE AND DISPUTED AUTHORSHIP (1964); G. YULE, THE STATISTICAL STUDY OF LITERARY VOCABULARY (1944).

22. Honoré's ten-page bibliography, pp. 285-94, lists only one book on method: A. ELLEGÅRD, A STATISTICAL METHOD FOR DETERMINING AUTHORSHIP (1962). The book has no detectable influence on *Ulpian*; it is cited but once, and then inappositely, p. 189 n.69. It is characteristic of Honoré that he specifically eschews statistics (e.g., pp. viii, 48). See also his early statement of method: Honoré, *Word Frequencies and the Study of Roman Law*, 30 CAMBRIDGE L.J. 280 (1972).

23. Chapter 5 ("*ad edictum*: Dates and Segments"), pp. 129-48; Chapter 6 ("Ulpian's Five-Year Plan: A Hypothesis"), pp. 149-62; Chapter 7 ("Details of Ulpian's Suggested Programme"), pp. 163-90. Honoré acknowledges the change in method: "When we come to elucidate Ulpian's working method and order of composition in chapters 6 and 7, we shall be looking for the sort of feature which is relatively evanescent." P. 48.

24. As to dating, Honoré claims only that "[i]t seems reasonable, therefore, to conclude that . . . the treatise . . . belongs to the period straddling Caracalla A and B. If . . . it represents a year's stint, it must be assigned . . . to the year 213." P. 156. Honoré admits that "this starting-point is provisional." P. 163.

argues that several Ulpianic words occur "exclusively" in books 6-31/1 *ad Edictum* and in the *de officio Proconsulis* (p. 163). "This suggests they were composed about the same time," probably in 213 (pp. 163-64). The significant words are *destricte* ("indiscriminately"),²⁵ *discutere* ("to investigate or decide as a judge"),²⁶ and *commendatio* ("recommendation").²⁷ The argument is built entirely on the occurrence of unusual words. But now suppose that we wanted to prove that the *de officio Proconsulis* was composed at the same time as the last third of the *ad Edictum*, books 56-81, which Honoré dates to 217 A.D. Then we might assemble a quite different list of significant words and expressions: *exaggerrare* ("to enlarge or exaggerate");²⁸ *solitudo* ("unfrequented place");²⁹ and *solet autem* ("but it is usual").³⁰ We might further note that such characteristic Ulpianic expressions as *nemini dubium est* ("no one doubts")³¹ and *nulla dubitatio est* ("there is no doubt")³² first appear only in the later books of Ulpian's great commentaries, but are missing in the earlier books.³³ Is such evidence better or worse than what Honoré adduces? Who can say?

I have closely examined several of Honoré's other arguments on dating; each of them suffers from the identical flaw. Honoré consistently produces argument for whatever position he desires to obtain, while ignoring any contradictory evidence. Nowhere does he succeed in proving that Ulpian's style appreciably evolved during the period, much less that works can be precisely dated within the quinquennium on the basis of style.³⁴ All of his assertions exhibit the same straining for results, the same overspecificity. Distinctive style does not emerge as an adequate basis for dating.

Now it is certain that Ulpian was heavily engaged in literary ac-

25. Once each in books 8, 11, 13 *ad Ed.*; 8 *de officio Proconsulis* [hereinafter cited as *de off. Proc.*]. See p. 163.

26. Twice in 13 *ad Ed.*; once in 2 *de off. Proc.* See p. 163.

27. 11 *ad Ed.*; 1 *de off. Proc.* Honoré gives references at pp. 163-64. I have omitted two further words that do not fulfill his criterion of exclusivity.

28. Once each in 70 *ad Ed.*; 3 *de off. Proc.*

29. Once each in 57 *ad Ed.*; 8 *de off. Proc.*

30. Once each in 64, 68 *ad Ed.*; 8, 10 *de off. Proc.*

31. Once in 8 *de off. Proc.*

32. Once in 9 *de off. Proc.*

33. For citation of pertinent sources, see p. 72 n.432 (*exaggero*); p. 57 n.119 (*solet autem*); p. 76 n.569 (*solitudo*); p. 58 n.143 (*nemini dubium est*); and p. 58 n.142 (*nulla dubitatio est*). The last two expressions occur only in Ulpian, 7 and 19 times respectively. I am also prepared to argue, on similar grounds, for any other year in the quinquennium.

34. Honoré makes one stab at collecting statistical data. Pp. 188-90. But the data are obviously contradictory and inconclusive, though he himself applies no statistical tests. I ran linear regressions on Honoré's data for use of the future tense in works he assigns to the years 213 to 217; the results nowhere indicated a significant degree of positive covariance.

tivity during the reign of Caracalla (211-217).³⁵ Although Honoré vigorously disputes the point (pp. 139-41), I believe, along with many earlier scholars,³⁶ that during Caracalla's reign Ulpian revised and prepared for final publication his commentary *ad Edictum*, together with numerous other works both large and small. Which of these works were written at an earlier date is impossible to determine exactly; on the whole, it makes small difference. It is, however, unlikely that all of them were first written under Caracalla. Further, nothing suggests that Ulpian's literary activity under Caracalla was stimulated by Caracalla's famous decree extending citizenship to all free subjects of the empire.³⁷ Why Ulpian ceased writing in or soon after 217 remains a mystery; perhaps old age, or perhaps some new-found interest in politics.³⁸ In any case, he left inexplicably incomplete his massive commentary *ad Sabinum* (pp. 151-52).³⁹ Honoré gives no explanation for this fact which plainly contradicts his notion that "[o]ver the five-year period a synopsis of Roman law in 220 books was planned" (p. 160).

III. ULPIAN AS STATESMAN, MAN, AND JURIST

In 1980, Ronald Syme published a long and intricate article on the careers of the great Severan jurists.⁴⁰ His remarks were aimed at legal historians, and his tone was admonitory:

The masters of jurisprudence excite interest on manifold counts: local origin, life and career, governmental employment and involvement with the dynasty. The path of enquiry is seductive — and infested by traps and impediments. Facts are infrequent. The literary testimony serves up a number of assertions that can be proved false and even fraudulent.⁴¹

But time and again legal historians have ignored these difficulties, evidently because they sought to exaggerate the significance of the jurists within Roman government and society. "The hazards inherent in exalting the importance of jurists are an ample mani-

35. This is clear from numerous references to Caracalla as the reigning emperor. See pp. 130-44 (*ad Ed.*), pp. 149-53 (*ad Sab.*), pp. 153-58 (the medium-sized treatises).

36. See 5 PAULYS REALENZYKLOPÄDIE DER CLASSISCHEN ALTERTUMSWISSENSCHAFTEN *Domitius*, at cols. 1501-07 (1905); 2 T. MOMMSEN, GESAMMELTE SCHRIFTEN 158-59 (1905) 158-59; 2 H. FITTING, ALTER UND FOLGE DER SCHRIFTEN RÖMISCHER JURISTEN 8, 106 (1908); T. KIPP, GESCHICHTE DER QUELLEN DES RÖMISCHEN RECHTS 122 (3d ed. 1919). But see F. SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE 201 (1946). Cf. A. SCHILLER, *supra* note 19, at 361-62.

37. *Contra* pp. 26-29. Ulpian reports the decree, but without indicating his reaction. D. 1.5.17 (Ulp. 22 *ad Ed.*).

38. Both possibilities are canvassed by Syme, *Lawyers in Government: The Case of Ulpian*, 116 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 406-09 (1972).

39. Only about eighty percent of the commentary was completed.

40. Syme, *supra* note 4.

41. *Id.* at 78.

festation."⁴² In particular, "the personality of Ulpian baffles assessment. . . . Facts are few and inadequate. A satisfying elucidation of a character and events would belong elsewhere, to fictional history or biography."⁴³

What we can ascertain about Ulpian's public career is precisely the following: that he was Prefect of the Grain Supply on 31 March 222, two weeks after the accession of the Emperor Alexander, and that he was Praetorian Prefect on 1 December 222.⁴⁴ All else is largely the subject of fictional biography.

Honoré argues that Ulpian was Petitions Secretary (*a libellis*) to Septimius Severus from 25 March 202 to 1 May 209, and as such was responsible for drafting imperial declarations of law (rescripts) during that period; Ulpian allegedly succeeded Papinian, who had served from late 194.⁴⁵ Once again, the sole evidence is style: imperial rescripts preserved from 202 to 209 are supposed to contain distinctively Ulpianic expressions. Honoré now shifts back to assuming a stylistic uniformity, this time extending over decades. But the stylistic evidence adduced at pages 196-99 is unimpressive. Only a single distinctive expression, *frustra timere* ("to entertain vain fears"), is found more than once both in the imperial rescripts of 202-209 and in Ulpian's juristic writings; and it occurs three times in the former source, twice in the latter.⁴⁶ Furthermore, once Honoré begins comparing Ulpian with nonjuristic sources such as the rescripts, he must confront yet another problem: what if we are dealing with some other author, a jurist whose writings are not attested, but whose style resembles Ulpian's in some respects? Oddly enough, there is even a candidate: Aelius Coeranus, named in an Ephesian inscription as Petitions Secretary to Severus and Caracalla ca. 200-205.⁴⁷ Coeranus does not rate a mention in *Ulpian*.⁴⁸ Honoré's attempt to draw some further support for Ulpian's tenure from a passage in the *His-*

42. *Id.* at 99.

43. *Id.* at 102.

44. See, respectively, *Codex Iustinianus* 8.37.4; 4.65.4. The *Codex* is cited from 2 CORPUS IURIS CIVILIS (P. Krueger 8th ed. 1906); see also Syme, *Three Jurists*, in 2 ROMAN PAPERS 790, 799 (E. Badian ed. 1979) (first published in the 1968/69 BONNER HISTORIA-AUGUSTA COLLOQUIUM 309-23 (1970)).

45. T. HONORÉ, EMPERORS AND LAWYERS, *supra* note 11, at 59-64; Chapter 8 ("Secretary *a libellis*"), pp. 191-203. Tryphoninus, D. 20.5.12 pr. (8 *Disputationes*), says that Papinian was Petitions Secretary under Severus, the date uncertain.

46. Honoré also observes some decidedly non-Ulpianic rescripts in this period, and hence supposes that someone was sitting in for Ulpian part of the time. Pp. 201-03. That is, of course, one possible explanation.

47. 2 FORSCHUNGEN IN EPHEOSOS 125 (1912). The man is perhaps identical with the Coeranus in *Dio* 77.5.5.

48. But see T. HONORÉ, EMPERORS AND LAWYERS, *supra* note 11, at 145, where it is argued that Coeranus' "career fits none of the three tenures under Severus and Caracalla. . . . He must therefore have been secretary to the junior Augustus, Caracalla." Syme, *supra* note 4, at 94, is rightly skeptical of this aprioristic suggestion.

toria Augusta need not detain us; the total worthlessness of the passage has long since been exposed,⁴⁹ and in any case the passage is not to the point. Therefore, *non liquet*.

Most of the remainder of Ulpian's career depends for its reconstruction on sporadic references by romanticizing historians. Honoré gets little out of this inconsistent material. No evidence supports the guess that Ulpian accompanied Severus on the Caledonian expedition of 209-211 (p. 25). Of Ulpian's career under Caracalla and Macrinus, nothing can be said. As Honoré notes, the stray reports that Elagabalus made Ulpian Praetorian Prefect, but later expelled him from Rome, must be treated circumspectly (pp. 34-35). The obscure events surrounding Ulpian's rapid ascendancy under Alexander, his alleged influence over this twelve- or thirteen-year-old boy, and his final tragic end, are narrated straight out of contradictory sources (pp. 35-44).⁵⁰ "In the end we have little idea of Ulpian's policies and achievements during his brief period of power" (p. 44). This statement introduces a page and a half of unsubstantiated conjectures on the beguiling topic.

Ulpian the Statesman, confidant of emperors and shaper of public policy, was largely a myth manufactured by ancient romancers and perpetuated by modern legal historians.⁵¹ So long as scholars dated Ulpian's death to 228, they could confidently see in his legal training and expertise the bulwark of a boy prince's unexpectedly long dominion. Then a small papyrus intervened, with proof that the grand vizier's talents were available only for a year or so. This new evidence demanded not just an embarrassed reshuffling of facts, but rather a reconsideration of some fundamental propositions. What were the sources of stable power in ancient empires? Was it an asset to "think like a lawyer," or instead a distinct liability? The calamity that so swiftly engulfed Ulpian is signal in its implications. In the end, Honoré himself draws back a little: "Ulpian was. . . ill equipped to rule the empire as a sort of imperial consort" (p. 45). The myth departs, unmourned.

As for Ulpian the Man, the subject is almost as dark. Honoré sifts the fragments for indication of Ulpian's experience and opinions; the

49. Compare *Historia Augusta, Pescennius 7.4*, with pp. 22-23, 191-93, 200. This argument too is exploded by Syme, *supra* note 4, at 86-93, 95, 102. Marginally more reliable evidence suggests that Ulpian held the post under Alexander, perhaps while the latter was still Caesar. See Syme, *supra* note 4, at 81, 93, 95, 102. PFLAUM, 2 LES CARRIERES PROCURATORIENNES ÉQUESTRES 764-65 (1968) drops the *a libellis* post altogether, perhaps wisely.

50. One conjecture deserves comment. Honoré states that Ulpian as Praetorian Prefect was obliged to accept two pairs of junior colleagues in 223. Pp. 39-40. There is no evidence for this assertion. Most scholars now take the likelier view that the two pairs in turn succeeded Ulpian after his assassination. See A. SCHILLER, *supra* note 19, at 361.

51. It must be stressed, however, that Honoré is by no means the worst offender in this regard. See, e.g., Crifò, *Ulpiano*, in II.15 AUFSTIEG UND NIEDERGANG DER RÖMISCHEN WELT 708-89 (H. Temporini ed. 1976).

yield is meager. Do we profit at all from being told that Ulpian's frequent use of *ego* indicates that he is "both self-assertive and self-absorbed" (p. 61)? Or that Ulpian's casual mention of ferryboats plying the Adriatic suggests "he had made this crossing himself" (pp. 32-33)? Or that his fondness for the future tense of verbs may imply "a forward-looking, perhaps optimistic, outlook" (p. 65)? Many dozen such mischievous deductions are spotted throughout the text of *Ulpian*. My favorite is on page 31, where we learn that Ulpian had Neoplatonic leanings because he attributed rational behavior to animals. Honoré advances two passages in support. The first, a discussion of *ius naturale*, says that nature "taught" (*docuit*) animals to form couples, procreate, and raise their young, and that animals know this by "experience" (*peritia*);⁵² the second states that the owner of a horse is not liable if the horse does damage while acting *contra naturam*, for example, by kicking someone after a third party has struck it.⁵³ As for the Tyrian origin in which the jurist himself once gloried, there is no sign that it had the slightest intellectual significance for Ulpian.⁵⁴

When the dross is cleared away, all that remains incontestable is Ulpian the Jurist, known to us almost solely in his *persona* as a writer. Honoré devotes his final chapter to this subject.⁵⁵ The chapter is a welcome relief from what has gone before; at last, something intelligible can be discerned. With one exception,⁵⁶ gone are the crabbed hypotheses and improbable stylistic arguments of earlier pages. Honoré sets out the evidence for Ulpian's use of previous juristic writings; it "is extensive and scholarly. . . . He used the available sources selectively, preferring the original minds and relegating the more derivative authors to a secondary role. . . . Ulpian was entitled to think, with pride, that he had transmitted to posterity a good selection of what was best in Roman jurisprudence" (pp. 234-35). Any constant reader will nod assent. Likewise for the finding that "Ulpian aims at a balance between juristic and imperial sources" (p. 239); he cites jurists five times more frequently than emperors (p. 236). "Ulpian as a Lawyer" (pp. 242-48) is a cursory introduction to Ulpian's juristic capacities. "Though not inventive, he

52. D. 1.1.1.3 (Ulp. 1 *Institutiones*).

53. D. 9.1.1.7 (Ulp. 18 *ad Ed.*).

54. D. 50.15.1 pr. (Ulp. 1 *de Censibus*); cf. D. 45.1.70 (Ulp. *ad Ed.*). On Tyre, see pp. 9-15. Honoré argues that Ulpian "perhaps belonged to a family of scholars," p. 15, on the strength of a like-named character from Tyre in Athenaeus' fantastical *Deipnosophists*. The notion has little to commend it. On p. 45, the "perhaps" becomes "probably."

55. Chapter 9 ("Ulpian as a Writer"), pp. 204-48.

56. See pp. 214-17, where Honoré argues, on the basis of stylistic similarities in frequency of use of fifty common words, "that Ulpian copied from Paul." P. 217. This need not follow, of course. But if it is so, and Paul is even "a major source," p. 217, then surely Ulpian's distinctive style is in jeopardy.

had the qualities of a good judge or legislator: a sense of proportion, of moderation, and a sure instinct for the just solution" (p. 242).

So the book ends, where it might more aptly have begun: with law and legal science. The verdict on Ulpian is finally delivered; he was conservative, prudent, and sound. At this point, some readers may wish to meditate on the gulf dividing Ulpian from *Ulpian*. Why did the book go wrong?

Honoré, confronted with early negative reactions to *Ulpian*, did not hesitate to assert his critics' resistance to innovative methods.⁵⁷ That was unfair. Honoré's mode of stylistic argument looks not forward, but back, to the now discredited linguistic technique of the "interpolation hunters." They too were excessively preoccupied with unusual vocabulary and diction, but whereas they took such features as a sign of Justinianic alteration in the text, Honoré sees them as marks of "style."⁵⁸ What is more, stylistic analyses identical to Honoré's were once commonly attempted for ancient authors ranging from Homer to Plato and Aristotle, from Tacitus to the letters of St. Paul, in the hope of determining authenticity and date of composition; but the method fell into desuetude owing to its blatant subjectivity and contradictory results.⁵⁹ The revival of such a method, and its application to the Roman jurists, is not to be welcomed. For better or worse, we live in the age of technique, and have learned to distrust the illusion of technique.

Therefore the failure of *Ulpian* cannot be blamed on its critics. The reasons must be sought elsewhere, and perhaps foremost in the undisciplined imagination of its author.

One derives no pleasure from demolishing a book such as *Ulpian*. Its author is an eminent scholar, one of whose earlier books stands among the monuments of modern jurisprudence.⁶⁰ Further, every page of *Ulpian* advertises that the book's composition took many years. It is therefore disagreeable to state the truth, that much of Honoré's effort was not worthwhile. The book has intermittent

57. "But the critics and I are at cross-purposes. For me, as for Torvill and Dean, 'there is no point in standing still'. If obstacles are present we demolish them with whatever lies to hand. That is the hazardous but fertile route. The alternative is the old-fashioned waltz; respectable but, at least in Roman law, obsolete." *The Times Literary Supplement*, Apr. 8, 1983, at 355, col. 1. I share this view, except for "with whatever lies to hand."

58. On the interpolationists, it is enough to refer to A. SCHILLER, *supra* note 19, at 62-83. ("Recent critics have pointed to the overwhelming reliance upon the philological criterion in the search for interpolations as one of the basic errors in the epoch of radical textual criticism." *Id.*, at 71.) Oddly enough, the main value of *Ulpian* may be in criticizing suspected interpolations; compare pp. 81-85, with Honoré, *Some Suggestions for the Study of Interpolations*, 49 *TUJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 225 (1981).

59. For a lively account of the development of stylometry, see A. MORTON, *LITERARY DETECTION* 22-28 (1978). The potential of computer-based analysis for Roman laws was already emphasized in Schiller, *Vindication of a Repudiated Text*, 1971 *LA CRITICA DEL TESTO* 727.

60. H.L.A. HART & A. HONORÉ, *CAUSATION IN THE LAW* (1959).

passages of genuine lucidity, even brilliance; but it must always be consulted with caution. Would that the matter were otherwise.