

Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws



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THE FOLLOWING essay attempts to explain the current neglected state of the science of construing legal texts, and offers a few suggestions for improvement. It is addressed not just to lawyers but to all thoughtful Americans who share our national obsession with the law.

THE COMMON LAW

The first year of law school makes an enormous impact upon the mind. Many students remark upon the phenomenon. They experience a sort of intellectual rebirth, the acquisition of a whole new mode of perceiving and thinking. Thereafter, even if they do not yet know much law, they do—as the expression goes—“think like a lawyer.”

The overwhelming majority of the courses taught in that first year, and surely the ones that have the most profound effect, teach the substance, and the methodology, of the common law—torts, for example; contracts; property; criminal law.

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American lawyers cut their teeth upon the common law. To understand what an effect that must have, you must appreciate that the common law is not really common law, except insofar as judges can be regarded as common. That is to say, it is not “customary law,” or a reflection of the people’s practices, but is rather law developed by the judges. Perhaps in the very infancy of Anglo-Saxon law it could have been thought that the courts were mere expositors of generally accepted social practices; and certainly, even in the full maturity of the common law, a well-established commercial or social practice could form the basis for a court’s decision. But from an early time—as early as the Year Books, which record English judicial decisions from the end of the thirteenth century to the beginning of the sixteenth—any equivalence between custom and common law had ceased to exist, except in the sense that the doctrine of *stare decisis* rendered prior judicial decisions “custom.” The issues coming before the courts involved, more and more, refined questions to which customary practice provided no answer.

Oliver Wendell Holmes’s influential book *The Common Law*¹—which is still suggested reading for entering law students—talks a little bit about Germanic and early English custom. But mostly it talks about individual court decisions, and about the judges, famous and obscure, who wrote them: Chief Justice Choke, Doderidge, J., Lord Holt, Redfield, C.J., Rolle, C.J., Hankford, J., Baron Parke, Lord Ellenborough, Peryam, C.B., Brett, J., Cockburn, C.J., Popham, C.J., Hyde, C.J., and on and on and on. Holmes’s book is a paean to reason, and to the men who brought that faculty to bear in order to *create* Anglo-American law.

This is the image of the law—the common law—to which an aspiring American lawyer is first exposed, even if he has not read Holmes over the previous summer as he was supposed to. He learns the law, not by reading statutes that promulgate it or treatises that summarize it, but rather by studying the judicial opinions that invented it. This is the famous case-law method,

¹ Oliver Wendell Holmes, Jr., *The Common Law* (1881).

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pioneered by Harvard Law School in the last century, and brought to movies and TV by the redoubtable Professor Kingsfield of *Love Story* and *The Paper Chase*. The student is directed to read a series of cases, set forth in a text called a “casebook,” designed to show how the law developed. In the field of contracts, for example, he reads, and discusses in class, the famous old case of *Hadley v. Baxendale*,² decided a century and a half ago by the English Court of Exchequer: A mill in Gloucester ground to a halt (so to speak) because of a cracked crankshaft. To get a new one made, it was necessary to send the old one, as a model, to the manufacturer of the mill’s steam engine, in Greenwich. The miller sent one of his workers to a carrier’s office to see how long the delivery would take; the worker told the carrier’s clerk that the mill was stopped, and that the shaft must be sent immediately. The clerk replied that if the shaft was received by noon, it would be delivered the next day. The miller presented the shaft to the carrier before noon the next day and paid the fee to have it transported; but because of the carrier’s neglect it was delivered several days late, with the result that several additional days passed before the mill got back into service. The miller sought, as damages for breach of the shipping contract, his lost profits for those days, which were of course many times what the carrier had received as the shipping charge. The carrier said that he was not liable for such remote consequences.

Now this was a fairly subtle and refined point of law. As was the case with most legal points that became the subject of litigation, it could not really be said that there existed a general practice that the court could impose as common, customary law. The court decided, essentially, that the carrier was right, laying down the very important rule, that in a suit for breach of contract not *all* damages suffered because of the breach can be recovered, but only those that “could have been fairly and reasonably contemplated by both the parties when they made [the] contract.” The opinion contains some policy reasons for that result, citation of a few earlier opinions by English courts, and

² 9 Ex. 341, 156 Eng. Rep. 145 (1854).

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citation of not a single snippet of statutory law—though counsel arguing the case did bring to the court’s attention the disposition set forth in the French Civil Code. For there *was* no relevant English statutory law; contract law was almost entirely the creation and domain of English judges.

I must interject at this point that even according to the new rule—that only reasonably foreseeable damages are recoverable—the miller rather than the carrier *should* have won the case. The court’s opinion simply overlooks the fact that the carrier was *informed* that the mill was stopped; it must have been quite clear to the carrier’s clerk that restarting the mill was the reason for the haste, and that profits would be lost while the mill was idle. But if you think it is terribly important that the case came out wrong, you miss the point of the common law. In the grand scheme of things, whether the right party won is really secondary. Famous old cases are famous, you see, not because they came out right, but because the rule of law they announced was the intelligent one. Common-law courts performed two functions: One was to apply the law to the facts. All adjudicators—French judges, arbitrators, even baseball umpires and football referees—do that. But the second function, and the more important one, was to *make* the law.

If you were sitting in on Professor Kingsfield’s class when *Hadley v. Baxendale* was the assigned reading, you would find that the class discussion would not end with the mere description and dissection of the opinion. Various “hypotheticals” would be proposed by the crusty (yet, under it all, good-hearted) old professor, testing the validity and the sufficiency of the “foreseeability” rule. What if, for example, you are a blacksmith, and a young knight rides up on a horse that has thrown a shoe. He tells you he is returning to his ancestral estate, Blackacre, which he must reach that very evening to claim his inheritance, or else it will go to his wicked, no-good cousin, the sheriff of Nottingham. You contract to put on a new shoe, for the going rate of three farthings. The shoe is defective, or is badly shod, the horse goes lame, and the knight reaches Blackacre too late.

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Are you really liable for the full amount of his inheritance? Is it reasonable to impose that degree of liability for three farthings? Would not the parties have set a different price if liability of that amount had been contemplated? Ought there not to be, in other words, some limiting principle to damages beyond mere foreseeability? Indeed, might not that principle—call it presumed assumption of risk—explain why *Hadley v. Baxendale* reached the right result after all, though not for the precise reason it assigned?

What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges!

Besides the ability to think about, and devise, the "best" legal rule, there is another skill imparted in the first year of law school that is essential to the making of a good common-law judge. It is the technique of what is called "distinguishing" cases. That is a necessary skill, because an absolute prerequisite to common-law lawmaking is the doctrine of *stare decisis*—that is, the principle that a decision made in one case will be followed in the next. Quite obviously, without such a principle common-law courts would not be making any "law"; they would just be resolving the particular dispute before them. It is the requirement that future courts adhere to the principle underlying a judicial decision which causes that decision to be a legal rule. (There is no such requirement in the civil-law system, where it is the text of the law rather than any prior judicial interpretation of that text which is authoritative. Prior judicial opinions are consulted for their persuasive effect, much as academic commentary would be; but they are not *binding*.)

Within such a precedent-bound common-law system, it is critical for the lawyer, or the judge, to establish whether the case at hand falls within a principle that has already been decided.

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Hence the technique—or the art, or the game—of “distinguishing” earlier cases. It is an art or a game, rather than a science, because what constitutes the “holding” of an earlier case is not well defined and can be adjusted to suit the occasion. At its broadest, the holding of a case can be said to be the analytical principle that produced the judgment—in *Hadley v. Baxendale*, for example, the principle that damages for breach of contract must be foreseeable. In the narrowest sense, however (and courts will squint narrowly when they wish to avoid an earlier decision), the holding of a case cannot go beyond the facts that were before the court. Assume, for example, that a painter contracts with me to paint my house green and paints it instead a god-awful puce. And assume that not I, but my *neighbor*, sues the painter for this breach of contract. The court would dismiss the suit on the ground that (in legal terminology) there was no “privity of contract”: the contract was between the painter and *me*, not between the painter and my neighbor.³ Assume, however, a later case in which a company contracts with me to repair my home computer; it does a bad job, and as a consequence my wife loses valuable files she has stored in the computer. *She* sues the computer company. Now the broad rationale of the earlier case (no suit will lie where there is no privity of contract) would dictate dismissal of this complaint as well. But a good common-law lawyer would argue, and some good common-law judges have held, that that rationale does not extend to this *new* fact situation, in which the breach of a contract relating to something used in the home harms a family member, though not the one who made the contract.⁴ The earlier case, in other words, is “distinguishable.”

It should be apparent that by reason of the doctrine of *stare decisis*, as limited by the principle I have just described, the common law grew in a peculiar fashion—rather like a Scrabble board. No rule of decision previously announced could be *erased*, but qualifications could be *added* to it. The first case lays

³ See, e.g., *Monahan v. Town of Methuen*, 558 N.E. 2d 951, 957 (Mass. 1990).

⁴ See, e.g., *Grodstein v. McGivern*, 154 A. 794 (Pa. 1931).

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on the board: “No liability for breach of contractual duty without privity”; the next player adds “unless injured party is member of household.” And the game continues.

As I have described, this system of making law by judicial opinion, and making law by distinguishing earlier cases, is what every American law student, every newborn American lawyer, first sees when he opens his eyes. And the impression remains for life. His image of the great judge—the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law. That image of the great judge remains with the former law student when he himself becomes a judge, and thus the common-law tradition is passed on.

DEMOCRATIC LEGISLATION

All of this would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy. In most countries, judges are no longer agents of the king, for there are no kings. In England, I suppose they can be regarded as in a sense agents of the legislature, since the Supreme Court of England is theoretically the House of Lords. That was once the system in the American colonies as well; the legislature of Massachusetts is still honorifically called the General Court of Massachusetts. But the highest body of Massachusetts judges is called the Supreme Judicial Court, because at about the time of the founding of our federal republic this country embraced the governmental principle of separation of powers.⁵ That doctrine is praised, as the cornerstone of the

⁵ See *Plaut v. Spendthrift Farms, Inc.*, 115 S. Ct. 1447, 1453–56 (1995).

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proposed federal Constitution, in *The Federalist* No. 47. Consider the compatibility of what Madison says in that number with the ancient system of lawmaking by judges. Madison quotes Montesquieu (approvingly) as follows: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*."⁶ I do not suggest that Madison was saying that common-law lawmaking violated the separation of powers. He wrote in an era when the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely "discovered" rather than created. It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact "make" the common law, and that each state has its own.

I do suggest, however, that once we have taken this realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of the separation of powers) becomes apparent. Indeed, that was evident to many even before legal realism carried the day. It was one of the principal motivations behind the law-codification movement of the nineteenth century, associated most prominently with the name of David Dudley Field, but espoused by many other avid reformers as well. Consider what one of them, Robert Rantoul, had to say in a Fourth-of-July address in Scituate, Massachusetts, in 1836:

Judge-made law is *ex post facto* law, and therefore unjust. An act is not forbidden by the statute law, but it becomes void by judicial construction. The legislature could not effect this, for the Constitution forbids it. The judiciary shall not usurp legislative power, says the Bill of Rights: yet it not only usurps, but runs riot beyond the confines of legislative power.

⁶ *The Federalist* No. 47, at 326 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis in original). The reference is to Montesquieu, 1 *The Spirit of the Laws* 152 (Thomas Nugent trans., Hafner Pub. Co., N.Y. 1949).

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Judge-made law is special legislation. The judge is human, and feels the bias which the coloring of the particular case gives. If he wishes to decide the next case differently, he has only to distinguish, and thereby make a new law. The legislature must act on general views, and prescribe at once for a whole class of cases.⁷

This is just by way of getting warmed up. Rantoul continues, after observing that the common law “has been called the perfection of human reason”:

The Common Law is the perfection of human reason,—just as alcohol is the perfection of sugar. The subtle spirit of the Common Law is reason double distilled, till what was wholesome and nutritive becomes rank poison. Reason is sweet and pleasant to the unsophisticated intellect; but this sublimated perversion of reason bewilders, and perplexes, and plunges its victims into mazes of error.

The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till, by this accommodating principle, a whole system of law is built up without the authority or interference of the legislator.⁸

The nineteenth-century codification movement espoused by Rantoul and Field was generally opposed by the bar, and hence did not achieve substantial success, except in one field: civil procedure, the law governing the trial of civil cases.⁹ (I have always found it curious, by the way, that the only field in which lawyers and judges were willing to abandon judicial lawmaking

⁷ Robert Rantoul, Oration at Scituate (July 4, 1836), in Kermit L. Hall et al., *American Legal History* 317, 317–18 (1991).

⁸ *Id.* at 318.

⁹ The country’s first major code of civil procedure, known as the Field Code (after David Dudley Field, who played a major role in its enactment), was passed in New York in 1848. By the end of the nineteenth century, similar codes had been adopted in many states. See Lawrence M. Friedman, *A History of American Law* 340–47 (1973).

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was a field important to nobody except litigants, lawyers, and judges. Civil procedure used to be the *only* statutory course taught in first-year law school.) Today, generally speaking, the old private-law fields—contracts, torts, property, trusts and estates, family law—remain firmly within the control of state common-law courts.¹⁰ Indeed, it is probably true that in these fields judicial lawmaking can be more freewheeling than ever, since the doctrine of *stare decisis* has appreciably eroded. Prior decisions that even the cleverest mind cannot distinguish can now—adays simply be overruled.

My point in all of this is not that the common law should be scraped away as a barnacle on the hull of democracy. I am content to leave the common law, and the process of developing the common law, where it is. It has proven to be a good method of developing the law in many fields—and perhaps the very best method. An argument can be made that development of the bulk of private law by judges (a natural aristocracy, as Madison accurately portrayed them)¹¹ is a desirable limitation upon popular democracy. Or as the point was more delicately put in the late nineteenth century by James C. Carter of New York, one of the ardent opponents of Field's codification projects, "the question is, shall this growth, development and improvement of the law remain under the guidance of men selected by the people on account of their special qualifications for the work" (i.e., judges) or "be transferred to a numerous legislative body, dis-

¹⁰ The principal exception to this statement consists of so-called Uniform Laws, statutes enacted in virtually identical form by all or a large majority of state legislatures, in an effort to achieve nationwide uniformity with respect to certain aspects of some common-law fields. *See, e.g.*, Uniform Commercial Code, 1 U.L.A. 5 (1989); Uniform Marriage and Divorce Act 9A U.L.A. 156 (1987); Uniform Consumer Credit Code, 7A U.L.A. 17 (1985).

¹¹ "The [members of the judiciary department], by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions." *The Federalist* No. 49, at 341 (Jacob E. Cooke ed., 1961).

qualified by the nature of their duties for the discharge of this supreme function?"¹²

But though I have no quarrel with the common law and its process, I do question whether the *attitude* of the common-law judge—the mind-set that asks, “What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?”—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law. As one legal historian has put it, in modern times “the main business of government, and therefore of law, [is] legislative and executive. . . . Even private law, so-called, [has been] turning statutory. The lion’s share of the norms and rules that actually govern[] the country [come] out of Congress and the legislatures. . . . The rules of the countless administrative agencies [are] themselves an important, even crucial, source of law.”¹³ This is particularly true in the federal courts, where, with a qualification so small it does not bear mentioning, there is no such thing as common law. Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution. Let me put the Constitution to one side for the time being, since many believe that that document is in effect a charter for judges to develop an evolving common law of freedom of speech, of privacy rights, and the like. I think that is wrong—indeed, as I shall discuss below, I think it frustrates the whole purpose of a written constitution. But we need not pause to debate that point now, since a very small proportion of judges’ work is constitutional interpretation in any event. (Even in the Supreme Court, I would estimate that well less than a fifth of the issues we confront are constitutional issues—and probably less than a twentieth if you exclude criminal-law cases.) By far the greatest part of what I

¹² James C. Carter, *The Proposed Codification of Our Common Law* 87 (New York: Evening Post Printing Office 1884).

¹³ Friedman, *supra* note 9, at 590.

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and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations. Thus the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers. It will not do to treat the enterprise as simply an inconvenient modern add-on to the judge's primary role of common-law law-maker. Indeed, attacking the enterprise with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation.

THE SCIENCE OF STATUTORY INTERPRETATION

The state of the science of statutory interpretation in American law is accurately described by a prominent treatise on the legal process as follows:

Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.¹⁴

Surely this is a sad commentary: We American judges have no intelligible theory of what we do most.

Even sadder, however, is the fact that the American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory. Whereas legal scholarship has been at pains to rationalize the common law—to devise the *best* rules governing contracts, torts, and so forth—it has been seemingly agnostic as to whether there is even any such thing as good or bad rules of statutory interpretation. There are few law-school courses on the subject, and certainly no required

¹⁴ Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

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ones; the science of interpretation (if it is a science) is left to be picked up piecemeal, through the reading of cases (good and bad) in substantive fields of law that happen to involve statutes, such as securities law, natural resources law, and employment law.

There is to my knowledge only one treatise on statutory interpretation that purports to treat the subject in a systematic and comprehensive fashion—compared with about six or so on the substantive field of contracts alone. That treatise is Sutherland's *Statutes and Statutory Construction*, first published in 1891, and updated by various editors since, now embracing some eight volumes. As its size alone indicates, it is one of those law books that functions primarily not as a teacher or adviser, but as a litigator's research tool and expert witness—to say, and to lead you to cases that say, why the statute should be interpreted the way your client wants. Despite the fact that statutory interpretation has increased enormously in importance, it is one of the few fields where we have a drought rather than a glut of treatises—fewer than we had fifty years ago, and many fewer than a century ago. The last such treatise, other than Sutherland, was Professor Crawford's one-volume work, *The Construction of Statutes*, published more than half a century ago (1940). Compare that with what was available in the last quarter or so of the nineteenth century, which had, in addition to Sutherland's original 1891 treatise, a *Handbook on the Construction and Interpretation of the Laws* by Henry Campbell Black (author of *Black's Law Dictionary*), published in 1896; *A Commentary on the Interpretation of Statutes* by G. A. Endlich, published in 1888, an Americanized version of Sir Peter Maxwell's 1875 English treatise on the subject; the 1882 *Commentaries on the Written Laws and Their Interpretation* by Joel Prentiss Bishop; the 1874 second edition of Sedgwick's *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law*; and the 1871 Potter's *Dwarris on Statutes*, an Americanized edition by Platt Potter of Sir Fortunatus Dwarris's influential English work.