INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES

Seventh Edition

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William Burnham
Professor of Law
Wayne State University Law School

Stephen F. Reed
Clinical Professor of Law
Northwestern University Pritzker School of Law

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CHAPTER II

LEGAL METHODOLOGY

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The first task of this chapter is to inventory the various forms that sources of law take in the United States and place them in the appropriate hierarchy of authoritativeness. We will then examine the two most frequently encountered sources of law—common law and statutes—and will explore their interrelationship and methodology. Finally, we will examine briefly the practical questions of how lawyers find and research the law and argue legal points.

A. SOURCES OF LAW AND THEIR HIERARCHY

1. ENACTED LAW

Constitutions exist on both the federal and state level. As will be evident from later chapters, there is scarcely an area of the law that has not been touched by the growth of federal constitutional limitations on government action. Federal constitutional law is discussed in more detail later in this book.[1]

Challenges to state laws and practices based on *state* constitutional grounds are also possible. State constitutional rights and limitations were for years overshadowed by the development and vigorous application of federal constitutional rights. However, some state constitutions provide greater protections.[2] Even where federal and state constitutional provisions have exactly the same wording, state courts have sometimes interpreted their state's versions to provide more protection than their federal counterparts.[3] This is important because state action, to be valid, must satisfy both federal and state constitutional requirements. In addition, the United States Supreme Court has no power to decide any issue of state law, so such state supreme court constitutional rulings based

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1 *See* Chapter IX.

2 William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARVARD L. REV. 489 (1977); Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEXAS L. REV. 1269 (1985).

3 *Compare Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) *with Sitz v. Dept. of State Police*, 506 N.W.2d 209 (Mich. 1993), discussed in Chapter VIII, p. 495 and note 248 (unreasonable searches). *See* Utter, *State Constitutional Law, the U.S. Supreme Court and Democratic Accountability*, 64 WASHINGTON L. REV. 19 (1989) (finding 450 such decisions).

on state constitutional provisions are immune from reversal by the United States Supreme Court.

Statutes: Statutes are laws enacted by federal, state, and local legislative bodies. Generally proposed statutes, called "bills," must survive close scrutiny by specialized legislative committees and gain the approval of the appropriate head executive official. The collection of federal statutes is called the United States Code, while collections of state statutes are called compiled laws or statutes. Statutes and statutory interpretation are discussed in greater depth later in this chapter.[4]

Treaties: Treaties with foreign nations, concluded by the President and ratified by the Senate, and executive agreements—treaty-like documents that need not be ratified—are another source of law, though not a major one. All treaties are federal law, as states are prohibited by the federal Constitution from entering into treaties with foreign nations.[5] Unlike the situation in some other countries, treaties in the United States are on the same hierarchical level as federal statutes, meaning that Congress can change a treaty by simply passing a contrary statute—arguably not a firm basis on which to build good international relations. In addition, some treaties are not "self-executing" and cannot be enforced unless Congress has passed implementing legislation.[6]

Court Rules: Court rules govern the procedures to be followed in courts. For example, the federal courts are governed by the following bodies of court rules adopted in the following years: Federal Rules of Civil Procedure (1938), the Federal Rules of Criminal Procedure (1946), Federal Rules of Appellate Procedure (1968), and the Federal Rules of Evidence (1975).

Federal court rules are the primary responsibility of the Judicial Conference of the United States, a supervisory and administrative arm of the federal courts. The Conference appoints an Advisory Committee of legal academics, judges and practitioners who draft the rules. The rules are then reviewed and revised by the United States Supreme Court and, if Congress does not intervene, they become law. Federal court rules have the same force as federal statutes. Federal rules of civil procedure, criminal procedure, and evidence are discussed in later chapters.[7]

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[4] *See infra* pp. 81–98.

[5] Art. I § 10. States may, however, with Congressional approval, enter into "compacts" with foreign nations, as they may with sister states. Pursuant to this authorization, some American states have entered into compacts with neighboring Canadian provinces.

[6] *See Frolova v. U.S.S.R.*, 761 F.2d 370 (7th Cir. 1985) (U.N Charter and Helsinki Accord concerning the reunification of married couples were not self-executing, so American wife of a Russian citizen could not sue the Soviet Government for its refusal to allow her husband to emigrate) and Chapter XVII, pp. 1126–1127 (self-executing treaties).

[7] *See* Chapter VII, pp. 366–383, 413–418 (civil procedure), Chapter VIII, pp. 451, 457–458, 463–554, 516, 525, 540 (criminal procedure), and Chapter III, pp. 164–174 (evidence).

States also have court rules, which are adopted by various means, usually by the supreme court of the state. Often in states, the court rule (if it truly deals with matters of procedure) has higher status than a statute passed by the legislature and, if there is a conflict, the court rule will prevail.[8]

Administrative Agency Rules and Decisions: Administrative agencies make law primarily through rules they promulgate. In addition, administrative hearing decisions may have some lawmaking effect in the same manner as judicial caselaw, discussed next. Some federal administrative agencies make policy almost exclusively by way of case-by-case adjudication. Agency rule-making and adjudication are discussed in the chapter on administrative law.[9]

2. CASELAW

In a common law system, court decisions of individual cases are a source of law, referred to collectively as "caselaw." Thus, not only does a court decision resolve a *past* controversy, it is also a "precedent"—meaning its legal principles can be used to decide analogous cases in the *future*. This future legal effect comes from the principle of *stare decisis*—the idea that similar future cases should be decided the same way as past cases.[10] Caselaw is sometimes referred to as "unwritten" law because the legal principles established by court decision are often only implicit in the decision.

There are two kinds of caselaw: common law caselaw and caselaw interpreting enacted law. The two types of caselaw occupy different places in the hierarchy of sources of law, so they are treated separately here.

a. Common Law Caselaw

"Common Law" as Used Here: The term "common law" is sometimes used to refer to *all* judicial decisions in a system where those decisions have precedential effect. In this book, the term will be used in a more narrow sense to mean only that body of law developed and articulated *solely* through judicial decisions. As such, unlike caselaw interpreting statutes, common law constitutes a separate and distinct source of law independent of enacted law. The history and nature of common law and its relationship to statutory law are discussed in more detail below.[11]

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8 *See, e.g., Winberry v. Salisbury*, 74 A.2d 406 (N.J. 1950) (court rule governing the time period within which an appeal could be taken governed over a contrary statute) and *Ammerman v. Hubbard Broadcasting, Inc.*, 551 P.2d 1354 (N.M. 1976) (since evidence law in New Mexico was considered procedural rather than substantive, statute establishing a privilege in favor of newspaper reporters was ineffective).

9 *See* Chapter VI, pp. 305–308.

10 *Stare decisis* is discussed in greater detail *infra* pp. 100–104.

11 *See infra* pp. 65–72 and pp. 75–79.

Common law is on the lowest level of the hierarchy of sources of law in a given legal system. At one point in history, there was a suggestion that the common law prevailed over contrary statutory law.[12] However, the principle of legislative supremacy has won out. Consequently, a legislature has the power to abolish or modify the common law as it sees fit. Common law may also be displaced by a constitutional provision or even by an administrative agency rule properly promulgated and within the agency's statutory authority.

State and Federal Common Law: As discussed in Chapter I, the legislative powers of the state and federal governments are different in nature. States have the general power to pass legislation in any area and are limited only by limitations imposed on them by the Constitution. The federal government, on the other hand, is one of limited legislative powers. Similar restraints have been said to operate on judicial law-making as a result of both separation of powers and federalism factors.[13] Thus, while state common law governs many broad areas of the law in a state, such as contracts, torts and property, federal common law's domain is more limited.[14]

Federal judicial lawmaking is proper only in three situations: (1) where Congress directs its application pursuant to a proper exercise of its enumerated powers; (2) where there are clear and strong uniquely federal interests that need to be protected, and (3) where it is needed to fill gaps in federal statutes. An example of the first category is Federal Rule of Evidence 501, which governs evidentiary privileges. Privileges are legal rules whereby information disclosed in certain confidential relationships—such as doctor-patient, lawyer-client and spousal relationships—is not subject to disclosure. Rule 501 states that the law of privileges is to be governed by the "common law—as interpreted by the courts of the United States in the light of reason and experience." Examples of the second category are as varied as the federal interests involved: maritime and admiralty law, international relations, disputes between the states, federal property, and financial paper issued by the federal government. As for the third category, even the most comprehensive federal statutes have gaps. Some of those gaps are filled by state common law. But more often, federal common law is developed based on the federal interests underlying the statute. Sometimes state law is adopted as the content of the federal common law with appropriate adjustments to accommodate the federal interests.[15]

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12 *See Dr. Bonham's Case*, 77 Eng. Rep. 646 (C.P. 1610) (Coke, J.).

13 *See* Chapter I, pp. 54–55.

14 *See generally* Chapters X (contracts), XI (tort law), XII (property law).

15 *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991) (content of federal common law on pre-suit demand requirement for federal law claim is state law of the state of incorporation).

There are also "hybrid" situations where there are elements of both congressional direction and strong federal interests. In one case at least, the power to make federal common law was inferred from the federal statute granting jurisdiction to federal courts over cases arising under the federal statute.[16] Similarly, a combination of statutory gaps and congressional direction can be involved when Congress chooses general statutory terms and signals its intent that courts interpret those terms in accordance with pre-existing common law understandings of their meaning.[17]

While state and federal common law deal with different subject matters, they are identical in their methodology. Consequently, no further mention will be made of the distinctions between the two in the discussions of common law that follow.

b. Caselaw Interpreting Enacted Law

Caselaw interpreting enacted law, like common law caselaw, follows the rule of *stare decisis*. Consequently, a case decision interpreting a statute is a source of law and will control later cases arising under the statute that involve similar facts.

Caselaw interpreting enacted law is listed here as a separate source of law apart from the text of the enacted law being interpreted. This reflects the understanding that a case decision interpreting and applying enacted law adds something to the law beyond the effect of the enactment standing alone. The amount of law that is added by judicial decision depends on how much interpretation of the enacted law is needed. But that is only a matter of degree. Some lawmaking is taking place.

As a *source of law*, however, caselaw interpreting enacted law is considered to be derivative of the law it interprets. As such, this form of caselaw takes on the hierarchical level of the enacted law that it interprets. Thus, caselaw interpreting the Constitution prevails over a conflicting statute, caselaw interpreting a statute prevails over common law, and so on. Caselaw interpreting a statute can be overruled by later action of the legislature, just as the statute itself can be amended. Caselaw interpreting the Constitution is reversible only by amending the Constitution.

For more on federal common law, *see* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 7TH ED. (Wolters Kluwer 2016), §§ 6.1–6.3.

[16] *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (grant of federal jurisdiction over suits under collective bargaining agreements treated as congressional direction to federal courts to make federal common law that is responsive to federal legislative policy on labor-management relations).

[17] *See* Sherman Antitrust Act, 15 U.S.C.A. § 1, and *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978) (Congress intended that § 1, prohibiting all agreements "in restraint of trade or commerce," would be "shape[d]" by "drawing on common law tradition"). *See also* Chapter XIV, p. 906 (common law used to define statutory terms for criminal offenses).

Common law and caselaw interpreting statutes employ much the same reasoning process. For that reason, the two are discussed together when the nature of caselaw reasoning is discussed.[18]

3. THE HIERARCHY OF SOURCES OF LAW

Adding the supremacy clause of the Constitution to the points about hierarchy just discussed, a complete hierarchy of sources of law can be constructed. From highest to lowest, they are (1) the federal Constitution, (2) federal statutes, treaties and court rules, (3) federal administrative agency rules, (4) federal common law, (5) state constitutions, (6) state statutes and court rules, (7) state agency rules, and (8) state common law. It is understood that each level of enacted law includes the caselaw interpreting that enacted law. If two sources of law on the same level of the hierarchy conflict, then the later in time will govern.

This hierarchy of law should be viewed with caution. First, a law's superior position in the hierarchy is not an indication of its importance or the frequency of its use. As discussed in Chapter I, while there is more federal law now than ever before, it is still true that most everyday transactions and occurrences affecting most people and companies in the United States are governed by state law.[19]

A second caveat regarding this hierarchy is that some conflict combinations in the hierarchy are more likely than others. Courts quite often find that a state statute or regulation conflicts with a federal statute and is consequently invalid. But it would be rare that a federal administrative rule would override a right guaranteed by a state constitution. The subject matters addressed by the typical federal agency rule and the typical state constitutional provision are so dissimilar that a conflict between them is unlikely.

In the next sections, we will focus in more depth on common law and statutes. There are several reasons to do this. First, common law and statutory law together govern the overwhelming majority of legal questions that arise in the U.S. legal system. Second, the relationship between common law and statutory law is important, as the role of one affects the nature of the other. Third, the judicial processes involved in common law and statutory interpretation serve as paradigms for dealing with other sources of law: reasoning applied in common law caselaw applies generally to all caselaw, and statutory interpretation principles have applicability to interpretation of other forms of enacted law.

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18 *See infra* pp. 99–114.

19 *See* Chapter I, pp. 48–51.

B. COMMON LAW

1. A VERY BRIEF HISTORY

After the Norman Invasion of Britain in 1066, the first royal courts developed from the King's Council. The first royal judges, then, were the King's closest advisors who traveled the country checking on local administration and, as part of their duties, deciding disputes. Later their tasks became primarily judicial. They separated from the Council and began to acquire their own jurisdiction as royal courts. These royal judges held court both in Westminster and while traveling throughout the country. Local courts controlled by local nobles continued to resolve most disputes. However, the more important cases were reserved for the King's courts.

The royal judges through their travels acquired in-depth knowledge of local customary law in all parts of the country. However, they believed that cases of "national" interest should be decided—not according to local customary law as applied by the local courts—but in accord with a single national body of law common to the entire country. Meeting in Westminster, they developed such a body of law by selecting from, combining or modifying the local customs that they had learned about. The law thus determined and applied became known as the "common law." This was because it was law that was "common" to the entire country, as opposed to local law, which varied from place to place. Eventually, the royal courts grew and common law displaced a large part of local law.

The instinct of the early common law judges was to keep their decisions as consistent as possible. This principle, called *stare decisis*, dates at least to the 1170s when Richard Fitz-Nigel wrote: "There are cases where the course of events, and the reasons for decisions are obscure; and in those it is enough to cite precedents."[20] A system of precedent is difficult without some written records of earlier decisions, but the small number of common law judges during this period and their central location in Westminster made it possible to maintain some consistency.[21] In addition, lawyers who appeared in the common law courts would assist by reminding the judges of prior cases. This rough system of precedent later gave way to a more sophisticated one when reliable reports of decisions became available.[22] Assisting in the insularity and cohesiveness of the system was

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[20] RICHARD FITZ-NIGEL, DIALOGUS DE SCACCARIO (written 1177–1179), quoted in HENRY J. ABRAHAM, THE JUDICIAL PROCESS, 7TH ED. (Oxford U. Press 1998), p. 9.

[21] The three courts at Westminster were the Court of Exchequer, the Court of Common Pleas and the Court of King's Bench.

[22] *See generally* JOHN P. DAWSON, THE ORACLES OF THE LAW (U. of Michigan Law School 1968), pp. 1–80 and KONRAD ZWEIGERT AND HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW, 2D ED. (Clarendon Press 1992), pp. 189–191, and authorities cited therein.

the eventual requirement that common law judges be selected exclusively from the ranks of the lawyers who practiced in those courts.[23]

One might wonder why judge-made law survived in England at a time when it was abandoned in the rest of Europe. The common law survived two major threats to its existence. The first came during the 16th and 17th centuries when the common law faced competition from more accessible Roman-canon law. But Roman-canon law was on the losing side of the struggle for supremacy between the King and Parliament—a struggle which Parliament eventually won. The losing Royalists favored Roman-canon law, which was simpler and its procedure and content more easily controlled by the King. The common law, which Parliament favored, represented a guarantee of freedom. This was in large part because its ponderous, formalistic procedures and strong judges made the courts more difficult for the King to control.[24]

The second threat to the common law's existence was the French Revolution. Its democratic theory maintained that the legislature was the only proper source of positive law in an enlightened democratic age. Strong feeling against judge-made law were also a reaction to the practices of pre-revolutionary French judges, who were members of the aristocracy. When the French Crown enacted moderate statutory reforms in an effort to stave off revolution, these conservative judges sabotaged the effort by giving the statutes narrow and perverse interpretations.[25] Thus, the powers of judges were strictly limited in order to assure that they do nothing more than strictly apply the law as set out by the legislature. This idea spread from France to other parts of continental Europe as part of the widespread influence of the ideals of the French Revolution.[26]

English common law was well developed when North America was being settled, primarily by English colonists. Around the time of the Declaration of Independence and thereafter it was formally "received" from England by the newly independent states.[27] Since then, after more than 200 years of separate existence, common law in the United States has taken on a life of its own. Though common law method is largely the same,

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[23] *See* Harry Jones, *Our Uncommon Common Law*, 42 TENNESSEE L. REV. 443, 450–452 (1975); ZWEIGERT & KÖTZ, *id.* pp. 189–204 and authorities cited therein.

[24] ZWEIGERT & KÖTZ, *supra* note 22, *id.*

[25] *See* DAWSON, *supra* note 22, pp. 368–371 and authorities cited therein.

[26] *See* JOHN H. MERRYMAN, THE CIVIL LAW TRADITION, 3D ED. 15–16 (Stanford U. Press 2007); DAWSON, *supra* note 22, pp. 362–379. An important development not discussed here is the appearance of more flexible "equity" courts that grew up in England. Equity and law are now combined in one court. Equity today determines the form and mode of giving relief in civil cases and whether there is a right to a jury trial. The development of equity is discussed in the chapter on civil procedure. *See* Chapter VII, pp. 261, 263–267.

[27] *See* WEST'S FLA. STAT. ANN. § 2.01, quoted in *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), set out on p. 1224 of the Appendix. *See generally* Harry Jones, 23, note 21, pp. 452–454. Some states received English statutes as well. *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VANDERBILT L. REV. 791, 816, 818 (1951).

there are numerous differences in substantive common law rules in the United States and England, and it is rare that courts in the United States rely on English decisions today.[28]

2. THE NATURE OF THE JUDICIAL PROCESS IN COMMON LAW ADJUDICATION

Common law decisions and rules are based on precedent. However, all cases differ somewhat from prior cases. Consequently, a judge deciding a case must, to a greater or lesser degree, rely on considerations and principles beyond what is set out in prior cases. Moreover, when a court is faced with making the *first* decision in a given area of the law—the "case of first impression"—there is often little precedent on which to rely. This gives rise to the question: what is the ultimate source of common law rules and the nature of the judicial process in common law adjudication? This question has been answered differently at different times.

Current Theory: Today, we know that the creative component of the common law comes from judges. Judges "make" common law by applying their conception of what is appropriate public policy and engage in "lawmaking" activities when they develop common law, much as a legislature does.

An example of this is *Hoffman v. Jones*,[29] a Florida Supreme Court opinion that is set out in the Appendix.[30] *Hoffman* involved a major doctrinal change in the common law of torts—the change from "contributory negligence" to "comparative negligence." Under contributory negligence, an injured plaintiff's negligence, however slight, operates as a complete bar to recovery of damages from even a clearly negligent defendant. Under comparative negligence, the negligence of the plaintiff serves to *reduce* the amount of damages recovered, but will not stand as a complete bar.[31] In reaching this decision, the majority opinion in *Hoffman* freely considered and weighed considerations of history, economics, and philosophy. It observed that the old rule was developed at a time when tort recovery was thought to pose a serious threat to the development of industry, that industry today is stronger and widespread insurance coverage has made damage awards less a threat to its existence, and that most people today consider it unfair and inhumane to completely deny recovery to an injured person just because of he or she was slightly at fault.

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[28] Differences in caselaw methodology are discused in P.S. ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 116–127 (Oxford U. Press 1991). Overall, it concludes that English and American legal methodology differ in that English law tends to be "formal" and American law more "substantive." *See also* Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM.J.COMP.L. 67 (2006).

[29] 280 So.2d 431 (Fla. 1973).

[30] *See* Appendix, pp. 1211–1227.

[31] *See* Chapter XI, p. 746 (contributory and comparative negligence in tort law).

Consistent with the notion that what is taking place is lawmaking, these kinds of considerations are commonly referred to as "legislative facts"—the kinds of data and public policy considerations a legislature would discuss in deciding whether to pass a statute. This is in contrast to "adjudicatory facts"—facts that courts must ascertain to decide whether a particular fact situation fits a settled rule of law.

Courts are assisted in fully exploring all the relevant considerations in an important case by permitting *amicus curiae* briefs. Several *amici* appeared in *Hoffman v. Jones*.[32] An *amicus curiae*, literally "friend of the court," is a person or organization with an interest in the legal issues being developed in a case, who is permitted to state views and arguments on one side or the other of a case. *Amici* are especially important in setting out arguments that the parties, for their own reasons, choose not to make. For example, in *United States v. Windsor*,[33] the Obama Administration instructed the Justice Department not to defend the constitutionality of the federal Defense of Marriage Act—a federal statute declaring that marriage can exist only between one man and one woman. The Supreme Court noted in the case that it has a "practice of entertaining arguments made by an *amicus*" when the federal government becomes convinced while the case is pending—usually as a result in a change in presidential administrations—that the law is unconstitutional.[34]

Past Theories of Common Law Judicial Process: We acknowledge today that judges sift through "legislative facts" and "make" common law, but that was not always the case. In the 18th and 19th centuries, the common law was spoken of as if it existed independently of human action. Thus, judges did not *make* law. They *discovered* and *declared* it. A past case was not law, but only "evidence of the existing applicable rule" of law.[35] In overruling a case, Blackstone noted, "if it be found that the former decision is manifestly absurd or unjust, it is declared not that such was bad law, but that it was not law."[36] Thus, a court overruling a case simply "recognized that the common law has changed" or that the prior case "evinced an incorrect understanding of what the common law rule is." As Sir William Blackstone put it, a judge is simply an "oracle of the law."[37]

An allied notion was that the common law method of adjudication was a "scientific" one. According to this, a court could reach the single, correct

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32 *See* Appendix, p. 1212.

33 570 U.S. 744 (2013).

34 *Id.* at 760.

35 *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 529–30 (1928). *See also Swift v. Tyson*, 41 U.S. 1 (1842) ("it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.")

36 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (William S. Hein & Co. 1992) (originally published 1765–1769), p. 70.

37 BLACKSTONE, *id.*, p. 69.

result in any new case if it located the correct precedents and then used the proper tools of logic in reasoning from those precedents.[38] Christopher Langdell, who introduced the "case method" of law study at Harvard Law School in 1870 and later became its Dean, is associated with this view.[39]

Justice Oliver Wendell Holmes, Jr., was an early challenger of these conceptions of the common law. He mocked the "discovery" approach that perceived the common law as a "brooding omnipresence in the sky"[40] and the common law method as a scientific product of reasoning and logic. His view in 1881—considered shocking at the time—was that:

> The life of the [common] law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. . . . The very consideration which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, consideration of what is expedient for the community concerned.[41]

Whatever other purposes the discovery and scientific myths of the common law served, they made judicial lawmaking appear more legitimate. If judges discover the law or use a scientific method to determine and apply it, then judicial decisions are objective and dictated by "the law," not by policy choices made by judges. The persistence of the myth that judges do not make law can probably be attributed to the fact that judicial lawmaking threatens a basic notion that underlies all legal systems—the fundamental principle that court decisions should be made in accord with *preexisting rules.*

This notion undoubtedly explains the persistence of a parallel myth in civil law countries that judicial decisions are not a source of law—that judges simply apply code provisions to the case at hand and come up with a decision. The development of a complex body of tort law in France from only 40 or so words in the French Code Civil demonstrate that civil law judges are just as creative as common law judges.[42] And the fact that a very

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[38] See GRANT GILMORE, THE AGES OF AMERICAN LAW (Yale U. Press 1977), p. 62.

[39] Although the "scientific" method of Langdell's formalism is now largely discredited, his case method of teaching in law school remains. *See* Chapter IV, pp. 195–196.

[40] *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[41] OLIVER W. HOLMES, JR., THE COMMON LAW 1–2 (1881). Oliver Wendell Holmes, Jr. (1841–1935) was among the most famous of American judges, serving as Chief Justice of the Supreme Judicial Court of Massachusetts and as an Associate Justice of the U.S. Supreme Court. For similar views, *see* BENJAMIN N. CARDOZO, THE JUDICIAL PROCESS (Yale U. Press 1921), pp. 98–141 (discussing the "judge as legislator").

[42] *See* MARTIN SHAPIRO, COURTS (University of Chicago Press 1981), pp. 136–143 (discussing French tort law).

different body of tort law developed in the province of Quebec in Canada—from essentially the same text—shows how the words of a code hardly dictate decisions.[43] As Professor Merryman has said, "the important distinction between civil law and common law judicial processes does not lie in what courts in fact do, but in what the dominant folklore tells them they do."[44] The concept also retarded the development of judicial review in civil law countries—where it was difficult to "harmoniz[e] substantive judicial review with a rigidly orthodox vision of judges as skilled mechanics operating a syllogism machine."[45]

The most comprehensive attack on the "folklore" of the common law in the United States was by the Legal Realists in the 1930s, led by Professor Karl Llewellyn and Judge Jerome Frank. The Realists developed both points made by Holmes: first, that the law in judicial opinions is not discovered and declared, it is made; and second, that its content is affected by social, political, economic, historical and other trends in thinking that operate consciously or unconsciously through the judge making it.[46]

Practical Effects of Legal Realism: The demise of the discovery and scientific theories of the common law has made judges more self-conscious about their creative functions. An example of this can be found in the *Hoffman v. Jones* case, discussed above and set out in the appendix. Considerable time was spent in the majority opinion and a dissent was sparked on the question of whether it fell to the court or the legislature to change the rule on contributory negligence.[47] And outside the courtroom, whether at public gatherings or confirmation hearings or in judicial election campaigns, judges tend to emphasize their role as law-*appliers* and to downplay their law-*making* functions.[48] Debates over the nomination of federal judges in recent years have revealed a gross ignorance on the part of the public—and apparently among Senators who should know better—who rail against judges who "legislate from the bench," as if the job of judges in a common law system is one of mechanical application of the law.

The recognition that judges make law based on policy considerations has led to somewhat greater candor in judicial opinions. Instead of trying

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[43] *See* H.R. Hanlo, *Here Lies the Common Law: Rest in Peace*, 30 MODERN L. REV. 341, 245–256 (1967).

[44] MERRYMAN, *supra* note 26, p. 47. *See also* ZWEIGERT & KÖTZ, *supra* note 22, pp. 272–273 and MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (Clarendon Press 1989), pp. 3–56 (exploring the spread of the domain of judge-made law in civil law countries and the possible reasons for it).

[45] Burt Neubourne, Judicial Review and Separation of Powers in France and the United States, 57 N.Y.U. L. REV. 363, 378 (1982).

[46] *See generally* WILLIAM W. FISHER (ED.), AMERICAN LEGAL REALISM (1993).

[47] *See* pp. 1223–1227.

[48] *Cf. Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (state ban on judicial candidates stating views on disputed legal and political issues is unconstitutional as a violation of the First Amendment). Judicial election and appointment systems are discussed in Chapter V, pp. 265–274.

to hide policy choices behind intricate discussions of precedents, judges are more likely to forthrightly support the rule they have chosen with arguments based on public policy considerations. The majority opinion in *Hoffman v. Jones* openly relies on considerations of history, sociology, economics and philosophy and is an example of this more direct public policy approach.[49] A demonstration of the older approach of hiding public policy choices behind masterful feats of recasting and distinguishing precedents is Judge Cardozo's opinion in the 1916 case of *MacPherson v. Buick Motor Co.*[50] *McPherson* is often cited as a paradigm of the judicial process in common law. But even though the *McPherson* decision makes radical changes in the nature of liability for defective products, Judge Cardozo's opinion for the court reads as if it were making only the smallest incremental change in the law.

The Limits of the Realist Critique and the "Legal Process" Reaction: Although we are all Legal Realists now, that same realism requires that we recognize grains of truth in both the discovery and scientific theories of common law. Judges are products of the society in which they live and their attitudes and actions reflect more than personal predilections. They reflect society's values in their opinions and decisions. And, to the extent that society's values and a judge's values conflict, conscientious judges will try to discover and choose society's values rather than their own. Practical considerations support this as well. Common law rules that reflect widespread customs and conventional morality lessen the concern about notice of the common law's "unwritten" rules—simply living in society gives people at least some notice of those rules. To this extent, much of the law *does* already exist "out there" in society waiting to be "discovered" by judges.[51]

In addition, the accepted "rules" of reasoning from precedent—whether truly "scientific" or not—do count in common law. Judges are expected to write opinions justifying their decisions, and those justifications are expected to comply with long-standing judicial conventions. "We just felt like it" is not a sufficient justification for a judicial decision. The Legal Process School of jurisprudence, which grew up in the 1950s, explored the nature of the constraints imposed on judicial creativity by the need for justification, and demonstrated how they are real.[52] According to Legal Process adherents, the common law tradition's

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[49] *See supra* p. 67. This greater candor has been referred to as evidence of the greater overall "substantive" nature of the American as compared to the English approach to law. *See generally* ATIYAH & SUMMERS, *supra* note 28.

[50] 111 N.E. 1050 (N.Y. 1916).

[51] *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Harvard U. Press 1977), pp. 22–45 (discussing how fundamental principles that exist in society and are recognized as binding are themselves law and are used to decide cases that are not directly covered by prior rules).

[52] HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Foundation 1994) (originally released 1958). This casebook, labeled by

demand for "reasoned elaboration" of precedent and other standards of "craftsmanship" in reasoning and opinion writing limit the freedom of judges to decide cases in whatever way they want. And potential criticisms of colleagues on the bench and scholars provide an extra incentive to properly justify one's conclusions. Consistent with the Legal Process view, judges in real life sometimes complain that they personally feel inclined to decide a case a particular way, but that "the opinion won't write" that way.[53]

Opinions of courts in real cases often contain both Legal Realism and Legal Process elements. In *Hoffman v. Jones*, the candid Legal Realist side of the opinion has already been mentioned—its considerations of public policy and fairness in deciding to adopt comparative negligence as the rule for negligence cases. But the majority also engages in a close, traditional analysis of precedent in the section of the opinion that examines whether the court or the legislature should decide the issue of comparative negligence.[54]

Some Perspective on Judicial Creativity: The power of common law judges to make law should be put into perspective. Virtually all legal issues decided by trial courts, many cases decided by intermediate appellate courts and the majority of cases decided by state supreme courts involve simple application of settled authority or, at the most, choosing between two divergent lines of authority. At a time when the common law still reigned supreme in many areas of the law, Benjamin Cardozo, a judge known to be creative with the common law, remarked that the majority of the cases that came before the highest court of New York "could not, with semblance of reason, be decided in any way but one."[55]

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the authors a "tentative edition" and distributed for years only in duplicated form, has been widely used to teach courses on legal process and is among the most influential books on the subject. *See also* KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (Little Brown 1960).

[53] Of course, if no reasons are given for a decision, this restraint is absent. This is part of the basis for criticism of U.S. Supreme Court decisions on what some have called its "shadow docket"—cases that it decides summarily without giving any reasons for the decision. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U.J.L. & LIBERTY 1 (2015).

[54] *See* pp. 1214–1217. *See also* pp. 1223–1227 (dissent analysis of precedent on the issue). Some believe that the constraints imposed by the need for justification are illusory. Among the most critical are those of the Critical Legal Studies movement, among them Duncan Kennedy and Robert Unger. Adherents of the Law and Economics (identified with Richard Posner), assert that courts should strive to develop and effectuate legal rules that are economically efficient. Followers of Feminist Jurisprudence question legal doctrine and all the jurisprudential movements for their failure to reflect the experiences of women. For a review of trends in jurisprudence, *see* Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599 (1989). For a short collection of readings outlining the principal tenets of these and other contemporary jurisprudential movements, *see* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, MATERIALS ON LAW AND JURISPRUDENCE IN AMERICAN HISTORY, 4TH ED. (West 2006).

[55] CARDOZO, *supra* note 41, p. 164. *See also* Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIFORNIA L. REV. 200, 204 (1984) (in all cases decided in a one year period in 1982–1983, dissenting votes were cast in only 3.7% of them).