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The Concept of the Common Law

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The common law is, among other things, a mode of legal development. In this mode, judges develop the law yet simultaneously act as if they were only discovering law that already existed. This sketch of the common law introduces contemporary readers to a way of thinking and talking about law that was once instinctive for judges. The common law as a mode of development may seem alien at certain points, yet its influence on the legal systems of the United States has been enormous, and it is critical background for understanding the grant of "the judicial power" in the U.S. Constitution.

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A PRELIMINARY NOTE

This is a sketch of the concept of the common law as a mode of legal development. Many fields of private law have their origins in the common law, including tort, contract, restitution, and property. There is vigorous dispute about whether common law development is the right model for understanding U.S. constitutional law (as argued by Professor David Strauss), but it is indisputable that the common law tradition has been generative for constitutional understandings of the judicial role. The common law is critical background for understanding the reference to "the judicial power" in Article III, and the common law is what makes intelligible Chief Justice John Marshall's statement that courts "say what the law is."

A few caveats are in order before we begin. First, there are voluminous literatures related to the common law that are not presented here. One is the long line of critiques, including those of Jeremy Bentham, John Austin, and the Legal Realists. Another absent literature is the histories of the common law, such as the work of Sir John Baker, which show that this mode of development was itself developing, contested, and variegated. Some characteristics described here stretch back to the Middle Ages, while others would not solidify until the eighteenth or nineteenth century. For all the propositions stated here, there has been undulation that goes undescribed: For example, over the last century the apex courts in multiple common law jurisdictions, including the United Kingdom and the United States, have changed their approaches to precedent. It is simply not possible to offer a set of propositions that summarize the common law as a mode of legal development—one in continual operation for nearly a millennium—without rounding a few square corners.

A second caveat is that this sketch describes the internal perspective of common law judges. It does not address normative claims about the common law's rationality. Peripheral to this account is the idea that the common law expresses a community's customs and values; this account leans toward seeing the common law as the custom of legal experts.

A third caveat is that this sketch does not explore the relationship of the common law to statutes. That relationship has been understood differently at different times (as explored, for example, by Professor Farah Peterson). And that relationship was subjected to strain as the quantum and length of statutes grew, views about law and democracy altered, and the administrative state was born.

A fourth caveat is that there is no exploration of the relationship of the common law to equity. The phrase "the common law" can be

used exclusive or inclusive of equity, and some aspects of the common law described in this sketch are not characteristic of equity courts and doctrines.[2]

A final caveat is about certain familiar models of the common law judge. One is an umpire who has no discretion. Another is a heroic genius, lauded sincerely by Professor Ronald Dworkin as "Hercules" or lauded sarcastically by Justice Antonin Scalia as the person who can "perform the broken-field running" needed to get past all the precedents and arrive at the best rule. Still another model is the common law judge as an instrument of economic expansion. Each of those models, or caricatures, of the common law judge may have elements of truth and falsity, but they are not directly engaged in this sketch. Implicit, however, is a somewhat different model of the common law judge.

THE SKETCH

1. *Common law* can refer to
    a. a mode of legal development;
    b. the law developed through this mode;
    c. the countries with law developed through this mode; or
    d. other aspects of legal decision-making that are analogized to this mode of development.
2. In the common law as a mode of legal development, the basic element is the judicial resolution of a dispute—in technical terms, a judgment in a case. To give a judgment, a court must have jurisdiction over proper parties.
3. The case is what determines the scope of the judicial action, and the existence and scope of the case are to a substantial degree controlled by those parties. Thirty years before he became a justice on the U.S. Supreme Court, Oliver Wendell Holmes, Jr.,

[2] *See, e.g.*, The Juliana, 2 Dods 504, 521, 165 Eng. Rep. 1560, 1567 (Adm. 1822) ("A Court of Equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case."); *In re* Hallett's Estate; Knatchbull v. Hallett [1880] 13 Ch. D. 696, 710 ("It must not be forgotten that the rules of Courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial.").

wrote, "The common law begins and ends with the solution of a particular case."[3]

4. Judgments are accompanied by opinions that give reasons. In an opinion, a judge has an obligation to show that a judgment is consistent with prior judgments.

5. The common law is a collective enterprise. This can be seen from many aspects of judicial practice. One is the habit of appellate judges sitting in groups and sometimes rendering their views *seriatim*: no single judge may give an authoritative expression or articulation of the law. Another is the practice of judges citing several cases for a point of law, not just one case. Still another is their practice of sometimes citing a concurring or dissenting opinion as being a better statement of "the law" than any majority opinion. Moreover, the common law (here in sense 1b) is the coordinated work of judges over a long passage of time.

6. In this temporal progression, the common law is not simply repeated by judges; rather, it is developed through their judgments and opinions. As Lord Goff of Chieveley put it in *Kleinwort Benson Ltd. v. Lincoln City Council*, "It is universally recognised that judicial development of the common law is inevitable. If it had never taken place, the common law would be the same now as it was in the reign of King Henry II." Thus the common law is created, and the judges are its creators. In this sense it is proper to speak of the common law as "judge-made law."[4]

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[3] Oliver Wendell Holmes, Jr., Review of James Bryce, *The Academical Study of the Civil Law* (1871), 5 AM. L. REV. 715, 716 (1871). In a similar vein, Professor Karl Llewellyn offered four presuppositions for judicial action:

> (1) The court must decide the dispute that is before it.
> (2) The court can decide *only* the particular dispute which is before it.
> (3) The court can decide the particular dispute only according to a *general* rule which covers a whole class of like disputes.
> (4) Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him.

[4] Professor Caleb Nelson has carefully delineated different meanings of "judge-made law," including (1) judicial formulation of rules of decision based on, and thus constrained by, sources external to the law such as custom and other social practices; (2) judicial formulation of rules of decision with constraints internal to the judicial process, such as precedent; and (3) more radically, judicial formulation of rules of decision unconstrained by forces past or present. Caleb Nelson, *The Legitimacy of (Some) Federal*

7. Yet the judges make the common law in a particular way:
    a. in cases;
    b. collectively (in both senses noted above); and
    c. while talking about the grounds for decision not only as if they were consistent with prior judgments, but as if they were already present in the prior judgments.[5]
8. That is, a judge will talk as if the common law were fully present prior to her judgment and as if she were only accessing and ascertaining it (a phenomenon explored by, among others, Professors Allan Beever, John Finnis, David Ibbetson, and Stephen E. Sachs). Talking as if the law were being discovered is the argot of common law judges without regard to whether they are extending or limiting an existing principle, elaborating or reconceptualizing it, or applying it to new facts. It is even how judges talk when they are making "a major departure[ ] from what has previously been considered to be established principle," as Lord Goff put it—adding that even such a major departure "must nevertheless be seen as a development of the law, and treated as such." In this sense, judges act as if the common law were *not* "judge-made law."
9. Common law judges sometimes show that they are aware that they are simultaneously developing the law and acting *as if* they were only discovering it. Justice Scalia commented that "the judicial power as understood by our common law tradition . . . is the power 'to say what the law is,' not the power to change it." Yet he immediately added: "I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be."
10. That judges act as if they were discovering the law is consistent with a range of views of the nature of law, including varieties of positivism and natural law perspectives, whether classical or Dworkinian. It is also consistent with a range of views about the

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Common Law, 101 VA. L. REV. 1, 10–18 (2015). Nelson's second sense is the one presented here.

[5] Points b and c are inconsistent on their face, for development collectively over time is inconsistent with later decisions being contained with earlier ones. Judges rarely remark on this tension, but it is addressed by the *as-if* quality of point c.

manner and rapidity with which law should be responsive to social needs and transformations.

11. In the common law, because judges act as if they were discovering the law, any statement of legal principle has retroactive effect. Such a statement is regarded not only as an assertion of what the legal principle is but also of what the legal principle was, even when this assertion about the past is manifestly untrue.[6] Note, however, that many modern judges do not see themselves as discovering the common law, and they may see the retroactive force of a decision as a separate policy question.[7]

12. Precedents are the raw material for the reasons given to justify a judgment. Precedents are also a constraint on that justification because the judge must show why her judgment is not inconsistent with the precedent. In this way, as Professor Cass Sunstein wrote, the common law invites "judicial modesty, not judicial hubris." Or, in Justice Scalia's words, the common law "comes with its own constraints on judicial power, brought about through the doctrine of stare decisis, close attention to the details of cases, and a general reluctance to issue rules that depart much from the facts of particular disputes." (This claim of modesty has been criticized.)

13. A precedent can be reversed—or, more precisely, its absence of legal force can be recognized. As Sir William Blackstone wrote, "if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." Thus, in the common law as a mode of legal development, "wrong" simply means "wrong on the day it was decided."

14. Precedents are abandoned under the same rules as they are recognized. That is, the reversal of a precedent must itself be consistent with precedent.

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[6] Compare Professor Finnis's remark that "The declaratory theory of law is not and never was put forward as a description of the history of our law—a history that includes many changes in the common law and in interpretations of statute law, changes which may go beyond development to abrogation. Rather, it is a statement of the judge's vocation and responsibility."

[7] *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 550 (1991) (O'Connor, J., dissenting); *see also* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997).

15. In both the accumulation of precedent and the abandonment of precedent, what the court does is not algorithmic. As Professor Neil Duxbury notes, "The value of the doctrine of precedent rests not in its capacity to commit decision-makers to a course of action but in its capacity simultaneously to create constraint and allow a degree of discretion. A theory capable of demonstrating that judges can never justifiably refuse to follow precedent would support a doctrine of *stare decisis* ill-suited to the common law." Rather than eliminating discretion, precedent offers permission and guidance for the court's judgment and its articulation of the relevant legal principle.[8]
16. The legal principle that the court expresses must be capable of application more broadly than the individual case. It therefore extends to cases involving events in the past and in the future.
17. Retroactivity and prospectivity are both downstream from the judicial habit of treating judgments and opinions as if they were the expressions and articulations of a law that lies behind them. That law is distended forward and backward in time.
18. That judicial habit is one reason the common law—despite its many written judgments and opinions—has been called "unwritten law." It is also why judicial decisions are said to be evidence of the law rather than being the law itself.
19. These statements tend to provoke skepticism or even incredulity today, yet they illuminate two characteristics of the common law as a mode of legal development.
    a. *Amenability to change*: In the common law, a court does not "repeal" a precedent, as if the judge were a lawmaker determining that yesterday's law should not be tomorrow's law. Rather, a judge will justify her rejection of a precedent on the grounds that it is inconsistent with "the law." A precedent is discardable because (the conceit runs) it appears to be the law but is not *actually* the law; to the contrary, it is inconsistent with the law that lies behind the precedents and to which all the precedents point. In other words, the attenuated sense in which a

[8] For legal realism as a surprising reaction to this degree of freedom, consider Judge Charles E. Clark and Professor David Trubek's remark that "It was perhaps Cardozo who first pointed out that the movement we have come to call Legal Realism was, despite its more extreme adherents or the occasional brash statements of its more uninhibited followers, a quest for legal certainty."

precedent is law has the effect of making precedents amenable to judicial reversal, thus opening more space for change in the common law. Justice Harlan Stone made this point well:

> This conception of the common law as a "brooding omnipresence in the sky," something apart from the expression of it found in judicial decisions, may serve as well as another to advance the idea that the law itself is something better than its bad precedents, and to open the way for recognition that the bad precedent must on occasion yield to the better reason.

b. *Establishment of precedent*: Today it is commonplace to think of a single case as a binding precedent, provided it is given by an appellate court with jurisdiction. But the common law historically required a series of cases, and only afterwards could it be authoritatively discerned that there was binding precedent. That conception of what it takes to make (and unmake) precedent is more intelligible if we think of judicial decisions as evidence of the law.

20. The idea that the present case must be fitted into an already existing common law affects the characteristic methods of common law judges. These include pervasive reasoning by example or analogy; a relatively high density of legal fictions; and a tendency toward rules that Professor Lorraine Daston has said take the form of "a model or paradigm," which will be "a load-bearing precedent with broader implications for many [ ] cases."[9]

21. Even if a previous judgment is recognized as being inconsistent with the law, it remains binding on the parties in the case unless it is vacated by a court having the requisite authority. Thus, even though a change in legal principle is given retroactive effect, the past judgments are left undisturbed.

22. On the settled-versus-right choice, therefore, at the level of the case the common law strongly favors "settled." Yet with a long enough time horizon, at the level of the system it leans toward "right," since any prior line of precedent can be abandoned.

23. Even so, the pursuit of "right" is constrained by precedent's path-dependence and the common law's need to keep the legacy

[9] LORRAINE DASTON, RULES: A SHORT HISTORY OF WHAT WE LIVE BY 8–9 (2022).

system online at all times even while the software engineers are updating it. As a mode of legal development, therefore, the common law struggles to make large-scale changes. In the very dissent in which Justice Holmes argued that the common law was a sovereign or quasi-sovereign's "articulate voice" and not a "brooding omnipresence," he noted this limitation:

> I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, "I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."

24. The inability to make large-scale changes curtails the common law judge's ambition to get things "right." On the other hand, the habit of constant refinement holds out the possibility that the law produced by this mode of development can simultaneously retain a measure of stability and avoid sclerosis.

25. Thus one characteristic of the common law is said to be its lack of order—"more like a muddle than a system"[10]—yet the common law is also said to have a high degree of "systematicity." Both descriptions have a point: Intrinsic to the common law as a mode of legal development is order and system, but *à la* Jane Jacobs, not Le Corbusier.

26. For centuries it has been conventional to compare the judges' constant refinement of the common law to the rebuilding of the Argonauts' ship. In this work, judges are understood to be the custodians of the coherence of the law. They should leave the law more coherent than they found it, or at least not less.

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[10] A. W. B. Simpson, *The Common Law and Legal Theory*, *in* Legal Theory and Legal History: Essays on the Common Law 359, 381 (1987).