CHAPTER II

LEGAL METHODOLOGY

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 The structural provisions of the federal Constitution were discussed in Chapter I, as was the increased "constitutionalization" of the law that has taken place since 1953. As will be evident from later chapters, there is scarcely any 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 have been increasingly successful. Development of state constitutional rights for years was overshadowed and made unnecessary by vigorous development of federal constitutional rights. However, some state courts have chosen to provide their residents with 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 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 from 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 more 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

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1 *See* Chapter IX.

2 William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV.L.REV. 489 (1977); Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. 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. 295 , note 158 (unreasonable searches). *See* Utter, *State Constitutional Law, the U.S. Supreme Court and Democratic Accountability*, 64 WASH.L.REV. 19 (1989) (finding 450 such decisions).

4 *See infra* pp. 49-63.

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. Some of the federal rules related to civil and criminal procedure and evidence are discussed in later chapters.[7]

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, caselaw court decisions of individual cases are a source of law and are referred to as a whole as "caselaw." Thus, court decisions not only resolve past controversies; a decision of a case is considered to be a "precedent" that has legal effect in the future. This effect comes from the principle of *stare decisis* — the idea that future cases should be decided the same way as past cases.[10] Caselaw is

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 17, p. 673.

7 *See* Chapters VII, pp. 227-240 (Federal Rules of Civil Procedure) and Chapter III, pp. 110-116 (Federal Rules of Evidence).

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. 197-202.

10 *Stare decisis* is discussed in greater detail *infra* pp. 65-67.

sometimes referred to as "unwritten" law, because the rule established by the court decision is 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 is 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]

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 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, state common law governs many areas of the law of a given state, such as torts, contracts and property. Federal common law's domain is narrower. Federal judicial lawmaking is proper only under two circumstances: (1) where Congress directs its application pursuant to a proper exercise of its enumerated powers and (2) where there are clear and strong uniquely federal interests that need to be protected.

An example of the first category is Federal Rule of Evidence (FRE) 501, which provides that the privilege of witnesses from testifying, *e.g.*, doctor-patient privilege, "shall be governed by the principles of the common law as they may be 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, and federal government property and financial paper. In addition, in areas where Congress has legislated, even the most comprehensive statutes have gaps. In some cases, those gaps are filled by state common law. However, federal common law built on promotion of the federal interests behind the statute is most often the preferable solution.[14]

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11 *See infra* pp. 44-48 and 49-54.

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

13 *See* Chapter I, pp. 35-36.

14 *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 4TH ED. §§6.1-6.3 (Aspen 2003) and sources cited therein.

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 them 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 construing enacted law is listed here as a separate source of law apart from the enacted law it interprets. 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.

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.[15]

3. The Hierarchy of Sources of Law

Adding the supremacy clause of the Constitution to the points about hierarchy mentioned above, 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,

15 *See infra* pp. 67-74. The precise boundary between common law caselaw and statutory interpretation is sometimes difficult to discern. There are at least three "hybrid" forms. As mentioned earlier in the discussion of federal common law, *supra* p. 40, the legislature may delegate the power to make common law without limitations. Or the legislature may so delegate with the understanding that such common law will be consistent with prevailing legislative principles in the area. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (construing §301 of the Taft-Hartley Act as a congressional direction to federal courts to make a federal common law of collective bargaining contracts that is responsive to federal legislative policy on labor-management relations). Or the legislature may use general statutory language and signal its intent that courts interpret that language in accordance with pre-existing common law understandings of its meaning. *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 XVII, p. 713 (definition of "commercial activity").

it is still true that most everyday transactions and occurrences affecting most people and companies in the United States are governed by state law.[16]

A second caveat regarding this hierarchy is that some conflict combinations in the hierarchy are more likely than others. It is not uncommon for courts to find that a state statute or regulation conflicts with a federal statute and is consequently invalid. 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 constitution are so dissimilar that such a conflict 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 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.

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 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."[17] 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

16 *See* pp. 30-33.

17 RICHARD FITZ-NIGEL, DIALOGUS DE SCACCARIO (written 1177-1179), quoted in HENRY J. ABRAHAM, THE JUDICIAL PROCESS, 6TH ED. 9 (Oxford U. Press 1993).

in Westminster made it possible to maintain some consistency.[18] 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 once reliable reports of decisions became available.[19]

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. However, this was also the time 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, in large part because its ponderous, formalistic procedures and strong judges made the courts more difficult for the King to control.[20]

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 with narrow and perverse interpretations.[21] 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.[22]

English common law was well developed when the North American colonies were 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.[23] Since then, after 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, there are numerous differences in substantive common law rules in

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

19 *See generally* JOHN P. DAWSON, THE ORACLES OF THE LAW 1-80 (U. of Michigan Law School 1968) and KONRAD ZWEIGERT AND HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW, 2D ED. 189-191 (Clarendon Press 1992) and authorities cited therein. Assisting in the insularity and cohesiveness of the system was the eventual requirement that common law judges be selected exclusively from the ranks of the lawyers who practiced in their courts. *See* Harry Jones, *Our Uncommon Common Law*, 42 TENN.L.REV. 443, 450-452 (1975); ZWEIGERT & KÖTZ, *id.* at 189-204 and authorities cited therein.

20 ZWEIGERT & KÖTZ, *supra* note 19, *id.*

21 *See* DAWSON, *supra* note 19, at 368-371 and authorities cited therein.

22 *See* JOHN H. MERRYMAN, THE CIVIL LAW TRADITION, 2D ED. 15-16 (Stanford U. Press 1985); DAWSON, *supra* note 19, at 362-379: An important development not discussed here is the appearance of "equity" courts that grew up in England. Equity and law are now combined in one court and equity primarily concerns the form and mode of giving relief in a civil case and whether there is a right to a jury trial in civil cases. Consequently, the development of equity is discussed in the chapter on civil procedure. *See* Chapter VII, pp. 240-241 and 242-244.

23 *See* West's Fla. Stat. Ann. §2.01, quoted in *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), set out on p. A12 of the Appendix. *See generally* Harry Jones, *supra*, note 19, at 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 VAND.L.REV. 791, 816, 818 (1951).

the United States and England and it is rare that courts in the United States rely on English decisions today.[24]

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. If there is law from prior caselaw to be applied, it should be applied. But whether in applying prior caselaw or striking out in a completely new direction, judges cannot avoid infusing public policy elements into decisions choosing a new rule of law or, for that matter, whenever they decide a case that is not exactly controlled by precedent. Thus, it is customary today to describe judges as "creating" common law or engaging in "lawmaking" activities when they develop common law.

An example of this is *Hoffman v. Jones*,[25] a Florida Supreme Court opinion that is set out in the appendix.[26] *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, operated as a complete bar to recovery 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.[27] 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 today industry is stronger and widespread insurance coverage has made damage awards much less a threat to its existence, and that it is considered unfair and inhumane today to deny recovery for injury because of only slight contributory fault of the injured person.

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.[28]

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24 Close examination reveals some significant differences in caselaw methodology as well. *See* P.S. ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 116-127 (Clarendon Press 1987). This interesting book makes comparisons between English and American legal methodology in several areas, concluding that English law tends to be "formal" and American law "substantive." *See also* Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM.J. COMP.L. 67 (2006).

25 280 So.2d 431 (Fla. 1973).

26 *See* Appendix, pp. A1-A14.

27 *See* Chapter XI, p. 435.

28 *See generally* WILLIAM REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL, 2D ED §§4.22-4.26 (West 2002). Courts are assisted in fully exploring all the relevant considerations in an important case by permitting *amicus curiae* briefs. Several *amici* appeared in *Hoffman*. *See* Appendix, p. A3. An *amicus curiae*, literally "friend of the court," is a person or organization with an interest in the legal issues being developed in a

Past Theories of Common Law Judicial Process We acknowledge today that judges make common law, but this 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. According to Sir William Blackstone, a judge was simply an "oracle of the law."[29] Thus, judges did not *make* law. They *discovered* and *declared* it. A past case was not law, but only "evidence of the law."[30] 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."[31] 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."

An allied notion was that the common law method of adjudication was a "scientific" one by which a court would come to a single, correct result in any new case if it located the correct precedents and then used the proper tools of logic in reasoning from that precedent.[32] Christopher Langdell, who introduced the "case method" of law study at Harvard Law School in 1870 and later became Dean, is associated with this view.[33]

Justice Oliver Wendell Holmes, Jr., was an early challenger of this conception of the common law. He mocked the "discovery" approach as perceiving the common law as a "brooding omnipresence in the sky"[34] or 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.[35]

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 apply it, then judicial decisions are objective and dictated by "the law" rather than 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

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case, who is permitted to state views and arguments on one side or the other of a case.

29 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 69 (William S. Hein & Co. 1992) (originally published 1765-1769).

30 *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.")

31 BLACKSTONE, *supra* note 29, at 70.

32 See GRANT GILMORE, THE AGES OF AMERICAN LAW 62 (Yale U. Press 1977).

33 Although the "scientific" method of Langdell's formalism is now largely discredited, his case method of teaching in law school remains. *See* Chapter IV, p. 131.

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

35 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 98-141 (Yale U. Press 1921) (discussing the "judge as legislator").

principle that decisions should be made in accord with *preexisting rules* and not by fiat. This notion undoubtedly explains the persistence of a parallel myth in civil law countries — that judicial decisions are not a source of law and that judges simply apply code provisions to the case at hand and come up with a decision.[36] Such "folklore," as Professor Merryman has called it, is difficult to eradicate.[37]

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.[38]

Practical Effects of Legal Realism The demise of the discovery and scientific theories of the common law has made judges 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.[39] And outside the courtroom, whether at public gatherings or confirmation hearings or in judicial election campaigns, judges tend to emphasize their role as law-*interpreters* and to downplay their law-*making* functions.[40] 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 was one of mechanical application of the law.

The recognition that judges make law based on policy considerations has also led to somewhat greater candor in judicial opinions. Instead of trying 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*, which, as discussed earlier, openly relies on considerations of history, sociology, economics and philosophy, is an example of this.[41] A demonstration of the older approach of hiding public policy choices behind masterful feats of recasting and distinguishing precedents is Judge Cardozo's opinion

36 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 have just as creative a role as common law judges. *See* MARTIN SHAPIRO, COURTS 136-143 (University of Chicago Press 1981) (discussing French tort law). The fact that a very different body of tort law has developed in the province of Quebec in Canada from essentially the same words shows how codes hardly dictate decisions. *See* H.R. Hanlo, *Here Lies the Common Law: Rest in Peace*, 30 Modern L. Rev. 341, 245-256 (1967).

37 MERRYMAN, *supra* note 22, at 47 ("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."); ZWEIGERT & KÖTZ, *supra* note 19, at 272-273. *See also* MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 3-56 (Clarendon Press 1989) (exploring the spread of the domain of judge-made law in civil law countries and the possible reasons for it).

38 *See generally* William W. Fisher (Editor), AMERICAN LEGAL REALISM (1993).

39 *See* pp. A8, A11-A14.

40 *But see 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 1st Amendment). Judicial election and appointment systems are discussed in Chapter V, pp. 179-182.

41 *See supra* p. 44. 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 24.

in the 1916 case of *McPherson v. Buick Motor Co.*[42] *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, 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 also support common law rules that reflect widespread customs and conventional morality. Such rules best serve expectation interests of the people governed by them and lessen the concern about notice of the common law's "unwritten" rules. To this extent, much of the law *does* already exist "out there" in society waiting to be "discovered" by judges.[43]

In addition, 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. The Legal Process School of jurisprudence which grew up in the 1950s explored the nature of these justificatory constraints on judicial creativity and demonstrated how they are real.[44] According to Legal Process adherents, the common law tradition's 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. 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.

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 determines whether the court should decide the issue of comparative negligence.[45]

42 111 N.E. 1050 (N.Y. 1916).

43 *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-45 (Harvard U. Press 1977) (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).

44 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 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).

45 *See* p. A4. *See also* A11-A14 (dissent 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, principally 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

Some Perspective on Judicial Creativity The power of judges to make law is 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, 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."[46]

3. The Problem of Retroactivity

Any system that considers judicial decisions to be a source of law should be concerned about problems of retroactive lawmaking.[47] Retroactivity did not trouble Blackstone and other adherents to the "discovery" theory of common law. The announcement of a "new" rule did not change the law; it only declared what the true common law rule was all along. But once one admits that caselaw really does change the law, one must be concerned with the fairness of applying that rule retroactively.

The primary concern about retroactivity is with the rule's application to persons other than the parties to that case. Courts in the United States often resort to the technique of giving decisions prospective effect only or only partial retroactivity.[48] In deciding whether to do so, they evaluate the extent of reliance on the old rule and the degree to which the new rule represents "a clear break with the past."[49] The most common form of prospective application is to apply the new rule to the parties in that case, to other cases pending on the date of the decision, and to all cases arising in the future. This is what the Florida Supreme Court did in *Hoffman v. Jones*, the comparative negligence case in the appendix discussed earlier.[50]

But in a strict sense, the parties in the very case that changes the law are subject to retroactive lawmaking. The appellate decision in a case is made some period of time (often years) after the conduct in question in the lawsuit took place. If the standard of conduct is a new one and especially if the decision overrules some prior clear rule, it would seem unfair to apply it even to the parties in the case, who would have had no notice of such a rule when they engaged in the conduct.[51] Recognizing this, a few cases have given *solely* prospective effect to new caselaw rules, thus not

IN AMERICAN HISTORY, 4TH ED. (West 2006).

46 CARDOZO, *supra* note 35, at 164. *See also* Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. 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).

47 Retroactivity is a problem with common law, where rules are completely judge-made, but it is also a problem with caselaw interpreting statutes in new directions and particularly with caselaw interpreting the Constitution.

48 English courts generally follow a rule of full retroactivity. But English courts adhere to *stare decisis* more rigidly and are generally not as activist as American courts, thus reducing the unfair effects or retroactivity. *See* ATIYAH & SUMMERS, *supra* note 24, at 147-148.

49 *Desist v. United States*, 394 U.S. 244 (1969).

50 *See* Appendix, p. A10.

51 Jeremy Bentham, a strong supporter of codification of law, explained the problem in a colorful way in answering the question of how judges make common law: "Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog and this is the way the judges make law for you and me." Jeremy Bentham, *Truth v. Ashhurst*, 5 WORKS 233, 235 (W. Tait, Edinburgh 1923) (first published 1838).

even giving the "winning" party in that case the benefit of the new rule.[52] However, this technique is rarely used as it gives rise to a host of other objections. Among them is the fact that, without some prospect of gaining some benefit from an appeal, few parties would seek changes in the law, and it would become stagnant. The prevailing view today is that the winning party should get the benefit of the decision, even if it is prospective in all other respects, and that this is an unavoidable cost of a caselaw system.[53]

The retroactivity problem should not be exaggerated, however. As just discussed, changes in doctrine are not that common because of the strength of *stare decisis*. A court must decide that the policies supporting adherence to the established rule — predictability, certainty, fairness and efficiency — are outweighed by the need to overrule an established precedent. Even when there are changes in doctrine, most changes effected by caselaw are incremental and are hardly surprises.

Moreover, although retroactivity is a disadvantage of judge-made law, many argue that the benefits of its flexibility outweigh any such disadvantage. Judge-made law can react to the multitude of situations that could not be foreseen by even the most conscientious legislature. Judges can thus make exceptions to general rules as needed or even rethink and change a rule if it is causing unjust results. And, in any event, any major judicial "mistakes" are subject to change by the legislature.[54]

It should be noted as well that retroactivity is no less a problem in code-based systems with statutory law, since "interpretations" of statutes can change. The sparse 45 or so words of the French Civil Code dealing with civil wrongs have undoubtedly provided little notice to those affected by the judicially created twists and turns of French tort law. Certainly the parties in French tort cases that developed in the law in new directions were no less unfairly surprised than was the defendant in *Hoffman v. Jones*.[55]

C. Statutory Law in a Common Law System

1. Growth of Statutory Law

Calling the United States a "common law" country is misleading to the extent that it suggests that the most prevalent form of law is common law. While this might have been true at one point, it is emphatically not true today. Since the turn of the 20th century and particularly since the 1930s, there has been an "orgy of statute-making"[56] ushering in what has been called the "Age of Statutes." [57] The "center of gravity" of state law has also shifted to statutes. Indeed, it is probably fair to say that the average

52 *See Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) (affirming Montana Supreme Court decision reversing case rule for future, but refusing to give appellant benefit of new rule).

53 *See Stovall v. Denno*, 388 U.S. 293 (1967). Other objections to solely prospective effect are discussed in REYNOLDS, *supra* note 28, §4.29.

54 In England, legislative change is spearheaded by various law reform commissions that keep track of the law in particular areas and report needs for changes to the legislature. This is not generally true in the United States, where the likelihood of legislative intervention in the event of judicial "mistakes" is much lower. *See* ATIYAH & SUMMERS, *supra* note 24, at 29-30, 134-141, 148-149. For a good discussion of the limits and weaknesses of judicial law-making, *see* CAPPELLETTI, *supra* note 35, at 35-46.

55 *See Jand'heur c. Les Galeries Belfortaises*, D.P. 1930.I. 57 (words of the Civil Code imposing liability upon persons for damage caused by "things under their guard" meant that there would be strict liability in automobile accidents), discussed in SHAPIRO, *supra* note 36, at 140-143. *See also* Ruth Redmond-Cooper, *The Relevance of Fault in Determining Liability for Road Accidents: the French Experience*, 38 INT. & COMP. L.Q. 502-509 (1989).

56 GILMORE, *supra* note 32, at 95.

57 *See* GUIDO CALIBRESI, A COMMON LAW FOR THE AGE OF STATUTES (Yale U. Press 1985).

state in the United States has as many statutes as the average civil law country in Europe. If one multiplies that amount of statutory law by 50 states, one can see just how prevalent statutory law is in the United States.

Some statutes have replaced common law, but many more have created entirely new areas of law. On the federal level, volumes of federal taxation, social security, environmental, financial securities and banking law fill the United States Code. On the state level, numerous statutes regulating businesses, consumer rights, commercial transactions, and family relations have been enacted. Common law has not disappeared. Many areas of private law in the states — contracts, torts and property law — are governed primarily by common law with some statutory modifications. In most areas of the law, however, statutes are the rule rather than the exception.

2. The Common Law Attitude Toward Statutes

The prevalence of statutory law in the United States does not mean that statutes in the United States and continental Europe are applied the same way or even look the same. A quick glance at federal or state statute books will disclose that U.S. statutes are longer and infinitely more complex than the average civil law code or even most "special legislation" that has grown up in civil law countries outside the codes.[58] Underlying this formal difference is an important conceptual difference in attitudes about statutes.

The Civil Law Approach to Statutes Because of the influence of the French Revolution throughout continental Europe, the idea of legislative supremacy that developed was really one of legislative *exclusivity* — that legislation was the *sole* legitimate source of law. Judicial lawmaking was formally denied. When legislatures passed codes, they intended those codes to be a comprehensive statement of the entire law on the subject addressed. Thus, when gaps in code coverage inevitably developed, whether through oversight of the drafters or simple obsolescence, judges supplied an answer, but were compelled by the principles of comprehensiveness and legislative exclusivity to justify that answer as an interpretation of the code. This led to a flexible approach to the interpretation of statutes. Flexible interpretation was in turn aided by the fact that the codes, intended as they were to be comprehensive and enduring for years to come, tended to be written in general terms.

The Common Law Approach to Statutes There is a distinctive "common law attitude" toward statutes that differs from the approach taken in most civil law countries. Common law judges see statutes as containing specific *rules of law* that will be applied fairly according to their terms, but not beyond. Subject matter outside the terms of the statute remains governed by the common law. This means that, as a general rule, U.S. courts will not interpret statutes in two ways that are routine in civil law countries.

First, courts in civil law systems treat the codes as containing germinating principles from which specific rules can be generated. An entire body of French tort law, for example, has been derived from only a few lines of general text in the civil

58 An interesting comparison in this respect can be made between the "Model Uniform Product Liability Act" promulgated by the U.S. Department of Commerce as a suggestion for state enactment, U.S. Dept. of Commerce, Uniform Products Liability Act: A Model For the States (U.S. Govt. Printing Off., Washington 1979) and the Federal Republic of Germany's Act of December 15, 1989, on Liability for Defective Products (Product Liability Act — ProdHaftG) (eff. January 1, 1990). Anyone who doubts the potential for complexity of U.S. statutes and has access to federal laws should examine the Clean Air Act, particularly 42 U.S.C.A. §7511a, or most any section of the Internal Revenue Code, 26 U.S.C.A. §1 *et seq.*.

code.[59] Courts in the United States are not likely to find — nor are legislatures likely to write — broad principles in legislation that can be used for the germination of rules.[60] Broad principles suitable for germinating rules exist for common law judges, but they are found in the common law.

Second, courts in civil law countries may reason by analogy from a statute and apply it to situations not within its literal terms. An example is the decision the German Federal Constitutional Court that interpreted a statute protecting the rights of a surviving *spouse* of a deceased tenant to continue living in an apartment to grant the same rights to a live-in male companion of a deceased tenant. In doing so, it emphasized the propriety and even the obligation of courts to reason by analogy where appropriate.[61] The average U.S. court will interpret a statute to apply to the extent of its terms, but will generally decline to reason by analogy to a different rule. Indeed, it is likely that a U.S. court considering a statute like the German statute just mentioned would use the maxim *expressio unius est exclusio alterius* and hold that the statute, by specifically including spouses, impliedly excluded persons in other cohabitation relationships.[62]

3. Reasons for the Common Law Approach to Statutes

The common law attitude toward statutes is somewhat ironic, given that common law courts regularly reason analogically from prior cases and germinate specific rules from general *common law* principles, as discussed later in this chapter.[63] There would not seem to be any logical reason why *legislative* principles could not *also* be used to germinate rules.[64] To the extent that judges give a reason for the narrow approach to statutes, it is said to be compelled by legislative supremacy. Any judicial effort to extend a statute beyond a fair reading of its text would add something to the statute that the legislature apparently did not wish to be there. Had the legislature wished to go further than the rule stated in the text of the statute, it would have done so. So any court that adds anything to a statute beyond what is fairly traceable to its text is invading the province of the legislature.

Of course, it is equally logical that the legislature would have wished that courts fill unanticipated gaps in its statutes by reasoning by analogy from the rules set out in the statute and their apparent underlying principles. So, the common law view strikes many as a singularly unhelpful judicial attitude. Where it comes from, however, is understandable. It is the result of the lack of any necessity to view statutes any

59 The principal section is §1383, which provides: "Everyone is liable for damage he has caused not only by his intentional acts, but also by his negligence or imprudence."

60 The alternative is for the legislature to simply delegate to the courts the power to make common law on the subject. *See infra* p. 63.

61 *See Constitutional Complaint of Building Cooperative "X,"* BVerfGE 82, 6 (First Panel, April 30, 1990). *See also Harty v. Ville de Châlon-sur-Marne*, S. 1878.II. 48 (French Court of Appeals) (interpreting §1386 of the French Code Civil, which makes owners of buildings liable for any damage caused by collapse of their buildings, to apply by analogy to owner of a rotten tree which collapsed causing personal injury) and D. NEIL MACCORMICK AND ROBERT S. SUMMERS EDS, INTERPRETING STATUTES: A COMPARATIVE STUDY 471-472 (Dartmouth Publishing, Brookfield, Vermont 1991). Reasoning by analogy is inappropriate to expand the reach of criminal or tax statutes, however.

62 The *expressio unius* maxim is discussed *infra* on p. 59.

63 *See infra* pp. 70-73.

64 As long ago as 1908, Dean Roscoe Pound noted the distinctive common law attitude and urged U.S. courts to consider statutes in a more expansive manner. *See* Roscoe Pound, *Common Law and Legislation*, 21 HARV.L.REV. 383 (1908). *See also* Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L.REV. 4, 12-15 (1936) and Roger Traynor, *Statutes Revolving in Common law Orbits*, 17 CATH. L.REV. 401, 405-409 (1968). Stone later became Chief Justice of the United States Supreme Court, serving from 1941 to 1946. Traynor was Chief Justice of the California Supreme Court.

differently, the basic conception of the relationship between statutes and common law, and a historical judicial hostility toward statutes.[65]

Lack of a Need for Expansive Statutory Interpretation As discussed earlier, a complete system of judge-made common law was developed relatively quickly, over about 100 years.[66] The common law was understood to be the repository of all the "broad and comprehensive principles" that existed in the law.[67] Statutes were enacted on an *ad hoc* basis as needed to address specific problems thought not to be sufficiently addressed by the common law. Thus, common law judges did not search for basic principles in statutes, nor did legislators deem it necessary to set out such principles in the statutes they passed.

Relationship Between Statutes and Common Law Because common law developed first and statutes dealt with relatively narrow subjects, the common law mind views statutes as being enacted against the comprehensive backdrop of the common law. As a result, there is no need to fill any statutory gaps by extending the reach of the statute. Any gaps have already been filled by the common law. Enacting a statute in a common law system, then, is like placing a rock in a bucket of water. The rock displaces the water as far as it goes, but the water rushes in to fill any holes or cracks in the rock. Judges deciding a case not covered by the statute simply resort to the common law. As a result, common law judges faced with gaps in a statute need not to resort to a highly flexible interpretation of the statutory language, such as reasoning by analogy, or to germination of rules from the statutory principles.

Historical Judicial Hostility The common law reigned supreme for centuries before there were any significant statutory intrusions. As statutory enactments became more frequent, common law judges resented infringements on their domain. In their modest view, statutes were quite unnecessary since the common law had an answer for all important legal questions. Judges viewed Parliament's forays into lawmaking as mistaken and amateurish, and therefore calling for a narrow interpretation. As Pollock observed, "Parliament generally changes the law for the worse, and . . . the business of the judge is to keep the mischief of its interference within the narrowest possible bounds."[68] The maxim that "a statute in derogation of the common law should be strictly construed" is a product of this attitude.[69] In turn, Parliament reacted to narrow and grudging judicial interpretations of its statutes by spelling out its intentions in detail in the statutory language. This then resulted in a complex and specific legislative product unsuitable for expansive interpretation.[70]

Common Law and Statutes in the United States The above relates to the experience in England. In the United States, discomfort with statutes was perhaps less from the very beginning. States formally "received" English common law by constitutional or statutory enactment, but they freely modified it by statute from the beginning,

65 The common law approach to statutes is especially ironic in the United States, where constitutional interpretation is marked by an extremely flexible view of the text of the Constitution somewhat similar to some continental European courts' approaches to their codes. *See* Chapter IX, pp. 323-325.

66 DAWSON, *supra* note 19, p. 6.

67 *Norway Plains Co. v. Boston & Maine R.R.*, 67 Mass. 263 (1854) (Shaw, C.J.).

68 SIR FREDERICK POLLOCK, ESSAYS ON JURISPRUDENCE AND ETHICS 85 (1882).

69 *See* Jefferson B. Fordham & J. Russel Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VANDERBILT L. REV. 438, 440-441 (1950).

70 *See* ZWEIGERT & KÖTZ, *supra* note 19, at 273-278.

sometimes in a fit of anti-English pique.[71] However, the notion of strictly construing statutes in derogation of the common law experienced a surge at the turn of the 20th century in the United States when politically conservative judges narrowly interpreted progressive state social legislation. American legislatures reacted much as Parliament did, by spelling out their intentions specifically.[72]

Courts in both England and the United States have abandoned their general hostility toward statutes, and the legitimacy of statutes as the principal form of law in a modern society is accepted completely. However, the basic concept that "the law" means "the common law with a few statutes added in" continues. Returning to the conceptual analogy of the statutory "rocks" in a bucket of common law "water," the fact that today — in the "Age of Statutes" — the pail is now more full of rocks than water does not alter the basic concept.

4. Attempts at Codification in the United States

Given the common law attitude toward statutes, it is not surprising that efforts at comprehensive legislative codification of the law have failed in the United States. The first codification opportunity presented itself when Jeremy Bentham, a proponent of codification in England, wrote to President James Madison in 1811 offering to codify law in the United States. His offer was politely refused.[73]

The Field Codes Somewhat more fruitful efforts were undertaken in the latter half of the 19th century. This movement was led by David Dudley Field of New York, who in 1847 persuaded the New York legislature to constitute a commission to codify the law. In 1865, the commission presented five codes to the legislature for passage: civil procedure, criminal procedure, penal, civil and political. However, New York enacted only the civil and criminal procedure codes. Much of the reason for the lack of success was the opposition of the organized bar. Another factor was that much of the driving force behind codes — the claim that unwritten caselaw was difficult to understand and apply — had been undercut by the appearance of commentaries on the law, books that summarized caselaw, particularly the commentaries of James Kent and Joseph Story.[74]

Field's codes had greater success in the Western United States, where frontier attitudes about law made the apparent simplicity and accessibility of a code more appealing. Five Western states passed forms of his Civil Codes and still have them today (California, North Dakota, South Dakota, Idaho and Montana). However,

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71 It is reported that a common toast during the immediate post-Revolutionary United States was: "The Common Law of England: may wholesome statutes soon root out this engine of oppression from America." EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 96 (Fred B. Rothman & Co., Littleton, Colo. 1981) (originally published in 1944). *See also* Eric Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA.L.REV. 403 (1966). New Jersey and Kentucky statutes prohibited citation of any English common law authorities. LAWRENCE FRIEDMAN, HISTORY OF AMERICAN LAW, 2D ED., 97-98 (Touchstone Books, N.Y. 1985).

72 *Jones v. Milwaukee Elec. Ry. & Light Co.*, 133 N.W. 636 (Wis. 1911) (statute imposing liability on "every railroad company" does not include an "electric interurban railroad company"). It was this conservative judicial attitude that constitutionalized free enterprise that led to the problems generated by the *Lochner* Era discussed in Chapter I, pp. 11-12.

73 ZWEIGERT & KÖTZ, *supra* note 19, at 250. Bentham's view of judge-made law was mentioned *supra* note 51.

74 James Kent (1763-1847) was a judge for many years and then retired to become a professor at Columbia University in 1823, when he published his *Commentaries on American Law*, which went through several editions between 1826 and 1830. Joseph Story (1779-1845) was a Justice of the Supreme Court who taught at Harvard Law School while still a Justice. He published nine commentaries on various subjects of private and constitutional law from 1832 to 1845. Many continued to be updated after his death. These great commentaries inspired many imitators and commentaries became a principal means of gaining access to the law in a system that relied principally on case decisions.

legislators and their drafting assistants — themselves products of the common law system — made the codes too specific. In turn, judges similarly steeped in the common law tradition treated these "codes" the same way common law courts have always treated statutes — as statements of rules to be applied according to their terms, not as sources of germinating principles.[75]

Despite the pervasive common law attitude toward statutes, there has been some move away from it and toward a more expansive view somewhat similar to the European approach. Some of those unusual cases are discussed after the following discussion of more traditional approaches to statutory interpretation.[76]

D. Statutory Interpretation Methods

What follows is a mixture of approaches and "maxims" of statutory interpretation commonly encountered in judicial opinions interpreting statutes.[77] In reading this description, two things should be kept in mind. First, there is no single official approved list of approaches or maxims.[78] Although most of the cases cited here are from the United States Supreme Court, this is done primarily for ease of referencing the opinions cited. State courts are not compelled to follow the Supreme Court's approach except as to *federal* statutes. However, state court approaches are generally similar in any event. Second, many of the maxims discussed contradict each other. In some cases, the court's choice of one maxim over another is left unexplained.[79]

If pressed to give an overall generalization about statutory interpretation in the United States, one could say that courts in the United States generally believe they should interpret the language of the statute in such a way as to give effect to the purpose the legislature sought to accomplish, keeping in mind that ordinarily the best evidence of purpose is the text of the statute. Yet, there are many approaches used that ignore or run counter to this goal.[80]

1. The Plain Meaning Rule

According to this rule, a court should construe a statute so as to give its words their ordinary meaning, unless the result would be absurd. Resort to legislative history or

75 FRIEDMAN, *supra* note 71, at 351-354; *See also* ARTHUR T. VON MEHREN, LAW IN THE UNITED STATES 20-21 (Kluwer 1989). *See, e.g., Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963) (notice required by the Civil Code does not apply to warranties arising independently under the common law).

76 *See infra* pp. 61-63.

77 For a taxonomy of methods used in the U.S., *see* MACCORMICK & SUMMERS, *supra* note 61, at 407-459. This excellent book contains chapters on many other countries and a concluding comparative discussion. *See also* HART & SACKS, *supra* note 44, pp. 1111-1380; F. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (Little, Brown 1975) (a classic though theoretical book); KENT GREENAWALT, LEGISLATION - STATUTORY INTERPRETATION: 20 QUESTIONS (FOUNDATION 1999); MICHAEL M.B.W. SINCLAIR, A GUIDE TO STATUTORY INTERPRETATION (Lexis 2000).

78 Some state legislatures have attempted to compile lists of rules. *See, e.g.*, Minn. Stat. Ann. §645.16. However, courts tend to ignore them. *See Comment*, "The Effect of the Statutory Construction Act in Pennsylvania," 12 U. PITT. L. REV. 283 (1951 (act used in fewer than 3% of cases involving statutory interpretation). There is also a MODEL STATUTORY CONSTRUCTION ACT, promulgated by the Uniform Law Commissioners, and available at www.nccusl.org/Update/. *See* Chapter I, p. 34, note 154.

79 The "thrust" and "parry" of a whole host of competing maxims are outlined in Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes are to be Construed*, 3 VANDERBILT L.REV. 395, 401-406 (1950). One commentator has noted with alarm the Supreme Court's increased use of formal maxims of statutory construction. *See* Daniel A. Farber, *Revival of the Canons*, TRIAL, p. 82 (June 1992). *See also* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism and the Rule of Law*, 45 VANDERBILT L. REV. 533, 535 (1992).

80 No attempt will be made here to distinguish between legislative "purpose" and "intent." *See* REYNOLDS, *supra* note 28, §5.5.

aids to understanding beyond the text is ordinarily not appropriate. The "plain meaning" rule is returning to favor after a period of disfavor.[81]

Proponents of the plain meaning approach argue two points in its favor. First, what the legislature passed and the executive signed were the words of the statute, not the committee report or speeches of supporters or opponents. As Justice Jackson put it, "[i]t is the business of Congress to sum up its debates in its legislation." He viewed going beyond the words of the statute in any case but one where they are "inescapably ambiguous" as allowing the courts to inject themselves and take sides in the "political controversies" that accompanied the enactment, thus subverting the democratic process.[82] Second, ordinary people and most lawyers rely solely on the statutory language and do not have ready access to legislative history materials: "[t]o accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country."[83]

Opponents of a plain meaning rule argue that plain meaning "rests on the erroneous assumption that words have a fixed meaning," pointing out that "[w]ords are symbols used for communication — means, not ends, in the legislative process."[84] As Justice Holmes stated, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[85] Moreover, the plain meaning rule can make for worse judicial meddling than that it seeks to avoid: "Why should a judge be permitted to impose his own reference or that of some hypothetical average person on statutory words instead of inquiring in the first instance as the reference of the enactors?"[86]

The Supreme Court has at one time or another approved the use of the plain meaning rule. A classic application was in *Caminetti v. United States*.[87] There the Court held that the language of a federal criminal statute that prohibited transportation of women across state lines for prostitution or "any other immoral purpose" was clear, and therefore applied to non-commercial debauchery. The decision came over a strong protest that the sole aim of the statute was to stop *commercialized* vice.

Some commentators and judges see a trend in the late 1980s back toward plain meaning in the Supreme Court, largely as a result of Justice Antonin Scalia's influence. In the 1981 Supreme Court term the Court always checked the text against the legislative history.[88] Yet, in the 1989 and 1990 terms, 10 out of 65 and 19 out of 55 statutory interpretation cases were decided without *any* reference to legislative history.[89]

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81 *See* Phillip P. Frickey, *The New Textualism*, 37 U.C.L.A. L.REV. 621 (1990).

82 *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951).

83 *Id.*

84 *Note, A Re-evaluation of the Use of Legislative History in the Federal Courts*, 52 COLUM. L. REV. 125, 134 (1952).

85 *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

86 John M. Kernochan, *Statutory Interpretation, An Outline of Method*, 3 DALHOUSIE L. J. 333, 342 (1975).

87 242 U.S. 470 (1917).

88 Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197 (1983). Judge Wald was Chief Judge of the Court of Appeals for the District of Columbia Circuit.

89 Stephen Breyer, *The Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L.REV. 845, 846 (1992). The author, a proponent of using legislative history, is currently a justice of United States Supreme Court. *See also* MACCORMICK & SUMMERS, *supra* note 61, at 457-458. For a discussion pros and cons of using legislative history, *see* Breyer, *supra*, at 861-869. A recent plain meaning case is *Alabama v. Bozeman*, 533 U.S. 146 (2001) ("shall" dismiss means what it says; *de minimus* violation exception rejected).

2. Plain Meaning and Legislative History

The Court has *said* that the plain language of the statute governs when it is unambiguously applicable to the problem[90] and that "[t]he starting point of every case involving construction of a statute is the language itself."[91] It has also cautioned that reliance on legislative history as a means of ascertaining congressional intent is a "step to be taken cautiously"[92] and at one time emphasized Justice Oliver Wendell Holmes's admonition that "[w]e do not inquire what the legislature meant; we ask only what the statute means."[93]

However, the Court has also gone to the opposite extreme. In 1976, it unanimously reversed the Court of Appeals for its invocation of plain meaning and refusal to consult legislative history.[94] Moreover, statutory language apparently has rarely been so clear that the Court does not at least "peek" at that history to verify its reading of the language. Such a "peek" would seem to be required even when the statutory language is clear: one formulation of the plain meaning rule has it that the language of the statute controls "absent a clearly expressed legislative intention to the contrary."[95] Thus, the Civil Rights Act of 1964 was interpreted in *United Steelworkers of America v. Weber*[96] to allow some race-based disadvantageous treatment of white employees (through use of an affirmative action program for minorities) despite the statute's literal prohibition against discriminating "because of . . . race." The legislative history disclosed a purpose to permit reasonable race-conscious attempts to remedy "conspicuous racial imbalance in traditionally segregated categories" of employment.

When legislative history is used, there is a hierarchy of probative value of the various items of that history. Of greatest importance are legislative committee reports.[97] These are descriptions of the legislation written by the legislative committees that have studied it, heard testimony and arguments for and against it, and have voted to send it to the floor for a vote by the relevant house of Congress. Committee reports are thought to be important for statutory interpretation because busy legislators often rely on those reports for their information about the bill in order to decide whether to vote for it or against it. Also important if they exist are conference committee reports. Conference committees are committees with both House and Senate members on them that are set up to work out the differences between versions of bills passed by the House and Senate.[98]

90 *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

91 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976).

92 *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977).

93 Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 HARV.L.REV. 417, 419 (1899), quoted in *S&E Contractors v. United States*, 406 U.S. 1, 14 n.1 (1972).

94 *Train v. Colo. Public Interest Research Group*, 426 U.S. 1 (1976). Indeed, in one case the Court seemed to reverse the usual order of things *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) ("Because of this ambiguity [in the *legislative history*], it is clear we must look primarily to the *statutes* themselves to find the legislative intent.") (emphasis supplied).

95 *Maine v. Thiboutot*, 448 U.S. 1, 6 n.4 (1980), citing cases.

96 443 U.S. 193 (1979). The substance of *Weber* is discussed in Chapter XV, p. 605.

97 *Lewis v. United States*, 445 U.S. 55, 63 (1980); *Wright v. Vinton Branch Bank*, 300 U.S. 440, 463-64 (1937).

98 *See* Chapter I, p. 17. "Standing" committees of the whole Congress also issue reports, such as the Joint Committee on Taxation, which is active in studying various proposals for tax reform and issues frequent studies and reports describing the current law as well as the reform proposals. At least the Committee's analysis of current reform proposals are used by courts much like other legislative history. Senate and House reports are numbered sequentially for each year without reference to the originating committee. Thus, the 175th committee report in the Senate in the year 1997 would bear a formal citation "S. Rep. 97-175," while the 493rd House report of 1997 would be cited "H.R. Rep. 97-493." Conference

Of a value equal to committee reports are statements of individual legislators responsible for the preparation or drafting of the bill.[99] A statement on the floor of Congress by a representative immediately after introducing an amendment to a bill, which later became part of the final legislation, was held to be "clearly probative of a legislative judgment."[100] Statements in debates on the floor of Congress are considered as somewhat persuasive, "though [they are] not entitled to the same weight" as committee reports.[101] Statements "other than by persons responsible for the preparation and drafting of a bill, are entitled to little weight"[102] and "the fears and doubts of the opposition are no authoritative guide to the construction of legislation."[103]

Justice Scalia champions the plain meaning rule in large part because he believes that legislative history is a highly unreliable guide to intent. He has noted that statements in debate on the floor of Congress are not probative because they are "ordinarily addressed to a virtually empty floor."[104] It is even concocted to influence courts who may later the called on to interpret the statute. There are many opportunities to "plant" sentences or case citations in committee reports or to engage in rehearsed exchanges on the floor of Congress. This would be bad enough if done out of the legislator's philosophical disagreement with the majority. But the chances are great that such activities would be done at the behest of a lobbyist employed by some special interest group to influence the legislation.[105]

There is considerably less reliance on legislative history in state court decisions construing state statutes. The reason for this is that state legislative histories are usually not published and are otherwise difficult to find and compile. Thus, state courts are more likely to use the plain meaning rule or to resort to the other aids to interpretation discussed here.[106]

3. The Social Purpose Rule

Under the "social purpose" rule, a statute will be construed to effectuate the social purpose it was designed to accomplish. Traceable to the 1584 English case, *Heydon's*

reports bear a House number.

99 *Fed. Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *United States v. International Union*, 352 U.S. 567, 573-75 (1957).

100 *Simpson v. United States*, 435 U.S. 6, 13 (1978).

101 *Chandler v. Roudebush*, 425 U.S. 840, 858 n.36 (1976).

102 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n.24 (1976).

103 *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 483 (1981).

104 *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 391 (2000) (Scalia, J., concurring).

105 *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring); *Thompson v. Thompson*, 484 U.S. 174 (1988) (Scalia, J., concurring). *See* William S. Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect on the Interpretation of Statutes*, 45 A.B.A.J. 1314 (1959). *See also Exxon Mobil Corp. v Allapattah Services*, 545 U.S. ___, 125 S.Ct. 2611 (2005) (alleged manipulation of House report). Justice Scalia has even railed against the use of legislative history "to confirm what the statute plainly says anyway." In a way, he says, "this utter lack of necessity makes it even worse — calling to mind St. Augustine's enormous remorse at stealing pears when he was not even hungry, and just for the devil of it ('not seeking aught through the shame, but the shame itself!')" (citing *The Confessions of St. Augustine*, Book 2, ¶ 9). *Crosby*, *supra* note 104 at 391.

106 The official English view before 1993 was not to examine legislative history, although English courts before then could consider committee reports and other preparatory material to determine the evil against which the Act in question was directed. See GLANVILLE WILLIAMS, LEARNING THE LAW 102 (11th ed. 1982) and RUPERT CROSS, STATUTORY CONSTRUCTION 42-52 (1976). This changed in *Pepper v. Hart*, [1993] 1 All E.R. 42, in which the House of Lords adopted the view that it was proper to consider parliamentary legislative history materials in ascertaining the meaning of the statute.

Case,[107] it was used by the United States Supreme Court in the famous case of *Holy Trinity Church v. United States*.[108]

In *Holy Trinity Church*, a federal statute made it unlawful for anyone to assist in the migration of "any alien . . . under contract or agreement . . . to perform labor or service of any kind in the United States." Holy Trinity Church was prosecuted when it hired an Englishman to come to the United States to be its pastor. Despite the wording of the statute, the Supreme Court held that the church had not violated the statute. It observed that the "evil" at which the statute was directed was importation "an ignorant and servile class of foreign laborers" who agreed to work "at a low rate of wages," thus "break[ing] down the labor market." Since "it was cheap unskilled labor that was making the trouble" and that it was never suggested that "the market for the services of Christian ministers was depressed by foreign competition," the statute would not apply, despite its clear terms. Clearly the "social purpose" rule can conflict with application of the "plain meaning" rule.

A version of the social purpose rule is the "absurdity" limit on the plain meaning rule. The Court has cautioned that the absurdity exception should be utilized only in "rare and exceptional circumstances."[109] The absurdity limit was used, however, in *United States v. Kirby*,[110] a case in which a state sheriff was prosecuted for violating a federal statute which made it a crime to "knowingly and willfully obstruct or retard the passage of the mail, or of any driver . . . carrying the same." The defendant sheriff had arrested a federal postal service letter carrier on a warrant issued by a state court. The Supreme Court found that this was an absurd application of the law that could not have been intended by Congress.

In one case, a literal reading of the word "defendant" would have meant that in a civil case evidence of a prior criminal conviction could be introduced to attack the *defendant's*, but not the plaintiff's credibility, a distinction that was simply irrational.[111] The Court declined to read the rule literally, relying in part on the absurdity exception. The case is also notable for the fact that it one of the rare instances when Justice Scalia agreed that use of legislative history was proper.

4. The Context of Statutory Language

The Immediate Context of Terms Two maxims are used for discerning the meaning of statutory terms from their immediate context. The first is the canon *ejusdem generis*, the concept that "where general words follow an enumeration of specific items, the general words are read as applying to other items akin to those specifically enumerated."[112] For example, in *McBoyle v. United States*,[113] the Supreme Court held that the National Motor Vehicle Theft Act did not apply to airplanes. The definition of "motor vehicle" listed "an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on

107 76 Eng. Rep. 637 (Exchequer 1584).

108 143 U.S. 457 (1892).

109 *Howe v. Smith*, 452 U.S. 473, 483 (1981) (no reason to depart from language of federal statute on prisoner transfer).

110 74 U.S. (7 Wall.) 482 (1868).

111 *Green v. Bock Laundry*, 490 U.S. 504 (1989) (interpreting Federal Rule of Evidence 609(a)).

112 *Harrison v. P.P.G. Industries, Inc.*, 446 U.S. 578, 588 (1980).

113 283 U.S. 25 (1931).

rails." Although an airplane met the literal definition of the statutory language, the Court held that this definition covered vehicles *running on land only*.[114]

A second, similar rule is *noscitur a sociis* — the notion that "a word may be known by the company it keeps." It was used in *Jarecki v. G.D. Searle & Co.*,[115] in which the Court held that inventions of drugs and photographic devices were not, despite their great novelty, within the definition of "discovery" where the statute used "exploration" and "prospecting" in conjunction with the word "discovery." According to the Court, the context indicated that Congress intended to describe income-producing activity in the oil and gas and mining industries, not in the development of manufactured products, such as drugs and cameras. However, the maxim may not be used to narrow any distinctive meaning intended by the legislature.[116]

Statutes In Pari Materia and Contextual Harmonization On a broader level of harmonization, courts are supposed to interpret statutes *in pari materia* — "on the same subject" — in a way that is consistent. This device was employed by the Court in *Bowen v. Massachusetts*,[117] in which it held that an action for "damages" included an action for *injunctive* relief that would require payment of money, a form of relief not technically within the definition of "damages."[118] The suit was one against the United States. Another federal statute defining jurisdiction in suits against the United States, had long been construed to include such injunctive actions. The Court consequently found support for its reading from the settled meaning of the other statute. Other harmonization efforts might include intersectional harmony within the same statute or harmonization with a general public policy applicable to that subject matter area.

5. Presumptions About the Use of Language

The Negative Implication Rule An important maxim close to the heart of the limited common law view of statutes is *expressio unius est exclusio alterius*: the expression of one thing implies the exclusion of others. An example of the *expressio unius* canon is *Tennessee Valley Authority v. Hill*,[119] in which the Court upheld an injunction against completion of a $100 million dam. The injunction was to prevent possible extinction of an endangered species of fish, called "snail darters," in accord with the Endangered Species Act, an act prohibiting destruction of species shown to be on the verge of extinction. The federal agency in charge of the dam argued that there should be a "hardship exemption" from the strict protections afforded to endangered species by the Act, but the Court disagreed. The Act listed several other exemptions, and the Court presumed that the list was exhaustive. *Holy Trinity Church*, discussed earlier, was distinguished.[120]

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114 *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) ("contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" was intended to apply only to transportation workers).

115 367 U.S. 303 (1961).

116 *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (in defining "take" to mean only the direct application of force against an endangered species, the lower court ignored surrounding words, such a "harm,"that contemplated indirect effects).

117 487 U.S. 879 (1988).

118 Though both forms of relief require payment of money, one is "legal" while the other is "equitable." *See* Chapter VII, pp. 240-241, 242-244.

119 437 U.S. 153, 184 (1978). *Hill* is discussed in another respect in Chapter XV, p. 623.

120 *See also Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit*, 507 U.S. 163 (1993) (federal court rule's requirement of higher pleading standard for certain types of claims precludes its application to other types not listed); *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122, 133 (1989) (Warsaw Convention's specifying one sanction for defective notice of limited liability on airline ticket impliedly excluded the sanction of making airline fully liable for damages).

Specific Language Controls Over the General Another maxim of statutory construction is that specific statutes take precedence over general statutes. For example, in *People v. Ruster*,[121] the defendant was convicted of felony theft under a general theft statute for falsifying his identity in order to receive unemployment benefits. The California Supreme Court reversed the conviction, however, because there existed a more specific statute that made the falsification of unemployment applications a less serious misdemeanor.

6. External Influences on Statutory Interpretation

The Rule of Lenity for Criminal Statutes Another canon of construction that likely underlay the *McBoyle* case, discussed above as an example of *ejusdem generis*, is the "rule of lenity." Under this concept, basic fairness requires that criminal laws give clear notice to possible violators of what conduct is prohibited, so any ambiguity or lack of clarity will be interpreted in favor of the accused. This rule was applied in the early case of *United States v. Wiltberger*,[122] in which the Court interpreted a federal statute extending jurisdiction of American courts over crimes committed on the "high seas" as not extending to crimes committed on rivers in foreign countries.[123]

Deference to Administrative Interpretations The interpretation of a statute by an administrative agency charged with administering that statute is entitled to deference by the courts. If the intent of Congress is clear and the interpretation contradicts that intent, legislative intent controls and a contrary agency interpretation will be struck down. But where the statute or its legislative history is ambiguous or silent on the precise question involved, then a court "does not simply impose its own construction on the statute." Instead, it must defer to the agency's position so long as it is a "permissible construction of the statute."[124] However, statutory "interpretations in opinion letters . . . policy statements, agency manuals, and enforcement guidelines" do not warrant *Chevron*-style deference. They are "entitled to respect," but "only to the extent that they are persuasive" to a court interpreting the statute.[125]

Interpretation to Avoid Unconstitutionality A court should avoid an interpretation of a statute that might result in its being unconstitutional. In *Kent v. Dulles*,[126] the Court interpreted passport laws as not authorizing the State Department to prohibit persons with "communist backgrounds" from traveling, since such an application would infringe on the fundamental right to travel. In *Webster v. Doe*,[127] the federal Administra-

121 548 P.2d 353 (Cal. 1976).

122 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.).

123 *See also United States v. Thompson/Center Arms* Co., 504 U.S. 505, 517-518 (1992) (rule applied to scope of definition of prohibited weapons). But *see United States v. Alpers*, 338 U.S. 680 (1950) (statute prohibiting any "book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character" was not limited to articles comprehended by sight alone; it included obscene phonograph records).

124 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Compare Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (rejecting FDA conclusion that it could regulate cigarettes; overall statutory scheme, later statutes and common sense dictated otherwise) *with National Cable & Telecommunications Ass'n v Brand X Internet Services*, ___ U.S. ___, 125 S.Ct 2688 (2005) (upholding Federal Communications Commission's rule determining that broadband cable internet service is not a "telecommunication service," but an "information service").

125 *Christiansen v. Harris County*, 529 U.S. 576, 587 (2000) (rejecting labor department's "opinion letter" interpreting the Fair Labor Standards Act to prohibit employers from requiring employee to take compensatory time to offset overtime); *United States v. Mead Corp.*, 533 U.S. 218 (2001)(same for customs department tariff classification letters). As the opinions in the *Mead* case indicate, there is sharp disagreement on the Court over just what kinds of agency pronouncements qualify for *Chevron* deference.

126 357 U.S. 116 (1958).

127 486 U.S. 592, 603 (1988).

tive Procedures Act was construed to allow a suit for violation of constitutional rights "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Also included in this category are various "clear statement" rules imposed by the Supreme Court that require that Congress make absolutely clear its intentions to alter certain aspects of state sovereignty.[128]

Interpretation in Light of Fundamental Values Courts sometimes base a statutory interpretation in whole or in part on the assumption that the legislature did not mean to enact a rule that violates fundamental societal values absent some clear statement. Part of the basis for the Court in *Trinity Church* decision interpreting the statute to permit the church to bring in the English pastor was a supposed policy favoring religion.[129] A more specific fundamental policy may also affect interpretation. In *Santa Clara Pueblo v. Martinez*,[130] the Court declined to imply a private right of action under a federal statute because of the long-standing special policy against judicial interference in Indian affairs.[131]

7. Less Traditional Approaches to Statutory Interpretation

The above aids and approaches to statutory interpretation are generally consistent with the limited "common law attitude" toward statutes identified earlier. However, there has been some movement in recent years toward a more "civil-law" style of reasoning from statutes.[132]

a. Legislatively-Inspired Common Law

Filling "gaps" in statutes with common law is nothing new. This is fully consistent with the conception that statutes are enacted against a common law background. The common law rule that fills the gap may be one that runs counter to the general thrust of the statutory rule.[133] But when a new common law rule must be developed, there is no reason why it could not be consistent with the statute. Thus, courts have sometimes chosen a *complementary* common law rule analogous to the statutory rule. For example, in *University of Tennessee v. Elliott*,[134] a federal statute required that state *court judgments* be respected by other states and the federal courts. The statute did not by its terms apply to decisions of *administrative agencies*, but the Court was inspired by the principles underlying the statute to create a complementary common law rule

128 *See also* Chapter I, p. 32, and Chapter IX, p. 334 (statutes preempting state control over core functions) and Chapter VI, p. 223 and note 175 (statutes abrogating 11th Amendment immunity), p. 207 (statutes limiting judicial review of agency action). *Cf.* Chapter IX, p. 344 note 136 (clear statement required for Congress to approve state regulation that burdens interstate commerce). The need to avoid questions of constitutionality trumps *Chevron Oil* deference. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

129 *See supra* p. 58.

130 436 U.S. 49 (1978).

131 Courts are also required to interpret statutes in a manner that will not violate treaties or international law. *See* Chapter XVII, p. 682.

132 A broader approach to statutes has been championed by some scholars and judges. *See supra* note 64.

133 *See, e.g., Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co.*, 464 U.S. 30 (1983) (telephone company that was required to relocate equipment because of street realignment was not a "displaced person" entitled to relocation benefits within the meaning of federal statute; court applied common law principle that a utility forced to relocate from public right-of-way must do so at its own expense).

134 478 U.S. 788 (1986).

analogous to the one stated in the statute that would govern administrative agency decisions.[135]

Other cases involving legislatively-inspired common law move further away from complementary gap-filling cases like *Elliott* and closer to direct reasoning by analogy. In these cases, the "gap" being filled is quite large (if indeed it can be described as a "gap"), and legislative policy is used to *displace* an inconsistent, well-settled common law rule.

A pair of California cases illustrates this. The California legislature had passed Married Women's Property Acts, which abrogated common law disabilities of married women related to property rights.[136] The California Supreme Court relied on the policies underlying those Acts to abolish two common law doctrines that were not within the sweep of the statutes. In one case, the court abolished the doctrine prohibiting tort suits between spouses[137] and in the other, it abolished the rule deeming that husband and wife were incapable of a criminal conspiracy.[138] The court found that the statutes abrogating common law property ownership disabilities had undercut the principle underlying the tort and criminal law doctrines — the fiction that a married woman's person merged with that of the husband upon marriage. The new statutory principle of separate personhood in property matters was applied in a non-property context.

A U.S. Supreme Court case, *Moragne v. States Marine Lines, Inc.*,[139] involved similar reasoning. In that case, an 1886 common law precedent stood in the way of a wrongful death suit by the widow of a longshoreman killed in coastal waters off Florida. Although the common law authorized suits for *injuries*, the 1886 precedent established that *wrongful death* suits by survivors were not permitted unless provided for by statute. Neither Florida nor federal statutes authorized suit in the case. However, the Court overruled the troublesome common law precedent and permitted the suit. It based its decision on the fact that federal and state legislatures in several statutes had consistently granted a statutory right to recover for wrongful death in analogous situations. Justice Harlan's unanimous opinion spoke expansively of the propriety of drawing on legislative policy as a basis for lawmaking.[140]

Legislatively-inspired common law should not seem alien to a common law court. When choosing a common law rule, a court considers *all* possible input into the question of what that rule should be. Public policy choices made by democratically elected legislators are certainly a legitimate part of that data. Indeed, to the extent that courts are concerned that judicial lawmaking is undemocratic,[141] legislative sources for common law-making should be all the more attractive to courts.[142]

b. Reasoning by Analogy Without the Common Law Medium

There are a few examples of true application of statutory provisions by analogy without using the medium of common law doctrine. In *Cintrone v. Hertz Trucking*

135 It is interesting that the Court in the *Elliott* case did not consider the possible application of the *expressio unius* maxim, which would have dictated the opposite result. *See supra* p. 59.

136 *See* Chapter XIII, p. 509, for a discussion of Married Women's Property Acts.

137 *Self v. Self*, 376 P.2d 65 (Cal. 1962).

138 *People v. Pierce*, 395 P.2d 893 (Cal. 1964).

139 398 U.S. 375 (1970).

140 *See Comment*, "The Legitimacy of Civil Law Reasoning in Common Law: Justice Harlan's Contribution," 82 YALE L.J. 258 (1972).

141 *See supra* p. 46.

142 The development of common law from legislative principles was pointed out several years ago in an essay. *See* James Landis, "Statutes and the Sources of Law," in HARVARD LEGAL ESSAYS 213 (1934).

Leasing and Rental Service,[143] and *Newmark v. Gimbel's, Inc.*,[144] the New Jersey Supreme Court found that an implied warranty of fitness for purpose, as set out in the Uniform Commercial Code (UCC) for *sales* of *goods*, applied to the *lease* of a truck and to *services* rendered in a beauty parlor. In the lease case, the court observed that the "development of the warranty doctrine in sales should point the way by suggestive analogy to similar results in cases where a commodity is leased" in view of the fact that the same business ends that can be achieved by selling and buying can be achieved by leasing.[145] The aftermath of the UCC analogy cases, however, shows just how strong a pull the typical common law attitude still has. Other courts have followed the *result* of these cases, but not surprisingly have understood the cases as extending a *common law* rule of strict liability in *tort*. They do not rely on or even mention the Uniform Commercial Code.[146]

One U.S. Supreme Court opinion has reasoned directly by analogy, though over a strong protest from Justice Scalia. In *Agency Holding Corp. v. Malley-Duff & Associates*,[147] the Court had to determine what the time limitation period was for filing actions under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute.[148] The majority opinion applied the limitation period of a different federal statute, an antitrust act, believing that it provided the "closest analogy" to the RICO statute based on its similar structure and purpose. Justice Scalia, voicing the traditional common law attitude, viewed this form of reasoning as illegitimate. If the statute did not provide a limitations period, he argued, then either state law applied or there simply was *no* limitation period. He objected strongly to the Court's "prowling hungrily through the Statutes at Large for an appetizing federal limitations period," absent legislative direction to apply an analogous federal statute. He could "find no legitimate source for the new rule" and argued that picking a limitation period of a certain length was "quintessentially the kind of judgment to be made by the legislature."[149]

The above cases should not lead one to conclude that American courts reason analogically from statutes on a regular basis. Justice Scalia's dissenting position in the *Agency Holding* case is clearly the traditional view. Further, the maxim of *expressio unius est exclusio alterius*, which has seen a resurgence in use by the Supreme Court in recent years, remains an obstacle to much analogical reasoning from statutes. So far, it remains an exotic form of reasoning that is more often rejected than accepted.

E. The Form and General Nature of Caselaw

Having considered statutes in depth, we will now consider caselaw in this and the next section of this chapter. This section will consider the form that caselaw generally

143 212 A.2d 769 (N.J. 1965).

144 258 A.2d 697 (N.J. 1969).

145 This is consistent with the Uniform Commercial Code's drafters' suggestion that the Code's underlying principles should be applied to decide cases not expressly included in the language of the act. See Comment to UCC §1-102, SELECTED COMMERCIAL STATUTES (West 2005).

146 *See Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976). Analogical application of the UCC to leases was rendered largely moot when a new Article 2A covering leases was added in 1990 and adopted in 43 states.

147 483 U.S. 143 (1987).

148 The statute failed to specify any period. Typically, the Court has applied state-law limitation periods of the state where the federal action is brought. This has been justified either on a theory that state law applies of its own force where Congress has not preempted it or because Congress has implicitly directed that courts "borrow" state law.

149 *But see* Traynor, *supra* note 64, at 405-409 (collecting examples from between 1300 and 1800 of English common law courts analogizing from limitation periods in otherwise inapplicable statutes). Traynor was Chief Justice of the California Supreme Court.

takes and the principle of *stare decisis*. In the next section, we will discuss the legal reasoning process used in applying caselaw.

1. Judicial Opinions and Their Structure

Types of Opinions The most important judicial opinions are appellate court opinions. Appellate courts have multiple judges — usually 3, 5, 7, or 9 judges — and the case is decided by a majority vote of the judges on the court. There is an "opinion of the court" which states the decision and detailed reasons for that decision agreed to by a majority of the judges.[150] This opinion is written and signed by an individual judge who is a member of that majority.[151] Unless the decision is unanimous, one or more "dissenting opinions" may be filed by judges who disagree with the majority's conclusion and reasoning, or a judge may simply indicate the fact of dissent without an opinion. There may also be "concurring opinions" written by judges who agree with the conclusion of the majority, but disagree with its reasoning. Clearly, the majority opinion is the most important opinion, but the attentive lawyer will wish to read concurring and dissenting opinions to clarify the impact of the majority opinion.

The assignment to write the majority opinion is usually made by the chief justice or judge. Drafts of proposed majority, dissenting and concurring opinions are circulated among members of the court. In the process, the majority opinion writer often gets suggestions from other members of the majority and may include responses to criticisms by dissenting and concurring opinions. Sometimes there is a need to "bargain" to accommodate demands from members of the majority. This will force the writer to include ideas that are not his or her own, thus sometimes making for a less-than-completely coherent or consistent opinion. If a majority agrees on the proper result, but less than a majority agrees on a rationale for the decision, no one opinion receives the approval of a majority. The opinion supporting the result in the case that has the most votes is referred to as a "plurality opinion." The precise precedential value of a plurality opinion is not well defined and depends to a large extent on how later majority opinions of the same court treat it. Some have been cited and treated almost like majority opinions while others have been given little weight or have been completely ignored.

Structure and Content of Opinions There is no set structure for a majority opinion, but it will usually start with a statement summarizing the case and its procedural posture, a statement of the facts and the legal issues presented, a section discussing in detail the reasons supporting the decision, and the action to be taken in the case. The discussion of the reasoning behind the decision will often be encyclopedic, including extensive citations to and discussions of all prior relevant cases and many secondary authorities, such as law review articles and treatises. Thus, as noted in the Reader's Guide and Bibliographic Introduction to this book,[152] the judicial opinions of some courts — and of the U.S. Supreme Court in particular — are often helpful as references for discovering useful sources in the general area of law to which the case relates.

2. Precedential Effect of Court Decisions

Stare Decisis The essence of the system by which court decisions are a source

150 The general form of appellate opinions can be seen from *Hoffman v. Jones*, reprinted in the Appendix A.

151 The English style in the 1700s, inherited by American appellate courts, was to have *seriatim* opioions by each judge, giving the reader the task of figuring out who was in the majority and what their reasoning was. Chief Justice John Marshall of the United States Supreme Court, who served from 1801 to 1836, was responsible for breaking with the English practice and requiring a single opinion of the Court.

152 *See* pp. xxxi-xxxiv.

of law for later cases is the rule of *stare decisis*. The precise meaning of *stare decisis* is best expressed by the full Latin phrase from which the term comes: "*stare decisis et non quieta movere*," which means "to stand by precedents and not to disturb settled points."

The rationales for having a caselaw or precedential law system have been variously stated.[153] Perhaps the most often-stated justification for following precedent is what Karl Llewellyn called "that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances."[154] This equality of treatment in turn serves to limit bias and arbitrariness and allows parties to rely with some certainty on how the system has dealt with cases similar to theirs. In addition, following precedent is efficient since similar cases need not be reasoned through "from the ground up." Since statutes can be subject to differing interpretations, the rationales for a system of precedent apply with equal force to judicial decisions interpreting enacted law.

Court decisions can have two types of *stare decisis* effect. The effect can be "binding" or it can be only "persuasive."

Binding Stare Decisis Effect Binding effect on a court means that the court is obligated to follow the rule established by an earlier case. The decisions of a superior court have binding effect on all lower courts in the same court system. Thus, a decision of the Florida Supreme Court, the highest court in the state, has binding effect on all other state courts in Florida. This form of binding effect is sometimes referred to as "vertical" *stare decisis*. Prior decisions of a court will also bind that *same* court in later cases. This is sometimes referred to as "horizontal" *stare decisis*. However, horizontal binding effect is more flexible than vertical binding effect. It is not unusual that a court would sometimes overrule its own precedent.[155]

Persuasive Stare Decisis Effect If a court is not obligated to follow precedents established in earlier cases, but may do so if it is persuaded by the reasoning used, the precedential effect is only "persuasive." The decision of a legal question by the courts of one state will have only persuasive effect on the courts of another state. For example, New York courts will follow a Florida Supreme Court decision only if they believe it is correctly reasoned. Similarly, as noted in Chapter I, federal courts must apply state law in suits between citizens of different states.[156] However, their interpretations of state law have only persuasive effect on the state courts of that state, since authoritative interpretations of a state's law may only be rendered by those state courts.

Stare Decisis Effect of Statutory Interpretations Some have argued for a rule of absolute *stare decisis* effect for caselaw interpreting statutes.[157] Among the factors urged in favor is the ease with which the legislature can notice and correct any misunderstanding of legislative intent. In addition, the greater specificity of statutes

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153 *See* LLEWELLYN, *supra* note 44 at 26, where several are discussed..

154 LLEWELLYN, *id.* See also EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 425-430 (Harvard U. Press 1974).

155 *Stare decisis* is more closely adhered to in England than in the United States. Indeed, it was only in 1966 that the House of Lords, the highest court in England, formally adopted the principle that it should feel free in appropriate cases to depart from its own prior decisions. 1 W.L.R. 1234 (H.L. 1966) (Lord Gardner L.C.).

156 *See* p. 33.

157 *See* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989) (arguing for an absolute rule and suggesting that *stare decisis* as used today is a "mere rhetorical device").

often means that there are greater reliance interests involved. This has not been the Supreme Court's approach, however.[158]

Stare Decisis Effect of Constitutional Decisions Legislatures have the ability to change both common law caselaw and caselaw interpreting statutes. However, legislative "correction" of *constitutional* caselaw can only take place through the process of amending the Constitution — rarely a successful option. For this reason, the Supreme Court has been somewhat more amenable to overruling cases interpreting the Constitution that have been called into serious question.[159]

F. The Legal Reasoning Process in Caselaw

Two basic types of legal reasoning are used with caselaw: deductive reasoning and analogical reasoning.[160] Deductive reasoning takes caselaw "rules" and applies them in a manner similar to statutes. Analogical reasoning directly compares the facts of the prior precedent to the facts of the case to be decided.[161]

1. Deductive Reasoning from Caselaw Rules

The deductive reasoning process used in caselaw, like the process used with statutes, begins with a rule. However, caselaw involves an added step, because one must first determine just what "rule" has been established by prior caselaw. When dealing with one prior case, that "rule" is the "holding" of a case. In England, the term "ratio decidendi" is used.

a. Determining the Holding or Rule of a Case

The "holding" or "rule" of a case is a one or two sentence statement that summarizes the broader, more abstract principle for which the case stands, and for which the case can be used to decide later cases. A holding must be stated in such a way that it will make sense to a person who has not read the case, so a proper holding will contain shorthand references to the facts which were deemed most important for the decision.

For example, assume A owns a boat. B steals the boat. B then sells the boat to C. C pays B fair market value for it and does not know the boat is stolen. A finds out that C has the boat and sues C for possession.[162] Assume the judge decides for A, the owner. The opinion states in part: "It is argued that C paid fair market value for the boat and had no notice that it had been stolen and therefore acquired title. We do not agree. The seller B acquired the boat by illegal means and thus did not gain any right or title to it. Having no title himself, he was powerless to convey any to C. Moreover, there is benefit in a rule that serves to make it more difficult for thieves to dispose of stolen property. Judgement for A." The holding of the case might be as follows:

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158 *See, e.g. Monell v. New York Department of Social Services*, 436 U.S. 658 (1978) *overruling Monroe v. Pape*, 365 U.S. 167 (1961) (confessing error in construing the word defining suable defendant "persons" as not including municipalities).

159 *See Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandies, J., dissenting) ("in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions"). *But see Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (declining to overrule its 1973 decision establishing a constitutionally-secured right to an abortion, largely on *stare decisis* grounds).

160 For discussions of the modes of legal reasoning, *see* STEVEN BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING, 2D ED (Aspen 1995); MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (Harvard U. Press 1988); RUGGERO ALDISERT, LOGIC FOR LAWYERS (Clark, Boardman 1989). *See also* Vincent Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO.L.REV. 45 (1985).

161 The legal reasoning process is the same for common law caselaw as for caselaw interpreting statutes or other enacted law. Consequently, the two are treated together in this section.

162 These illustrations are adapted from Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV.L.REV. 353, 375-76 (1978).

"Where property is stolen from the owner and sold by the thief to a third person, the owner can recover that property from the third-party purchaser even if the purchaser paid full value and had no knowledge that the property was stolen." This rule can then be applied in the same manner as a statute.[163]

There can be broad and narrow statements of the holding of a case. A broad statement is on a higher level of generalization, while a narrow one will stick more closely to the precise facts of the decided case. The statement of the holding just given above is probably a relatively narrow statement of it, though a statement confining the holding to boats alone, would be even narrower. A broader one would be: "An owner can recover *unlawfully-obtained* property from a subsequent purchaser, even if the subsequent purchaser did not know of the property's illegal origins."

The danger of broad statements of holdings is that they can turn out to be *overly* broad. This is illustrated by assuming that after the above case is decided, which we will call Case 1, a Case 2 arises in the same court. In this case, the boat was bought with a *fraudulent check* and the defrauding purchaser in turn sold it to a third party. The court holds in Case 2 that the original owner may *not* recover from the third party. Without getting into the reasons why a court might so decide (we will discuss that below), it is clear at least one form of "unlawfully-obtained property" may *not* be recovered from the third party purchaser for value. The court has detected a difference between outright theft and fraud and our statement of the holdings in both cases should reflect that fact.

b. Dictum

Judges are expected to give reasons for their decisions. In the process of doing so, they are conscious of the fact that they are not only deciding a case; they are also making law. As a result, they will often seek to elucidate the impact of their decision for future cases. However, not all statements of legal principles by judges deciding a case are part of the holding. Statements that were not necessary to the decision of that case can have no binding authority in a later case, and should be ignored in stating the holding of the case. A statement that is not necessary for decision of the case is called "*dictum*" or "*obiter dictum*."[164] For example, assume that in Case 1 (outright theft of the boat and later sale; A wins), the court goes on to say that "in a case in which a seller of property obtained that property from the owner fraudulently, the owner could not recover." Or the court might say that "an owner who abandoned his property cannot thereafter sue to recover it from someone who finds it." These comments would not have been necessary to the decision of Case 1 in A's favor and would therefore be *dictum*.

Strictly speaking, *dictum* has no precedential value for future cases. Consequently, it would be improper to say that the above dictum from Case 1 applies to determine later cases of fraudulent sale or abandonment of property. However, no sensible lawyer can ignore *dictum*. It shows that the court has thought about how those other

163 Note that this statement of the holding largely ignores the reasoning given in the "opinion" in the earlier case. The extent to which the reasons given by the court in the opinion are to be incorporated into the statement of the holding is a matter of some difference of opinion and the American lawyer is much more likely to include them than the English lawyer. *See* ATIYAH & SUMMERS, *supra* note 24, at 124-125 and sources cited therein.

164 *Dictum* means literally a statement. *Obiter dictum* means a statement uttered in passing. The practical reason why *dictum* should not be relied upon is that both the court and the parties before it have most comprehensively investigated and considered the question actually before the court, and any side issues are not the product of as thorough a process. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.)

cases should be resolved and would so act if given the chance. The lawyer whose argument in a case is contrary to *dictum* contained in the majority opinion in a recent supreme court case will have a difficult time convincing the court otherwise. On the other hand, it is not unheard of for a court to go against its own earlier *dictum*. The hypothetical nature of *dictum* often means that the court will not have thought about it as deeply and the parties' arguments will not have addressed it as well as points more central to decision of the case.

c. Multiple and Implied Holdings

It sometimes happens that a court rendering a decision does not explicitly state a holding, but one may be implied from the result and the court's statement of the facts. Assume, for example, in boat Case 2 where the seller procured the boat by fraud and then sold it, the court decides that the purchaser wins instead of the owner. However, instead of explaining its reasons, the court merely states the relevant facts of the case, emphasizing the fact that the purchaser of the boat did not know of the fraud. Any statement of the holding in the case must necessarily include the element of lack of knowledge since the context indicates that the court viewed that as important.

A case can have more than one holding. Thus, in Case 1 above involving the stolen boat, the opinion may have also discussed and decided whether the original owner could get specific recovery of the property (as opposed to recovery of the value of the property) as a remedy. A holding that accounted for this part of the case might be: "An owner of stolen property found in the possession of another may obtain an order for specific relief requiring its return so long as the property can be reasonably identified and the person in possession is subject to the jurisdiction of the court."[165]

d. Synthesizing a Rule From Several Cases

There is a second kind of caselaw rule from which lawyers can argue deductively. It is like the holding or rule of a particular case, but represents a "synthesis" of several cases. By putting together or "synthesizing" the holdings of several cases, the lawyer can come up with an overall legal rule for which a line of decisions stands.

To demonstrate this, assume as before that Case 1 involved a *stolen* boat and the owner was *allowed* to recover. Assume as well that Case 2 involved a *fraudulently-obtained* boat and the court held the owner could *not* recover. Now assume a Case 3, in which X has an oil painting. Y obtains the painting from X through fraud. Y then sells the painting to Z. Before this sale, Z had heard rumors that perhaps Y had obtained the painting through some improper means and the price Y was asking was very low. But Z bought the painting anyway. The original owner X now sues Z for possession of the painting. Assume that the court in Case 3 holds that X *can* recover this time. In so deciding, the court notes that, unlike Case 2 (where fraud was also involved), in Case 3, Z paid much less than market price for the painting and had heard from others that Y might have obtained the painting unlawfully. These facts, the court observed, should have put Z on notice that there was something wrong with the painting. A synthesis of cases 1, 2 and 3 might be stated as follows: "An owner may recover stolen personal property from a subsequent purchaser for value who did not have notice that it was stolen. However, an owner may not recover fraudulently-obtained property from a subsequent purchaser unless the purchaser knew of the fraud or had reason to question the seller's title to the property." This synthesized rule, like the rule derived

165 However, if the court had decided that A could *not* recover because A had failed to prove ownership, and then went on to state the circumstances under which an owner *could* obtain an order for specific relief, then such a statement would be *dictum*.

from a single case, can then be applied deductively to a later case much the same way that a statute might be applied.

If a synthesis of cases is a broad one and involves the common law, it is sometimes referred to as a "common law rule." Such rules are abstract statements that summarize a "family" of related holdings. The just-stated synthesis of cases 1 through 3 might be treated this way, though most common law rules will cover a broader area. Sometimes a court's opinion will helpfully provide a summarized synthesis of cases.

2. Analogical Reasoning Directly From Prior Caselaw Decisions

There are limits to using holdings and case syntheses deductively like statutes. Deductive reasoning alone is of little use in deciding whether a case *comes within* the rule one has distilled from a prior case, unless the new case involves the same facts as the earlier one. For example, judges who are trying to decide Case 2 (fraudulently obtained boat) can read and reread the *holding* of Case 1, but it will not tell them whether the rule of Case 1 *should* cover Case 2 as well. What the judges need to decide is how Case 2 is similar to or different from Case 1 or any other precedents in the area. To do this requires the application of analogical reasoning directly from the facts of the prior case.

a. The Analogical Reasoning Process

The analogical reasoning process involves a two-step process of (1) identifying the factual similarities and differences between the new case to be decided and the precedent and (2) determining whether the current case is either similar to or different from that precedent in *important* respects relevant to the issue to be decided. If the precedent is deemed similar in those important respects, it will be *followed*. If it is deemed different in important respects, it will be *distinguished*.[166]

Following or distinguishing precedents involves a simple analogical reasoning process used every day. To take an example anyone with children will recognize, assume that you have decided to let your ten-year-old stay up until 10:00 PM (on a non-school night).[167] Your six-year-old feels the sting of injustice when she is forced to go to bed at 8:00 PM. She appeals to you to allow her to stay up until 10:00, arguing that you let the ten-year-old child stay up. In developing her argument from precedent, perhaps the six-year-old will point out the factual similarities between their situations, e.g., that they are both children and that neither of them has school the next day. If you find the younger child's appeal to the precedent involving the older child unpersuasive, it will be because you have determined that the difference in their ages is more important than whatever similarities might exist. This difference is important because age directly relates to the issue to be decided — bedtimes for children. The difference in ages is important to bedtimes because younger children need more sleep.

Clearly the most difficult part of the analogical reasoning process is evaluating the importance of the differences and similarities. This question of importance cannot be

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166 *See* BURTON, *supra* note 160, at 26-27. Professor Edward Levi explains analogical reasoning from precedent as involving three steps: "similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case." *See* EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (University of Chicago Press 1948). Levi is not specific enough about the nature of the "rule of law" involved to judge, but this seems more like deductive, not analogical reasoning. I believe that Burton's and Golding's view more accurately portrays what lawyers and judges actually do, especially in difficult cases: they make direct comparisons between the facts of each case without the intervention of any clearly formulated intermediate "rule." *See* MARTIN GOLDING, LEGAL REASONING 103 (Alfred Knopf 1984); BURTON, *supra* note 160, at 36.

167 This example is adapted from BURTON, *supra* note 160, at 26-27.

determined in the abstract. Importance is situational and depends on the issue that is to be decided. In the example with the children, denying the younger child's request to stay up late on the ground that "she's Ann and you're Zelda" is a decision based on an actual difference between them — their names. But different names cannot be a valid basis for deciding the case presented because it is based on a difference that has nothing to do with *bedtimes*. On the other hand, "she's Ann and you're Zelda" *is* a relevant difference in determining where each child should be in a line of children that is arranged alphabetically.

b. Evaluating Factual Variations in Common Law Caselaw

The importance question for common law caselaw is most often determined by examining a "family" of similar cases and principles underlying them. We will return to the example introduced earlier of the dispute between the owners of property and subsequent purchasers to demonstrate the process.

Analogical Reasoning Applied to a Common Law Example Assume that a court has decided Case 1 (boat stolen and sold; owner wins). The Court must now decide Case 2 (boat fraudulently-obtained) where the innocent purchaser has also been sued. On the one hand, underlying Case 1 and similar cases protecting owners of property is the notion that ownership of property is good for society and greater protection will encourage owners to invest in and preserve their property. On the other hand, free commerce in goods is important to society. One could argue that it is unreasonable to burden an innocent purchaser with the risk that the original owner could appear on the scene at any time, even years later, and reclaim the property. The court in Case 1 nonetheless imposed this risk on the purchaser in the case of theft in the name of protecting property ownership and making things more difficult for thieves.[168]

Case 2 is arguably different because owners are more able to protect themselves from fraud than from theft. An owner can prevent fraud by insisting on verification of any tender of payment, while theft can take place at any time and is usually unexpected. At the same time, the subsequent purchaser is *less* able to protect himself from the fraud than from theft. Purchasers in the marketplace in general have limited ability to verify assertions of good title. But purchasers have even more trouble verifying title where their seller has obtained the property by fraud. The transaction has all the outward appearances of a *bona fide* sale, complete with a bill of sale signed by the owner. In fact, but for the fact that the check the owner received for the property later turned out to be worthless, the transaction had all the characteristics of a sale, including the fact that the owner, at the time of transfer of the property, voluntarily parted with possession.

On this analysis, assume that the court decides Case 2 in favor of the purchaser. It concludes that, while no title passes by virtue of a theft, many of the elements of a normal sale are present in the fraudulent transaction, including the owner's intent to transfer title, such that it can be said that the defrauding purchaser obtained at least voidable title. Thus, while the owner might be able to sue the *defrauding party* directly to void the title and regain the property, if the property is resold to an innocent purchaser before title is voided, title passes to that purchaser and the owner cannot recover his property from that purchaser.[169]

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168 The "opinion" of the court is set out *supra* p. 66.

169 Many jurisdictions have distinguished fraud cases from stolen property cases for the reasons stated, as does the UCC. *See generally* RAY A. BROWN, THE LAW ON PERSONAL PROPERTY §§9.4, 9.6 (Callaghan & Co. 1975).

Now assume that Case 3 arises, the case in which the painting was fraudulently obtained and the buyer paid a low price and had heard rumors about the possibly dubious title of the seller. Case 3 is the same as Case 2 except for the fact that the purchaser seems to have some reason to suspect that there is a problem with the painting. The discussion in Case 2 would seem to make this factual difference an important one, since underlying that decision is a concern that buyers in the market have great difficulty finding out about defective title in fraud cases. In terms of this factor, the purchaser in Case 3 is different from the purchaser in Case 2 and should have been on notice from the low price and rumors that there should be further inquiry. A more subtle basis for deciding Case 3 against the purchaser that might be gleaned from the earlier cases deals with the reprehensibility of the conduct of the actors involved. In Case 1, the Court in part justified its decision on the policy of making things more difficult for thieves. In Case 2, it was undisputed that the owner could recover against the *perpetrator* of the fraud. A person who takes advantage of fraud, as the purchaser in Case 3 did, is only slightly better than the thief or the perpetrator of the fraud and should not be allowed to benefit from that conduct.

"Ghost" Precedents The analogical arguments made here suggest that there may be more "precedents" involved than just the decided cases. For example, it was argued in Case 2, not only that the fraudulent transfer situation was *distinguishable* from the *theft* situation in Case 1, but that the fraudulent transfer was *similar* to a *true sale*. We were given no *real* case involving a true sale. But we can assume hypothetically that a court would reject the claim of an owner who received the price he asked and completed a sale, but then had second thoughts and sought to reclaim the property from his purchaser. A similar hypothetical "precedent" was used to support the decision in Case 3. The court in Case 3 necessarily assumed that the owner *would* win in a contest between the owner and the *perpetrator* of the fraud. It then used that "ghost" precedent as one of its reasons for denying recovery to the purchaser who took advantage of the fraud.

Recasting Precedent The arguments made in Case 2 and Case 3 also point out how a court dealing with precedent is not necessarily limited to the rationale given in earlier opinions. The opinion in Case 1 relied in part on a rather formal theory that title had not passed to the thief. The case is recast in the decision of the later cases to fit into a more general theory about safeguarding ownership and purchasers' abilities to protect themselves in the market.[170]

c. Choice of Deductive or Analogical Reasoning: Easy Cases and Hard Cases

Having outlined both deductive and analogical reasoning in caselaw, it is appropriate to consider when judges or lawyer might choose one mode over the other. Some judicial opinions or arguments go through a complete analogical analysis of the factual differences between the case to be decided and various precedents. Others will synthesize a rule out of the applicable precedents and apply that rule deductively like a statute. Which approach is used depends on a number of factors, including the personal decision-making style of the judge.

170 A classic recasting of precedent is Judge Cardozo's opinion in *McPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (recasting precedents to broaden protection from harm caused by "imminently" dangerous products, such as mislabeled poisons, to harm caused by products that are dangerous because they are negligently made, such as an automobile).

Deductive reasoning from general rules established by cases is particularly useful in deciding *easy* cases or easy parts of cases. For example, returning to the property hypothetical, assume that after Case 3 is decided, a Case 4 arises in which the buyer of stolen property actually helped to facilitate the theft of the property. The court could dispose of the case by citing the common law rule set out earlier, followed by a "string cite" of Cases 1 through 3 and other prominent cases in the particular "family" of cases.[171] Because the matter is so clear, there would be no need for any analogical analysis of the facts of the cases.[172]

In fact, deductive reasoning from statements of holdings or rules of prior cases is useful *only* to decide clear or "easy" cases. Arguments in more difficult cases may start out with deductive reasoning, but soon disagreement arises over whether a particular synthesized rule is applicable to the case at bar, or whether such a "rule" exists at all. When that happens, the arguments turn immediately to analogical reasoning directly from the facts of prior cases, seeking to apply them to or distinguish them from the facts of the case to be decided.

3. Reasoning in Caselaw Interpreting Statutes

a. Deductive and Analogical Reasoning in Statutory Caselaw

As already discussed when statutory interpretation was outlined, a court faced with applying a statute must examine the text of the statute and any permitted aids to interpretation allowed to be consulted. The court must also consider prior caselaw interpreting the statute. These holdings and syntheses of holdings serve as "sub-rules" of the statutory rule being interpreted and can be applied deductively to decide easy cases. For example, it is common that a criminal statute will punish assault "with a deadly weapon" more seriously than a simple assault. A case arises in which the defendant, who was stopped by a policeman for a traffic violation, tried to run over the policeman with his car. If there is caselaw holding that a car qualifies (or does not qualify) as a deadly weapon, then that caselaw rule is applied as if it were explicitly provided in the statute.[173]

Courts use caselaw interpreting statutes in much the same way that common law caselaw is used — both deductively and analogically. If the caselaw is clear on the subject of whether a car can be a "deadly weapon" if used to try to kill someone, then the case is an "easy" one and the rule established can be applied deductively without any need for direct analogical reasoning.[174] If there is no prior precedent that provides a suitable sub-rule holding that is directly on point, the court must resort to analogical reasoning. Perhaps there are cases involving assaults using other implements that were not originally designed to be used as deadly weapons, but which could be and were used as such. The court will then have to use the analogical reasoning process already outlined for common law decisions and make the factual comparisons and judgments involved.[175]

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171 A "string cite" is where a court or lawyer simply "strings" together in a list the case names and citations of several cases without discussing their facts or reasoning.

172 Use of deductive application of a rule with string cites is so identified with resolving easy questions that intellectually dishonest or lazy judges or lawyers who want the issue involved to seem easier than it is will often misuse the technique. Examination of the facts and holdings of cases in a "string cite" often turn out not to support the proposition claimed.

173 Of course, if there is an explicit definition supplied by the legislature, it must be followed instead.

174 *See supra* pp. 66-69.

175 *See supra* p. 69.

b. Evaluating Factual Variations in Caselaw Interpreting Statutes

Applying Legislative Policy The main difference between analogical reasoning in common law and statutory caselaw comes at the point when the court must evaluate the questions of the *importance* of the factual differences and similarities between prior cases and the new case to be decided. In *common law* caselaw, the court refers to principles enunciated in prior cases or in the common law generally. In dealing with caselaw concerning *statutes*, the importance inquiry must generally be confined to criteria set by the *legislature*.

These legislative criteria are usually found by examining the language, purpose and legislative history of the enactment. However, the relevant legislative policy and purpose have often been sifted through several judicial filters. As Professor Shapiro has cogently observed:

> [J]udges [in the United States] often construct their opinions as mosaics of excerpts from, citations of, and comments about earlier judicial decisions. Even when the case is one of statutory interpretation, the wording of the statute may be buried in a footnote. In many instances, of course, the judge will openly proclaim that the source of the basic legal rule being applied is a previous decision rather than a statutory provision.[176]

In the process of this judicial filtering of legislative policy, more general principles sometimes appear.[177]

"Ghost" Precedents in Statutory Interpretation As we saw earlier when "ghost" common law precedents were discussed, one need not have *actual* prior caselaw to reason by analogy. So strong is the pull of cases and analogical reasoning that judges or lawyers will often create "ghost" cases from which to argue when interpreting a statute. A court will often construct "paradigm cases" that reflect the social ills that the legislature was seeking to eradicate or the kinds of positive behavior it was trying to promote. The court will then compare the instant case with the hypothetical cases and reason from them as if they were real cases. Such "ghost" precedents are especially easy to generate in statutory caselaw because sponsors and supporters of the bill will often themselves create such examples to illustrate the purpose of the legislation.[178]

G. Legal Research Techniques and the Form of Legal Argument

1. Library Resources for Finding Primary Materials

Caselaw The percentage of appellate court decisions that are published varies widely and has in general been declining in recent years as the number of appeals has increased. Among the federal courts of appeal, fewer than half of their decisions are published. The rest are disposed of summarily or by means of an unpublished opinion. The judges who decided the case make the decision whether to release their decision for publication. Even if not published, opinions are generally available nonetheless from one of the computerized legal research services, discussed below. However, local

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176 MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 135 (U. Chicago Press 1981).

177 For a discussion of how general principles operate in both common law and statutory caselaw, *see* DWORKIN, *supra* note 43, at 23-24 (discussing both a common law example and one involving a statute). *Cf. Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1899) (grandson could not inherit from the grandparent he had murdered despite lack of such disqualification in the statute; court presumed that legislature had "maxims of the common law" in mind when it passed the statute). *See also supra*, p. 61 (statutory interpretation in light of fundamental values).

178 This technique was used by the Court in a statutory context in the *Holy Trinity Church* case, *supra* p. 58. *See also supra* p. 34 ("ghost" precedents in common law caselaw).

rules generally prohibit citation to them, maintaining that such opinions have no precedential effect.[179]

Published judicial opinions in cases are published in chronological order and can be found in books known as "reporters" or "case reports."[180] Case reporting in the United States began informally and on a selective basis just as it did in England. However, it soon became more systematic with "official" reports issued by states and the United States Supreme Court. West Publishing Company, a private company, began an effort to be more comprehensive and systematic in the 1880s. Today West publishes "regional reporters" covering all the states. In addition, it publishes the only readily available reporters of lower federal court decisions. Because the West reporters publish all opinions released for publication, many states have abandoned publication of official reports. State trial court decisions are generally not published even on a selective basis except in a few states.

On the federal level, United States Supreme Court opinions are published in three places: the official reporter, United States Reports (U.S.); the Supreme Court Reporter (S.Ct.) published by West Publishing; and U.S. Supreme Court Reports, Lawyer's Edition (L.Ed.), a reporter series published by Lawyer's Cooperative Publishing Company, another private legal publisher.[181] Selected federal district court opinions are reported in reporters entitled Federal Supplement (F.Supp.) and, if they deal with issues of federal court procedure, in the Federal Rules Decisions (F.R.D.). Federal appellate opinions available for publication are published in Federal Reporter, now in its Third Series (F.3d). A federal court of appeals opinion might be cited as *Fligiel v. Samson*, 440 F.3d 747 (6th Cir. 2006). The parenthetical material indicates that the court was the U.S. Court of Appeals for the Sixth Circuit.

Enacted Law State and federal constitutions, statutes, and regulations are published in volumes arranged topically. State and federal statutes are published by governmental publishers and by private publishers in annotated volumes providing reference to cases interpreting the statute, citations to legislative history, pertinent articles in legal periodicals, and references to computer data bases. For example, on the federal level, statutes are contained in the government publication entitled United States Code (U.S.C.) and in two privately published and annotated versions entitled United States Code Annotated (U.S.C.A.) and United States Code Service (U.S.C.S.). Annotations are brief summaries of cases that have been decided that interpret each section of the statute. State statutes are presented in a similar manner, and both federal and state codes are updated regularly by the insertion of a pamphlet known as a "pocket part" into the back of the applicable volume. These pocket parts contain new statutes and summaries of new caselaw explaining existing statutes.

The legislative history accompanying a federal statute is reprinted in two sources. The first is the United States Code Congressional and Administrative News (USCCAN),

179 The issue of unpublished opinions without precedential effect was highlighted when one circuit court of appeals found it to be unconstitutional in *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000), but another found it constitutional. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

180 Case citation form is discussed in the Bibliographic Introduction and Reader's Guide of this book. For more on legal research *see* ROBERT C. BERRING & ELIZABETH EDINGER, LEGAL RESEARCH SURVIVAL MANUAL (West 2002); MORRIS L. COHEN & KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL, 8TH ED. (West 2003); RUTH ANN MCKINNEY, LEGAL RESEARCH: A PRACTICAL GUIDE AND SELF-INSTRUCTION WORKBOOK, 4TH ED. (West 2003).

181 Only official U.S. Supreme Court cites are given in the text of this book, but for those whose libraries have one of the other reporting services, parallel cites are set out in the Table of Cases in Appendix C to this book.

which contains selected documents pertaining to the statute. The second and more exhaustive source is the Congressional Information Service (CIS). It contains transcripts of committee hearings, committee reports, and congressional debates accompanying the passage of federal laws. This source of legislative history is immense and is contained on microfiche.

Federal regulations promulgated by administrative agencies are contained in the Code of Federal Regulations (C.F.R.) where they are arranged by subject matter. Any changes to existing regulations or the addition of new regulations are published daily in the Federal Register and the C.F.R. is completely revised every year.

2. Secondary Authorities

Secondary authorities are used to supplement the primary sources. These include treatises, hornbooks, restatements of the law, law reviews, and other legal periodicals, which summarize, restate, review, analyze, and interpret the law. Secondary sources are only persuasive authority, that is, they can influence a court to the extent that the court is persuaded by the reasoning in them. They are also consulted as a finding aid by lawyers or judges seeking citations to statutes, cases or other primary sources of law.

Attorney General Opinions In many states state officials have the right to request an opinion of the state's Attorney General on a particular point of law. These opinions are published in a set of books labeled in most states Opinions of the Attorney General (OAG). No such practice exists with the federal Attorney General. These state attorney general opinions are cited and sometimes relied upon by courts and lawyers as secondary authority. However, like other forms of secondary authority, they are influential in courts only to the extent that they demonstrate thorough analysis of the issues involved.

Texts and Treatises Treatises are books written about a particular area of the law with the needs of the practitioner in mind. Many treatises are multi-volume. For example, the treatise on Federal Practice and Procedure by Wright, Miller and Cooper extends to some 23 volumes. Treatises strive to summarize in narrative form all the applicable law touching on a particular area, from statutes and regulations to common law or constitutional law. They also contain analysis and commentary by the authors, including their opinions and criticisms of various rules adopted by courts and legislative bodies.

Restatements of the Law These are compilations or summaries in statute form of the common law in designated areas of the law, such as torts, contracts, property, judgments and conflicts of laws.[182] Restatements are prepared by the American Law Institute, an organization of eminent scholars and practitioners in the given fields. The overall form is a set of statements of the "black letter" law on the subject arranged in sections and stated in the form of a statute.[183] After the "black letter" statement of the law on a particular point, there are scholarly comments on the application of each of the rules just stated, complete with appropriate hypotheticals drawn from actual cases that illustrate the rule stated. These are followed by annotations, updated regularly, that summarize the cases deemed relevant to the subject matter in the section.

182 Currently there are Restatements of Torts, Contracts, Property, Judgments, Agency, Conflicts of Laws, Foreign Relations, Restitution, and Trusts.

183 The expression "black letter" law refers to any clear, simple statement of a rule of law on a particular point without a statement of the reasons for the rule or how to apply the rule to other circumstances. Law students, confused by a conflicting and seemingly endless number of court opinions in a given area of law, often yearn for the professor to give them the applicable "black letter law" on a point, that is, a simple statement of the legal rule established by all those decisions.

Restatements are supposed to do just that — restate or summarize common law rules derived from caselaw. However, that has not prevented some restatement authors from stating what they believe is the more enlightened rule of law, even if it is not the majority view in current caselaw. Thus, some restatements have been less a reflection of *current* law than a statement of what the authors of them think the rule of law *should* be. Restatements have had an influence on the shape of the law. Particularly influential has been the Restatement of Torts, which was largely responsible for establishing strict liability for injuries caused by defective products.[184]

Law Review Articles Law reviews or law journals, usually published by law schools, contain articles by law teachers and scholars analyzing and discussing issues in various areas of the law. If these articles provide a useful analysis of a particular problem that may be facing a court, they can have an impact on the law. Treatises, law review articles and other works by scholars in the United States generally have a greater impact on the law than their counterparts in England do, and less impact on the law than at least some of their counterparts in continental Europe.[185] Generally, in both England and the United States, a judge searching for authority is more likely to turn to another judge's judicial opinion than to a scholar's work.

One-Volume Treatises and Student Texts Single volume treatises and other student texts were introduced in the Bibliographic Introduction and Reader's Guide following the Preface to this book. The "Hornbook" published by West are the most numerous of the one-volume treatises. These works are written primarily by law teachers for law students and therefore are used in judicial opinions only for relatively general propositions of law.[186] However, they are useful as departure points for research and have footnotes that can be used by the reader to locate more specific authority. There are also student aids, such as "nutshells," outlines and review problems, but these are much less likely to be consulted by a lawyer or judge or cited in a judicial opinion. Casebooks — collections of edited cases and statutes with commentary and discussion questions used in law school courses — are rarely relied upon by courts.[187] If a summary of the pertinent law is desired, a treatise will generally be used.

Other Secondary Authorities Legal encyclopedias can be used as secondary sources of law, but they usually serve as a beginning point of research. Legal encyclopedias in the United States contain short general entries written by unnamed authors. The two national encyclopedia series available, Corpus Juris Secundum (CJS) and American Jurisprudence, Second (Am. Jur. 2d), were discussed in the Bibliographic Introduction and Reader's Guide. Most states also have at least one encyclopedia of its own law. These encyclopedias provide a rudimentary description of the law by breaking it into subjects which are arranged and presented alphabetically. Their purpose is to provide background on a particular legal topic and direct the researcher to pertinent case law and enacted law as well as secondary sources such as restatements and legal periodicals.

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184 *See* Chapter XI, pp. 438-440.

185 *See* Chapter IV, p. 134, and pp. A4-A7 of the majority opinion and p. A12 of the dissent in *Hoffman v. Jones*, reprinted in the Appendix.

186 The term "hornbook" was originally defined as "A leaf or written or printed paper pasted on a board, and covered with horn, for children to learn letters by, and to prevent their being torn and daubed." *Pardon's New General English Dictionary* (1758). Later, the hornbook was replaced by primers in book form for children to learn basic information.

187 One example of a casebook that gets cited relatively frequently by courts is HART & WECHSLER, *supra* note 143.

Somewhat similar to the encyclopedia are the American Law Reports (ALR). The ALR contains "annotations" in the form of short articles with summaries of the law and citations for selected legal topics. ALR started originally as a selective reporter of important cases, but is now used principally for its annotations.[188]

3. How Legal Research is Approached

Lawyers doing legal research are usually in one of two positions. The lawyer may have only a general understanding of the law governing the problem and may wish to find the specific cases and statutes that address the problem at hand. Or the lawyer may already have a specific case or statute that addresses the issue involved — or at least addresses some aspect of the issue — and must find other cases, statutes or authorities and more general support. While the research tools used in both instances are the same, they are used differently.

If the lawyer has a general idea of the law and wants to narrow the issue and the search, the first step is often to refer to a treatise in the general area involved or, if a treatise cannot be found, to one of several legal encyclopedias or the ALR. The researcher can then obtain citations to the principal cases and statutes in the area or to other more specific secondary authorities.

The researcher who already has an applicable case or statute may use one of several finding aids to locate other similar authorities. One way to do this is by looking for cases that cite the cases or statutes with which the researcher is already familiar. This is traditionally done by using Shepard's Citations, which show what other court decisions have cited the particular case, statute, court rule or other source of law. Beneath the citation will be a list of the citations of all the later cases that have cited the case. If these later opinions have discussed the cited case, their treatment of it will be indicated in the margin next to the citation (e.g., criticized, distinguished, followed). Such "Shepardizing" of a case is not just a useful way to find other cases. Before relying on any case, it is essential to "Shepardize" the case to determine whether it has been reversed or overruled.[189]

Another method of finding cases is to use state or federal "digests" published by West, the major reporter of opinions. West publishes "headnotes" with every case. Headnotes are brief summaries of the points of law contained in the case that are written by an editor. The headnotes appear at the beginning of the opinion and are serialized with a "key number" assigned to that particular topic throughout all West's publications. The state and federal digests then contain the listings of these headnotes organized by subject matter with the key numbers. The researcher who has a case need only take the pertinent key number from a known case that deals with the issue to be researched and look it up in the appropriate digest, which lists the headnotes from all the other cases that have addressed the same issue. Key numbers and cases may also be found in the digest by looking up key words or terms in the digest's general index similar to the method used for encyclopedias and ALRs.[190]

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188 Rules for all forms of citation are set out in two competing books, the "Blue Book" put out by Harvard Law School and the "Maroon Book" put out by the University of Chicago Law School.

189 A competing, completely computerized service since 1997 is West "Keycite" system.

190 Examples of two of the headnotes with key numbers published with *Hoffman v. Jones*, the case in Appendix A, are set out on p. A2. *See also* p. A1, note 4. It is perhaps a continuing legacy of the common law bias against statutes that there is no similar comprehensive system for nationwide indexing and classification of statutes.

4. Computerized Legal Research

Clearly, finding authorities and parsing the results of a search are made much easier when done by computer. There are two on-line legal research databases: Lexis-Nexis (by Reed Elsevier) and Westlaw (by West Group and Thomson). Subscribers can access both on the Internet. In addition to speeding up use of traditional methods of legal research just outlined, the computer services permit word searches and have hyperlinks to authorities cited in research results and a wider range of more specific information about how the case has been used or treated in other cases. Computer data bases are also updated more quickly than books and contain materials — particularly unpublished court decisions — that are not available in any books. The disadvantage of computer research services is that they are relatively expensive. There are monthly charges and charges by the minute for time spent doing research.[191]

5. The Form of Legal Argument

There are usually four distinct conceptual components to every legal argument. The lawyer must (1) state the issue involved; (2) state the rule to be applied; (3) apply the rule to the facts of the client's case and (4) state the conclusion reached from the application of the rule to the facts. It is during steps (3) and (4) that the deductive or analogical reasoning processes discussed earlier take place.

The physical form that legal argument generally takes in court is a written "brief," sometimes called a "memorandum of law." There are "trial briefs" submitted to trial courts and "appellate briefs" addressed to appellate courts.[192] Generally, all types of briefs are composed of standard, well defined, sections that correspond with the structure of legal arguments just discussed.

Most argument of legal issues in the United States is in written form. While oral argument of legal points does take place in both trial and appellate courts, it does not serve as a substitute for a written brief in the modern American appellate court. Indeed, it could not so substitute even if the parties wished, since the entire oral argument of the case is customarily limited to 15 or 30 minutes per side. In this respect, American appellate legal argument is very different from that of England, where oral arguments in an appellate court develop much of the argumentation that is contained only in written briefs in the United States and can take hours or even days. Oral argument in U.S. appellate courts is limited to the advocate highlighting the most important aspects of the case and answering questions from the appellate judges. It is not uncommon that the questioning of the advocate will occupy almost the entire time allotted for oral argument.

The prevalence of legal argument in written form has caused some to question the need for any oral argumentation and some courts have abolished it. However, most judges still believe that even short oral argument is important for clearing up questions the court has after reading the parties' written briefing, and many judges assert strongly that it should be retained.[193]

Argument of legal points in trial courts during trial is much more likely to be entirely oral, but even during trial, if the legal point is anticipated and is important, most

191 Access to free legal materials is possible on the Internet. However, search engines are not very sophisticated and there is often no guarantee that those materials are up to date. Appendix B of this book sets out a few of these sites. *See also* Reader's Guide, p. xxxiii.

192 For a discussion of the nature of trial and appellate courts, *see* Chapter V, pp. 165-169.

193 *See* William H. Rehnquist, *Remarks on the Process of Judging*, 49 WASH. & LEE L. REV. 263, 269 (1992). Rehnquist was Chief Justice of the United States.

good lawyers will produce at least a short written memorandum or brief discussing the relevant authorities. Pre-trial motions raising legal issues that are made in trial courts outside the immediate context of the trial itself are invariably required to be in writing and are most often accompanied by a written brief. An example would be a pre-trial motion to dismiss for lack of subject matter jurisdiction. In some jurisdictions, a written brief is required by the relevant court rules for all motions made other than those made during trial, and the clerk of the court will not accept any motion for filing that is not accompanied by a brief.