

subtopic

## Common Law and the Law of Reason

### **COMMON LAW and the LAW OF REASON**

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Like cousins who resemble one another, common law and natural law are sometimes confused. Both are unwritten law; both claim to be anchored in reason and to discern principles of right and wrong; both have been invoked by judges to confine (if not simply void) acts of positive legislation, and derided by others who oppose such action. There is in fact a deep affinity between common law and natural law, but it is better at the outset to describe their differences, and best to do this historically. Indeed, starting from the past rather than from nature is already a characteristic means of distinguishing common law from natural law.

Common law is first and foremost the customary law of England, as applied in the courts of law. In its classic era (the seventeenth century) and in its classic text at the time of the [American Founding](#) (Blackstone's [Commentaries on the Laws of England](#)), the common law was said to exist "from time immemorial," that is, so long that "the memory of man runneth not to the contrary."<sup>iii</sup> Historical research eventually showed that most of its rules and rights had an origin in time; for a while it was settled that a custom would be accepted as valid if it were in place in 1189, at the end of the reign of Henry II, whose reform of the royal courts established the framework for administering justice in England that was to remain in place until the late 19th century. As written records came to be made of the decisions of the royal courts, judicial precedents, seen as the most authoritative evidence of a custom, were held to have the force of law: not because judges willfully made law, but because of the principle of natural justice that similar cases ought to be similarly decided.

Common law judges decide cases on the basis of the specific facts in light of all applicable law. Actually, the determination of the facts is characteristically by a jury, traditionally "twelve good men and true," who issue a verdict upon a unanimous vote, following instructions of the judge as to the law that governs the case. Due process, in a criminal trial, requires a formal accusation, the right of the defendant to call witnesses and not to be forced to be a witness against himself, the right to a jury trial and even the right to play a role in the choice of his jurors, the presumption of innocence until proven guilty "beyond a reasonable doubt," and more. Before a trial, the accused is ordinarily entitled to be released on bail and in general to have the privilege of the writ of habeas corpus, guaranteeing that there be no imprisonment without a trial. After a trial, he cannot be tried again for the same offense nor punished in any way except as specified by law, and he has, besides, a right to appeal his verdict. In civil trials at common law, many of these rules are altered, because both parties are equal before the law and either might have initiated proceedings in a dispute. The standard of judgment in civil trials is preponderance of the evidence, and the judgment typically awards monetary damages. Juries were traditionally involved in civil cases as well as criminal ones, though they are increasingly less common in the former. Still, the right to appeal remains intact, and even more than in criminal cases, where crimes are now defined by code rather than by precedent, similar civil cases typically establish the parameters for decision in subsequent cases, unless there is in the circumstances something genuinely new.

There is much about common-law due process that is not strictly speaking a requirement of natural law: no one today would say that justice is impossible anywhere a jury is not composed of twelve, or if its verdicts are not unanimous, or even if some facts are found by a judge or a panel of judges rather than by a lay jury, and so on. Nevertheless, in at least three ways natural law seems particularly evident in common-law thinking. First, while from the point of view of natural-law theory, common-law due process is one among many "determinations" a society might choose in establishing a system of justice, by

settling on a particular and stable legal process, the common law forms a felicitous package that minimizes the role of political power and maximizes the role of both individual liberty and community assent in the administration of justice, thus serving the demands of the natural law. For instance, though due process does not ensure that courts exert, in Alexander Hamilton's phrase, "neither force nor will, but merely judgment,"<sup>[2]</sup> the various checks and balances built into common-law formalities—from the distinction between judge and jury, to the adversarial nature of proceedings, to the right of appeal—have seemed to its proponents to make it more likely. Moreover, the centrality of the jury at common law suggests deference to common sense at the center of the system and thus constitutes a restraint on elite theorizing and on partisan will.

A second natural-law moment in common law appears in the process of reasoning by appellate courts. In most legal disputes that are appealed, both sides can argue precedents in their favor; the issue is which set of precedents forms the better analogy to the pattern of facts in the case at hand. For example, is an exchange of instant messages more like a phone conversation, which sometimes cannot alter a written contract, or is it like an exchange of written documents, which can? Is a motor home more like a house, and thus entitled to constitutional protection from warrantless searches, or more like a motor vehicle, searchable upon reasonable suspicion? It is no accident that these examples involve technological change, for that seems to be a common source of genuinely new cases. Where, by contrast, the issue suggests a reinterpretation of established precedent, the common law presumes in favor of the tried and true over innovation. Natural law, though in principle anchored in immutable human nature, does not forbid all change in positive law and may even command it: for a law to remain just when the circumstances in which it arose are altered, the law itself might have to change. The ability of common law to develop in the light of reason as a series of precedents unfolds has led scholars to allude to the "open texture of law" in such a system.<sup>[3]</sup> Its unwrittenness allows judges to adjust the law without exerting raw power, while the formal process of judging—hearing arguments from both sides, focusing on a precise issue in dispute, settling only the case at hand and thus effectively changing the law only as the new rule becomes widely respected and adopted—ought to dampen the arbitrariness of such adjustments.

The third natural law moment in common-law judging appears in the adage that "nothing that is against reason can be lawful," even while the presumption in the common law is for the tried and true. The basic idea is that the law will brook no contradiction within itself, not that judges need be set up as philosopher-kings to ensure the rule of abstract reason; common law judges try first to reconcile apparent contradictions and accommodate all the various sources of law that apply to a particular case. Nevertheless, since at least Sir Edward Coke's opinion in [Doctor Bonham's Case](#) (1610), it has been argued that "when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."<sup>[4]</sup> English practice eventually held that parliamentary sovereignty overrode the claim of reasonableness, but in America this idea helped to birth the practice of judicial review: the power of courts to strike down statutes or executive actions that contradict written constitutions. American courts invoke a written constitutional text rather than abstract "reasonableness," but the rule that unconstitutional acts can be voided by courts is itself not written in any constitution. In Alexander Hamilton's words, the principle relies upon "the nature and reason of the thing," or in the words of John Marshall in *Marbury v. Madison*, on the "theory...essentially attached to a written constitution." Like natural law itself, the common law maxim that "nothing that is against reason can be lawful" is hardly adequate to generate a whole jurisprudence on its own, but it serves case by case to weed contradictions out of the law and thus to make the law a reasonable whole.

Part of the reasonableness of common law is that its judges traditionally did not see their jurisdiction as unlimited; on the contrary, judges can rule only in cases properly presented before them, and the remedies they can impose for the injustices they find are likewise defined and limited by law. In England and in some of the states, separate courts of equity were established for special circumstances where the operation of strict law was thought to work an injustice; in federal law, the same judges were made responsible for law and equity, but until the 1930s the process for filing a case at law and that for moving a bill of equity were entirely distinct. Moreover, although common law courts are courts of

general jurisdiction, they have usually co-existed with other specialty courts responsible for distinct areas of law (such as admiralty or martial law). In England, where there is an established church, ecclesiastical courts were likewise separate, while the American tradition of religious liberty allows ecclesiastical law to operate within denominations without state interference, provided civil law itself is not breached. Constitutional law was always more closely entangled with common law. The unwrittenness of the British constitution might be attributed to England's common law tradition, and the American choice for written constitutions might be construed as a rejection of common-law constitutionalism. But the Americans also inherited from the British the tradition of declaring constitutional principles in writing—a tradition that extended back at least to [Magna Carta](#) and forward to the [English Bill of Rights](#)—and not a few provisions of the latter appear in almost unaltered form in the early American constitutions and in the Bill of Rights that figures so prominently in American constitutional law today.

In discussing common law in relation to natural law, more has been said about common-law process than about substantive rules of law, many of which—for example, the law of coverture in marriage, or various tenures for the holding of real property—have been radically changed, often by legislation. American judges never held the common law to have been imported intact, but rather only insofar as applicable to American circumstances and as unaltered by local legislation. The English themselves, as long ago as the 17th century, used the analogy of the Argo—the ship of the ancient hero Jason whose planks were replaced one by one while at sea—to explain how the common law can remain constant even as its particular rules are altered to adapt to changing circumstances.<sup>[5]</sup> More impressed by the change than the continuity, legal theorists in the 20th century began to refer to common law as “judge-made law,” and they were led in this reinterpretation by Oliver Wendell Holmes, Jr., who also belittled natural law as the drunken dream of the self-deluded.<sup>[6]</sup> To refute Holmes's interpretation would go beyond the bounds of this article, but it is perhaps enough to note the link between his redefinition of common law as purely positive and his rejection of natural law per se. In seeking to discover law in the context of settling rights in particular cases, looking to established rules and precedents while keeping in mind the basic maxims of justice, common law judges did not make natural law their only point of reference, but they also did not treat it as something they were free to ignore. This is not the only way a legal order can respect natural law, but it is a legitimate way, and one that has contributed to keeping natural law a living force in the English and American constitutional traditions.

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[1] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769), vol. 1, 67.

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[2] Alexander Hamilton, James Madison, John Jay, *The Federalist* (Middletown, CT: Wesleyan University Press, 1961; orig. 1787-1788), no. 78, 526.

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[3] See H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), ch. 7.

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[4] In Steve Sheppard, ed., *Selected Writings of Sir Edward Coke* (Indianapolis: Liberty Fund, 2003). The traditional citation of the famous passage is 8 Co. Rep. 118a.

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[5] Sir Matthew Hale, *The History of the Common Law of England* (Chicago: University of Chicago Press, 1971; orig. written before 1676), 40.

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[6] See Bradley Watson's article on [Oliver Wendell Holmes](#).