1 A BRIEF INTRODUCTION TO THE COMMON LAW

One of two legal systems prevails in most developed economies: common law or civil law. The purpose of this book is to consider, explain, and analyze legal reasoning in the common law, and more particularly in American common law.

Law can be conceptualized as sets of binary categories. One set consists of public law and private law. Public law concerns such matters as the organization of government, the relations between the branches of government, other public matters, such as administrative, tax, and criminal law, and the relationships between government, on the one hand, and private individuals and institutions, on the other. Private law concerns such matters as the relationships between individuals, the relationships between individuals and private institutions, and the rights and obligations of individuals and private institutions.

A second set consists of common law and civil law systems.[1] In civil law systems public law is largely found in statutes and executive decrees, while private law is largely found in Civil Codes – codifications of the law concerning obligations, property, and family. In contrast, in common law systems, particularly American common law, public law

[1] Common law systems are in force in England, the United States, countries that like the United States began as English colonies, such as Australia, New Zealand and Canada (except Quebec), and other countries that had a connection with England. Civil law systems are in force in most or all European, South American, and Central American countries, and many or most Asian and sub-Saharan countries. In addition to civil law and common law, some developed economies have religious or mixed legal systems. Religious systems include Hindu law and Islamic or Sharia law. Mixed systems usually combine civil law and common law or civil law and religious law. *See* Vernon Valentine Parker, *Mixed Legal Systems—The Origin of the Species*, 28 TUL. EUR. & CIV. L. F. 103, 103–04 (2013).

is largely made by legislatures and administrative agencies, while private law is largely made by the courts, in the form of precedents, that is, judicial decisions. (There has been some convergence between common law and civil law systems, expressed principally in an increased significance of precedents in some civil law jurisdictions,[2] but there remains a fundamental difference between the two systems: In the common law a single precedent decided by an appellate court is law; in the civil law it is not.)

The reason why American private law is largely made by the courts is that complex societies need a great amount of private law to facilitate private planning, shape private conduct, and facilitate the settlement of private disputes, and the capacity of American legislatures to systematically make private law is limited.

To begin with, legislative time is limited and most of that time is devoted to public law.

Next, American legislatures are not staffed in a manner that enables them to comprehensively perform the function of making private law. So, for example, when an American legislature enacts a private-law statute frequently it does not draft the statute but instead adopts legislation proposed by nongovernmental organizations, such as the American Law Institute (ALI), the American Bar Association (ABA), or the Uniform Laws Commission. For example, the corporation law statutes of many states are based on the Model Business Corporation Act, which is drafted by a committee of the ABA. Other important statutes, including the Uniform Commercial Code, are taken from legislation proposed by the Uniform Laws Commission or jointly proposed by the Commission and the ALI.

Given the need to have a great deal of private law and the incapacity of American legislatures to systematically fill that need most

[2] Robert Alexy and Ralf Dreier report that precedents are cited in 95 percent or more cases in Germany's highest courts but add that "the jurisprudence [here meaning law] of the courts does not treat precedents as sources of law independent of statute and custom." Robert Alexy & Ralf Dreier, *Precedent in the Federal Republic of Germany*, *in* Interpreting Precedents: A Comparative Study 17, 23, 26–27, 32 (D. Neil MacCormick & Robert S. Summers eds., 1997). In France "the word 'precedent' never means a binding decision because courts are never bound by precedents." Michel Troper & Christophe Grezegorczyk, *Precedent in France*, *in* Interpreting Precedents, *supra*, 103, at 111. In some Civil Code jurisdictions precedents may play a significant role where the relevant Code does not provide a rule or provides only a very general rule, which the courts may then fill out with a line of precedents.

American private law is made by the courts. Accordingly, American common law courts have two functions: resolving disputes by the application of legal rules and making legal rules. *Cukor* v. *Mikalauskus*,[3] decided by the Pennsylvania Supreme Court, is a good example of judicial lawmaking. Corporate directors, officers, and controlling shareholders are unlikely to sue themselves for their own wrongdoing. The courts therefore developed the rule that shareholders have the power to bring derivative actions (actions brought by a shareholder on the corporation's behalf) against directors, officers, and controlling shareholders to remedy such wrongdoing. However, the courts also developed limits on that power. One limit is that subject to certain exceptions a shareholder who wants to bring a derivative action must first make a demand on the board to bring the action on the corporation's behalf. In *Cukor* a shareholder in PECO Energy Co. brought a derivative action against PECO directors and officers on the ground that they had engaged in wrongdoing, and PECO's board moved to terminate the action on the basis of a report by a special litigation committee that concluded that the action was not in the corporation's best interests. To resolve the case the Pennsylvania Supreme Court made a number of new rules of Pennsylvania law. The court said:

> The considerations and procedures applicable to derivative actions are all encompassed in Part VII, chapter 1 of the *ALI Principles [of Corporate Governance]* . . ., which provides a comprehensive mechanism to address shareholder derivative actions. A number of its provisions are implicated in the action at bar. Sections 7.02 (standing), 7.03 (the demand rule), 7.04 (procedure in derivative action), 7.05 (board authority in derivative action), 7.06 (judicial stay of derivative action), 7.07, 7.08, and 7.09 (dismissal of derivative action), 7.10 (standard of judicial review), and 7.13 (judicial procedures) are specifically applicable to this case. These sections set forth guidance which is consistent with Pennsylvania law and precedent, which furthers the policies inherent in the business judgment rule, and which provides an appropriate degree of specificity to guide the trial court in controlling the proceedings in this litigation.

[3] 692 A.2d 1042 (Pa. 1997).

> We specifically adopt . . . the specified sections of the *ALI Principles* [as the law of Pennsylvania] . . ..[4]

Cukor v. *Mikalauskus* is a single instance of judicial lawmaking. Of vastly more importance, great areas of American private law, such as contracts, torts, and property, are largely judicially made.

[4] *Id.* at 1048–49. For those readers who are not members of the legal profession (judges, practicing lawyers, and legal academics), the ALI is an organization composed of approximately 4,000 elected members of the profession. Its objective is to promote the clarification and simplification of the law and its better adaptation to social needs. The ALI seeks to achieve that objective largely through adopting and publishing Restatements of various branches of the law. The theory of the Restatements is that the ALI should feel obliged in its deliberations to give weight to all the considerations that the courts, under a proper view of the judicial function, deem it right to consider in theirs. The *Principles of Corporate Governance* is for the most part a Restatement of the law in that area. It sets out the legal rules applicable to the governance of corporations, including derivative actions.

2 RULE-BASED LEGAL REASONING

Common law courts have two functions: resolving disputes according to legal rules and making legal rules. A common law rule is a relatively specific legal norm, established by the courts, that requires actors to act or not act in a specified manner, enables or disables specified types of arrangements (such as contracts) or dispositions (such as wills), or specifies remedies for designated wrongs. Reasoning in the common law is almost entirely rule-based, that is, based on the application of legal rules to the facts of the case to be decided.

Hernandez v. *Hammond Homes, Ltd.*[1] is an example of rule-based reasoning. Hammond Homes was in the business of building homes. It hired Felix Brito, a roofing contractor, to install a roof on a home that it was building. Hernandez worked as a roofer for Brito. While working on the Hammond roof he descended a ladder. The ladder slipped, and Hernandez fell and was paralyzed. Hernandez sued Hammond on the grounds of premises liability and negligence. Hammond moved for summary judgment on the ground that it had no duty to Hernandez because he was an employee of an independent contractor and Hammond exercised no control over the roofing activities related to Hernandez's injury. The trial court granted summary judgment for Hammond. The Texas Court of Appeals affirmed, based on a series of rules established in binding precedents. Here is an

[1] 345 S.W.2d 150 (Ct. App. Tex. 2011).

excerpt from that opinion; brackets are inserted to mark out the legal rules the court applied:

> [1] Generally, an employer of an independent contractor does not owe a duty to ensure that the independent contractor performs its work in a safe manner. *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 214 (Tex. 2008); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985). [2] However, "one who retains a right to control the contractor's work may be held liable for negligence in exercising that right." *Moritz*, 257 S.W.3d at 214; *see Redinger*, 689 S.W.2d at 418 (adopting Restatement (Second) of Torts § 414 (1965)). [3] For liability to attach, "[t]he employer's role must be more than a general right to order the work to start or stop, to inspect progress or receive reports." *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002) . . .. [4] For a duty to arise, the control must be over the manner in which the independent contractor performs its work. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001). [5] The employer's duty "is commensurate with the general control it retains over the independent contractor's work." *Id.* [6] Also, "[t]he supervisory control retained or exercised must relate to the activity that actually caused the injury." *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999) (per curiam). *See Moritz*, 257 S.W.3d at 215; *Hagins v. E–Z Mart Stores, Inc.*, 128 S.W.3d 383, 388–89 (Tex. App. – Texarkana 2004, no pet.). [7] A party can prove a right to control in two ways: first, by evidence of a contractual agreement that explicitly assigns the employer a right to control; and second, in the absence of a contractual agreement, by evidence that the employer actually exercised control over the manner in which the independent contractor performed its work. *Dow Chem. Co.*, 89 S.W.3d at 606; *Coastal Marine Serv.*, 988 S.W.2d at 226. [8] If a written contract assigns the right to control to the employer, then the plaintiff need not prove an actual exercise of control to establish a duty. *See Pollard v. Mo. Pac. R.R. Co.*, 759 S.W.2d 670, 670 (Tex. 1988) (per curiam). [9] However, if the contract does not explicitly assign control over the manner of work to the employer, then the plaintiff must present evidence of the actual exercise of control by the employer. *See Dow Chem. Co.*, 89 S.W.3d at 606; *Hagins*, 128 S.W.3d at 388–89. In this case there was no written contract between [Hammond and Brito] . . . and the evidence does not

> raise a genuine issue of material fact regarding [Hammond's] actual exercise of control over Brito's employees' performance of their work.

ANALOGY-BASED LEGAL REASONING

Some commentators claim that reasoning in the common law is analogy-based rather than rule-based. For example, Lloyd Weinreb claimed that "There is something distinctive about legal reasoning, which is its reliance on analogy."[2] Emily Sherwin claims that "According to traditional understanding judges engage in a special form of legal reasoning, the method of reasoning by analogy."[3] Scott Brewer claims that "[L]egal argument is often associated with 'reasoning … by analogy; indeed if metaphor is the dreamwork of language then analogy is the brainstorm of jurists."[4] Cass Sunstein claims that "Much of legal reasoning is analogical …. Analogical reasoning is pervasive in law."[5] Gerald Postema claims that "The distinctive technique of the common law discipline is analogical thinking."[6]

These claims are incorrect; common law courts seldom reason by analogy. I base this on three sets of data, one positive, one negative, and one experimental.

The positive set of data consists of the several thousand common law cases I have read. Few of these cases reasoned by analogy.

The negative set of data consists of the paucity of case citations by commentators who claim that legal reasoning is reasoning by analogy. Only two of these commentators cited even a single case to support

[2] Lloyd Weinreb, Legal Reason: The Use of Analogy in Legal Argument 4 (2d ed. 2016).

[3] Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. Chi. L. Rev. 1178, 1179–80 (1999).

[4] Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Argument by Analogy*, 109 Harv. L. Rev. 925, 926 (1996).

[5] Cass Sunstein, Legal Reasoning and Political Conflict 62–63 (1996).

[6] Gerald J. Postema, *Philosophy of the Common Law*, *in* The Oxford Handbook of Jurisprudence and philosophy of Law 588, 603 (2012). *See also* Steven J. Burton, An Introduction to Law and Legal Thinking 25–26 (1985) ("[T]he central tenet of the common law is the principle of stare decisis …. Reasoning under the principle of stare decisis is reasoning by example or by analogy."

their claim, and both cited the same. If these commenters had been able to cite a number of cases to support their claim they would have done so. They didn't because they couldn't, since very few common law cases reason by analogy.

The experimental set of data was derived as follows: First, I selected three Regional Reporters at random – 345 South Western 2d, 65 Southern 3d, and 713 South Eastern 2d.[7] I then reviewed all the common law cases in these three volumes – eighty-four in all. The result was as follows: only *three* of the eighty-four cases involved reasoning by analogy.[8]

The reason so few common law cases reason by analogy is simple: a court will never reason by analogy if the case before it is governed by a binding legal rule and the common law is rich with binding legal rules.

SIMILARITY-BASED LEGAL REASONING

Some commentators claim that legal reasoning depends on a finding of similarity between a precedent case and the case to be decided. For example, Fred Schauer claims that "in order to determine what is a precedent for what, we must engage in some determination of the relevant similarities between the two events"[9] and "[it must be determined] whether there is a relevant similarity between some possible precedent case and the instant case, for only when there is will the instant court be under an obligation to follow what the precedent court said."[10] Similarly, Cass Sunstein claims that judges "look for relevant similarities and relevant differences."[11]

[7] For readers who are not members of the legal profession, Regional Reporters publish all or most of the cases decided by state courts in a given region. For example, the South Western Reporter publishes cases decided by the courts in Arkansas, Kentucky, Missouri, Tennessee, and Texas. Any given volume of a Regional Reporter publishes all or most of the cases in its region that were decided during a given period of time. For example, volume 346 South Western 2d published most or all of those cases that were decided in July and August 1998.

[8] One who wishes to test or verify this experiment can do so by reviewing the Reporters I reviewed or any other Reporters to determine if they contained significantly more common law cases that reasoned by analogy than I found.

[9] Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 577 (1987).

[10] Frederick Schauer, Thinking Like a Lawyer 45 (2009).

[11] Sunstein, *supra* note 5, at 77.

These claims are also incorrect. Under the principle of stare decisis if a case is governed by a binding rule established in a precedent that was decided by a superior court or by the deciding court itself, the deciding court must apply that rule, subject to the limits of the principle. A deciding court would never reason by similarity if the case before it was governed by a binding legal rule.

With that background, suppose first that there is a binding prior case that is extremely similar to a case to be decided. Such a case would almost certainly have established a rule that governed its decision. Accordingly, the deciding court would almost certainly base its decision on that rule, not on similarity.

Suppose next that there is no extremely similar prior case, but there is a prior case that is loosely similar to the case to be decided. In that event, neither stare decisis nor any other principle of legal reasoning would require the deciding court to follow the prior case. Of course, the deciding court might follow the prior case just because it is loosely similar to the case before it, even though no principle of legal reasoning requires it to do so. However, that is very unlikely. If the case before the deciding court is not governed by a binding legal rule the court is much more likely to apply an authoritative although not binding rule (see Chapter 5), or to establish a new rule, because either course would involve much crisper reasoning than following a prior case because it is loosely similar to the case to be decided.

The proof of the pudding is in the eating. Of the several thousand cases I have read, few involved reasoning by similarity; neither Schauer nor Sunstein cite a single case in which a court reasoned by similarity; and in the experiment described earlier, in which I reviewed eighty-four common law cases selected at random, only one reasoned by similarity.

APPENDIX

Larry Alexander's Rule Model of Precedent

Larry Alexander has developed a model of common law reasoning that he calls the rule model of precedent.[12] Under this model "the precedent court has authority not only to decide the case before it but also to promulgate a general rule binding on courts of subordinate and equal

[12] Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1 (1989).

rank. The rule will operate as a statute and will, like a statute, have a canonical formulation."[13] Alexander's rule model is comparable to rule-based legal reasoning in some respects but differs in others.

To begin with, Alexander argued that

> one problem with the rule model of precedent is its requirement that cases contain discernible rules in order to operate as precedents. This is a problem because many cases clearly fail this condition. For instance, some cases lack discernible rules because the court's opinion is particularly opaque, cryptic, or self-contradictory. Other cases lack discernible rules because the majority of the court is divided into factions, each of which offers a different rule, and no rule commands a majority of the court.[14]

If it were correct that many precedents do not contain discernible rules, that would call into question the proposition that legal reasoning is rule-based. However, Alexander's characterization of common law precedents is incorrect. The rules established in American common law precedents are seldom, if ever, opaque, cryptic, self-contradictory, or expressed in opinions in which no rule commands a majority. On the contrary, almost all American common law precedents establish rules that are clear, not cryptic; straightforward, not opaque; internally consistent, not self-contradictory; and adopted either unanimously or by a majority of the judges.[15]

Here are four illustrative cases:

In *Louise Caroline Nursing Home, Inc.* v. *Dix Construction Co.*,[16] the issue was the measure of damages for a contractor's failure to complete a construction contract. The court held that the measure of damages in such a case is the reasonable cost of completing the contractor's defective performance less any part of the contract price that has not been paid.

[13] *Id.* at 17–18.

[14] *Id.* at 27. For a comparable position, *see* Michael Moore, *Precedent, Induction, and Ethical Generalization*, *in* Precedent in the Law 184–88 (Lawrence Goldstein ed., 1987).

[15] It is important to distinguish between whether a rule established in a precedent is clear and whether it is clear that a new case falls within the rule. For example, it is a well-established rule of contract law that if an offeree rejects an offer, its power of acceptance is terminated. That rule is clear, but whether an offeree's statement constitutes a rejection may sometimes not be clear.

[16] 362 Mass. 306 (1972).