The Common Law in the American Legal System: The Challenge of Conceptual Research*

Morris L. Cohen**

Professor Cohen discusses approaches to researching the subject of the common law, noting the various usages of the term itself and historical development of the common law in the United States. He concludes that researching the topic requires study in a variety of subject areas, and provides a bibliography of sources.

The common law, in one or another of its usages, has always been among the most popular topics of scholarly research in England and America. In this country, it ranks with due process, equal protection, judicial review, and constitutional interpretation as a major subject of scholarly writing. The common law has been the focus of massive commentaries and treatises throughout the legal history of England and its former colonies, including the United States. In recent years, it continues to be the subject of many monographs and symposia and hundreds of articles.

Since the concept of the common law is multifaceted, encompassing a variety of meanings, the literature that surrounds it reflects a wide range of approaches and themes. So diverse is this literature that one is often initially uncertain as to the thrust of a particular author's discussion of the common law. Research on a legal concept with such a long and diverse history similarly raises unique bibliographic problems.

My primary aim in this article is to suggest research strategies for studying the various aspects of the common law, while briefly tracing influences on the development of the common law in America. By initially reviewing the various usages of the term, I hope to assist librarians, bibliographers, and students to better understand the mass of writing on the common law. This discussion of conceptual research on one topic may also suggest approaches for similar research on other complex legal concepts.

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* © Morris L. Cohen, 1989. This article is based on a talk given at the American Association of Law Libraries Institute on Legal Reference Services, Madison, Wisconsin, July 3, 1987.

** Librarian and Professor of Law, Yale Law School, New Haven, Connecticut.

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When faced with a particular piece of writing on the common law, one can ask a variety of questions to help clarify the author's approach. For example, is the author dealing with the general jurisprudential notion of the common law tradition? Or is the writer concerned with the historical development of the common law? If so, what period does the author discuss—the Romans, the medieval canonists, the period from the Norman conquest, or some later starting point? Is the subject a comparative analysis of the common law in various legal systems? If the work is limited to the Anglo-American tradition, does it focus on the common law of the commentators—Bracton, Coke, Blackstone, Kent, Story, and others—or on the common law of the law reports themselves? Or, is the author dealing rather with the process of the common law by which disputes are resolved by precedent and judicial review? Does the writer reflect a natural law approach, Langdell's view of law as a science, the views of the legal realists, or the varied strands of the new critical legal studies movement?

To impose some order on the scholarship produced around this variously defined term is not an easy task. It is surprising to discover how the familiar words *the common law* have come to mean so many different things and to be treated in so many different ways. The decision of where to begin is itself a puzzle. Do we start with lexicography or history or perhaps both? This effort will be a record of one librarian's search for order in dealing with the challenge of conceptual research.

The *Oxford English Dictionary* seemed a reasonable starting point, as it includes both lexicography and history. Omitting its examples of historical usage, the *O.E.D.* offers the following under its entry for *common law*:

> 1. The general law of a community, as opposed to local or personal customs, as of a caste, family, calling, city, or district. *Obs.* . . .
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> b. *Common law of the church*: the general law of the Church, as opposed to provincial constitutions, papal privileges, etc. . . .
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> 2. The unwritten law of England, administered by the King's courts, which purports to be derived from ancient and universal usage, and is embodied in the older commentaries and the reports of adjudged cases.
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> In this sense opposed to *statute law*; also used for the law administered by the King's ordinary judges as distinguished from the *equity* administered by the Chancery and other courts of like jurisdiction, and from other systems administered by special courts, as ecclesiastical and admiralty law, and (in the Middle Ages) the *law merchant*.
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> In *U.S.*: the body of English legal doctrine which is the foundation of the law administered in all the States settled from England, and those formed by later settlement or division from them.[1]

1. 2 OXFORD ENGLISH DICTIONARY 692-93 (1893).

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Approaching other dictionaries, I started with the first editions of Dr. Samuel Johnson and Noah Webster, more out of curiosity than with serious expectations, and found the following in Dr. Johnson: "Common law contains those customs and usages which have, by long prescription, obtained in this nation the force of laws. It is distinguished from the statute law, which owes its authority to acts of parliament."[2] Noah Webster's definition was more helpful:

> *Common Law,* in Great Britain and the United States, the *unwritten* law, the law that receives its binding force from immemorial usage and universal reception, in distinction from the *written* or statute law. That body of rules, principles and customs which have been received from our ancestors, and by which courts have been governed in their judicial decisions. The evidence of this law is to be found in the reports of those decisions, and the records of the courts. Some of these rules may have originated in edicts or statutes which are now lost, or in the terms and conditions of particular grants or charters; but it is most probable that many of them originated in judicial decisions founded on natural justice and equity, or on local customs.[3]

Using Cowley's bibliography of legal abridgements and dictionaries[4] as a guide, I then reviewed more systematically the definitions in several editions of John Rastell's *An Exposition of Certaine Difficult and Obscure Wordes and Termes of the Lawes of this Realme,* from the first version with substantial English translation[5] to the first American edition (1812).[6] This survey included various editions of Cowell,[7] Blount[8] and Jacob.[9] It is beyond the scope of this paper to quote all of these definitions and the many treatments of the term which I examined in other sources. The exercise was useful, however, and is recommended as an initial stage of such conceptual research, though it need be used only selectively. Reviewing dictionaries may show changes in the concept over the period of time covered, although in this instance it revealed remarkable stability in

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2. A DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1755).

3. AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828).

4. J. COWLEY, A BIBLIOGRAPHY OF ABRIDGMENT, DIGESTS, DICTIONARIES AND INDEXES OF ENGLISH LAW TO THE YEAR 1800 (1932).

5. S.T.C. dates this as "[1526?]," A. POLLARD & G. REDGRAVE, SHORT-TITLE CATALOGUE OF BOOKS PRINTED IN ENGLAND, SCOTLAND, & IRELAND AND OF BOOKS PRINTED ABROAD, 1475-1640, at 20702 (1926), but Cowley describes it as "[after 1530]." J. COWLEY, *supra* note 4, at 20.

6. J. RASTELL, LES TERMES DE LA LEY—OR, CERTAIN DIFFICULT AND OBSCURE WORDS AND TERMS OF THE COMMON AND STATUTE LAWS OF ENGLAND, NOW IN USE, EXPOUNDED AND EXPLAINED (1812).

7. J. COWELL, THE INTERPRETER: OR, BOOKE CONTAINING THE SIGNIFICATION OF WORDS (1607), and later editions.

8. T. BLOUNT, NOMO-LEXICON: A LAW DICTIONARY (1670), and later editions.

9. G. JACOB, A NEW LAW-DICTIONARY (1729), and later editions.

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the definitions of common law and extensive borrowing among the lexicographers.

Continuing the lexicographic approach into American legal dictionaries did not produce any startling new insights. Bouvier showed extensive change and expansion of his treatment between his first edition of 1839[10] and the latest version (called the third revision, eighth edition) by Francis Rawle.[11] The Bouvier entry grew from less than one column in the first edition to over eight columns of smaller type in the last revision. Beyond the obvious Americanization of the definitions and some interesting leads to treatises and judicial decisions in Rawle's revisions, this study offered more on the development of American legal lexicography than on the primary inquiry.

Black's Law Dictionary, *Ballentine's Law Dictionary*, and the many new shorter law dictionaries added little to this search. Redden and Veron's *Modern Legal Glossary* (1980), not as helpful as it usually is, gave an interesting but rather rambling historical account of the term.[12] Bryan Garner's *Dictionary of Modern Legal Usage* (1987), on the other hand, fulfilled its promise and offered a clear, concise and modern statement of the four currently relevant definitions. In addition, Garner provided the adjectival definition missing from most other dictionaries.[13]

Moving from dictionaries to encyclopedias, I found both rewards and disappointments. David Walker's *Oxford Companion to Law* (1980) set out with clarity and thoroughness seven distinct meanings of the term and a reference to the French and German usage of common law. In a relatively brief treatment, he managed to include both the historical development and the comparative law dimension.[14] As usual, Walker was the best source for a brief reference. With a few exceptions, the other encyclopedias consulted were less satisfying.

The New Encyclopaedia Britannica gave a long historical account, including Roman, civil, and comparative law aspects.[15] Although quite scholarly in tone, its coverage of modern periods (particularly the American aspects) was so truncated, relative to the rest of the article, as to be misleading in emphasis. The bibliography, while commendable in its English historical references, was weak in the American sources it selected.

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10. J. BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION (1839).
11. F. RAWLE, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYLCOPEDIA (8th ed. 1914).
12. K. REDDEN & E. VERON, MODERN LEGAL GLOSSARY 98-99 (1980).
13. B. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 127 (1987).
14. D. WALKER, THE OXFORD COMPANION TO LAW 253 (1980).
15. 4 THE NEW ENCYCLOPAEDIA BRITANNICA (MACROPAEDIA) 998-1005 (15th ed. 1974).

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On balance, the article was worth consulting, but by trying to appeal to too many audiences, it served none very well.

Corpus Juris Secundum[16] and *American Jurisprudence, 2d*[17] were better than I had suspected, but both were so diffuse and so anxious to cover all bases that they lacked focus. Their useful insights, and they each had some, tended to be submerged in masses of verbiage. The extensive footnote citations to decisions, usually the main value of these case-finders, seemed forbidding in a general article like this. Although some of the many state court decisions cited may actually be useful, they seemed a doubtful avenue to pursue. The author of the common law article in West's *Guide to American Law: Everyone's Legal Encyclopedia* (1983-1985) produced an unbalanced and rather disorganized piece.[18]

Both the *Encyclopaedia of the Social Sciences* (1930-1935) and its successor, the *International Encyclopedia of the Social Sciences* (1968), were more historical than socially scientific. The article in the original version,[19] by Roscoe Pound, reflected his personal biases, but was much meatier than that in the successor set.[20] Less well-known, Scribner's *Dictionary of the History of Ideas* (1968) was surprisingly good in its historical and comparative law approaches but didn't reach America (or even nineteenth century England) until column eleven of its eleven-column article.[21]

Most researchers, I suspect, would not have used the monumental *International Encyclopedia of Comparative Law* (1971-date) in such an inquiry. It does in fact contain a useful survey of the common law system in its section, "Legal Systems of the World."[22] Even more helpful were the discussions of historical sources in the articles on the United Kingdom[23] and the United States[24] in its series, "National Reports." Those three articles together provided the most informative treatment of the encyclopedias.

From this preliminary study, I derived six separate definitions or aspects of the common law—expandable to eight or compressable to four. The six definitions I formulated are as follows.

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16. 15A C.J.S. 40 (1967).
17. Perovich, *Common Law*, in 15A AM. JUR. 2D 593- 620 (1976).
18. McLaughlin, *Common Law*, in 3 THE GUIDE TO AMERICAN LAW 102-07 (1983).
19. 4 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 50 (1931).
20. 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 211-13 (1968).
21. 2 DICTIONARY OF THE HISTORY OF IDEAS 691-96 (1973).
22. 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 2, pt. 3 [1975].
23. 1 *id.* at U-69-U-74.
24. *Id.* at U-136-U-149.

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1. The general or central law of any community, as distinguished from divergent local customs or other bodies of rules having a particular source, or applied by a particular court, or applicable to a particular group or area. Examples include the *ius commune* in Roman law; the general law of the universal Church in Canon law, as distinguished from provincial rules or customs, papal edicts, etc.; and, on the European continent, the law which was common to the whole of a state's jurisdiction, as distinguished from regional customs or variations.
2. The centralized system of law developed in the courts of the English kings by the royal justices from the 12th century on, as embodied in the Yearbooks, the later reports, and the older commentaries.
3. The English law developed by the king's ordinary judges, as distinguished from equity administered by Chancery and other courts of equitable jurisdiction, and as distinguished from the specialized bodies of law administered in ecclesiastical courts, admiralty courts, and mercantile courts.
4. The whole law of England, including ecclesiastical, maritime and mercantile law, as distinguished from the law of other countries, particularly those using the civil law system based on Roman law.
5. The rights, powers, remedies and crimes derived from the decisions of common law courts in England and America, as distinguished from those originating in statutory law.
6. In America, the body of English legal doctrine which formed the foundation of the law administered in those States settled from England and in the later States formed by settlement or division from the original States, *and* the later development of that law in America down to modern times.

The next questions are how and where we can study the various aspects of the common law in detail. Appended to this article is a selective bibliography, which provides some leads to relevant sources in legal history, philosophy, and the social sciences. This list is, of course, only suggestive, and there are literally hundreds of other useful publications, including treatises and histories devoted to particular subject areas of the common law.

Our primary focus here, however, is the common law in the American legal system, beginning with the settlement of the North American colonies in the seventeenth century. First, we must deal with the commonly held notion that the English settlers in America simply brought the common law with them, and transplanted a homogeneous body of English law in American soil. So described, the colonists' intellectual baggage consisted of three B's: religion in the *Bible*, literature in *Bunyan* (i.e., John Bunyan's

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Pilgrim's Progress) and the law in *Blackstone* (William Blackstone's *Commentaries on the Laws of England*). But, since the first volume of Blackstone's *Commentaries* wasn't published until 1765, what were the sources of the common law in America from 1620 to 1765? The story of the diffusion of the common law to the New World is more complicated, and so also is research into its sources.

The complexity stems from several, often overlooked, historical conditions. For example, English law itself was quite unsettled in the seventeenth century, when North America was first settled. Within a few years of the English settlement of the Massachusetts Bay Colony, Cromwell's Revolution, the establishment of the protectorate, and the Commonwealth brought widespread disruption and many legal changes to seventeenth century England.

Sir Edward Coke, in *The First Part of the Institutes of the Laws of England*, listed fifteen diverse sources of English law operating at the beginning of the seventeenth century. These sources included the following:

1. The law of the Crown (*lex coronae*).
2. Parliamentary law and custom (*lex et consuetudo Parliamenti*).
3. The law of nature (*lex naturae*).
4. The common law of England (*Communis lex Angliae*).
5. Statute law (laws established by authority of Parliament).
6. Customary law (*consuetudines*).
7. Law of arms, war and chivalry (*jus belli*).
8. Ecclesiastical or canon law.
9. Civil law in certain cases—not only in ecclesiastical courts but in the courts of the constable and marshall, and of admiralty.
10. Forest law (*lex forestae*).
11. The law of marque and reprisal.
12. Merchant law (*lex mercatoria*).
13. Laws and customs of the Channel Islands.
14. The law and privileges of the Stannaries (mines).
15. The laws of the East, West and middle Marches.[25]

The impact of that diversity was felt differently in the various American colonies. In addition, some of the colonies had other non-English and non-common law traditions, sources, and religious influences which were merged into their reception of the common law. Later influences from other legal systems and cultures affected the development of a unique American law, both on the federal level and in some of the states.

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25. E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND lib. 1, cap. 1, § 3 (1628).

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To add to this complexity, we must remember that the composition of population and cultures changed constantly over the 350 years of American history. The mixture of subgroups, affected by changing immigration patterns, was quite different in the America of 1700, 1800, 1850, 1900, and today. Finally, one must consider the impact of very different physical environments, economic patterns, social attitudes, and religious views in different times and places.

The varied sources of American law also have included Spanish influences in Florida; the Spanish and the fossilized French tradition of Louisiana; the Spanish remnants in Texas, California, and other states of the American Southwest; native Hawaiian influences in Hawaii; and Spanish sources of Puerto Rican law. And we often tend to overlook the indigenous law of the various Native American groups in the areas that they controlled.

Despite these often-overlooked variations in the legal traditions of the American colonies, and later of the American states, the English common law, or some parts of it, were *the* major influence in the early legal history of this country. Every jurisdiction, except Connecticut, expressly received the common law by charter, subsequent legislation, or constitutional provision. Such reception was subject, of course, to the reservation that the courts or the legislature could (and did) reject those parts of English law inconsistent with the needs or conditions of that jurisdiction, or repugnant to its views. The reception of the common law and the subsequent legal development of the original colonies and of the subsequent states varied considerably. For example, the different effective dates on which the common law was received in each jurisdiction[26] would, to some extent, define what was being received.

The differing status of British statutes in the various American colonies, and the statutes' differential treatment after independence by the new states, varied the development of the common law among the states.[27] Before independence, the colonists had sought (usually unsuccessfully) the protection of the English common law and statutes. After independence, they would selectively use only those statutes and parts of the common law that suited their needs.[28]

To understand the importance of the reception statutes, we must remember that the common law of England did not have automatic or direct applicability or authority in the American colonies. Blackstone in his

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26. For example, 1607 in Virginia, 1662 in Maryland, 1712 in South Carolina, 1770 in Rhode Island, 1775 in New York, and 1776 in Pennsylvania.

27. E. BROWN, BRITISH STATUTES IN AMERICAN LAW, 1776-1836 (1964).

28. *Id.* at ix.

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Commentaries explains this by distinguishing between those colonies that were uninhabited and uncultivated and were claimed by right of occupancy only, and those that were already occupied and cultivated and were gained by right of conquest or ceded by treaties. Blackstone then extended that distinction with respect to the law applicable to each, as follows:

> . . . if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. . . . But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. Our American plantations are principally of this latter sort; being obtained in the last century, either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there. . . .[29]

Of course, many American jurists of the time disagreed with Blackstone, whose views here, as elsewhere, were shaped by his conservative political and legal attitudes. The general American view is more accurately stated by St. George Tucker, the Virginia jurist and law teacher, in the appendix to his 1803 edition of Blackstone:

> *First* . . . That the common law of England, and every statute of that kingdom, made for the security of the life, liberty, or property of the subject, before the settlement of the British colonies, respectively, so far as the same were applicable to the nature of their situation and circumstances, respectively, were brought over to America, by the first settlers of the colonies, respectively; and remained in full force therein, until repealed, altered, or amended by the legislative authority of the colonies, respectively; or by the constitutional acts of the same, when they became sovereign and independent states.
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> *Secondly* . . . That neither the common law of England, nor the statutes of that kingdom, were, at any period antecedent to the revolution, the general and uniform law of the land in the British colonies, now constituting the United States.
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> *Thirdly* . . . That as the adoption or rejection of the common law and statutes of England, or any part thereof, in one colony, could not have any operation or effect in another colony, possessing a constitutional legislature of it's [sic] own; so neither could the adoption or rejection thereof by the constitutional, or legislative act of one sovereign and independent state, have any operation or effect in

29. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 107 (4th ed. 1770) (citations omitted).

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> another sovereign independent state; because every such state hath an exclusive right to be governed by it's own laws only.
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> *Fourthly* . . . Therefore the authority and obligation of the common law and statutes of England, as such in the American states, must depend solely upon the constitutional or legislative authority of each state, respectively; as contained in their several bills of rights, constitutions, and legislative declarations. . . .
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> *Fifthly* . . . That neither the articles of confederation and perpetual union, nor, the present constitution of the United States, ever did, or *do*, authorize the federal government, or any department thereof, to declare the common law or statutes of England, or of any other nation, to be the law of the land in the United States, generally, as one nation; nor to legislate upon, or exercise jurisdiction in, any case of municipal law, not delegated to the United States by the constitution.[30]

Tucker reflected the view of Section 34 of the federal Judiciary Act of 1789, which set forth the rules of decision in the new federal courts as follows: ". . . the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[31]

Thus, there was no *federal* common law at the onset of our legal history. The common law was received by the states and was to be applied in the federal courts as altered, interpreted, or preserved by the state courts. The Federal Constitution by implication imposed limitations on the common law, primarily through the first ten amendments. Article VI, which designates "the Constitution; and the laws made in pursuance thereof; and all treaties made under the authority of the United States," to be the supreme law of the land, did not, however, diminish the force of the retained common law.

In 1842, the Supreme Court, in *Swift v. Tyson*[32] interpreted Section 34 of the Judiciary Act of 1789 to permit the federal courts to decide questions of substantive law themselves, thereby sanctioning the creation of a federal common law. Although *Swift v. Tyson* was widely and regularly criticized, it remained the law of the land for almost a hundred years. In 1938, the Supreme Court in *Erie R.R. v. Tompkins*[33] restored state law, as defined and interpreted by the state courts (except as to procedural matters), as the rule of decision in diversity cases in the federal courts.

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30. Tucker, *Appendix* to 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 432-33 (S. Tucker ed. 1803).

31. 1 Stat. 73, 92 (1789).

32. 42 U.S. (16 Pet.) 1 (1842).

33. 304 U.S. 64 (1938).

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What are the main features of common law in America? Roscoe Pound said on many occasions that the unique characteristics of the English common law were the doctrines of precedent, the supremacy of law, and trial by jury. American law has continued these three doctrines in general terms, but with variation in form and content, in substance and procedure. The pace and causes of deviation varied from period to period. The visceral tie to the mother country, felt in the seventeenth century, gradually weakened with the economic and political differences that developed increasingly in the eighteenth century, and then more rapidly and pervasively in the nineteenth century.

The abundance of land in this country rendered meaningless one of the fundamental premises of the common law—that is, the scarcity of real property in England. While the colonies accepted the general principles of the common law, American practice was simpler, with less need for the elaborate distinctions, fictions, and procedural complexities of English law. Concern with personal rights, growing out of the religious dissent of many of the early settlers and the varied grievances of the colonies against oppressive English legislation and Royal despotism, led to new American constitutional protections. Aversion to the practices and rules of equity and the ecclesiastical courts, the English system of primogeniture, and the proprietary privileges of landlords led to other changes. The American deviations stemmed also from differences in the constitutional structures of the colonies, in their political experiences and social attitudes, in local traditions and social attitudes, and in local geography, resources, climate, and economic conditions.

In the period following independence, the formative era of American law, modification of the common law to meet American needs in a rapidly expanding country was continued both by legislation and judicial decision.[34] The development of a domestic legal profession, an American legal literature, and local sources of legal education were essential to the new legal system, and each moved the received common law further from its original roots. This was reflected in the literature of the law, seen in the American editions of Blackstone,[35] which added notes relevant to practices in this country; in James Kent's *Commentaries on American Law* (1826-1830); and in the remarkably prolific writings of Justice Joseph Story, who produced original treatises on nine different subjects while serving both as a Justice of the Supreme Court and as Professor of Law at Harvard. The

34. This process in Massachusetts has been described in W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975).

35. These editions can be traced in C. ELLER, THE WILLIAM BLACKSTONE COLLECTION IN THE YALE LAW LIBRARY: A BIBLIOGRAPHICAL CATALOGUE (1938).

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extensive literature of legal treatises, which reached its peak in the late nineteenth and early twentieth centuries, is an invaluable source for the study of the common law.[36]

The Ordinance of 1787 carried the basic law to what is now the Midwest, and subsequent Congressional acts extended such coverage further west and southwest. The Louisiana Purchase in 1803 added extensive new territory, although the part that became the state of Louisiana retained the legal system it had under Spanish, and then French, rule. As Louisiana developed, the constitutional, public, and procedural aspects of its law became Americanized, and the civil law influence was largely limited to the private law areas of family law, real property, and succession. Texas, California, and most of the Southwest, originally under Mexican or Spanish rule, retained some of those influences. Here again, the common law gradually intruded, so that, except for Mexican and Spanish land grants and related land law in Texas, the community property system is the major remainder of the old law in those states. The Constitution of the Texas Republic in 1836 expressly provided for the introduction of the common law, with some modification for local needs.[37]

Probably the most significant American innovation after the Constitution itself was the establishment of the doctrine of judicial review. In a series of decisions, the Supreme Court of the United States, under Chief Justice John Marshall, developed the power of the judiciary to decide on the constitutionality of legislation. In 1803, the decision in *Marbury v. Madison*[38] held an act of Congress unconstitutional; in 1810, *Fletcher v. Peck*[39] held a state law unconstitutional; *Martin v. Hunter's Lessee*[40] in 1816 and *Cohens v. Virginia*[41] in 1821 extended to the state courts the power of judicial review of state legislation; and in 1824, the decision in *Gibbons v. Ogden*[42] upheld the authority of federal regulation of commerce over competing state regulation by declaring a New York state law to be incompatible with a federal act based on the commerce clause of the Constitution.

Despite the later growth of statutory law in the nineteenth century, and then of administrative law in the twentieth century, the vitality of American common law development was assured by the role of the courts

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36. *See* Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981).

37. TEX. CONST. OF 1836, art. IV, § 13.

38. 5 U.S. (1 Cranch) 137 (1803).

39. 10 U.S. (6 Cranch) 87 (1810).

40. 14 U.S. (1 Wheat.) 304 (1816).

41. 19 U.S. (6 Wheat.) 264 (1821).

42. 22 U.S. (9 Wheat.) 1 (1824).

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as lawmakers. This creative role developed in three respects: first, judicial review of the constitutionality of legislation; second, judicial interpretation of the Constitution; and third, the continuing review and reformulation of the common law. The extent to which the power to change the common law by judicial reinterpretation was exercised has fluctuated through our history, depending on the political climate, the pressure of social and economic needs, and popular attitudes. Despite variations in the courts' willingness to revise the common law, it is clear that in general the force of precedent has been far less binding here than in England. Both the widespread practice of distinguishing cases to avoid inconvenient precedents and the power of the judiciary simply to change the law by overruling prior decisions are now well established, although limited, of course, by judicial sensitivity to the threat of legislative reaction and public opinion.[43] In any event, research in the common law must include the study of judicial decisions, which remain its main repository.

A major countervailing development to the primacy of the common law in America was the codification movement,[44] which began as early as 1796 when Virginia adopted Jefferson's codification of the criminal law. The agitation for codification was spurred by the spread of the Napoleonic codes in Europe and by reformers who saw it as the best means for rationalizing the law. It drew support both from the populist critics of the legal profession and its "mystification" of the law, and from distinguished jurists and scholars like Thomas Cooper, Zephaniah Swift, Albert Gallatin, Edward Livingston and David Dudley Field.

Jeremy Bentham, the English advocate of law reform and codification, had always considered the United States to be fertile ground for his proposals. He wrote to President James Madison in 1811 offering to draft a code of American law, without charge and in fact with an offer to pay the printing costs himself. In his letter, Bentham set forth the following scathing attack on the existing common law system in the United States: "Every man's dearest and most important interests stand, or rather fluctuate . . . on some random decision or string of frequently contradictory decisions, pronounced . . . almost without any intelligible reason under the impulse of some private sinister interest."[45] Bentham characterized the common law as a "shapeless mass of merely conjectural and essentially uncognizable matter," as "confused, indeterminate,

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43. For a landmark discussion of changing attitudes, see Douglas, *Stare Decisis, reprinted in* 4 REC. A.B. CITY N.Y. 152-79 (1949).

44. Described in detail in C. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981).

45. *Quoted in id.* at 98.

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inadequate, ill-adapted, and inconsistent," and as "a species of mock law."[46] But the War of 1812 intervened; Madison did not reply until May 1816, and then offered no encouragement. In the meantime, Bentham tried his proposals in Pennsylvania and New Hampshire, but again without success. The conservative bar opposed codification virtually everywhere in the country, and, with its frequent control of state legislatures, was usually able to prevent such reform.

The movement for codification continued through the nineteenth century, however, and gained some success first in Louisiana, where Edward Livingston's code of procedure was adopted in 1805. Livingston's other drafts of a criminal code, a civil code, a commercial code and a code of evidence, among others, failed in the Louisiana legislature, as did his proposal to Congress in 1828 for a complete, codified federal penal system.

David Dudley Field, who began working for codification in New York in the 1830s, achieved more success. His code of civil procedure was adopted in New York and became a model for so many other states that code pleading replaced common law pleading throughout most of the country. Field's penal code was not adopted in New York until 1887, but Georgia adopted a civil code in 1860, and California had civil, political, civil procedure, penal, and criminal procedure codes by 1872.

Much of the support for codification stemmed from dissatisfaction with the uncertainty and inaccessibility of the common law, arising from the multitude, diversity, and frequent inconsistency of judicial decisions. Roscoe Pound argued that the great American legal treatises of the nineteenth century, by providing practical access to the common law through their synthesis of the mass of decisions, were instrumental in defeating the codification movement. The West digest system provided another access tool for this purpose in the first half of the twentieth century.

The success of the American Law Institute's Restatements of the Law and the uniform law movement in the middle of the twentieth century represents a later stage and another approach in the effort for codification. The popularity of the Restatements was certainly enhanced by the increasing difficulty of access to the common law corpus through the West digests. Whether computerized legal research in the form of LEXIS and WESTLAW represents the latest salvation of the common law remains to be seen. In any case, it seems clear that codification is again gaining ground in the state legislatures, with the universal adoption of the Uniform Commercial Code but one symptom of the trend. Law librarians are aware

46. *Quoted in id.* at 75-76.

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that the common law and other legal sources depend for their survival on effective access tools. Could the proliferation of regulatory legislation and administrative law have been manageable in the last fifty years without the development of the looseleaf services? The success of the common law has always required effective access to the decisions and other legal sources on which the system rests.

Continuing this review of the common law system in America, we next see a jurisprudential challenge to the common law from the legal realists, beginning in the 1920s. From 1870 to 1930, the increasingly conservative American judiciary, opposing new legislation that sought to alleviate social and economic problems, emphasized the sanctity of the common law and of the English legal heritage. A group of American legal scholars were influenced by a more pragmatic approach to law in France, Germany, and Scandinavia, and by the writings of Justice Holmes. They developed a new skepticism toward traditional common law attitudes and judicial techniques. Led by Jerome Frank and Karl Llewellyn, the realists stressed law as a means to an end, not an end in itself. They focused on the ends which the law should serve, and on the effectiveness of the legal system in serving those needs. Their work included jurisprudential analysis, specific empirical research, and extensive use of the social sciences. Emphasizing law as part of the larger social context, they looked to the social sciences for a better understanding of legal processes. A new literature, which viewed law as a social science, developed rapidly and spread through the law schools and the legal journals.[47] This literature provides another source for the study of the common law in America in this century.

The influence of the realists gradually affected the judiciary, and moved the common law to deal more actively with the changing problems of American life. The effect of this thinking on many sympathetic judges increased pressures on the doctrine of precedent and led to a more flexible judicial process. The common law survived, but as a more fluid and socially sensitive legal system, with a fuller realization of its social impact and the consequences of its decisions.

Following the realists (in time but not in philosophy), we now have the well-publicized critical legal studies movement.[48] The "Crits" attack the

47. A few representative works can be found in the appendix, *infra,* under "Law and the Social Sciences." For proceedings of a 1936 conference reflecting this new view and opposition to it, see THE FUTURE OF THE COMMON LAW (1937). L. KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986) and R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982) describe the impact of the realists on American legal education and legal theory.

48. The movement is described by one of its leaders in R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986). Examples of the writings of the group can be found in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982) and in Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

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realists for their general acceptance of the common law system, as much as they attack the premises and practice of the common law itself. Their diverse views have not affected the judicial process and are not likely to in the foreseeable future, but the writings of this group may influence other scholars and may even affect the way common law research is conducted.[49]

Although this survey of American common law development has been sketched in the most general terms, it should indicate that meaningful research into the common law today requires study in a variety of subject areas. A few suggested sources are listed in the footnotes and in the appendix to this article. The growing interest in law and economics indicates that such research is now being carried further into yet another area of the social sciences—economics.[50]

Technological changes in the dissemination of legal information have played an important role in the development of the common law, and will undoubtedly continue to affect its direction in the future. The original sources of the common law were written on parchment rolls, known as "pipe rolls" and "plea rolls." These were succeeded by the manuscript codex of gathered leaves, the physical form of the books we read today. The invention of printing facilitated wider and faster dissemination of the Yearbooks, which contained English law reporting from 1270 to 1535, and other legal texts. Printing made possible the development of the common law from its medieval origins to our present system.[51]

In addition to the growing sophistication of the digests of decisions and the recourse to codification in the nineteenth century, the next major improvements in access took place at the end of the nineteenth and beginning of the twentieth century. These included West's National Reporter System and key number digests, the annotated reports of Lawyers Co-op, annotated statutory compilations, Shepard's citators, and the looseleaf services. That amazing series of bibliographic innovations has provided access to the law from 1900 to the 1980s. The latest developments, including micropublication, computer storage and retrieval, optical discs, laser technology, and CD-ROM, constitute an even more revolutionary series of changes. Their effect on the common law remains to be seen, but some scholars are already speculating about the possible

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49. *See* Barkan, *Deconstructing Legal Research: A Law Librarian's Commentary on Critical Legal Studies*, 79 LAW LIBR. J. 617 (1987).

50. *See, e.g.*, papers presented at the Symposium on Change in the Common Law: Economic and Legal Perspectives, *reprinted in* 9 J. LEGAL STUD. 189 (1980).

51. *See generally* Henderson, *Legal Literature and the Impact of Printing on the English Legal Profession*, 68 LAW LIBR. J. 288 (1975).

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impact of this technology on legal research and on the common law itself.[52]

American common law today is no longer a shared body of rules with those of England, but rather a common way of thinking about law—more a shared *process* for deciding cases and resolving disputes than a jointly held body of substantive rules. Whether viewed jurisprudentially or bibliographically, Sir Edward Coke's famous dictum on the common law, "out of old fields must spring and grow the new corn"[53] has fresh meaning for us today.

52. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15, 25-27 (1987).

53. *Preface* to 1 COKE'S REPORTS A6 (1727).

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Appendix

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