



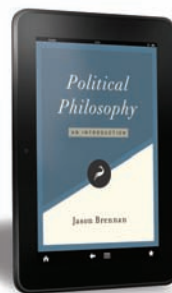
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Cato Policy Report

MARCH/APRIL 2016

VOL. XXXVIII NO. 2

Remember the Common Law

BY JIM HARPER

Good economists are familiar with Frédéric Bastiat's parable of the broken window, which illustrates that visible economic activity may have unseen costs. When a broken window leads to the purchase of a new window, it's easy to think that the broken window helped society by increasing production and trade. In fact, breaking a window makes society worse off; wealth has been destroyed, not increased. Bastiat's essay on this topic was titled "What Is Seen and What Is Not Seen."

A similar dynamic exists in the legal world. Legislative and regulatory processes are easy to see. Elections routinely draw public attention to legislative and administrative government. Elected and unelected regulators have media operations to tell reporters what they are doing. Common-law rules, on the other hand, are mostly unseen. Legal doctrines such as property and contract emerged quietly from series of court decisions over decades and even centuries, so they often go unconsidered and unspoken. Many people may believe that legislation and regulation do most of the work of ordering society.

Libertarians should remember the common law and generally prefer it. The common-law process for making the rules of a free

society has much to commend it. And where it falls down, it is more readily fixable than legislation and government regulation.

American law students learn early that the common law is an important inheritance from England that differs from the civil-law tradition dominant on the European continent. In the common-law tradition, the basic rules that govern our interactions arise from years of experience over generations. Our forebears learned that justice is served

and benefits accrue when people avoid violence, stick to their promises, and allocate things in an orderly way. The law of battery, contract law, and property law all emerged as common practice solidified into common law. It's often called "judge-made" law, but at its best common law is "judge-found" law—that is, judges discover law in common practices that are deeply ingrained in society.

In contrast, the source of rules in civil-
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IAN VÁSQUEZ, the director of Cato's Center for Global Liberty and Prosperity, spoke to students at January's Cato University in Heredia, Costa Rica. More information on Universidad ElCato is available at elcato.org, the Institute's Spanish-language website.

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law countries is the code books issued by rulers and governments. Civil codes establish the rules governing contracts, trade, property, criminal law, and so on. The civil-law tradition extols the great law-givers—Solon, Hammurabi, Napoleon—who wrote down the law codes purporting to govern their societies.

But the founding of civil law is something of a myth. In the times when civil law originated, the bulk of most populations was illiterate. These citizens did not have copies of the civil codes that purported to govern them. The civil-law tradition relies on the fiction that certain powerful men produced laws—but they actually arose like common law from the time-worn habits and customs of their subjects.

Part of the genius of the common law is its mix of adaptability and consistency. When new circumstances arise, common-law courts, urged on and educated by the parties to disputes, adapt existing rules in ways that they believe produce the most just and fair outcomes. They look for comparable cases in their own and other jurisdictions to learn what adaptation of existing law will produce the best results. Over time, new doctrines emerge and old ones may die out. But at any given time there is a stable rule-set people can use to organize their lives and business activities.

THE COMMON LAW OF PRIVACY

The field of privacy protection illustrates how common law develops. In 1890 a *Harvard Law Review* article entitled “The Right to Privacy” made the original argument that law should address privacy. Samuel Warren and Louis D. Brandeis, later to become a U.S. Supreme Court justice, catalogued the legal doctrines that might control certain abuses of private life arising from photography and mass circulation newspapers. They argued that the law should explicitly protect privacy.

Over time, a new branch of common law was born. Courts across the country began to recognize privacy torts—legally recognized

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wrongs that give victims of privacy invasions the right to sue invaders. In 1960 eminent legal scholar William L. Prosser documented how privacy as a legal concept had come to constitute four distinct torts: intrusion upon seclusion or solitude, or into private affairs; public disclosure of embarrassing private facts; publicity that places a person in a false light in the public eye; and appropriation of name or likeness. The common law of privacy continues to develop and advance. In 1998, the Minnesota Supreme Court recognized invasion of privacy as a tort in that state for the first time. The case was *Lake v. Wal-Mart Stores*. The defendant’s photo-developing shop failed to deliver two women their vacation photos, but an employee distributed a photo of the two showering together, spurring the court to adopt the “public disclosure” branch of the privacy torts. Like most law, the privacy torts work in the background, through the threat of lawsuits and not actual days in court or big damage awards. The rarity of lawsuits under the privacy torts may show how consistent these baseline privacy rules are with society’s general mores. Some would argue, of course, that they’re not strict enough and that debatable uses of information should produce successful privacy lawsuits more often. Legal evolution will decide who is right.

Privacy law may be in tension with free speech and the First Amendment, so it’s not clear that the privacy torts are a permanent fixture in the common-law pantheon. On the other hand, privacy-law professors and others often use the phrase “privacy harm” in a tacit effort to impress into common language—and ultimately common law—that more offenses against privacy or data security should be recognized as legally actionable harms. It’s all part of a quiet but important

debate about our privacy values and what may become our privacy laws.

But people don’t often ask how common law torts, property rights, and contracts protect privacy. They ask: “What will Congress and our state legislatures do?” Legislation and regulation get most of the attention.

The top-down process that established federal privacy regulation of health information illustrates some differences between understated common-law development and cacophonous civil-law-style rule-writing.

In 1996 Congress revamped the rules around health insurance. The Health Insurance Portability and Accountability Act (HIPAA) also addressed health privacy, but it didn’t set new privacy rules. Instead, Congress instructed the secretary of Health and Human Services (HHS) to make recommendations about the privacy of individually identifiable health information. It told HHS to go ahead and write privacy regulations based on those recommendations if Congress did not act.

When HHS reported back to Congress, it downplayed many safeguards for privacy that already existed. These included medical ethics, explicit and implied contract rights, malpractice claims, and state privacy torts—non regulatory privacy protections that got only a few cryptic lines buried deep in the report. In addition to largely ignoring them, HHS advocated eliminating some of them.

Today, with the HIPAA privacy regulations in place, people seeking health care sign a lot of forms and see a lot of notices discussing health privacy—but it’s not at all clear that their privacy is well protected. The HIPAA rules preserved and helped solidify behind-the-scenes information-sharing practices in the health care industry that may or may not serve consumers and society well. Every year, it seems, there is less and less of a free market in health care to test for and discover consumers’ true interests in health privacy and every other dimension of health care. The common law of health privacy is widely ignored.

INDUCTIVE COMMON LAW VS. DEDUCTIVE REGULATION

Common law is inductive. Building on experience in case after real-world case, common-law courts accrete knowledge about the rule-set that best serves society. Because rule development occurs with reference to real-life cases, it takes advantage of local knowledge about the precise disputes that occur. This allows better approximation of what the truly just rules will be for most cases.

Hayek emphasized the value of local knowledge in economic decisionmaking. He also emphasized the distinction between common law and top-down legislation in his three-volume work *Law, Legislation and Liberty*. The Italian lawyer Bruno Leoni is another great thinker in this area. His book *Freedom and the Law* extolled the virtue of English common law compared to Roman *jus civile*. The two systems have very different ways of developing rules. Common-law systems hew closer to common justice.

Legislation and regulation more often produce rank re-ordering of rights and liabilities because legislation is deductive. At a single point in time, based on all the knowledge it has drawn together at that moment, a legislature establishes the rule-set that it believes to make the most sense. This is often what it perceives as pleasing the most—or the most important—constituencies. That imperative to please constituencies means that the information legislatures codify often comes from well-organized interests with substantial resources. Special-interest pleading is a hallmark of legislation and regulation.

Judges in common law courts have fewer of the perverse incentives that legislators and regulators do, particularly when judges are appointed for life terms. A tenured judge gets professional acclaim from developing a reputation for fairness, from clearing dockets, and from suffering few reversals in higher courts. Judges generally don't anticipate growing their courts' budgets, getting post-service perks, or being re-installed in office

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due to the outcomes in their cases, as legislators and regulators often do. Legislation and regulation are systematically subject to a kind of intellectual corruption in which self-interest diverges from the public interest.

WRITING THE RIGHT RULES

Rules produced by the deductions of legislators and regulators don't always fail, of course, and they aren't always wrong. But it is better to arrive at just rules through a long, society-wide deliberation than through a legislative debate. To illustrate this subtle point, consider the rules that govern the liability of interactive computer services like YouTube, Yelp, craigslist, and Facebook.

In the mid-1990s courts were considering whether interactive online services would be considered publishers of the information people uploaded and posted to them. If they were publishers, websites might be liable for defamation and other causes of action because of the material users contributed to them. Had this rule taken hold, operators of online services would probably have allowed only tightly controlled and monitored interactions among users. The rollicking, interactive Internet we know today would have been sharply curtailed.

In response to this concern, Congress passed legislation saying that interactive computer services are not publishers or speakers of any information others provide using their services. Section 230 of the Communications Decency Act (CDA) is one of the most important protections for online

speech in the United States.

But CDA section 230 is often talked about as an “immunity” Congress gave to online service providers, a carve-out from general liability rules, put in place to advance a certain public policy goal. The perception of CDA section 230 as a special-interest favor means that other interests are on relatively strong footing when they come to Congress seeking to overturn it. Today, CDA section 230 is under attack from groups who would like to see it reversed. The rule against liability for online service providers would be stronger if courts had arrived at a rule of “no liability” based in considerations of natural justice.

When the rules that organize our society are temporal products of legislation, they may always be “in play” for a legislative reversal. Online service providers must always remain vigilant in Washington, D.C., for attempts to undercut their special “immunity.” The rules that govern online liability were established quickly, which is good, but they are less settled than they otherwise would be, and there is one more reason for private businesses to maintain a stable of lobbyists and lawyers in Washington.

There is no guarantee, of course, that the common-law rule would be the same right now as what CDA section 230 produced. The common-law process might still be searching for the right rule. Common-law development would probably find, though, that online service providers are not liable for the acts of others.

FAR FROM PERFECT, BUT BETTER IN PRACTICE

This is no argument that common-law courts are perfect. They are not. It takes a very long time for just rules to be found out and settled on through common-law development. Elected judges often have incentives to please powerful constituencies. The class-action mechanism is prone to abuse and often used to reward plaintiffs' lawyers. Punitive damages are too often a source of windfalls

to lucky plaintiffs. The rules about who pays for litigation may be changed to improve the delivery of justice in the courts.

But these challenges are more correctible than the dynamics in legislation and regulation. Public choice economics teaches that actors in all these rule-making processes will pursue their own self-interest, but the interests of legislators and regulators are likely to diverge from justice more often than the interests of judges.

There is a fair argument that legislation and government regulation create certainty, which may make it worthwhile to accept their many costs. This is particularly acute in the area of high tech, where the application of common law may be unclear.

But regulation produces certainty in theory better than it does in practice. Witness the recent “BitLicense” fiasco in New York State. When Bitcoin, a digital currency, first captured public attention a few years ago, New York superintendent of financial services Ben Lawsky saw it as an opportunity to make his mark in a hot new area. He proposed an ill-defined “BitLicense” that would require registration of Bitcoin businesses in New York. During the rule-making process, his office declined to release “research and analysis” backing the necessity of a BitLicense, in violation of New York’s Freedom of Information Law.

The final “BitLicense” was a hodgepodge of regulations like the ones that burden the mainstream financial services sector. They

“Common-law rules foster innovation because they allow anyone with a new idea or process to experiment with it.”

were an ill fit with this emerging technology and a hindrance to innovation because they drove up the cost of starting new businesses. They didn’t acknowledge the technology’s inherent capability to provide consumer protections that surpass existing financial services. Shortly after the “BitLicense” was finalized, Lawsky stepped down from his post to establish a financial regulation consultancy.

Today, it is anyone’s guess whether and how the New York Department of Financial Services will amend or enforce the technology-specific regulation that Lawsky produced. The “BitLicense” did not create certainty about the rules of the road for Bitcoin businesses in New York, and it did not create an upwelling of Bitcoin business activity in New York. America’s financial capital appears to be ceding ground on financial innovation to London, in the birthplace of common law.

Common-law rules foster innovation because they allow anyone with a new idea or process to experiment with it, subject only to background rules, such as “stick to your promises” and “do no harm.” There are no forms to fill out or licensing fees. There

is no oversight body that must examine how an innovation fits into pre-existing regulation. “Permissionless innovation” does mean some more risk to consumers and society, but our experience with high tech shows just how great the reward is when behavior is controlled with light-touch, simple, fair common-law rules.

The United States and England today live under a dual system. In many areas, they continue to enjoy the benefits of the common law. But legislatures increasingly insert themselves, making temporal judgments that rejigger the rules that people and businesses must live by. In many fields, people look to legislation and regulation first, rather than examining how time-honored rules can be adapted to solve new problems.

Legislatures and regulatory agencies have a lot of smart people working in them. They universally believe they are pursuing the best interests of their jurisdictions. But the system they work in has perverse incentives, and they have little of the knowledge that common-law processes gather and pass down through the ages. “The life of the law has not been logic: it has been experience,” wrote jurist Oliver Wendell Holmes, Jr., in his 1881 book, *The Common Law*.

The common law is an important part of structuring and ordering a free and prosperous society. It is preferable to legislation and government regulation. Even when we confront new problems, we lovers of liberty should remember the common law. ■

Cato University

July 24–29, 2016 in Washington, D.C.

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