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IS THE PRE-20TH CENTURY AMERICAN LEGAL SYSTEM A COMMON LAW SYSTEM? AN EXERCISE IN LEGAL TAXONOMY

Jacques Vanderlinden*

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I. INTRODUCTION

Many, many years ago, in 1973, I was invited to teach for a full academic year at the University of South Carolina. A former American colleague from the times when the going was good in Ethiopia a few years earlier encouraged me to come to Columbia, South Carolina, as the weather there would allow us to renew our epic tennis games all year round! Having accepted the invitation,

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the next point was to decide what to teach. Comparative law and jurisprudence were the usual choices for foreigners untrained in the common law. In addition to these obvious choices a course in African political systems was suggested in the Faculty of Arts. As it turned out, I respectfully submitted a proposal to teach a course on the law of common lands in South Carolina. This was unusual, as the topic was governed by state law and not usually taught at the law school. But these were also the years when Professor Sax was developing his ideas about public trust as a legal status for the beaches on the Pacific coast in Oregon or Washington states. The Faculty in Columbia kindly accepted my suggestion and I started my exploration of the law on common lands; this was in fact my first experience in the direct tackling of a common law topic and also my first direct acquaintance with the case method I had decided to use in class. And there came the surprise.

The more I was getting lost in the *South Carolina Law Reports* of the 19th century, the more I was fascinated by the contents of the law. I discovered that the State Supreme Court had indeed formulated the doctrine of the public trust for common lands in the early years of that century, but I was also puzzled by the scarcity of references to cases in the decisions and the abundance of quotations of Blackstone's and, later, Kent's classical commentaries. These two authors, and also some less-known ones, provided the starting-point of reasoning which appeared to me much more deductive than inductive.

I made a note of it for a possible further study, but more than thirty years went on without a chance of going any further in the matter although my South Carolinian experience still lingered in the back of my mind. In the course of these years I also developed my familiarity with the common law and my liking for comparison at the level of legal systems as a whole and for their taxonomy.¹ Finally I am perfectly aware of the fact that even if that type of exercise has gone out of fashion today, everyone still speaks of legal systems belonging to different families of laws as something self-evident.

Having reached the end of a half-a-century career as a law teacher and not having much to lose, I accordingly decided to take advantage of the great honour bestowed upon me by the Paul M. Hebert Law Center in asking me to deliver the 35th Tucker Lecture, to present in full the problem arising out in my view from

1. See J. Vanderlinden, *Religious Laws as Systems of Law: A Comparatist's View*, in *RELIGION, LAW AND TRADITION: COMPARATIVE STUDIES IN RELIGIOUS LAW* 165-182 (A. Huxley ed. 2002).

of the practice of considering the pre-20th century American law system as a common law system.

This, of course, requires a definition of the class “common law system,” in which we envisage the classification of the species “pre-20th century American law system.” There’s the rub. Of course, there’s no place here for a theoretical discussion on the “true” nature of a common law system, if there is one. Defining a system is a risky task, but it has to be done if the language of the law has to come out of the messy situation described by Karl Llewellyn in *The Bramble Bush*.² My own assumption is that there are a few possibilities. The essential characters of the “pre-20th century American legal system” may coincide with those of the “common law system” and the question asked in the title of this talk will be answered positively, or they won’t and the only solution, if we stick to the idea, will necessarily lead us to a redefinition of what is common law system as a whole. Another possibility is to consider that the American legal system is a system *sui generis* which escapes classification, as obviously I would not contemplate classifying it in the civil law systems. The last possibility is to consider that such taxonomic game is not worth playing and that not only my time, but also yours unfortunately has been totally lost. If such is the case, please, accept my most embarrassed apologies. Yet, allow me to take up the challenge of defining the class, “common law system,” if only for the sake of this essay.

The easiest way to characterize the common law is to use the well-known expression “judge-made law,” which would however not satisfy me fully as a person interested in comparison for two reasons. One is that, contrary to the theory which pretends to consider the judges’ *dicta* as simple authorities and not “sources,” the judges tend to play such a role in the production of the so-called “codified systems,” that the contents of the latter cannot be satisfactorily apprehended on the face of the code sections and, in many cases, require, in the most absolute manner, a maze of statements produced by the courts in order to be properly understood.³ Two is that English judges never miss an opportunity to assert the pre-eminence of the legislator in the law-making process and have as frequently repeated that if there was a gap in the law it was not their duty to fill it, but that such task was exclusively that of Parliament. Thus to give the impression that the

2. KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 83 (Oceana 1978).

3. J. Vanderlinden, *The Law-Making Power of the Judiciary in French Law*, JURIDICAL REVIEW 1-20 (1967).

common law is judge-made seems to be an oversimplification which does not provide a satisfactory criterion in the comparison of legal systems.

It is more useful to consider the steps followed by the English judge in his production of the cornerstone of the system, the precedent. If I am repeating it here, it is not to teach anything to anyone in this audience, it is only to make my reasoning as clear as possible. The English judge normally starts from facts brought to his attention. He is careful to present them at the opening of his judgment in the clearest and most possibly complete way; this is also, possibly, an opportunity to reveal his true personality as Lord Denning did so frequently and wonderfully in his opening statements. Once the facts of the case are clear, the judge goes on a search for previous decisions based on similar facts. Obviously he will very rarely, if ever, find absolutely similar facts. Thus he will have to decide upon the degree of satisfactory similarity existing between the facts at hand and the facts in the previous case. Once he is satisfied, he will look at the legal solution adopted in the previous case and will apply it to the instant case. It is only at that moment that the precedent is born; until then it is but a judgment in a maze of decisions in which the judge has to sift out the best from the worst, the technique of distinctions allowing him to navigate through the impossible total similarity between factual situations.

In conclusion allow me to quote two famous authors located at the beginning and the end of the long process of the history of the common law. Henry de Bracton⁴ recommended to the lawyers of his times to proceed “*a similibus ad similia*”, from the same facts to the same solutions. Jeremy Bentham⁵ characterized the common law as being an “*ex post facto* law.” These two terse formulas encapsulate what I have just written as to the nature of the common law. Let us turn now towards the late colonial and 19th century United States. Consider five major periods: the period of colonial America, the early post-independence period, the period preceding the civil war and, finally, the period following it up to the reform of legal education generally attributed to Langdell.

But, before entering the heart of the matter, let me express an important caveat. Is one able to write any statement which is globally valid for “the American colonies” as they progressively take shape during the two centuries separating the late 16th from the late 18th century and between what is now Maine down to South Carolina? The diversity of the colonial settlements

4. Circa 1210-1268.

5. 1748-1832.

amalgamated in what is known in common parlance as British North America is huge whether from a cultural, economic, political or social point of view even if they have a common language and a common origin. Envisaging the problem from the angle of the legal historian is even more difficult due to the scarcity of the readily available sources as to what the administration of law effectively was in each colony or later, state. This fundamental problem has not yet really frightened all those who have written volumes about colonial America or the United States at large. We'll meet in this short and necessarily summary presentation an example in the field of reactions towards Loyalists after independence of how the situation in one state, in the case Maryland, can radically differ from what is assumed to be a "national" situation. Nevertheless I'll follow the example of my colleagues who assume that one can generalize some conclusions at the level of the United States, while being fully aware of the high relativity of whatever I write under such heading. This had to be said before venturing in this brief presentation.

II. THE COLONIAL PERIOD

There are many ways through which the English common law came into the American colonies. The earliest and most common was the so-called birthright implying that every settler carried at his shoe soles the law under which he was born. One often quotes in that respect the article of James the First's Charter of Virginia, 1606 which runs as follows:

Also we do, for Us, our Heirs, and Successors, DECLARE, by these Presents, that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.⁶

Obviously the text doesn't refer to the common law as such, but rather to the "Liberties, Franchises, and Immunities" of all English subjects of the Crown. But that general statement is often

6. Available at <http://www.yale.edu/lawweb/avalon/states/va01.htm> (last visited April 21, 2011).

supplemented by provisions in the charters given to colonies and referring to the application of English Law or, at least, to a law, either imported or established locally, being “as near as may be” to the laws of England.⁷

If our perspective is narrower, what we must look for are court decisions which stand at the very beginning of a possible inductive process towards precedent. There’s the rub. What we are looking for is what Sir John Holt, Lord Chief Justice of England and Wales between 1689 and 1710, described as: “these scrambling reports [which] will make us to appear to posterity for a parcel of blockheads.”⁸ Not only are they scrambling but also they are numerous. A quick and quite summary count of the pages included in the 120 volumes or so of law reports published in England prior to 1776 comes up to a total of many tens of thousands pages of which no common index existed. There were not many lawyers in colonial America who could afford such a collection outside the main economic or political centers of the Northeast.

Law schools or law libraries did not exist at that time and everyone wishing to go into the business of law had to master his own documentary resources. The happy few, some 150 of them,⁹ who went to England were perhaps better placed as originating from reasonably affluent (and influent) families, but these were the exception.

The example of the resources available to John Adams, future vice-president and president of the United States, when he was articling is well known and fairly documented through his diary.¹⁰ Among all sorts of books, he successively reads Justinian’s *Institutes* (in Latin), Gilbert’s *Tenures* (at night), Wood, two

7. For example, in the charter of the same Queen to Sir Walter Raleigh which reads when dealing with the latter’s legislative power: “So always as the said statutes, lawes, and ordinances may be as neere as conveniently may be, agreeable to the forme of the lawes, statutes, gouvernement, or pollicie of England”, available at http://avalon.law.yale.edu/16th_century/raleigh.asp (last visited April 21, 2011); see also BARNES T.G., “As Near as May be Agreeable to the Laws of this Kingdom:” *Legal Birthright and Legal Baggage at Chebucto, 1749*, in *LAW IN A COLONIAL SOCIETY: THE NOVA SCOTIA EXPERIENCE* (Waite et al. eds. 1984).

8. Slater v. May, 2 Ld. Raym 1072.

9. CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 188-189 (1911).

10. See John Adams, *Experiences as a Law Student, 1758*, in 1 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES*, 93-106 (Steve Sheppard ed. 1999); see also, Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning and Legal Elitism 1758-1775*, in 1 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 75-92 (Steve Sheppard ed. 1999). This volume includes similar testimonies by two other famous lawyers, John Marshall and James Kent.

volumes of both Coke's *Reports* and John Lilly's *Practical Register or General Abridgment of the Law* (1719), Hawkins' *Pleas of the Crown*, and Fortescue; he also recites aloud Cicero's discourses against Catilina to improve his pulmonary capacity and speaking abilities. When he comes back to Boston, his first reading is, again, Justinian's *Institutes* with the hope of gaining the support of two veteran lawyers from the local bar. The reports are not much in the picture.

But, had they been on the shelves, finding the cases of which the facts were similar to those you had to deal with was another nearly insuperable challenge. It may accordingly be assumed that their current use at the level of practitioners outside these main centers was minimal and excluded.

Thus many people who wanted to become acquainted with the common law would certainly have been inclined to follow the advice to his nephew of another respected judge of these times,¹¹ Lord Thomas Reeve, Chief Justice of the Common Pleas (1736-1737) encouraged him at the beginning of his legal career¹² to only tackle the Law Reports after having perused and mastered Thomas Wood's *Institutes*,¹³ Jacob's *Dictionary*,¹⁴ Littleton's *Tenures*, and *An abridgment of the first part of my Ld. Coke's Institutes* by William Hawkins! Obviously, there was not yet any idea of a case method.

This does not mean that where precedents were available, lawyers would not respect them. But they were not conceived as the starting point of a deductive process. They were only there to allow a discovery of what the common law was through their rationale.

Thus most lawyers of these times, especially in what was then the south of the country, e.g. the Carolinas, would rather or had to (if only by the lack of English reports) rely upon a short practical presentation of the law of the kind cited in the last paragraph. In that respect, the real turning point is the publication in England, then in the United States of Blackstone's *Commentaries* published in four volumes between 1765 and 1769 at the Cambridge University Press; to Blackstone I'll come back in the following act.

11. 1 HARGRAVE F., *COLLECTANEA JURIDICA* 79-81(1791).

12. The letter was also given to be read by the first lawyer who accepted to take John Adams as an apprentice in Boston. *See supra* note 8, at 100.

13. Who also appears in the readings of John Adams.

14. References to this apparently well-known dictionary in his time are also found in the first judgments of the Supreme Court of Nova Scotia, the first one established by a British Government in what was still the colony of Nova Scotia, long before Canada was created in 1867.

But what about the knowledge and use of the common law in the meantime?

The impression which prevails is that we are confronted with what I would call on the one hand a “folk” knowledge of the law at large by non-lawyers and on the other hand a very indirect knowledge of an embryonic legal profession through the use of works like Wood’s *Institutions* at the best from a scholarly point of view and like those of Jacob’s *New Law Dictionary* at the best from a practitioner’s one. Wood’s is, in many respects a pioneer and an ardent supporter of the common law from whom Blackstone must have drawn much inspiration and Jacob’s *New Law Dictionary*, published in 1729, reached five editions before 1744 and was continued by T. E. Tomlins, who published its first American edition in six volumes in 1811 under the title *The Law Dictionary*. Whether one looks at the educated public or at the lawyer, the approach to the common law is essentially practical in everyday life.

Behind this earthly concern was a solid cultural background of basic principles about what justice should be in accordance with deep religious feelings. They included not only the law of God, but also “principles, that are permanent, uniform and universal.”¹⁵ Hence a fundamentally deductive approach going from the top, God, to the subject of the Crown in his daily activities. A high respect for what law should be in such surroundings certainly trumped technicalities and the doctrine of precedent (assuming it did exist at that time and is not a projection in history of more recent doctrines). One looked for the law in a diffuse corpus of Godly natural law or of reason, the lay face of which we profusely find in the English cases of the time.¹⁶ If they could support through a quotation or another a common cultural and obvious doctrine, thus making it “legal,” so much the better. The result was a narrow conception to the judge’s role. He was, as one often says, a “discoverer” of a common law which fitted with his cultural background. His task was not to innovate or create law and he accordingly most willingly practised a strict doctrine of *stare decisis*.¹⁷

Quite different was the frontier lawyer. The concept of frontier itself is not altogether well defined, but let us consider that it

15. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 7 (1992).

16. See Charles J. Reid, Jr., *Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent’s Commentaries*, (2006) University of St. Thomas School of Law, Legal Studies Research Paper No. 06-28, specially at 16-27.

17. HORWITZ, *supra* note 15, at 8-9.

encompasses the territories on the western edge of the 13 colonies where progressively settlers established themselves before its parts progressively obtain the status of territory, followed by that of state in the Union at the very end of the 18th and the early 19th century; that first frontier will give birth to States like Alabama, Missouri, Ohio, or Tennessee.¹⁸ From then on the frontier would carry on its progressive march westwards. As for the Frontier or Pioneer (Adventurer in the sense of the Merchant Adventurer of the 15th century and later would be an as good or even better qualification) lawyer.¹⁹ The generally young man with a fairly recent legal baggage acquired by articling or passing through one of the early law schools, one can easily imagine that his luggage strapped near his saddle would not leave much room for many books, even of the size of Jacob's *Dictionary* or—but this was much heavier—Blackstone. The Bible (indispensable to administer oaths or be read in the last minutes before the hanging of a murderer among other things) was more likely to be in the bags in front of or behind his saddle.

III. FROM INDEPENDENCE TO THE EARLY 19TH CENTURY

The period around the Declaration of Independence by the American colonies in 1776 and the 1820's opened up from the point of view of the production of law with five major events which may be seen as somewhat linked together by a common starting point: the Declaration of Independence itself and its legal form, the *Articles of Confederation*, followed by the *Constitution of the United States*. Centering on these fundamental texts, let us only mention these five major events: in chronological order, 1) the adoption of constitutional texts; 2) the departure from the legal scene of many prominent lawyers of the times; 3) the increased lack of law reports; 4) the rise of major treaties; and 5) the creation of the first law schools.

A. *The Adoption of Constitutions*

I am not going to elaborate on this, but let me just remind the reader of the importance, from the point of view of the formal sources of law, of the appearance of a text encompassing all the fundamental features of the structure of the State. It was of course known in the English legal history since the passing of the

18. In alphabetical not chronological order.

19. See, e.g. WILLIAM FRANCIS ENGLISH, *THE PIONEER LAWYER AND JURIST IN MISSOURI* XXI 2 (1947).

Instrument of Government of 1653, but had been deliberately wiped off from memory as unconstitutional and thus, altogether with all the laws of the Commonwealth, sent back to the limbos of non-existence. Whatever “legal” had taken place during a period of some fifteen years was replaced by the first “legal” years of the reign in absentia of Charles II in exile in the Netherlands.²⁰ From then on and until today, England (and later the United Kingdoms) never felt the need for a single constitutional document, although its constitution is far from being totally unwritten.

On the contrary, as from the *Articles of Confederation* the United States (and, in the immediately following years, their thirteen members) were living under a basic legal document. Even if at the beginning it did not matter much for the current adjudication of litigation between common citizens, it laid next to the principles of justice and natural law inherited from colonial times as another term of reference when starting the quest for law. That is, as a document where one would find some principle from which to *deduct* a possible solution to a legal problem.

B. The Departure from the Legal Scene of Many Prominent Lawyers

One of the first results of the American Revolution was the Loyalist diaspora which, for example, led to Canada between forty and fifty thousand British subjects who were faithful to the Crown. Among them were many lawyers of whose the exact number seems unknown although they have recently attracted more interest, especially insofar Nova Scotia is concerned.²¹ Among those who remained many went into politics or the judiciary at a high level. The names of Adams, Kent and Marshall, each in its own sphere, the State, and/or the Judiciary, have become the most glaring examples of that phenomenon. But it is likely that these are the trees concealing the forest. Finally, many Loyalists who had reached a respectable status in the profession and could or would not migrate for various reasons preferred retirement to the risk of being disbarred for their political opinions. Some of them depending on where they resided, were effectively expelled from the bar, but this attitude was far from making unanimity. Major

20. The first acts passed by Parliament after the return of Charles II in 1660 were numbered 12 Charles II.

21. See, among others, the recent article, Jim Phillips, *The Court and the Legal Profession: Loyalist Lawyers and the Nova Scotia Supreme Court, 1785–1790, The Promise and Perils of Law: Lawyers in Canadian History* (Wesley Pue & Backhouse eds. 2009); see also www.loyalistresearchnet.org (last visited April 21, 2011).

figures, like Alexander Hamilton took a clear stand against it and he was not alone in his stand. As a result, for some authors, independence “wrought havoc upon the American legal profession;” this quantity-wise, the quality-wise approach being as strong under the pen E. Griswold, “There is no doubt that this was a serious set-back to the overall calibre of the profession in America.”²² Such statements, which are common saying among the most prominent legal historians of the period, must be taken with caution, as Nolan has quite convincingly demonstrated by showing how different the situation was in Maryland.²³ One thing, however, may be accepted: training for the bar through apprenticeship became more difficult, which does not mean that it disappeared.

C. The Increased Lack of Law Reports

We have seen that in the previous period referring to cases was not an easy task for various reasons. The quasi-permanent conflict with Britain until the end of 1814 just accentuated the problem. Not only would English reports arrive with more difficulties, but the revolutionary spirit was prone to reject English law as such, it being one of the symbols of previous oppression. As for local reports it took some fifteen years for the first ones to appear in many states and one could not expect decided cases by the supreme or appeal courts to immediately cover the whole field of law. As Kent wrote at the end of the century, “one never dreamed of volumes of reports and written opinions.”²⁴ Thus the ground was not yet ready for the development of a possible inductive approach.

D. The Rise of Treatises

Five years before independence was proclaimed and two years after the publication of its last volume by the Cambridge University Press, William Blackstone’s four volumes of his *Commentaries* were published in Philadelphia and had an immediate success in the United States: 1400 copies were rapidly sold, supplemented by 2500 before 1776. Very quickly, Wood and Jacob were forgotten. Here, at last, a handy (four in eight volumes, instead of the similar folios of Wood) and systematic (as we have

22. The two quotations are in the seminal paper Dennis R. Nolan, *The Effect of the Revolution on the Bar: the Maryland Experience*, 62 VA. L. REV. 969 (1976).

23. *Id.*

24. See James B. Thayer, *The Teaching of English Law at the Universities*, 9 HARV. L. REV. 169, 170 (1895) (quoting Kent).

seen the plan of Justinian's *Institutes*, which Blackstone follows, was familiar to colonial lawyers) description of the common law was available. No wonder that the frequency of the references to the *Commentaries* had so quickly struck me when ventured for the first time in the South Carolina law reports many, many years ago. There is no need to elaborate on that success story which appears in all text-books about early American legal history. Blackstone was not only a source for judges. It also struck young men either articling or studying in one of the early law schools, or even some of them temporarily lost in the countryside because of the War of Independence.²⁵ As Nolan quite convincingly showed, his influence was "more indirect and far more diffuse, but no less significant, than is usually claimed."²⁶

But Blackstone presented a major problem as of 1776. The public law part of his work was pure blasphemy in the Republic. There was also a point here and there where the clause "as near as may be" had transformed English common law in American common law. No wonder thus that "annotated" versions of the *Commentaries* appeared rapidly, the best known being that of St-John Tucker published in 1803. Interestingly enough the notes updated Blackstone in accordance with the American constitution and laws, but also with the same of the Commonwealth of Virginia.

If Blackstone's work played a fundamental role in the shaping of American legal minds—one must not undervalue from our point of view, the influence of the many specific treatises—at first directly imported from England or locally republished and later on more or less adapted to the local law. To cite two examples, in the first group we find some standard textbooks like Gilbert's *Law of Evidence*, and in the second one, Chitty's *A Treatise on the Bills of Exchange*.²⁷

E. The Creation of the First Law Schools

Legal education in the common law as it was practiced in the colonies was not organized on a collective basis before independence. It appeared in Connecticut in 1784 in the town of Litchfield and was an initiative of a practitioner of high local

25. *Id.* at 170, still quoting Kent discovering "with awe" the *Commentaries* and "reading them again and again" in his later life.

26. Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y. U. L. REV. 731, 767 (1976); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996).

27. Quite interesting in that respect is A.W. Brian Simpson, *The Rise and Fall of the Treatise*, 48 U. CHI. L. REV. 632, 668-671 (1981).

reputation, Tapping Reeve. It lasted for nearly fifty years and trained a thousand or so lawyers among whom many achieved a reputation in the legal profession and beyond it.²⁸

For the first time, the definitely erratic articling system which is reflected in some diaries like the one of John Adams gave place to a systematic overview of the law spread on two years at the rate of a lecture a day delivered in the morning by Reeve or, later, by his associate John Gould. Afternoons were spent at questioning teachers, discussions between students and reading books or cases in the school small library which was also its only classroom located next to Reeve's house. Weekly examinations and moot courts also prepared the students for a career at the bar. The focus in the lectures was on principles corroborated by references to authors (Blackstone was prominent among them) or cases.

The impact of the school on American law can be appreciated by the careers of its graduates who came from all around the United States: three became Supreme Court Justices and thirty-four sat on state supreme courts, while scores of them became lower court judges or law professors. Finally, looked at from our point of view, it was very much in the traditional pre-independence approach of looking for or at principles when confronted with a case and buttressing the deducted solution by a reference to books of authority.

The case of small professional law schools like Lichtfield is not unique,²⁹ but other forms of formal legal education appeared during the period. They range from the setting up of a course of law in an Arts Faculty, the appointment of a professor of law or the beginnings of institutions such as Yale or Harvard Law Schools. Some of these ventures, including a first try at Harvard, aborted more or less rapidly. But they all shared a similar deductive approach when dealing with the production of legal solutions: from the facts of the case directly up to the principle and from the principle down to the solution of the case.

IV. FROM EARLY-19TH CENTURY TO LANGDELL

From our point of view, three points emerge from the half-century or so which separates the definitive independence of the United States from Britain at the end of the Anglo-American War

28. See Andrew M. Siegel, *To Learn and Make Respectable Hereafter: The Litchfield Law School in Cultural Context*, N. Y. U. L. REV. 1978 (1998).

29. See ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 132-150 (The Carnegie Foundation for the Advancement of Teaching 1921).

from the appointment of Christopher Columbus Langdell as professor at Harvard: 1) professional lawyers take control of the production of the common law; 2) specific treatises flourish; and 3) formalism prevails.

A. Professional Lawyers Take Control of the Production of the Common Law

If no real change appears in principle in the way of producing the law, something different but fundamental resulted from the change in legal education which characterizes the previous period. A class of professional lawyers was born endowed with a similar way of dealing with legal problems in times of deep changes in the cultural, economic, political and social features of American society. That class of lawyers was to provide to these changing times not only the legal superstructure and judiciary it needed, but also a good deal of its political elites. And when the latter would, in their view, default at the legislative or executive levels, the activism of the former would be there to supplement their shortcomings. Such approach was needed. Changing circumstances which characterize the first half of the 19th century required legal solutions which Blackstone could not necessarily provide. Or, if he could, at least come reinterpretation was needed in order to tackle these new challenges. This was an intense period of legal activity which shaped American law. It was based, like previous ones, on new credos which in turn were formulated in legal terms by the judiciary.

As Horwitz writes, “[w]hat dramatically distinguished nineteenth century law from its eighteenth century counterpart was the extent to which common law judges came to play a central role in directing the course of social change.”³⁰ Horwitz considers quite validly that judges have taken the place of the legislator by “establishing rules of very general application.”³¹ These rules were equivalent to legislation and became the basic term of reference towards which one would turn to solve legal problems. Thus the judge begins to consider himself as a legislator, someone who provides “remedies according to the growing wants, and varying circumstances of men ...”³²

30. HORWITZ, *supra* note 15, at 1.

31. *Id.* at 2.

32. *Id.* at 23.

B. The Triumph of Formalism

Once the transformation was achieved, the judiciary took up the task of buttressing the new legal framework he has contributed to create for the advantage of “men.” Horwitz’s phrase has to be completed by defining which men he refers to. The answer comes some two hundred pages later in his book. The beneficiaries of judicial activism are the ones who hold “political and economic power,” the “merchant and entrepreneurial groups” who manage “to forge an alliance with the legal profession.” One thinks irresistibly of what happened during the Tudor period in England when, in the 16th century, merchants, parliamentarians and lawyers joined in a ruling cultural, economic, political and social class. In the United States, the legal tool used for the purpose was formalism. The growing wants and varying circumstances of a class of men were satisfied and the resulting legal system took the new dimension of being self-evident and rational, thus completely objective and detached from the state of the Union. And so were, in principle, its fundamental values which, from then on, supported its development through interpretation. The latter became highly “rational” and “formal.”

In such framework, arguments of “justice,” “morality,” and “equity” were preposterous, and the latter, considered as a distinct mode of production of law would rapidly disappear being merged into the common law. They were replaced by a “scientific” approach to law, which was reflected in the treatise literature as we shall see. Such an approach implied a deductive method where solutions inexorably flow from pre-existing principles.

C. The Flourishing of Treatises

As we have seen specific treatises directly inspired from English law were known and used in the previous period alongside with major works offering an overall view of the same. We also had a glimpse at the progressive americanization of these doctrinal contributions. Thus the time had come for genuine American specific treatises. The first step, very much in the line of the previous period, was the publication of Kent’s *Commentaries* during the years 1826 to 1830. Then followed more specific writers: The most prolific of these was Joseph Story, Justice of the Supreme Court since 1811 and concurrently Dane Professor of Law at Harvard since 1829. In thirteen years, he published nine major treatises. From then on, treatises were part of the American legal landscape. From our point of view, they did not encourage a

deductive approach in the production of the common law. In spite of a growing load of State case law. It was not used much when confronted with concrete problems in order to launch an inductive process.

The apex of that doctrine characterizing the treatise tradition of the pre-civil war period which concentrated on the principles from which solutions were deduced is perhaps best described by William W. Story, a son of the previous one, in his *A Treatise on the Law of Contracts not under Seal*.³³ 1) principles come before cases; 2) cases, even the most interesting ones, are purely illustrative of the principle; 3) accordingly the place of cases is in the footnotes. Such a description would perfectly fit (but for the replacement of principles by articles of a code) any French treatise of the same period. This approach of law resulted of a strong belief in the “scientific” character of law and the correlated idea that the objective of any science was the discovery of fundamental principles from which the practitioner would deduct logical step by logical step a solution to the concrete problem he was confronted with in daily life. Thus principles established by the science of law would replace those which, in the previous period, came from God or non-religious natural law.³⁴

* * *

During that period, Louisiana constitutes a well-known exception on which there is no need for me to expand in front of auditors or readers of whom I am only a most grateful and humble guest. Louisiana stands at the confluent of three legal traditions which have their own laws even if two of them belong to the same “family;” it explains its qualification as a “mixed” system on which I’ll come back in my conclusion.³⁵ The contributions of Spanish and French law and lawyers to the development of Louisiana’s legal system are well-known.³⁶ Blackstone and his commentaries (or his followers) were nevertheless not completely absent from the picture. There are good reasons to this as much of Louisiana’s law is indeed common law. Thus, no wonder that if

33. WILLIAM W. STORY A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL (1844).

34. Simpson, *supra* note 27, at 671-672.

35. On this evolution which has given rise to a huge amount of literature, see, for example, volume 63, issue 4, of the University of Chicago Law Review (2003).

36. See, among so many others, the contribution of one of my predecessor in the Tucker Lectures, Professor Robert A. Pascal, *Of the Civil Code and Us*, 59 LA. L.REV. 301 (1998).

one looks at cases from the State Supreme Court between 1809 and 1834, one finds some 30 references to Blackstone, but also 39 to Kent's *Commentaries*, or other specific treatises written by well-known English jurists supplementing the Code provisions.

V. THE TIMES OF LANGDELL
(THE LAST QUARTER OF THE 19TH CENTURY)

Some ten years, after Christopher C. Langdell was appointed Dane Professor of Law at Harvard University, Holmes reacted in his *The Common Law* against what Horwitz characterizes as the development by judges and jurists of “a small group of fundamental conceptions—fault, will, property rights—from which one could logically deduce virtually all legal rules and doctrines.”³⁷ If one accepts that perception of the common law at the origins of our last act, there is no doubt that the assumption that American law is founded on an inductive method progressing from case to case towards a formulation of what law is in a specific case was still highly challengeable when Langdell enters the stage at our fourth and last act.

Langdell shares the belief of his contemporaries that law is a science and that accordingly the task of scholars is the discovery of the principles governing its object, i.e. the law.³⁸ There is however a reaction on Langdell's part which is twofold: 1) the number and volume of the law reports in which the principles were to be found became difficult to master by the students and 2) that intellectually the re-discovery of the principle by the student through the study of the judge's reasoning was educationally more fruitful than the reading and memorization of what the treatise said. As Langdell himself put it: “The object of the case system is to compel the mind to work out the principles from the cases.”³⁹ Complementary to that statement, came the fact that, in the mass of the decisions, only the “leading cases” had to be studied and studied in depth. The direct result for the teacher was his responsibility to provide classes with casebooks in which the student could find the path (or the successive stages) which led to a principle.

The question, from our point of view is: Has Langdell, through the establishment of a method of legal education (the presently everywhere practiced in the common law world case-method)

37. HORWITZ, *supra* note 15, at 129.

38. Harold J. Berman & Charles J. Reid Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L. J. 438, 513-514 (1996).

39. Cited in *The Increasing Influence of the Langdell Case System of Instruction.*, 5 HARV. L. REV. 89 (1891).

brought a fundamental change in the way the common law is produced? In other words has the production of the law by American judges become inductive?

I am in no position or ability even to risk an assessment of Langdell's contribution to a possible change in the nature of American law as a common law system; some of my most distinguished colleagues have been tempted by the challenge,⁴⁰ but again I have neither the wish nor the means to support or not their conclusions. Let me only mention them in their essentials. Horwitz, speaking of the structure of legal reasoning in the period 1870-1905, refers to the "[d]eduction from general principles and analogies among cases and doctrines" which he sees as "the crystallisation of a 'legalistic' mindset" which, as we have seen, had emerged in the previous half-century. In a totally apparently contradicting way, Kimball speaks of Langdell's "inductive approach" which differs so much from the previous ones.⁴¹ Kimball insists on that character of Langdell's approach in the discovery of principles, but, once they are established, he admits that it turns deductive in the application of principles to facts. Thus it appears that pre-existing principles still govern the production of the law.

In spite of the impossibility for me to propose a clear-cut answer to the question of Langdell's position and before concluding this presentation, I would like to offer a few personal remarks on the subject. Assuming that Langdell's supporters are right, his induction process seems to focus on extracting principles from the solutions offered by the courts; hence the need of a careful study of case-law; hence the case method while training lawyers. While fully supporting that method—which I have been applying to my teachings ever since I got familiar with it in South Carolina—I would only most carefully and humbly suggest that this is not starting from the facts, looking for similar facts, then for the legal solution resulting from the latter and finally applying it with possible distinctions to the pending case thus erecting the previous one to the status of precedent. *Mutatis mutandis* Langdell's inductive approach appears to me nearer to that of Lord Atkin in *Donoghue* when he suggests a quest for the general principles of tort law as they can be found in the existing cases. But as much as I am willing to admit that my reading of Langdell

40. See, e.g. HORWITZ, *supra* note 15, at 16-17; Bruce A. Kimball, *Langdell on Contracts & Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345 (2007); see also Berman & Reid, *supra* note 38, at 513-515.

41. *Id.* at 349.

is erring, I am also willing to admit that I am misreading Lord Atkin.

VI. CONCLUSION

What American practitioners and scholars developed during the 19th century can be characterized by many features of the “classical” common law system as it was born and grew up in totally different surroundings in England during some five or six (my starting point is either Henry the First or Henry the Second) centuries or so until the eve of the American Revolution. There is no doubt that one may say that what followed in the two countries was a “judge-made” system of law, even if there can be differences in the meaning of the adjective on both sides of the Atlantic and also some general reservations as to its inapplicability to civil law systems.⁴²

One may also maintain the opinion that preceding cases play an important, if not fundamental, role in the solution the judge will build up when confronted with the facts of a case. But, if one refers then to “precedent,” things change radically. The English precedent is indeed fundamental. So are facts. The American precedent is quite different, as it appears ancillary to the principles while the English lawyer is reluctant to refer to principles possibly deducted from precedents. Nothing is further away from facts than principle. This difference cannot be ignored as the latter inevitably provides a starting point for a deductive process while the latter remains deeply rooted in induction. And, for reasons which I believe I have shown to be obvious, the American system has developed around principles.

Now, all this relies on a choice made by the outside observer as to which factors matter in the definition of systems or families of laws and, of course, on the validity or even interest of taxonomy in its application to social phenomena. It could very well be that the latter are totally impervious to such approach. Or that the latter is totally out of fashion if not preposterous. I am most willing to accept all these.

The introduction of taxonomy in the field of legal systems is fairly recent; it dates back to the beginning of the previous century when the comparison of legal systems took a new start. Since then the taxonomy has developed and various combinations of some 19 criteria were proposed as a basis for the classification of legal systems. Among these, one found all sorts of possible

42. See Vanderlinden, *supra* note 3.

characteristic of laws or legal systems: their conceptual apparatus, their stage of development, the place they gave to fundamental rights, their dynamism, the hierarchy of their formal sources, their history, their economic, political or social ideology, their characteristic institutions, the development of their legal language, their way of thinking the law, their methods of interpretation, their way of reason, the number of people they governed, the place they left to religion, the race of the people they governed, their economic system, the role of the lawyers in their development, their material sources and, finally, their structures. Among all these, the specialists would combine a number of them ranging from one to seven.

As for the “families” accordingly constituted there were 20. In most cases, reference was made to a geographical area: Africa, Africa and Asia, Europe and America, the Far-East, Nordic countries, Western countries, and Scandinavia. Culture was involved when referring to religious laws or one of them, specifically Islamic law or languages when speaking of Slavonic laws. Then came an economic reference with the Socialist laws; oddly enough no one ever referred to a family of capitalist laws! There were also some odd families, like the Classical Antiquity one, that of the “civilized” laws which was easily opposed to the family of “primitive” laws, or, finally, that of the “other laws” regrouping all laws which would not fit into the other ones! As for the last four, they were, at last, referring to laws (or legal traditions): the common law family, the Germanic laws family, the Romanist laws family, and a combination of the last two, the Romano-Germanic legal family.

Such taxonomies did not make much sense. Finally the most often mentioned were the common law, Islamic law, romano-germanic and socialist families, but quite frequently selected on a different mixture of characteristics. This also was, in my view, not satisfying. If we bring laws together in “families,” there must be some logic in the selection justifying this or that grouping. The logical inescapable conclusion of such process is that every single potential member of a family must satisfy the requirements set down for entering the family as defined in its characterization. If it doesn't, it has to find another family or build a family of its own. Or we have to change the requirements asked for entering the family, thus its essential features. This is the choice I believe we are confronted with when looking for a family for the 19th century American legal system.

Thus, either the latter meets the requirement of a so-called common law family, including that fundamental one which is the

inductive method of law producing. Or it does not, which is what I tend to believe having read my fellow legal historians specializing in American legal history. Or, if we absolutely want to include American law in the common law systems, we have to exclude the inductive method from the essential characteristics of a common law system, which I am not willing to do when reading my fellow legal theorists of the English legal system which I still consider to be the archetype of common law systems.

Perhaps is it also true that logic itself is not any more part of the grid we are tempted to apply to social phenomena. We live in a time of disorder not of order, of irrationality not of rationality. It could very well be that if we look at the producers, forms, contents and processes characteristic of every law, each of them will appear as a mixed system—would I dare to say a bastard as it would have no real family. What we are contemplating today is, nearly everywhere, a complex ever-moving thoroughfare of producers, forms, contents and processes fighting and fertilizing one another. If this is the case, I would be completely satisfied. Being myself convinced, as a radical legal pluralist, that, in many cases if not most of them, law is but what every individual claims it is, I would appear so much contradicting myself when pleading for taxonomy, that I feel it much better to stop here before making a complete fool of myself.

Here cracks a noble scientific process
Good night sweet taxonomy
And flights of angels sing thee to thy rest.⁴³

Baton Rouge, May 16 2008-
Brussels, March 10 2011

43. I hope the bard of Stratford-upon-Avon will forgive me this free adaptation of the closing sentence of his *Hamlet*.

