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North Carolina and the Genius of the Common Law

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North Carolina and the Genius of the Common Law

JOHN V. ORTH*

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I. INTRODUCTION

The title of this article is "North Carolina and The Genius of the Common Law." When we hear the word "genius," we usually think of an extraordinary person like Albert Einstein or Pablo Picasso. And, indeed, the dictionary definition of "genius" is "a person endowed with transcendent mental superiority, inventiveness, and ability."[1] So, the title may have led you to think that this Article would be about the legal equivalent of Einstein or Picasso. Maybe Sir William Blackstone, who published his influential four-volume *Commentaries on the Laws of England* in 1765–1769. Or John Marshall, the great Chief Justice of the United States Supreme Court from 1801 to 1835. Or Justice Oliver Wendell Holmes, the "great dissenter," who served thirty years on the United States Supreme Court (1902–1932), after serving twenty years on the Massachusetts Supreme Judicial Court. But no, that's not what this Article is about, although all those lawyers had important things to say about the common law.

When I said earlier that the dictionary definition of "genius" is an extraordinary person, I should have said that that is *one* of the dictionary

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1. *Genius*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 946 (1971).

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definitions of the word. Another dictionary definition of "genius," and indeed a definition that gets prior billing, is a "peculiar, distinctive, or identifying character: essential nature or spirit . . . ."[2] Close readers of the North Carolina Constitution may recognize this use of the word. It appears in the Declaration of Rights, Article I, Section 34 on *Perpetuities and monopolies*: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."[3] That Section goes all the way back to the state's first constitution in 1776.[4]

I've always found it interesting that the drafters of our first constitution thought that the problem with perpetuities (property interests that the law permits to exist indefinitely) and monopolies (laws allowing only one supplier of a particular good or service) was that they threatened the essential character of a free state. I think today we can all see how perpetuities and especially monopolies threaten the operation of a free market. But the North Carolina framers were not primarily worried about threats to the free market. Instead, they were worried about threats posed by what today we would call "crony capitalism," how the politically well-connected can amass great wealth and preserve it for the benefit of their families for generations. *That* can endanger a free state.[5]

But "genius" is not the only problematic word in my title. The meaning of "common law" also poses a problem. It's a phrase we often use and never define—rather like Mark Twain's definition of a "classic": "a book which people praise and don't read."[6] *Black's Law Dictionary* gives a pretty standard definition of "common law": "The body of law derived from judicial decisions, rather than from statutes or constitutions; caselaw"—caselaw, that is, as opposed to statute law.[7] It's worth pausing to consider just how law is made by judges in their decisions of individual cases. Of course, the primary function of judicial decision-making is to resolve disputes between individuals, or between the state and an individual. Once a decision is rendered and all appeals are exhausted, the matter is settled.

2. *Id.*

3. N.C. CONST. art. I, § 34.

4. N.C. CONST. of 1776, Decl. of Rights § 23 ("That perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed."); N.C. CONST. of 1868, art. I, § 31 ("Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed.").

5. *See generally* John V. Orth, *Allowing Perpetuities in North Carolina*, 31 CAMPBELL L. REV. 399 (2009) (discussing *Brown Bros. Harriman Trust Co. v. Benson*, 688 S.E.2d 752 (N.C. Ct. App.), *appeal dismissed*, 698 S.E.2d (N.C. 2010)); *see also* John V. Orth, *Recent Developments in North Carolina Property Law: Where's The Supreme Court of North Carolina?*, 95 N.C. L. REV. 1561, 1582–89 (2017).

6. DICTIONARY OF QUOTATIONS 109 (Bergen Evans ed. 1968).

7. *Common Law*, BLACK'S LAW DICTIONARY (8th ed. 2004).

The same parties cannot litigate the same dispute over again. This may be called the *res judicata* effect of a judicial decision. The Latin phrase means "a thing adjudged"—settled finally, once and for all. But those lawyers not involved in the particular case pass pretty quickly over who won and lost.

That's because judicial decision-making has another effect—at least in our system—precedent-setting. Having solved a problem once, there's no reason to have to solve it again the next time it arises. Better to stand by the prior decision. The Latin name for this is *stare decisis*. This is where caselaw comes from. In the course of deciding a particular dispute, a judge lays down a rule for how similar disputes will be resolved in the future. "Like cases should be decided alike" is a fundamental rule of justice. Every parent knows just how basic this concept is. Children instinctively appeal to it when they say, "You let *him* do it!" Of course, we often respond: "It's not the same thing!" or "You're not like him!"—the common law art of distinguishing cases.

But *Black's Law Dictionary* also offers another definition of "common law": "The body of law based on the English legal system, as distinct from a civil law system; the general Anglo-American system of legal concepts, together with the techniques of applying them . . . ."[8] The common law cannot simply be reduced to the "body of law derived from judicial decisions" or caselaw. In fact, the relation between caselaw and statute law is far more complicated than it seems (we'll come back to this later). The common law also means a body of law and a set of techniques in a particular historical tradition, the English legal tradition, as distinct from another legal tradition, the civil law system.

II. THE ENGLISH LEGAL TRADITION

Ordinarily when American lawyers talk about "civil law," they mean the law concerning private rights—property, torts, contracts—as opposed to criminal law, the law concerning public wrongs, offenses against the state. But in the definition we just read, "civil law" means something altogether different: it means the legal tradition based on Roman law, specifically on the compilation of Roman law made in the fifth century A.D. by order of the Emperor Justinian, the Corpus Juris Civilis.[9] Civil law in that sense forms the basis of the legal systems of all European countries except England.[10] It is also, for historical reasons, the basis of the legal systems of Scotland,

8. *Id.*
9. *Civil Law*, BLACK'S LAW DICTIONARY (8th ed. 2004).
10. *Id.*

Quebec, Louisiana, Puerto Rico, and the countries of Latin America.[11] To oversimplify the difference between the common law and the civil law systems, you can say that the civil law system does not recognize caselaw, only statute law.[12] Although one can learn a lot about the common law by stepping outside and looking at it from the point of view of a "civilian," as lawyers in the civil law tradition are called, this is not the place to do it; nor am I the person to do it, being myself a common law lawyer.

The English legal tradition, from which North Carolina got its common law system, goes back hundreds of years. A few years ago, we celebrated the eight-hundredth anniversary of Magna Carta. In 1215, a group of heroic barons, "sword in hand"—as Alexander Hamilton put it in the *Federalist Papers*—vindicated English liberty against the would-be tyrant, King John, forcing him to accept Magna Carta ("the great charter").[13] Of the many provisions (called chapters) in Magna Carta, the most important was chapter 39, which may be translated from the original Latin as: "No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go against him, nor will we send against him, save by the lawful judgment of his peers or by the law of the land."[14] Students of the North Carolina Constitution may recognize some of these phrases. In 1776 they were put in the state's Declaration of Rights. They're still there, in Article I, Section 19: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."[15] In 1970 a second sentence, guaranteeing equal protection and prohibiting discrimination, was added.[16]

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11. *Id.*

12. *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (4th ed. 2018).

13. THE FEDERALIST NO. 84, at 534 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *123.

14. MAGNA CARTA OF 1215 ch. 39, *reprinted in* DAVID CARPENTER, MAGNA CARTA 52–53 (2015).

15. N.C. CONST. art. I, § 19; *see* N.C. CONST. of 1868, art. I, §17 ("No person ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."); N.C. CONST. of 1776, Decl. of Rights § 12 ("That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the law of the land."). *See generally* John V. Orth, *The Past is Never Dead: Magna Carta in North Carolina*, 94 N.C. L. REV. 1635 (2016).

16. N.C. CONST. art. I, § 19 ("No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."); *see* JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH

For present purposes, the thing I want to emphasize about the famous chapter 39 of Magna Carta—in addition to the fact that it's still the law in North Carolina over eight hundred years later—is that it invokes the "law of the land," the common law. The barons didn't make that law, neither did the King. In fact, at the time of Magna Carta, there were very few things that we would call statutes. Instead, the common law was made—or, as they would have said at the time, was discovered—piece by piece as the judges went about their business of deciding individual cases.

The judges built the common law out of the customs common to all the English people; that's why it's called the *common* law. Notice that it grew from the ground up, so to speak; it didn't come from the Emperor or King down. In other words, there was always a certain democratic element in the common law. But the judges did not uncritically adopt just any custom as common law—as shown by a story found in the earliest printed book on English law, Sir Thomas Littleton's short treatise on the law of real property called *Tenures* published in 1481.[17] Anyway, Littleton described the case of a manor in which it was the custom for the lord to seize cattle that strayed onto his land and hold them until their owner paid the lord whatever amount he assessed for the damage.[18] The judges recognized that this would make the lord a judge in his own case and open the door for abuse.[19] As Littleton pointed out: "[I]f he had damages but to the value of a halfpenny, he might assess and have therefore 100 pounds, which should be against reason."[20] That was not a good custom—it was "against reason"—and therefore the judges did not accept it as part of the common law.

One more story from long ago and far away: A legal argument in an English case from the year 1345 is preserved in the Year Books, very early law reports (also, by the way, in French).[21] At that time, the law of real property was still being developed, and the question presented was the very fundamental question, whether a remainder after a life estate was a valid future interest.[22] The barrister for the remainderman had found a case from thirty years earlier in which the court had accepted the validity of such an

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CAROLINA STATE CONSTITUTION 68 (2d ed. 2013) (describing the state's equal protection clause as based on the Fourteenth Amendment and the state's nondiscrimination clause as based on federal civil rights legislation).

17. LITTLETON'S TENURES IN ENGLISH § 212 (Eugene Wambaugh ed., 1985) (1481).

18. *Id.*

19. *Id.*

20. *Id.*

21. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 561 (5th ed. 1956).

22. *Id.*

interest.[23] So he rather condescendingly told the judges that he knew what they would do in his case: "[Y]ou will do as others have done in the same case, or else we do not know what the law is."[24] In other words, he told the judges that they had no choice but to rule for his client; they were bound by precedent.[25] One of the judges apparently didn't like the lawyer's tone and snapped: "[The law] is the will of the justices."[26] In other words, the law is what we say it is. Another judge, seemingly wanting to calm things down, quickly added: "No, law is reason."[27]

III. THE COMMON LAW CROSSES THE ATLANTIC

Precedent, will, reason—where do we look for law? This brief exchange raises two questions that continue to trouble the common law to the present day. First, is a precedent *law* pure and simple? Or is it only a particular example of a broader legal principle? In other words, is the reason behind the rule, the real rule? The second question raised by this exchange is: What is the role of the judge's individual will in judicial decision-making? To put it in modern terms: What about activist judges, disregarding precedent and striking out in a new direction? Should a judge ever change the law to make it better in his or her eyes? Or is that judge simply a legislator wearing a black robe? These questions help to explain why *Black's* second definition of common law describes it not just as a body of law but also as a whole "system of legal concepts, together with the techniques of applying them."[28]

How did the common law—this bundle of laws, concepts, and techniques—cross the Atlantic and become American? In North Carolina, as in the other British colonies in North America, it came with the colonists and was applied by the colonial governments.[29] But how did it cross the legal divide created by the American Revolution and become not just an English legal system but—as *Black's* says—an Anglo-*American* legal system?[30] We should never forget what a break the Revolution caused in legal authority. Colonial officials in North Carolina had served as agents of the British Empire. Once the colonies left the Empire, by what authority did

23. *Id.*

24. *Id.*

25. *See id.*

26. *Id.*

27. *Id.*

28. *Common Law*, BLACK'S LAW DICTIONARY (8th ed. 2004).

29. William E. Nelson, *Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 1660-1775*, 88 N.C. L. REV. 2133, 2137–38 (2010); *see generally id.* at 2133–97 (discussing the operation of the common law prior to independence).

30. *Common Law*, BLACK'S LAW DICTIONARY (8th ed. 2004).

their officials serve? In 1787 Justice Samuel Ashe of North Carolina, who had lived through the Revolution and helped draft the first North Carolina constitution, explained what the break with Britain meant in *Bayard v. Singleton*: "[A]t the time of our separation from Great Britain, we were thrown into a similar situation with a set of people shipwrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority."[31] The governments of the former British colonies—now independent states—had to be built on a new basis: popular sovereignty. As the North Carolina Constitution says—in phrases dating back to 1776: "All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."[32]

The people who made the Revolution were not in revolt against the common law. In 1774, the Continental Congress expressly laid claim to the rights of life, liberty, and property, *and the common law of England.*[33] In fact, the colonists argued that in many respects they were more faithful to the common law than the English themselves. What the colonists fought for was a purer common law. When Thomas Jefferson reported to the Virginia General Assembly on the project to draft laws for the new state, he explained: "The plan of the revisal was this[:] The common law of England, by which is meant, that part of the English law which was anterior to the date of the oldest statutes extant"—in other words, even before Magna Carta—"is made the basis of the work."[34] Jefferson continued: "It was thought dangerous to attempt to reduce [the common law] to a text: it was therefore left to be collected from the usual monuments of it"[35]—that is, the cases.

The danger in writing down the common law was that reducing it to writing was contrary to its most basic technique: reasoning from case to case and testing the results by posing hypothetical cases. Confining it to a text

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31. Bayard v. Singleton, 1 N.C. 5, 6, 1 Mart. 42, 43 (1787). Samuel Ashe had been a member of the committee of the Fifth Provincial Congress in 1776 that drafted the North Carolina Declaration of Rights and Constitution. *Minutes of the Provincial Congress of North Carolina, in* 10 COLONIAL RECORDS OF NORTH CAROLINA 913, 918 (William Saunders ed., 1890).

32. N.C. CONST. art. I, § 2; *see also* N.C. CONST. of 1868, art. I, § 2 ("That all political power is vested in, and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."); N.C. CONST. of 1776, Decl. of Rights § 1 ("That all political power is vested in, and derived from, the people only.").

33. LIBRARY OF CONG., JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 67–69 (1904).

34. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 137 (William Peden ed., 1954).

35. *Id.*

was contrary, you might say, to its genius. As Oliver Wendell Holmes put it in his book on the *Common Law*: "The truth is, that the law is . . . . forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."[36]

North Carolina's reaction to independence was similar to Virginia's. In 1778—as soon, in other words, as practicable after the Revolution—the General Assembly passed a common law reception statute.[37] It's still in the General Statutes, now at section 4-1: *Common law declared to be in force.*

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.[38]

What exactly was sloughed off was left to the judges in their decisions of particular cases. In 1991, our Supreme Court held that the common law's year-and-a-day rule—by which an act causing death cannot be prosecuted as homicide if the victim dies more than a year and a day after the act was committed—had become obsolete, even though it had been accepted as part of the received common law for two centuries.[39]

The effect of General Statutes section 4-1 was described by the North Carolina Supreme Court in 1971 in *Steelman v. City of New Bern*: "That statute adopted the common law of England as of the date of the signing of the Declaration of Independence."[40] To that extent, Sir William Blackstone's four-volume *Commentaries on the Laws of England* would prove to be a very useful reference. As the United States Supreme Court repeated just a few years ago: Blackstone was "the preeminent authority on English law for the founding generation."[41] The first volume of Blackstone's *Commentaries* appeared in 1765, the very year of the Stamp Act crisis, and affirmed that the common law extended to the colonies (although he later

36. OLIVER WENDELL HOLMES, THE COMMON LAW 36 (1881).

37. N.C. GEN. STAT. § 4-1 (2017).

38. *Id.*

39. State v. Vance, 403 S.E.2d 495, 498–99 (N.C. 1991); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *197–98.

40. Steelman v. City of New Bern, 184 S.E.2d 239, 241 (N.C. 1971).

41. District of Columbia v. Heller, 554 U.S. 570, 593–94 (2008) (citing Alden v. Maine, 527 U.S. 706, 715 (1999)).

qualified that).[42] The *Commentaries* were widely read by lawyers in colonial North Carolina, and later formed the basis of legal education in this state.[43]

But like so many statements concerning the common law, the North Carolina Supreme Court's statement in *Steelman* was only a first approximation. About twenty-five years later, Chief Justice Burley Mitchell qualified it in *Gwathmey v. North Carolina*: "[T]he statement . . . is correct only if it is understood to mean that the 'common law' to be applied in North Carolina is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence . . . ."[44] As you see, the common law had taken on a life of its own in colonial North Carolina.

The question in *Gwathmey* was whether the state had title to lands covered by water.[45] The common law of England had an answer to that: the sovereign owned lands under water that was subject to the ebb and flow of the tide.[46] Given England's geography, this was a convenient way to describe navigable waters. But in the colony of North Carolina, that rule of thumb was not very helpful. An early state judge described it as "entirely inapplicable to our situation," given the great length of our rivers, which extend far into the interior.[47] "By that rule," he said, "Albemarle and Pamlico sounds, which are inland seas, would not be deemed navigable waters, and would be the subject of private property."[48] Another judge added: "There can be no essential difference for the purposes of navigation, whether the water be salt or fresh, or whether the tides regularly flow and ebb or not."[49] So the judges restated the ebb-and-flow test as a test of navigability in fact. The principle behind the precedent was what mattered. The reason behind the rule was the real rule.

This idea had a venerable pedigree in the common law. Lord Mansfield, Chief Justice of the English Court of King's Bench, had said as

42. *See* THE OXFORD HANDBOOK OF LEGAL HISTORY 363 (Markus D. Dubber & Christopher Tomlins eds., 2018).

43. John V. Orth, *Blackstone's Ghost: Law and Legal Education in North Carolina, in* RE-INTERPRETING BLACKSTONE'S COMMENTARIES: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXT 125, 127–29 (Wilfrid Prest ed., 2014).

44. Gwathmey v. State *ex rel.* Dep't of Env't, Health, & Nat. Res., 464 S.E.2d 674, 679 (N.C. 1995).

45. *Id.* at 678–79.

46. *See* Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 456–60 (1851) (discussing the common law rule by the United States Supreme Court and its rejection as applied to American conditions).

47. Wilson v. Forbes, 13 N.C. (2 Dev.) 30, 34–35 (1828).

48. *Id.* at 35.

49. *Id.* at 38.

much in a case decided on the eve of the American Revolution: "[P]recedent, though it be evidence of law, is not law in itself; much less the whole of the law."[50] And Justice Joseph Story, in a celebrated decision of the United States Supreme Court construing the Federal Judiciary Act, even denied that caselaw is real law: "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are . . . ."[51] North Carolina Justice Richmond Pearson agreed: "Let a case be taken, as settling the law, *prima facie*; but if it is shown, not to be supported by principle and 'the reason of the thing,' let it be over-ruled."[52]

IV. RENOVATING THE COMMON LAW

In the decades after the Revolution, judges throughout the country were busy renovating the common law to suit American conditions. Britain was a small island that had been inhabited for millennia. Much of its landscape had been remade over the years and parceled out among private landowners, some of them great lords. England had a monarchy, an aristocracy, a landed gentry, and an established Church. The conditions in America, both geographic and social, were very different.

In an 1829 case, Justice Joseph Story announced what had by then become obvious: "The common law of England is not to be taken in all respects to be that of America."[53] The particular issue in the case was the ownership of items of personal property that a tenant had attached to rented land.[54] Under the common law, whatever was affixed to land became land and belonged to the landlord.[55] Justice Story recognized that this rule would penalize commercial tenants and inhibit economic development, something that would be very undesirable in a developing country like the United States.[56] So he restated the common law of fixtures; or, rather, he changed its substance, while keeping its form—another characteristic technique of common law development.[57] An item of personal property affixed by a commercial tenant in furtherance of a trade or business was a fixture, but a special kind of fixture—one that belonged to the tenant rather than to the

50. Jones v. Randall (1774) 98 Eng. Rep. 706, 707.

51. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

52. Gaskill v. King, 34 N.C. 211, 223, 12 Ired. 201, 213 (1851) (Pearson, J., dissenting).

53. Van Ness v. Pacard, 27 U.S. (1 Pet.) 137, 144 (1829).

54. *Id.* at 138.

55. *Id.* at 143.

56. *See id.* at 146.

57. *See id.* at 138–49.

landlord, if it could be removed before the end of the term without permanent damage to the leased property.[58] In what sense, other than the name, was this still a fixture?

Perhaps without intending it, Justice Story's decision on trade fixtures began the slow-motion process of common law change. Judging from the latest *Restatement of the Law of Landlord and Tenant*, it may be the case today that what Justice Story held concerning trade fixtures—that a commercial tenant could remove them—may now be true of all fixtures, including ordinary items of personal property affixed by a non-commercial, residential tenant.[59] Of course, the justification for allowing the removal of non-trade fixtures cannot be the same as the justification for allowing the removal of trade fixtures. Affixing ordinary items of personal property to residential tenancies does not have the same pro-developmental effect. But maybe the real reason for the exception is that tenants—all tenants, not just commercial tenants—should not be penalized for suiting the property to their own use (whether commercial or residential) if it would do no harm to the landlord. The trade-fixtures exception may be in the process of "swallowing the rule."

Something similar happened with the law of waste. Originally, waste was any physical change to a freehold made by anyone with an interest less than a fee (tenants for a term or tenants for life).[60] It gave the owner of the future interest (landlord, reversioner, or remainderman) the right to an injunction and damages, and in extreme cases resulted in the forfeiture of the lesser estate.[61] But what if the changes actually improved the freehold? Perhaps the principle behind the rule was not to protect the holder of the future interest against any change, but to protect against changes that caused harm to the freehold. Too restrictive a law of waste, like too restrictive a law of fixtures, could inhibit a tenant from making useful improvements. Viewed in this light, changes by a tenant did not seem to merit the intervention of equity or the award of damages, let alone forfeiture of the estate. Still, it was a change and therefore, under traditional law, still

58. *See Tenant's Fixture*, BLACK'S LAW DICTIONARY (8th ed. 2004); *Trade Fixture*, BLACK'S LAW DICTIONARY (8th ed. 2004) ("Despite its name, a trade fixture is not usu. treated as a fixture—that is, as irremovable.").

59. RESTATEMENT (SECOND) OF PROP. § 12.2(4) (AM. LAW INST. 1977) ("Except to the extent the parties to a lease validly agree otherwise, the tenant is entitled to remove permissible annexations he has made to the leased property, including agricultural crops, if the leased property can be and is restored to its former condition after the removal . . . .").

60. *See Waste*, BLACK'S LAW DICTIONARY (8th ed. 2004).

61. *See* N.C. GEN. STAT. § 1-538 (2017) ("In all cases of waste, when judgment is against the defendant, the court may give judgment for treble the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the damages are not paid on or before a day to be named in the judgment.").

technically waste. So a new category of waste had to be recognized: ameliorating waste. This was waste that did not trigger the remedies for ordinary waste. In other words, it was waste that was not waste.[62] By attaching a fancy Latin adjective, the superficial consistency of the law could be maintained while preventing the noneconomic consequences.

The problem of suiting the common law to America was bigger than the law of fixtures or waste. As Justice Story elsewhere admitted: "[T]he common law was an *utter stranger* to the principles of commercial jurisprudence . . . ."[63] "Almost all the principles, that regulate our commercial concerns," he said, "are of modern growth, and have been ingrafted into the old stock of the law."[64] A commercial republic needed commercial law, and fast. The common law judges went to work.

As judicial renovation and extension of the common law picked up speed, people began to realize that the courts were doing a lot more than decision-making; they were also doing some pretty significant law-making. What about the constitutional principle of separation of powers? From 1776 to the present, the North Carolina Constitution has provided that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."[65] How to square this with the developing caselaw? One could say that making caselaw was a delegated legislative function. Or that the power to set precedents, at least in a common law system, was a necessary included power in the general grant of judicial power. A more direct attempt to deal with judicial law-making, by the way, was to move to an elected judiciary. If the judges are exercising the people's sovereign legislative power, they should at least be directly accountable to the people. North Carolina made the move to popular election in its 1868 constitution.[66]

Of course, it was already clear at the time of the Revolution that a statute trumps the common law. On Blackstone's list of ten canons of statutory

62. *See Waste,* BLACK'S LAW DICTIONARY (8th ed. 2004) ("[A]meliorating waste [is a] lessee's unauthorized change to the physical character of a lessor's property—technically constituting waste, but in fact resulting in improvement of the property. Generally, equity will not enjoin such waste.").

63. Joseph Story, *Growth of the Commercial Law*, *in* MISCELLANEOUS WRITINGS OF JOSEPH STORY 269 (William W. Story ed., 1852).

64. *Id.* at 272.

65. N.C. CONST. art. I, § 6; *see also* N.C. CONST. of 1868, art. I, § 8 ("The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other."); N.C. CONST. of 1776, Decl. of Rights § 4 ("That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other.").

66. *See generally* John V. Orth, *Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges*, 70 N.C. L. REV. 1825 (1992).

construction, Number 7 was: "Where the common law and a statute differ, the common law gives place to the statute . . . ."[67] The legislative power includes the power not just to make statute law, but also to unmake caselaw. North Carolina's General Statutes section 4-1 is to the same effect. In 1987, the General Assembly decided to abolish the centuries-old common law rule of real property known as the Rule in Shelley's Case.[68] This is what the statute says: "The rule of property known as the rule in Shelley's case is abolished."[69]

Something similar happened with another old common law rule, the Rule in Dumpor's Case—a rule even more obscure than the Rule in Shelley's Case. In 2012 the General Assembly added the following section to the General Statutes: "The rule of property known as the Rule in Dumpor's case is abolished."[70] Because rights may have vested under the respective rules during the preceding centuries, both repeals were prospective only. Statutory change is like that: prospective only, especially if there could have been reliance on the prior law. It may be constitutionally required.

Notice that the statutes that abolished the Rule in Shelley's Case and the Rule in Dumpor's Case don't state the Rules; they just abolish them—whatever they are. The definitions are incorporated by reference to the common law. Lawyers trained in the civil law system of continental Europe would be shocked that a statute failed to define its essential term. But lawyers trained in the common law system find nothing unusual about it. The common law is always there in the background.

Even in the field of criminal law, the common law still has a role to play, at least in states like North Carolina that retain common law crimes. To this day, there is no statutory definition of murder or assault in the General Statutes.[71] As to the crimes of burglary and arson, the substantive offences

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67. 1 WILLIAM BLACKSTONE, COMMENTARIES *89.

68. N.C. GEN. STAT. § 41-6.3 (2017); *see generally* John V. Orth, *Requiem for the Rule in Shelley's Case*, 67 N.C. L. REV. 681 (1989).

69. N.C. GEN. STAT. § 41-6.3.

70. N.C. GEN. STAT. § 41-6.4 (2017); *see generally* John V. Orth, *North Carolina Bids Goodbye (Again) to the Rule in Dumpor's Case*, 35 CAMPBELL L. REV. 193 (2013).

71. There is no statutory definition of murder. *See* State v. Crawford, 406 S.E.2d 579, 587 (N.C. 1991) ("[M]urder is not defined by the statute . . . ."); State v. Vance, 403 S.E.2d 495, 501 (N.C. 1991) ("N.C.G.S. § 14–17 does not define the crime of murder . . . ."); State v. Beale, 376 S.E.2d 1, 2 (N.C. 1989) ("Murder under N.C.G.S. § 14-17 is murder as defined at common law."); State v. Monroe, 756 S.E.2d 376, 381 (N.C. Ct. App. 2014), *aff'd per curiam*, 768 S.E.2d 292 (N.C. 2015) ("Murder is a crime, defined as at common law."). Likewise, there is no statutory definition of assault. *See* State v. Floyd, 794 S.E.2d 460, 464 (N.C. 2016); State v. Mitchell, 592 S.E.2d 543, 547 (N.C. 2004); State v. Roberts, 155 S.E.2d 303, 305 (N.C. 1967) ("There is no statutory definition of assault in North Carolina and the

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remain "as defined at the common law."[72] Here the common law is incorporated by reference—not to abolish but to affirm. Whatever the elements of the offenses were at common law, they still are. It might be difficult to pin them down in a statute. Perhaps, as Jefferson said, it might even be "dangerous" to reduce them to a text. Something might be left out, leaving an opening for a criminal to escape.

The interaction between caselaw and statute is even more complicated than that. In 1973, the Massachusetts Supreme Judicial Court, the oldest court in continuous existence in the Western Hemisphere, confronted the question whether a wife has a claim for loss of consortium arising from injury to her husband caused by the negligence of a third party.[73] Clear precedent in Massachusetts, well-rooted in the common law, indicated the answer was no. Just two years earlier, a divided Massachusetts Supreme Judicial Court had stood by the rule and indicated that any change should be made by the legislature, not by the court. But then there was a change of personnel on the court—or maybe the judges just lost patience with the legislative process—and they overruled the recent precedent, allowing the action to proceed.

As explained by Justice Benjamin Kaplan, a former Harvard Law School professor, who had just been appointed: "In a field long left to the common law, change may well come about by the same medium of development."[74] That is, the judges had made this rule in the first place, so they could change it. Could there be an echo here of the medieval debate about whether judges are bound to "do as others have done in the same case?" Or can they exercise their reason (or is it their will?) and do something else?[75]

Let me pick up with Justice Kaplan's opinion: "Indeed," he said, "the Legislature may rationally prefer to act, if it acts at all, after rather than before the common law has fulfilled itself in its own way."[76] In other words, the interaction between legislation and precedent works in both directions:

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crime of assault is governed by common law rules"); *see also In re* B.C.D., 629 S.E.2d 617, 619 (N.C. Ct. App. 2006) ("The offense of assault has no statutorily prescribed definition.").

72. N.C. GEN. STAT. §§ 14-51, 58 (2017); *see also* State v. Bond, 478 S.E.2d 163, 174 (N.C. 1996) ("Robbery, a common law offense not defined by statute in North Carolina, is an aggravated form of larceny.").

73. Lombardo v. D. F. Frangioso & Co., 269 N.E.2d 836, 836 (Mass. 1971).

74. Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 563 (Mass. 1973).

75. I ask this without intending any criticism of the result—only in recognition that overruling precedent, that is, changing caselaw, is yet another of the common law's "techniques."

76. *Diaz*, 302 N.E.2d at 563. Justice Kaplan could have been thinking about the line in Alfred Lord Tennyson's poem, Mort d'Arthur: "The old order changeth, yielding place to new, And God fulfils Himself in many ways, Lest one good custom should corrupt the world." Alfred, Lord Tennyson, *Mort d'Arthur*, POETRY FOUND., https://perma.cc/44NA-A2EM.

the legislature may change caselaw and the judiciary may prompt a change in legislation. As an example, Justice Kaplan cited the response of the Massachusetts General Court (the legislature) to the Supreme Judicial Court's 1969 forecast of the abolition of charitable immunity in tort, another judge-made rule.[77]

Charitable immunity has an interesting history in North Carolina. In 1967, the state Supreme Court confronted the question. Although charitable immunity was being criticized in the literature and had been rejected by some courts, North Carolina and many other states—including Massachusetts at the time—had not yet taken this step.[78] After much soul-searching, Justice Susie Sharp (as she then was) led a narrow majority of the justices to hold that "the rule of charitable immunity can no longer properly be applied to hospitals."[79] In private correspondence, she confessed that in order to get Justice Joseph Branch to cast the deciding judicial vote,[80] she had to add that the holding was prospective only: "The rule of liability herein announced applies only to this case and to those causes of action arising after January 20, 1967, the filing date of this opinion."[81] (Looks a lot like legislation, doesn't it?) Prompted by the court, the General Assembly acted to abolish charitable immunity, effective September 1, 1967.[82] Actually, the statute went even further than the caselaw and abolished charitable immunity in general, not only as applied to hospitals.[83]

Sometimes in our federal system the signal for legislative change is sent by long distance. In 1970, the United States Court of Appeals for the District of Columbia decided to abandon the centuries-old common law conception of the lease as a conveyance, at least insofar as residential leases are concerned, and adopt the "civil law" concept of the lease as a contract.[84] According to Judge J. Skelly Wright, speaking for the court, "leases . . . should be interpreted and construed like any other contract."[85] Since contracts for the sale of consumer goods now include an implied

77. *Diaz*, 302 N.E.2d at 563 n.44.

78. *See* Rabon v. Rowan Mem'l Hosp., Inc., 152 S.E.2d 485, 496–98 (N.C. 1967) (reviewing cases in other jurisdictions).

79. *Id.* at 499.

80. ANNA R. HAYES, WITHOUT PRECEDENT: THE LIFE OF SUSIE MARSHALL SHARP 285 (2008).

81. *Rabon*, 152 S.E.2d at 499.

82. N.C. GEN. STAT. § 1-539.9 (2017).

83. *Id.*

84. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 n.13 (D.C. Cir. 1970) ("The civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law.").

85. *Id.* at 1075.

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warranty of fitness for use, residential leases should be interpreted to include a corresponding warranty of habitability.[86] That decision triggered a nationwide rethinking of traditional law on landlord and tenant—a rethinking that has still not reached a final conclusion. Although many state courts followed Judge Wright's lead, other courts, including in North Carolina, hesitated, awaiting legislation. And in 1977, the North Carolina General Assembly adopted the Residential Rental Agreements Act.[87] Two years later, it was followed with the Retaliatory Eviction Act,[88] echoing another decision of the District of Columbia Court of Appeals, also authored by Judge Wright.[89] In this case, the statute law in one jurisdiction followed the caselaw in another.

Earlier,[90] I mentioned that in *Gwathmey,* the case concerning title to lands covered by navigable waters, our Supreme Court explained that North Carolina had received the common law of England as of the Fourth of July 1776, but only "to the extent that it was in force and use within this State at the time."[91] I want to return to *Gwathmey* for something else Chief Justice Mitchell said in that case. After reciting—in words reminiscent of Blackstone—that the common law must yield to statute law, he added an exception: "except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment."[92] I don't know exactly what parts of the common law the chief justice had in mind, and he may have been simply avoiding—in good common law fashion—a statement more sweeping than it had to be.

Chief Justice Mitchell's words remind us that at the time of the American Revolution the common law was seen as a bulwark of individual rights against executive power. Indeed, in the days before the first constitutions were drafted and adopted, Americans thought of the common law as the source of their rights, and many of the procedural protections now enumerated in the North Carolina Declaration of Rights began as common law practices. The ban on ex post facto laws in Article I, Section 16, and the guarantee of the writ of habeas corpus in Article I, Section 21, would be useless unless we knew what they were.[93] The privilege against self-

86. *Id.* at 1077. *See also* U.C.C. §§ 2-314 to -315 (AM. LAW INST. & UNIF. LAW COMM'N 1977) (discussing implied warranties in contracts for the sale of goods).

87. N.C. GEN. STAT. §§ 42-38 to -44 (2017).

88. N.C. GEN. STAT. § 42-37.1 (2017).

89. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969).

90. *See supra* text accompanying notes 44–50.

91. Gwathmey v. State *ex rel.* Dep't of Env't, Health, & Nat. Res., 464 S.E.2d 674, 679 (N.C. 1995).

92. *Id.*

93. *See* N.C. CONST. art. 1, §§ 16, 21.

incrimination in Article I, Section 23 began as a common law rule.[94] It is an interesting thought that although a statute trumps the common law, some parts of the common law, now incorporated in the constitution, trump a statute.

V. THE COMMON LAW & THE CONSTITUTION

When in 1776 the first written constitutions appeared, the common law was already six hundred years old, and the courts had to pause and take a deep breath before they could sort out the relationship among caselaw, statute law, and constitutional law. The key question, of course, was whether the constitution was just another statute, subject to repeal by the legislature. In North Carolina, that question was answered within a dozen years of the Revolution. In *Bayard v. Singleton*,[95] the case in which Justice Ashe explained the legal effect of American Independence, the Court of Conference (the predecessor of our Supreme Court) held that the General Assembly did not have the power by simple majority vote to make an exception to the constitution: "[N]o act [the legislature] could pass, could by any means repeal or alter the constitution[.]"[96] As every law student knows, Chief Justice John Marshall reached the same conclusion a few years later in *Marbury v. Madison*: "[An] act of legislature, repugnant to the constitution, is void"—that is, is no law.[97] And as Chief Justice Mitchell pointed out, the sort of super-law that is the constitution may be modified only by constitutional amendment.[98]

But another question remained: How should a constitution be construed? The common law had centuries of experience in reading written documents—contracts, deeds, and wills. And Blackstone provided a complete set of rules for statutory construction.[99] But were written constitutions to be read the same way? The answer seems to be yes and no. There is always the undeniable logic of "original intent": a document means what those who executed it meant at the time—no more, no less. There's an old common law rule: where a writing has a plain meaning, no further inquiry is required or allowed. But another notable line from John Marshall suggests something different, at least as regards certain constitutional provisions:

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94. *See* N.C. CONST. art. 1, § 23.

95. Bayard v. Singleton, 1 N.C. 5, 6, 1 Mart. 42, 43 (1787).

96. *Id.* at 7, 1 Mart. at 45.

97. Marbury v. Madison, 5 U.S. 137, 177 (1803).

98. *Id.*

99. *See* John V. Orth, *Blackstone's Rules for the Construction of Statutes*, *in* BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY 79 (Wilfrid Prest ed., 2009).

"[W]e must never forget, that it is a *constitution* we are expounding."[100] I don't pretend to know just what he meant by that. It's usually interpreted to mean that the words should be given a (shall we say) generous construction. That's certainly what Marshall did when he wrote the line in *McCulloch v. Maryland*, construing the Necessary and Proper Clause to empower Congress to create a national bank. He was adopting Alexander Hamilton's definition of the word "necessary." "*[N]ecessary*," Hamilton said, "often means no more than *needful, requisite, incidental, useful*, or *conducive to*."[101] That definition is not what you would find in any non-legal dictionary. This infuriated Jefferson who said Marshall had turned the Necessary and Proper Clause into what he called the "sweeping clause," making just about any congressional action constitutional.[102]

I spoke earlier about the interaction between caselaw and statute law.[103] There's also an interaction between common law and constitutional law. We noticed how statutory and constitutional drafters alike use common law terms and rely on the common law for definitions and context. But I think there is another and little-noticed interaction between common law—at least the customs and techniques of common law—and constitutional law. I think courts treat some constitutional provisions more like precedents than like statutes—finding a principle behind the rule that is the real rule.

In a lecture I gave a few years ago at the United States Supreme Court Historical Society, I suggested that the complicated—indeed, contradictory—jurisprudence that has accumulated over the last two centuries concerning the Eleventh Amendment may be best explained just that way.[104] The Eleventh Amendment, usually covered in the course on Federal Jurisdiction, deprives federal courts of jurisdiction over certain suits against states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[105] Over the centuries, the United States Supreme Court has discerned the principle behind the Amendment to be recognition

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100. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (italics in original).

101. BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 30 (1993) (citing Hamilton's 1791 Opinion on the Constitutionality of an Act to Establish a Bank); *see also* 6 DUMAS MALONE, JEFFERSON & HIS TIME: THE SAGE OF MONTICELLO 352 (1981) (stating that Marshall had discovered Hamilton's opinion among the papers of President Washington).

102. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 501 (rev. ed. 1926).

103. *See supra* text accompanying notes 67–71.

104. John V. Orth, *The Judicial Amendment*, 37 J. SUP. CT. HIST. 125 (2012).

105. U.S. CONST. amend. XI.

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of state sovereign immunity and developed a line of precedents extending the rule far beyond the words of the Amendment. Like other lines of common law precedents, this one, too, has encountered competing rules, and the extension of the principle of state sovereign immunity has been limited by the need to reconcile it with the imperative of the Supremacy Clause. That's a long and complicated story. I wrote a book on that topic thirty years ago that examines the story in depth.[106]

For present purposes, substantive due process provides a more accessible example. In this case, the reason behind the guarantee of due process has been identified as protection against unreasonable government interference with private rights. As explained by the second Justice John Marshall Harlan: "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."[107]

The difficulty of determining exactly what is arbitrary and purposeless is the source of considerable disagreement, as we all know. To literal readers of the constitutional texts, some decisions—particularly in the area of the right to privacy in sexual matters—seem remote from the bare words "due process," as indeed they are. They can be justified, if at all, only by demonstrating that they are the latest link in a line of cases developing the concept of limited government. The test of the soundness of the latest due process decision must be—like the test of the latest decision in any line of cases developing a precedent—whether the linkages from case to case are reasonably sound and whether competing interests are adequately accommodated.

CONCLUSION

Finally, I must return to the place where I started and try to answer the question: What is the genius of the common law? I don't mean the wisdom of the common law, although I think it does embody a lot of practical wisdom. I mean the distinctive character or essential nature of the common law—this bundle of laws, concepts, and techniques. In its origin, caselaw was made out of common customs—once they had passed the test of reasonableness. To an extent, it still is. In a famous set of lectures on the nature of the judicial process, Justice Benjamin Cardozo explained how judges should decide one of those rare cases nowadays of truly "first impression,"

106. JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987).

107. Poe v. Ullman, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting).

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where there is no guiding precedent or binding statute.[108] According to Cardozo, they should try to figure out what "fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do."[109] This is exactly the process by which the common law took shape in the first place hundreds of years ago.

Caselaw is not like statute law. A precedent can be restated, as the reason behind the rule becomes clearer—as with the ebb-and-flow test.[110] Public policy can lead to a change in the rule—at first subtle, as with the trade fixtures exception to the general law of fixtures; later, more far-reaching.[111] Sometimes a precedent is simply discarded—as with the tort of loss of consortium.[112] Occasionally, caselaw looks a lot like statute law—as when abandonment of charitable immunity has only prospective effect.[113] Caselaw can trigger changes in statute law—as with the covenant of habitability in residential leases.[114]

Common law interacts with both statutory texts and constitutional texts. Common law can lend meaning to the terms. But the common law was never simply a legal dictionary. As we've seen, Jefferson actually thought it would be dangerous to reduce common law to a text. Once confined, it would cease to grow. The genius of the common law is to proceed case-by-case and not try to answer all the questions raised by a particular dispute. The characteristic common law case involves the question: As between A and B, who has the better right? That question must be answered, and maybe a few words (dicta) can be thrown out along the way (obiter) about related questions. But there is no need to go farther.

Statements of the common law are necessarily only approximations (as in *Steelman*)—to be refined later (as in *Gwathmey*). Although each restatement may draw closer to the truth, none is ever definitive—as demonstrated by the successive Restatements of the same bodies of law periodically issued by the American Law Institute. In fact, the common law can never be comprehensively stated. This, I think, is its essential character. It will always be a bit untidy. To return to Oliver Wendell Holmes's description, it is always adopting new principles at one end and sloughing them off at the other, and that necessarily involves a certain amount of

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108. BENJAMIN CARDOZO, *Adherence to Precedent. The Subconscious Element in the Judicial Process*, *in* NATURE OF JUDICIAL PROCESS 142, 142–43 (1921).

109. *Id.* at 142.

110. *See supra* text accompanying notes 45–52.

111. *See supra* text accompanying notes 54–59.

112. *See supra* text accompanying note 73.

113. *See supra* text accompanying notes 77–83.

114. *See supra* text accompanying notes 84–89.

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inconsistency.[115] But, as Holmes warned, the desire for an entirely consistent legal system is a death wish. An entirely consistent legal system is one that cannot grow, as ours has and does.

115. *See supra* text accompanying note 36.

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