THREE

The Language of Law

Common and Civil

The exact differences between law in the English-speaking world and law originating in the countries on the European continent remain disputed, but we may continue to work with the labels classifying legal systems as “common law” and “civil law.” We have probed the matter sufficiently to know that language plays a major role in generating the distinctive personality of each family of legal systems. Discussing law in English differs in fundamental respects from parallel conversations in French, German, and other Continental languages. The purpose of this chapter is to alert students to the particularities of English as a legal language.

Law

The particularities of English begin with the word law. Continental legal systems typically use two terms for “law”—one that stresses the written law enacted by the legislature (*Gesetz, loi, legge, zakon, törvény*) and a second that emphasizes that the law is a body of principles based on various sources (*Recht, droit, diritto, pravo, jog*). This distinction is best expressed as the difference between the law as statutory law (the law laid down by the legislature) and the Law as a set of principles that appeal to us by their intrinsic merit.³ Gesetz is statutory law; Recht is Law as principle.

To grasp this distinction, think of the difference between the text of the Constitution of the United States and constitutional law. The Constitution is the set of authoritative rules and principles written down within the four corners of a specific document. It is a finite set of words. Constitutional law is the body of principles that has evolved and continues to evolve from the written text. It obviously includes principles that go beyond the finite words of the document and the cases that have interpreted it. When a lawyer argues in a case of first impression, “The Constitution requires that we recognize this right,” the appeal runs in fact not to the text but to the principles that constitute the body of constitutional law.

Criminal law must be understood in the same way. It contains some authoritative words—words written down in codes and statutes and often in leading cases. Yet no one in the Continental tradition would say that the criminal law can be reduced to the criminal code. That would be to confuse Strafrecht (the whole of the criminal law) with the Strafgesetz (a particular criminal law or statute). Similarly, it would not make sense to say that criminal law in the common law tradition is exhaustively defined by the statutes and the cases. Although our word law sometimes refers to Gesetz (statutory laws) and sometimes to Recht (the Law as principle), the term criminal law is always used, it seems, in the broader, more inclusive sense.

The ambiguity of the word *law* in English accounts for the difficulty of understanding the term that played a central role in the 1927 abortion case, namely, *ungültig* or unlaufenheit. The term Rechtsunfähigkeit in German (*antijuridicidad* in Spanish, *antijuridicità* in Italian) is constructed of the following three parts: (*Recht, or Law*) + (anti) + (ness). The temp-

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1 For those mystified by the final terms in these ordered pairs, they are Hungarian. The influence of Hungarian on American culture is the subject of many gags. In the 1950s, there was a movie Hungarian (Sam Milby, Bingo to Zoo, Go! Cine) in the Hollow.

2 For more on this distinction, see George P. Fletcher, Basic Concepts of Legal Thought 11–19 (New York: Oxford University Press, 1966).
tation is to translate this term as anti-law-ness, or “unlawfulness”; the problem, of course, is the difficulty of translating Recht as “law.” Something is lost in this translation if we forget that the term Recht includes the higher sense of law as morally binding principles. For this reason, we have usually used the term wrongful to capture the evaluative connotations of the German term. Wrong is the opposite of right, and therefore acting contrary to the Law (in the sense of right) is best described as wrongful or wrongdoing.

The danger of translating Rechtswidrigkeit or anti-juridicidad as “unlawfulness” is that common lawyers often understand the law in a narrowly positive sense of the law laid down by the legislature (or the courts). Using this narrow definition would make it impossible to grasp the point of the 1927 abortion case, which is that “acting contrary to law” must be understood as acting contrary to the basic principles of law. The task of courts, relying upon the theories developed by scholars, is regularly to reinterpret the requirements of legal principle and the meaning of “acting contrary to law.”

The difference between the two senses of law raises questions about the proper translation of “common law” and “civil law” into Continental legal languages. The question is whether the common law should be understood as customary law enacted by the courts or as a set of evolving principles regularly reinterpreted by courts and scholars. If understood as the former, the common law would correspond to law in the positive (statutory) sense (Gesetz, loi, legge, zakon); if understood in the latter sense, the proper translation would be the term for the Law as principle (Recht, droit, diritto, pravo).

One way that this problem of translation gets formulated in countries that use Romance languages is whether the “common law,” when used in their respective languages, should be understood as masculine or feminine. That is, is the correct article in French “le common law” (masculine) or “la common law” (feminine)? They must choose one way or the other, and the choice is shaped by whether one associated the concept of “law” with loi or droit. Loi is feminine; droit, masculine. Therefore, the elementary grammatical dispute about the proper article for the noun raises deep jurisprudential questions about the nature of the common law. Our preference would be to think of the common law as “le common law,” by association with the concept of droit as a set of principles transcending the positive sources of law. The dominant view seems to be, however, that both the common law and civil law are understood as forms of loi, the common law embodied in the case law, as well as the civil law fully expressed in the codes adopted on the Continent. Thus the standard syntax seems to be “la common law.” But you can experiment with this matter on your own. Go to the Web search engine Google, type in, using quotation marks, “la common law” and then “le common law,” and see how many hits you get.

In the seventeenth century, the discourse of lawyers included a term right that corresponded to the higher concepts of Recht, droit, diritto, and pravo. We see traces of this concept in some translations of works by Kant and Hegel on the concept of Law (Kant’s Rechtlichehre as “Doctrine of Right” and Hegel’s Rechtsphilosophie as “Philosophy of Right”). But generally, the notion of Law as synonymous with Right has almost disappeared except in esoteric English usage. In its place have come a variety of terms to express the idea that law consists not only in the law laid down by lawmakers but also in higher principles that motivate the entire legal culture and demand constant reinterpretation in keeping with the needs of the time.

A survival of the distinction between Right and Statute is sometimes noted in the distinction between law (Rights) and laws (Statutes). For example, the Fourteenth Amendment to the U.S. Constitution holds that “no state shall . . . deprive any person of life, liberty, or property without due process of law nor deny to any person . . . the equal protection of the laws.” Note that the due process is associated with law in the singular and equal protection with laws in the plural. The more you study these particular provisions, the more you will see that in fact this subtle grammatical difference conveys a jurisprudential point very similar to the civil difference between the two concepts of law.

Policy

If the English language formally lacks the distinction between _Gesetz_ and _Recht_ (loi and droit), it compensates for this deficiency in part with a subtle concept of “policy” difficult to express in Continental languages. The concept of policy is a spin-off from the notion of politics (both deriving from the same Greek root—_polis_). The difference is that “policy” and “politics” are neutral and clean. “Politics” is partisan and dirty. There are entire institutions in the United States devoted to the study of “public policy” on the apparent assumption that this subject is an objective body of knowledge. This refinement of meaning and connotation is a remarkable feature of current English legal usage. To say the law pursues policies is considered up-to-date and sophisticated. But to say that law is political is supposed to undermine the neutrality and autonomy of the legal culture.

This is amusing because in many Continental languages there is no clear distinction between policies and politics. German marks the distinction between _politisch_ (“political”) and _rechtspolitisch_ (“policy”) by combining the word _Recht_ with the idea of politics. The distinction is harder to note in French, which relies on _politique_ to express both ideas.

The legal philosopher Ronald Dworkin puts great weight on the distinction between principles and policies.4 His claim is that policies represent instrumental goals, that is, social interests that the law might aim to maximize. These interests would include deterrence of crime, promoting security of expectations, distributing risks, and promoting democratic institutions. By contrast, principles state the requirements of justice. They are of the form: No person should profit from his own wrong. No person should be a judge in his own case. No innocent person should suffer at the hands of the state. These principles are formulated as absolute demands. They apply regardless of contingent circumstances. They are treated as imperatives of justice.

The distinction between policies and principles captures the ongoing debate in legal philosophy about the basic nature of the law. Does the law serve Kantian principles, sometimes called the deontological demands of justice, focusing on protecting rights and compelling the performance of duties? Or does the law promote the utilitarian goals of efficiency, promoting the social good with less attention to individual rights and duties?

Even though Dworkin’s distinction between policy and principle is not universally followed, it underscores an important difference between two different kinds of values that influence the law.

Due Process

An alternative way to express the idea of Right (Recht, droit, diritto, pnao) has emerged in the American constitutional concept of due process. The original use of this phrase in the Fifth Amendment (ratified in 1791) said simply that “no person shall be deprived of life, liberty, or property without due process of law.” This was understood at the time to restrict only the actions of the federal government. The Fourteenth Amendment (1868) applied the same principle to the states: “no state shall deprive any person of life, liberty, or property without due process of law.” As originally used, the notion of “due process” carries procedural overtones. It seems to refer to the procedure that is fair and necessary to protect life, liberty, and property. But over time the concept has acquired a substantive content reflecting basic principles of human rights. For example, the leading case of _Roe v. Wade_ (410 U.S. 113) held in 1973 that state laws prohibiting abortion in the first trimester of pregnancy violated the due process clause of the Fourteenth Amendment. The problem was not the procedure for forbidding abortions but the more basic question whether pregnant women had a right to abort in particular cases. At stake was “the right to privacy,” a right not mentioned in the text of the Constitution but now understood to be a principle implicit in the idea of due process.

Unfortunately, no one knows which principles are included within the notion of substantive due process and which are not. Justice Benjamin Cardozo defined substantive due process as the “principles of ordered liberty.”5 Those additional words did not help much by way of definition except to remind us that liberty lies at the foundation of due

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process, precisely as Immanuel Kant wrote that liberty—or freedom—is the central value protected by the concept of Right and the rule of law.

The problem is defining the boundaries of liberty. For example, a decades-long dispute over whether the due process right to privacy should include the right of homosexuals to engage in sexual relations was decided only in 2003. In 1986, in Bowers v. Hardwick (478 U.S. 186), the majority of the Court upheld the power of the state to prohibit homosexual sodomy. The Court defined the issue narrowly as a problem of liberty or of privacy but as a question whether an individual has a right to gay sex. That, they said, was not foreseen by the Constitution. In the succeeding years, Bowers met with nearly universal condemnation by legal theorists and commentators. The academic community in the United States was obviously not prepared to give the last word on the details of due process to the courts. The scholarly writers properly claimed for themselves the authority to interpret the demands of due process, precisely as scholars in the Continental tradition interpret the demands of Right for their time.

Eventually, in the summer of 2003, the Court reexamined the question under the broader question whether prosecuting gay men for private consensual sodomy violated the protection of liberty under the due process clause. The majority held that it did, in Lawrence v. Texas, 539 U.S. 588 (2003). One of the striking features of Justice Kennedy’s opinion for the majority is that he cites a parallel decision by the European Court of Human Rights, thus signaling a global perspective in interpreting the concept of due process.

Fairness

Let us return to the original conception of due process as a standard of procedure. The term that naturally comes to mind to English-speakers when they seek to describe due process is “fair trial.” Though the U.S. Constitution does not use the terms fair or fairness, the requirement of a fair trial has become a standard element of due process under the Fourteenth Amendment. Americans have exported the term abroad, and it has acquired international currency, despite the difficulties of translation. Article 6 of the European Convention of Human Rights provides that, in all cases, “Everyone is entitled to a fair and public hearing.” The Canadian Charter of Rights and Freedoms recognizes in Article 11(d) that everyone charged with a crime is presumed innocent until proven guilty “in a fair and public hearing.” The standard translations of these provisions fail to capture the associations that English-speaking cultures invest in the notion of fair trial and, more broadly, in the idea of fair play.

The most dramatic example of reliance on fairness in international treaties comes to the fore in the Rome Statute establishing the International Criminal Court (ICC),6 which uses the term fair more than fifteen times in a dozen different expressions—including “fair trial” (ICC § 8(2)(a)(vi)), “the requirements of fairness” (ICC § 55(1)(c)), and even, unexpectedly, the “fair representation of male and female judges” (ICC § 36(8)(a)(iii)).

It is a war crime “wilfully to deprive a prisoner of war or other protected person of the rights of a fair and regular trial” (ICC § 8(2)(a)(vi)). The effort to translate this provision into Spanish, French, Russian, Arabic, and Chinese—the other five official languages of the ICC—has revealed the uniqueness of English as the natural habitat of fair play and the language of fairness. The Spanish text originally rendered the key phrase as “juicio justo e imparcial,” which brought back into English would be “just and impartial trial.” But then, in the current version of the statute, the phrase reads “a ser juzgado legítima e imparcialmente” (“to be tried legitimately and impartially”). This conforms to the French translation, which also defines the war crime as “le fait de priver intentionnellement . . . de son droit d’être jugé régulièrement et impartialment.”7 Remarkably, these translations drop the concept of fairness altogether.

The Russian version uses the term спраедливое as equivalent to “fairness.” The term actually means “just,” but there is no better term in Russian. The “regularity” of the trial is captured by the popular Russian word нормальное or “normal” trial. Arabic and Chinese also rely on rough approximations of the concept of a “fair and regular trial.” It is “fair” to

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7 This translation is on the Web. See http://www.un.org/law/icc/statute/spanish/rome_statute.pdf, p. 39, § 68 (1)(j), and (g).
8 This translation highlights another problem in the English text, namely, the concept of “wilful deprivation.” There is nothing like this loaded term in any of the other languages of the Rome Statute.
generalize and conclude that none of the five other languages of the Rome Statute grasp the associations of English-speaking lawyers when they speak of a right to a fair trial.

The basic problem is that Romance and Slavic languages make no distinction between “justice” and “fairness.” A fair trial does not necessarily reach a just result, which presumably would require that the innocent are acquitted, and the guilty are convicted. Fair trials often result in injustice, in particular, the risk that the guilty go free. The “presumption of innocence” is often justified by saying that it is better to let ten guilty defendants go free than to convict one innocent. If justice requires the punishment of the guilty, then this concept of fairness, skewed as it is to the interests of the defendant, permits some injustice to occur.9

The difference between justice and fairness is evident in the alignment of these terms with different parties in the criminal process. Victims demand justice. Defendants want fairness. Recall the chant: “No justice, no peace.” This was a demand not for a fair procedure but for a “just” outcome. This confusion of justice and fairness plagues efforts to translate the philosopher John Rawls’s key phrase, “justice as fairness,” into European languages. This phrase is the cornerstone of Rawls’s influential work, A Theory of Justice, the thesis of which is that the principles of justice should be grounded in fair procedures of negotiations. Because the Romance languages recognize a term for “justice” but do not distinguish between justice and fairness, translators sometimes adopt the word “fairness” to avoid the collapse of thesis into “justice is justice.”10

Sometimes translators seek to recapture the distinction in English by treating fairness as an equivalent to “equity” (French équité; Spanish equidad). Thus “fair trial” becomes process équitable. But “equity” is clearly a different idea. In its origins in English law, equity represented the nuanced judgment of the chancellor, an officer of the king, which served to mitigate the rigors of the common law. Equity lacks the special feature of procedural justice that is implicit in fairness.

The particular attachment of Anglo-American legal culture to the concept of “fairness” derives from the emphasis in the common law on procedural regularity as a value in itself, a value worth respecting apart from justice in the individual case. Our notions of fairness and fair play draw heavily on analogies from competitive sports and games, which pervade idiomatic English. Fair procedures are those in which both sides have an equal chance of winning. The playing field is level. Neither side hides the ball. No one draws from the bottom of the deck. Regardless of the sport or game, no one seeks an “unfair” advantage—by “hitting below the belt,” “stacking the deck,” or “loading the dice.”

It seems that only English—among the languages of the West—relies so heavily on these metaphors of fair play. English-speaking children are reared on the maxim: “It is not whether you win or lose, but how you play the game.” Because the notion of fair play is so basic in American culture, the requirements of a fair trial understandably lie at the foundations of the American legal culture.

Relying on a sporting ethic to design the contours of criminal trials would strike lawyers from other parts of the world as misplaced enthusiasm for games and competition.11 And yet the language of fairness has entered the international discourse of criminal law, and with the word comes the Anglo-American ethic that seems to downplay justice and emphasize “playing the game” fairly.

Reasonableness

The notion of reasonableness plays a critical role in defining the contemporary Anglo-American legal mind. English-speaking lawyers refer rou-

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9 In the common law system, this balance is sometimes claimed to turn on the burden of proof—how well must the state prove a defendant has committed a crime to ensure a fair system and also a just result. In the Rawlsian system, these are cases of imperfect procedural justice. Following the rules does not preclude injustice. His methodology for choosing principles of justice, however, is based on pure procedural justice, which implies that if any procedural rules are followed, the outcome will automatically be just.


11 Some observers believe that the ethic of playing the game has also influenced the making of legislation, as parliamentarians and legislators vote not for or against a bill owing to its policies but according to whether their team supports it. See C. Northcote Parkinson, Parkinson’s Law and Other Studies in Administration 14–23 (Boston, MA: Houghton Mifflin, 1957). On the centrality of games in our institutional and cultural life, see the argument in John Perry, hans Jardine (Boston: Beacon Press, 1994) (in English).
tinely to reasonable time, reasonable care, reasonable mistake, reasonable risk, reasonable doubt, and reasonable force. Every time the term is used, the implicit reference is to the behavior of a “reasonable person under the circumstances.” This hypothetical character summons us to recognize and apply a community standard for judging individual behavior. Those who fail to meet the standard of the reasonable person are at fault and deserve to be blamed for their “unreasonableness” of belief or behavior.

There is no technical problem in translating “reasonableness” into Western languages that draw on the Hellenistic understanding of reason as a source of truth. French vocabulary includes raisonnable, Germans understand what it means to be vernünftig, and Russians have no trouble with razumnyj. The problem is that although lawyers could use this term in legal argument and in drafting statutory provisions, they traditionally have not. The French Civil Code uses raisonnable just once, and the German Civil Code never couches a rule in the analogous demands of Vernunft (“reason”). These legal cultures have a proper translation for reasonable at their disposal, but until recently they have preferred not to use it.

For languages outside the sphere of Hellenistic influence, however, the problem comes close to the difficulty of adopting the term fairness. When the concept of “reason” is not in common usage, it is difficult to find a cognate for reasonable. In modern Hebrew, for example, the lawyers had considerable difficulty translating the phrases employing reasonableness that appeared in the English statutes that they adopted as their own, in particular, James Fitzjames Stephen’s draft criminal code, which became standard in many of the former English colonies. Finally, sometime after the founding of the state of Israel, a group of experts convened at the Department of Justice in Jerusalem and decided to introduce the word savir as the designated equivalent of reasonableness. Consequently, the term not only became common in legal usage but also soon spread to the language as a whole, to the point that native speakers today are unaware of the calculated way the word was coined. We can expect a similar development to occur, eventually, in Arabic, Chinese, and other languages in which the concept of reason has weaker cultural roots than it does in the European languages.

It is interesting to observe, however, that different legal cultures respond at different rates to the challenge of integrating the concept of reasonableness into their legal vocabulary. The Rome Statute uses the term reasonable more than twenty times, and the French and Spanish translators have no trouble adapting their cognate (raisonnable and razonable) and using it as the equivalent of the American word. In their unofficial translation of the Rome Statute, however, the Germans appear to be more closed to the process of linguistic amalgamation. They could use the German word vernünftig whenever the English draft says “reasonable,” but they do not. They find about seven or eight different phrases for translating the concept of reasonableness as it appears in different contexts. The only place they use the term vernünftig is to capture the famous common law phrase “proof beyond a reasonable doubt.”

Eventually, however, the English pattern of usage—relying heavily on “fairness” and “reasonableness”—will creep into all cultures engaged in international commerce and legal relations. International negotiation in English will demand that lawyers start thinking in the idiom of reasonableness.

Another example of linguistic transmission is the growing influence of a familiar figure of common law rhetoric, the “reasonable person.” French lawyers have never traditionally spoken of the “reasonable person”—they prefer the quainter and politically incorrect expression bon père de famille, which we discuss in greater detail in Chapter Twenty-One. Under the influence of the common law, however, French-speaking Québecois lawyers now routinely speak of la personne raisonnable.

The movement toward linguistic convergence in this area should not becloud the strong cultural forces that issued in the initial divergence—between the common law’s attachment to reasonableness and the Continental preference not to use the term. There is in fact a profound point

12 The meaning of this usage has, however, changed over time, at least in the context of the criminal burden of proof, and perhaps more widely. See Steve Sheppard, “The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence,” 78 Notre Dame L. Rev. 1165 (2003).
13 This story is reminiscent of the legend about the way the Japanese introduced the word kore to mean “rights” after the Meiji Restoration in 1869. Just as the Japanese thought they had to conform to the vocabulary of the common law, the Japanese thought that to trade with the West they had to have a legal vocabulary that included the idea of individual rights.

14 My source for this story is the late Professor Shalev Ginossar—GPE
about legal method implicit in these two patterns of discourse. The reliance on the concept of reasonableness reveals a holistic style of legal thought. The opposing civil law methodology relies on structured or layered principles to achieve the same result. These terms holistic and structured required some clarification.

Holistic legal thought is based on the use of a single rule to resolve a complex legal problem, such as the use of force in self-defense. The word reasonable facilitates this way of thinking because the rule can be simply formulated: "Any who reasonably believes that he is about to be attacked may use reasonable force to repel the attack." This rule works as a summary of the law of self-defense because the variable "reasonable" is sufficiently protean to address various legal questions.

By comparison, think of the rule of self-defense formulated in Article 32 of the German Criminal Code: "A defensive use of force is legitimate when necessary to avert an imminent unlawful attack to oneself or others." This formulation leaves unmentioned both the problem of mistaken but reasonable belief about the imminence of the attack and the problem of proportionality or reasonableness of the degree of force used. Both of these issues are addressed in distinct dimensions of analysis. The problem of reasonable belief is filtered off into the separate dimension of excusing conditions. If the actor's belief is mistaken and he falsely believes that the attack is about to occur, the mistaken perception might be excused—typically on the grounds of reasonable belief. The conditions are not stated in Article 32, and yet every lawyer knows that this provision of the code is embedded in a structure that permits an excuse in certain cases of mistaken belief.

Similarly, the problem of proportionality is formulated in a doctrine unique to the civil law tradition, namely, abus de droit, or abuse of rights. A structured legal theory is able, at the first level of analysis, to stipulate an absolute right—say, to use all force necessary under the circumstances—and at the second level, to qualify the right by proviso: If you use too much force relative to the interests protected, then you abuse your right and your action is no longer lawful.

Though the term abus de droit is mentioned in neither the French nor the German civil codes, it is fundamental to civilian legal thought. It is important to know in order not to be misled by the seemingly absolute statements of the Continental codes. For example, if a defender uses deadly force to prevent the escape of an apple thief or to prevent being tickled by a child, the use of force might be necessary and thus meet the formal definition of Article 32. Yet the subsidiary doctrine of "abuse of rights" would presumably apply and lead to the conclusion that the force was disproportionate and therefore unlawful.

Thus, the structured approach to self-defense enables the legislator to state a simple rule, with difficult questions of accessibility and proportionality reserved for secondary levels of argument. In the common law tradition, these distinct levels tend to be absorbed into a single holistic rule based on the concept of reasonableness.

It would be a mistake to think that using or not using the opendended standard of reasonableness renders the rule either more or less precise. Article 32 of the German code appears to be more strictly defined than the common law rule, but this appearance depends on the lower visibility of the secondary levels of analysis. Neither one nor the other is more precise; both require judgments about the relevant factors that make a belief or the use of force reasonable under the circumstances. In the end—to use Karl Llewellyn's classic phrase—the "reasons that do the singing" are the same. Only the form in which they are presented differs.

Apart from these issues of form—holistic as opposed to structured

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17 The German code contains a provision that came close to that in Llewellyn, Supra, 949 (1935).
18 Karl Llewellyn, "Prüfungsrecht und Rechtsprechung in Amerika" (Leipzig: J. Weichert, 1933).
sonableness— in the Rome Statute and other international treaties. Yes ... and no. It would be desirable for Right-oriented legal cultures to develop a deeper appreciation for the potential of pluralistic thought in the law. But the imperial flavor of Anglo-American legal influence should be a cause for concern. The fact that international negotiations are conducted primarily in English gives Anglo-American lawyers a natural advantage in the marketplace of ideas and terminology. It would be better if American jurists developed more respect for the languages and legal cultures of the rest of the world so that these exchanges became reciprocal and mutually enriching.

Deference

One of the characteristic features of American law is its decentralization—the rejection of an ordered hierarchy in favor of legal entities with undefined powers relative to each other. This principle is expressed in the Constitutional principle of separation of powers among the legislative, executive, and judicial branches of government. The three branches of government are of equal power. There is no rule of law for resolving conflicts among them.

Similarly, judges, lawyers, and jurors have overlapping powers in a common law trial. They are not exactly of equal power, but it is not clear, as it is in a Continental civilian trial, that the judge is in charge. The lawyers are responsible for producing evidence, but the judge can also introduce evidence, as they say, *sua sponte* (“on his or her own motion”), although this is rarely done. In the routine case, the jury determines the facts of the case, but the judge can take the case away from the jury, at least in private disputes, if the judge finds that no reasonable jury could disagree. The judge can preempt the authority of the jury by directing a verdict for the plaintiff or the defendant. In a criminal case, the judge can dismiss the charges, but unless the defendant waives his or her right to a jury, only the jury may pronounce the defendant guilty.

To regulate disputes among the branches of government and to work out the relative roles of judge, jury, and lawyers, we need rules of deference. A rule of deference is not a precise statement about who should do what; rather, it is a description of an attitude or disposition. The Supreme Court sometimes defers to Congress about the constitutionality
of legislation. In some cases—such as declaring war—Congress now defers to the power of the president. If there is a dispute between the Court and the president—say, about whether the president must turn over a tape recording of private conversations in the Oval Office—the president defers to the power of the Court. The key feature of deference is that you have to qualify all of these preceding sentences with the phrase “but not always.” There is no precise rule for determining the limits of deference.

There are also rules of deference in working out the practical authority of judges, jurors, and lawyers. Judges defer to juries to determine the facts—but not always. Juries defer to judges when the judges define the law applicable to the case—but not always. (Juries defy judges when they engage in “jury nullification” by deciding contrary to the instructions.) Appellate judges apply rules known as “standards of review” to defer in varying degrees to the decisions of trial judges on evidentiary and procedural decisions—but not always. As in deference among the three branches of government, there is no precise rule for determining who should defer to whom and when.

If there is no precise rule, then how does the system work? The answer is that lawyers and citizens are socialized into a legal culture that informs their judgments about appropriate deference. They learn what it means to “go too far” or to not “go far enough.” These rules cannot be taught through texts or rules. They are learned by acquiring experience in a new legal culture.

It is not easy to translate deference into Continental legal languages. The idea bears some similarity to the principle of complementarity as it is recognized in the Rome Statute. According to the latter, the International Criminal Court should defer to national courts unless the latter “are unwilling or unable” to decide the case (Rome Statute § 17(1)(a)). How much deference is implied by this standard remains an open question. The international community will have to generate a culture in which the participants have an intuitive sense about how far the ICC should go in taking cases away from local officials.

Discretion

We end this survey of discourse in the common law with another term that has acquired great significance in American legal thinking. Like deference, the term discretion is often used today to imply imprecision and the breakdown of strict legal control under teachable rules. But this was not always the case. Discretion has its origins in administrative law and in the administrative decisions made by judges in the course of a trial. The appropriate translation in German is Ermessens and in French, pouvoir discrétionnaire.

All administrators—whether they are running governmental agencies, schools, or private firms—make decisions to maximize the goals of their enterprise. This is the sense of discretion used to describe administrative decisions to allocate funds to build highways, to order books for the library, or to send troops into battle. The test for making a sound decision of this sort is not whether the decision maker respects the rights of the parties or does justice, but whether the decision efficiently promotes agreed goals. The logic is instrumental: how best to adapt the possible means to the relevant end.

The traditional approach to adjudication under law was different. For Coke or Blackstone, legal decision making was not about promoting policy objectives but about protecting and enforcing the rights of the parties. Under the influence of the American Realists of the 1920s and 1930s, the meaning of the term discretion gradually changed so that it became plausible and commonplace to describe judges as exercising discretion in this administrative sense when they decided cases under the law. This shift was furthered by the continuing expansion of the nineteenth-century utilitarian influence in American legal thought under the slogan that the purpose of the law is to promote the social good. The combination of the two strains of thought is expressed in this formula: Judges exercise discretion when they make decisions, and they should make decisions by promoting the basic policies of the law.

As the term is used today, discretion has two radically opposed meanings or homonyms. One of the opposing ideas is that the rules of law determine the outcome of particular cases. This is the view naively attributed to the civilian codes, as in Montesquieu's tag that the judge is but la bouche or mouthpiece of the law. No one seriously holds this view today about the rules of the common law. Justice Oliver Wendell Holmes Jr. disposed of the naïve view when he wrote in 1905 in the dissenting opinion of Lochner v. New York (198 U.S. 34, at 76): “General propositions do not decide concrete cases.” If the norms of the law do not determine the outcome, then it must follow that judges exercise choice or discretion when they decide cases.
But there is also another logical opposite of discretion, which requires that we first understand the views of the Realists who prevailed in American legal thought from the 1930s to the 1960s and, some would say, continue to reign today. According to their view, judges always exercise discretion when they decide cases. In this respect the use of discretion clearly differs from European usage. It would be unusual for a German to claim that all legal decisions reflect Ernennungsfreiheit ("freedom of discretionary decision"). The Realist understanding of discretion implies that judges pursue policies in the same way administrators do. The opposite of discretion, then, would be a commitment to decide on the basis of principles rather than policies, to focus on the rights and duties of the party, and to reach a decision that is the right answer under the law. This is the line that Ronald Dworkin took in his classic article arguing against the Realist philosophy of pervasive judicial discretion.

Because the concept of discretion agiley shifts between two meanings—(1) the inevitability of judicial choice in applying the law and (2) a preference for pursuing policies over principles—the advocates of pervasive judicial discretion have gradually gained ground in American legal thought. Today they are often called "pragmatists." One of their leading advocates is Judge Richard Posner.

The recognition of discretion in decision making seems to be compatible in the American legal mind with the idea that judges are bound by the law. The problem is what it means to be "bound." There are two views, each corresponding to one of the two senses of discretion. As a physical metaphor, the judge's being bound suggests that the rule of law determines his or her decision. There is no choice in the decision. The rule is something like a whip beating the judge into marching in a particular direction. The other sense of being "bound" emphasizes the obligations of judging. To be bound by the law in this alternative sense means to be required to focus solely on legal criteria when making a decision. The personalities and wealth of the parties, their prior histories, their nationalities, their popularity and influence—these are all irrelevant. The first sense of being bound is external—something like being bound in chains. The second sense is to bear a duty to think and act in a particular way.

One apparent compromise between these senses is to consider the discretion within a boundary, or role, set by rules, such a limit of jurisdiction or, more important, a discretion to select only among several outcomes that are justified by rules. To exercise discretion in this sense is to have freedom to act within the boundary but to have no freedom to act outside that boundary. Even that compromise, however, fails to recognize that one form of discretion is the freedom to alter the boundary.

These ambiguities about discretion and being bound by law are by no means unique to American law. The German Basic Law (Constitution) contains two clauses that illustrate the difference between the physical metaphor of being bound and the alternative sense of obligation to think in a particular way. Article 97 of the Basic Law informs us that judges are subject only to Gesetz, the statutory law: Der Richter ist nur dem Gesetz unterworfen ("The judge is subject only to the statutory law"). The verb unterworfen literally means "thrown under." The image conveyed is that the judge is saddled and bound by a strict master called the statutory law.

Yet Article 20(3) tells us more broadly that the judges are bound by both principles of higher law and the statutory law: Die Rechtsprechung ist am Recht und Gesetz gebunden ("Case law is bound by both right and law"). This second sense of being bound emphasizes the duty of judges to think about higher principles at the same time that they are "subject" only to the statutory law.

This tension is readily understood by analogy to the problem of understanding discretion and its opposites. The first provision stresses the physical metaphor—being thrown under the yoke of law. The second, and historically the more recent provision, shifts the focus from physical control to the obligation of the judge to be guided by higher values of principle as well as by the letter of the law.

To sum up, then, discretion has at least these meanings: (1) being free to choose, (2) being free to choose within boundaries set by rules, and (3) functioning like an administrator required to maximize the future wel-

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23 On the difference between principles and policies, see pp. 58–59.
fare of society. The opposites of discretion are (1) being subject to control by rules of law, (2) being constrained from altering the boundaries set by rules, and (3) being bound to focus on the rights and duties of the particular parties before the court and to ignore the general interests of society. The reliance on the concept of discretion, with all its subtle ambiguities, is a unique feature of the common law and, in particular, of American legal thought in the late twentieth and early twenty-first centuries.

Further Reading

In addition to the books noted, an excellent introduction to the culture of American law is Karl Llewellyn’s classic, *The Bramble Bush* (New York: Oceana, 1951). For a useful introduction to the modern idea of the *lex non scripta*, see the recent reissue of Roscoe Pound’s *The Ideal Element in Law* (Indianapolis: Liberty Fund, 2002). For the idea of the common law’s relationship to liberty, see Frederic Pollock’s *The Genius of the Common Law* (New York: Columbia University Press, 1912). For a recent examination of many of the issues raised in this chapter, see George P. Fletcher, *Basic Concepts of Legal Thought* (New York: Oxford University Press, 1996).


When we talk about “reasoning,” we are never entirely clear about whether we mean to refer to internal mental processes or to public argument and justification. Lawyers argue conflicting points of view. Judges decide disputes and write opinions justifying their decisions in light of the prevailing legal sources (statutes, cases, scholarly commentary). Both engage in internal ratiocination, as well as interactive efforts to persuade others. Both lawyers and judges engage in mental and verbal efforts properly called “legal reasoning.”

Arguing for a client is a particular form of reasoning—but it is partial and subjective and sometimes excessively passionate. The way a judge decides a case—the process of looking at the statute and prior cases and commentary—and comes up with a decision is also called legal reasoning. This process is supposedly neutral and objective and dispassionate. The form of legal reasoning must be accessible to study and review by other judges, lawyers, and scholars. Most relevant to legal studies is the written opinion, in which the judge explains and justifies the decision in the light of the relevant sources of law.

The puzzle is understanding the relationship between the psychological process of reasoning to decide the case and the “reasoning” written in the opinion. Is the latter a mirror of the former? Hardly. It is at