



# A COMMON MISTAKE ABOUT THE COMMON LAW

By Vincent A. Wellman

**W**hat is the proper role of judges in the development of law? As both a law professor and a member of the bar, I confront this question regularly, and I can think of no thornier issue, nor a more important one. Even when I narrow my focus to the role of judges in developing the common law, a satisfactory answer seems elusive. In the past, great judges of the common law would participate in this debate,<sup>1</sup> and the profession would benefit from their contributions. But today's judges are, for many reasons, less likely than their predecessors to expound a theory of common-law decision-making.<sup>2</sup> Their reticence means that the legal community must guess at how contemporary judges understand their role.

A salient counter-example has been given by Chief Justice Young of the Michigan Supreme Court, expressing a dilemma (as he sees it) about his proper role in developing the common law.<sup>3</sup> On the one hand, he acknowledges that judges in our common-law tradition have the power to make law. On the other hand, as a judicial "traditionalist" he feels uncomfortable about the exercise of that power. Indeed, his discomfort has led him to assert

that he finds it "hard...to consider that the common law is 'law' in any conventional sense."<sup>4</sup>

Why should a judicial traditionalist feel uncomfortable with the exercise of a power that, he admits, has long been a part of the common-law tradition? For some, the discomfort stems from an allegiance to a "declaratory" theory of judging: judges shouldn't aim to change the law, but should seek to discover or declare the common law as it always has been.<sup>5</sup> This view of judging is often traced to Blackstone, who asserted that the duty of English courts was not to "pronounce a new law, but to maintain and expound the old one."<sup>6</sup>

It is not clear that Blackstone really believed this pronouncement.<sup>7</sup> But, whatever his true views, I can show that such a claim about the illegitimacy of judge-made law is unreliable: judicial lawmaking has long been a well-accepted feature of the development of the common law, both in England and the United States. Anyone who embraces the traditions of our legal profession should therefore describe judging in ways that, at least, include this power as a proper part of the judicial role.

**I**

To illustrate Blackstone's unreliability, I will briefly review the history of three important doctrines of Michigan contract law: bargained-for consideration, at-will employment, and the foreseeability limitation on consequential damages. Each was a judge-made change from prior law. If we were to take Blackstone seriously, we should regard them as illegitimate. But they are so deeply embedded in our law of contracts that we could hardly envision the law without them. Accepting instead that these doctrines are solid foundations of our law shows that we need a more subtle, and more sophisticated, statement of the judiciary's proper role.

### Bargained-For Consideration

In Michigan and elsewhere, whether a promise is supported by consideration is tested by the "bargained for" criterion. However, the bargained-for theory is a relative latecomer: it originated with Oliver Wendell Holmes Jr. when he expounded a requirement of "reciprocal conventional inducement."<sup>8</sup> Before Holmes, consideration was assessed by a different standard, usually called the "benefit-detriment theory."<sup>9</sup> The difference between the two theories can be significant. Under the benefit-detriment theory, a promise could be enforceable if it induced detrimental reliance on the part of the promisee. Under the bargained-for test, however, reliance is significant *only if* it is undertaken in exchange for the promise *and* the promise is given in exchange for the detriment. Unbargained reliance is now enforceable only under the rubric of "promissory estoppel."<sup>10</sup>

Over the decades, "reciprocal conventional inducement" became the dominant theory, and is now so commonplace that it was enshrined in both the First and Second Restatement of Contracts.<sup>11</sup> The history of the change is complex, and sometimes cloudy, but in Michigan the change is clear: "The essence of consideration...is legal detriment that has been bargained for and exchanged for the promise."<sup>12</sup>

### At-Will Employment

As commonly understood, at-will employment incorporates two ideas. First, there is the relationship that may be terminated by a party at any time—employment that endures at the "will" of each party. Second, there is the presumption that an indefinite contract is terminable at will. This presumption is often called Wood's Rule to reflect its origins in the 1877 treatise of Horace G. Wood.<sup>13</sup> English and earlier American law had presumed that employment would either endure for a year or would be coextensive with the pay period.<sup>14</sup> Wood pronounced instead that "the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will."<sup>15</sup> Wood lacked authority when he asserted the rule's acceptance in America. But his view prevailed, and in Michigan (and other states) at-will termination is now the standard presumption for agreements that have neither a definite duration nor an agreed-upon termination process.<sup>16</sup>

### The Foreseeability Limitation on Consequential Damages

No proposition of modern contract law is more recognizable than the "rule" of *Hadley v Baxendale*.<sup>17</sup> *Hadley* distinguished two components of contract damages: first, the injured party may recover "direct" damages for losses that "may fairly and reasonably be considered arising naturally"<sup>18</sup> from the breach; second, consequential damages are not recoverable unless the losses are "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result" of its breach.<sup>19</sup>

*Hadley* represented an enormous change from prior law. English contract law before the nineteenth century had few rules regarding damages, and judges instead left the assessment of damages for breach of contract largely to the discretion of the jury.<sup>20</sup> Controlling the determination of consequential damages was, in other words, just one part of a larger project to remake the law of contract damages. But whatever the magnitude of the change, it is now an accomplished fact.<sup>21</sup>

**II**

Many doctrines of modern contract law were the result of nineteenth-century judicial lawmaking. Anticipatory repudiation, for example, had its genesis in the English decision of *Hochster v De la Tour*.<sup>22</sup> In *Sherwood v Walker*,<sup>23</sup> the Michigan Supreme Court



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laid the foundations for a theory of mistake that was accepted throughout American law. And credit for the modern approach to third-party beneficiaries is given to the New York Court of Appeals' decision in *Lawrence v Fox*.<sup>24</sup> In each instance, judges made law. The pattern continues. Nearly 100 years after *Sherwood*, the Michigan Supreme Court's decision in *Lenawee County Board of Health v William and Martha Messerly* changed the law relating to mistake.<sup>25</sup> And in *Darwin Neibarger v Universal Cooperatives, Incorporated*,<sup>26</sup> the Court dramatically reshaped the law of product liability.

In sum, Blackstone is unreliable, and changing the law is a traditional part of the judicial role. How, then, could it be problematic? One basis for deriding judicial lawmaking is the idea that the common law was, in effect, settled when it was "received" or incorporated into the law of our state. For example, the Michigan Constitution of 1850 stated, "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature."<sup>27</sup> This provision might be read as reserving law-changing to the legislature. But that reading doesn't square with history: each of the changes discussed came *after* the Constitution's adoption. *Hadley* wasn't decided until 1854. *Hochster* was decided in 1859. Wood's Rule was first found in Horace's 1877 treatise. The bargained-for test was announced in Holmes's lectures, published in 1881. *Sherwood* was decided in 1887 and then changed in 1982. Nothing about Michigan's 1850 Constitution kept judges from changing the common law.

Michigan's current Constitution seems to accept judge-made change, for it now states, "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."<sup>28</sup> Some decisions cite the new language as authority for a judicial power to change the common law.<sup>29</sup> But judge-made change was accepted by the Court even before the revision.<sup>30</sup> For that matter, the current Constitution's drafting history indicates that the 1963 revision was regarded as inconsequential at the time it was adopted. The comments for the 1961–1962 Constitutional Convention state that the text of article 3, § 7 repre-

sented "[n]o change from Sec. 1 of Schedule in the present... constitution except for improvement in phraseology."<sup>31</sup> If Blackstone were reliable, judge-made changes would have been deemed illegitimate, and the 1963 constitutional revisions would have provoked an outcry.

Given Blackstone's authority on so many points of law, why didn't his nineteenth-century adherents voice their outrage in response to the activism of Michigan courts? Some reflection on the way we understand the common law can help illuminate how those earlier judges thought of themselves as acting legitimately. As it turns out, the phrase "common law" is broader than just the notion of a set of rules. Instead, there are at least three distinct senses in which the legal profession uses the phrase.

First, there is the historical origin of the concept of a common law. William of Normandy dramatically reshaped England's political and legal landscape. He claimed all of its land as his own, to bestow to nobles as he saw fit; he centralized the country's political and legal apparatus; and he and his successors established royal courts that provided a law that applied across the realm. In this sense, the idea of the common law is the idea of law common to all of England.<sup>32</sup>

Second, there is the result of accumulated decisions by the royal courts. Over the centuries, those decisions generated a set of rules to govern what we now call "tort," "property," "contract," and the like<sup>33</sup>—rules that Blackstone set down as the components of England's common law. The rules' development was sometimes so gradual that the fact of change wasn't always obvious, even when the change was significant. To choose just one example, the fundamental rules of what we now regard as contract law actually emerged from a branch of what we would now call tort law. More precisely, the English legal landscape was dominated by the famous "writs," and contract law emerged from decisions concerning the writ of *assumpsit*, which itself arose from the law of trespass.<sup>34</sup> So the common law of, say, 1830 was constituted by doctrines announced and employed by the judges of the time—after centuries of change—and not immutable rules that had been in place since time immemorial.

Third, and for my purposes most important, is the process by which English judges came to articulate and justify the rules that they announced. Although the matter is intensely complicated, it is this process that established the foundations of what we now regard as the common-law tradition, as distinguished from the alternative civil-law tradition. This process, with its emphasis on *stare decisis* and precedential reasoning, engendered the rules that were, at any particular moment, cited by England's lawyers and judges. But those rules were just the result, at that moment, of the process, and the process itself can be recognized and studied separately from the set of rules that it produced.<sup>35</sup>

## Conclusion

Recognizing these different meanings of the term "common law" helps explain how some lawyers might misapprehend the tradition of judicial lawmaking. If one thinks of the common

law in only the second sense—the rules employed by common-law judges and lawyers in 1850, for example—then one might think that those rules were settled when the Michigan Constitution was adopted in that year, in which case changing the rules would only be the province of the legislature. Perhaps it is this view of the common law that finds comfort in Blackstone’s declaratory theory.

But limiting our understanding of the common law to just well-established rules is myopic. It misses the other essential facets of our common-law tradition. In particular, it misses that part of the tradition which is grounded in the methodology of the common law—namely, that judges have used prior statements of the “law,” applied them to new situations, and in doing so have also changed the rules. Under this broader and more accurate view of our legal traditions, the process of common-law reasoning should

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be regarded as a more enduring and stable aspect of the common law than the particular rules in effect at a given time. This broader tradition was a vital aspect of the common law when it was adopted in Michigan. It was in this vein that the Court in *Bricker* observed:

That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society. . . . It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. Change of this character should not be left to the legislature.<sup>36</sup>

As a result, we should expect that the rules will continue to change because the common-law process will continue to reshape them, and we should therefore expect the judiciary to continue to play that role. ■

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## FOOTNOTES

1. See, e.g., Holmes, *The path of the law*, 10 Harv L R 457 (1897); Cardozo, *The Nature of the Judicial Process* (New Haven: Yale Univ Press, 1921).
2. Sometimes judges address the questions of their proper role in the context of arguing about a particular result. Compare *Woodman v Kera LLC*, 486 Mich 228, 244–258; 785 NW2d 1 (opinion by Young, J), with *id.* 266–279 (opinion by Markman, J).
3. Young, *A judicial traditionalist looks at the common law*, 8 Tex R L & Pol 299, 303–304 (2004).
4. *Id.* at 303.
5. *Id.* at 301 n 4: “A number of jurists have denied that judges have the power to create the common law anew, and have insisted instead that judges ‘discover’ a pre-existing common law.” (quoting *Rogers v Tennessee*, 532 US 451, 472–473; 121 S Ct 1693; 149 L Ed 2d 697 (2001) [Scalia, J, dissenting]).
6. 1 Blackstone, *Commentaries on the Laws of England* (1st ed), § 3, p 69.
7. See Alschuler, *Rediscovering Blackstone*, 145 U Penn L R 1, 37 (1996) [Blackstone presented the “‘declaration theory’ with a wink and a nod”].
8. Holmes, *The Common Law* (New York: Dover Publications, 1961), pp 293–294.
9. 1 Farnsworth, *Contracts* (4th ed), p 22.
10. *State Bank of Standish v Curry*, 442 Mich 76, 90–92; 500 NW2d 104 (1993).
11. See Restatement Contracts (1932), § 75; Restatement Contracts, 2d (1981), § 71.
12. *Higgins v Monroe Evening News*, 404 Mich 1, 20; 272 NW2d 537 (1978).
13. 2 Farnsworth, *Contracts* (4th ed), p 381.
14. *Toussaint v BCBS*, 408 Mich 579, 601; 292 NW2d 880 (1980).
15. Wood, *A Treatise on the Law of Master and Servant* (Albany: Parsons, 1877), § 134, p 272.
16. E.g., *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993).
17. *Hadley v Baxendale*, 156 Eng Rep 145 [Exch 1854].
18. *Id.* at 151.
19. *Id.*
20. 3 Farnsworth, *Contracts* (4th ed), p 255 n 1.
21. Compare *Clark v Moore*, 3 Mich 55 (1853) [pre-*Hadley*], with *Hutchings v Ladd*, 16 Mich 493 (1868) (citing *Hadley*).
22. *Hochster v De la Tour*, 118 Eng Rep 922 [QB 1853].
23. *Sherwood v Walker*, 66 Mich 568; 33 NW 919 (1887).
24. *Lawrence v Fox*, 20 NY 268, 274 (1859).
25. *Lenawee County v Messerly*, 417 Mich 17; 331 NW2d 203 (1982).
26. *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512; 486 NW2d 612 (1992).
27. Const 1850, art 20, sched, § 1.
28. Const 1963, art 3, § 7.
29. See, e.g., *Placek v Sterling Hts*, 405 Mich 638, 656–657; 275 NW2d 511 (1979).
30. See, e.g., *Bricker v Green*, 313 Mich 218, 234–235; 21 NW2d 105 (1946).
31. Const 1963, art 3, § 7, Editors’ Notes: Convention Comment.
32. See Baker, *An Introduction to English Legal History* (London: Butterworths, 2002), pp 11–18.
33. *Id.* at 326ff (negligence), 263ff (contract), and 193ff (property).
34. *Id.* at 60–61 (assumpsit out of trespass) and 287ff (contract out of assumpsit).
35. See, e.g., Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) (Lord Coke understood the common law such that “[t]he principles of Common Law are not themselves validated by reason; but they are the products of a process of reasoning, fashioned by the exercise of the special, professional intellectual skills of Common lawyers over time refining and co-ordinating the social habits of a people into a coherent body of rules.”), p 7.
36. *Bricker*, 313 Mich at 234–235.