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THE HOUSE OF THE LAW*

*Honorable Ruggero J. Aldisert***

The time is ripe to take a critical look at what federal courts are doing to our house of the law. I believe that both the timing and the view are significant. The timing is appropriate because we are only one year from the celebration of the bicentennial of the federal Constitution. We are also only three years from the bicentennial of the Judiciary Act of 1789.

My view will be that of an insider; it will be through a jaundiced eye. It will be the focus of one who is in his twenty-fifth year as a judge, a judge on both the state and federal benches. It is through the eyes of a student of the judicial process, of one who concentrates not so much on the nuances of substantive or procedural law, but on the tools of decision-making. What these eyes see, in short, is this: a system in which there is too much pettifogging about gingerbread and encrustation in the trimmings of our house, and too little attention paid to its basic structures—to the fundamental precepts upon which the house of the law is built.

I. THE STRUCTURE OF THE LAW OBSCURED

In observing the house of the law today, I have extreme difficulty in recognizing the eclectic components of its architecture. Surely, there is a Georgian front and a Queen Anne behind, but the design tinkering just starts with that. We have added porches, screened them in and, finally, expanded them, helter skelter, into a series of rooms. Perched on top we see a hip roof, a gable or two, and a mansard, along with a generous sprinkling of skylights. Originally, the house was clapboard; then someone added a touch of brick here and there. At spots there is aluminum siding and you can see countless layers of paint in a rainbow of colors in various stages of adhesion and peeling. Parts of the house of law seem firmly grounded and appear able to withstand the challenges of changing judicial winds; other parts are quite fragile.

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** Chief Judge, United States Court of Appeals for the Third Circuit. This Article is an expansion of remarks delivered to the faculty of Loyola Law School on February 24, 1986, and of the State of the Circuit Address delivered October 7, 1985 at the 48th Annual Judicial Conference of the Third Circuit at Hershey, Pennsylvania. The author acknowledges the assistance of David W. Burcham, John M. Maciejczyk and Gretchen M. Wolfinger.

What Henry Maine once said of the infiltration of Roman law into Western thought also may describe our house: "nearly buried in a parasitical overgrowth of modern speculative doctrine."¹ The architect of the finished product resembles not so much Thomas Jefferson at Monticello but Rube Goldberg. Yet we know that because ninety-five percent of federal court work is interpreting statutes and constitutional clauses, and because this interpretation proceeds in the common law tradition of lawyers and judges, we cannot expect a Palladio as an architect. We cannot follow the common law tradition and still guarantee clean lines and symmetry as we develop the law. "We have thought less of symmetry than of the advancement of knowledge," Maitland told us.² Under the case-by-case method, we cannot expect the *elegantia juris* of the original Twelve Tables of Rome or the unannotated Ten Commandments of Moses. We cannot look for the crisp order we see in the Napoleonic Code or the clean statutes prepared by the Commissioners of Uniform State Laws. We cannot expect this because we know that the common law tradition is a "byzantine beauty," a method "of reaching what instinctively seems the right results in a series of cases, and only later (if at all) enunciating the principle that explains the pattern—a sort of connect-the-dots exercise."³

We know that a gulf will always exist between the scientific theory of law and the practical doing of it. As Emerson said, "[w]e boil at different degrees."⁴ The lawyer has to be more than a historian. The lawyer's knowledge is an inversion of "real" or "scientific" history. The lawyer seeks authority, and the newer the authority the better, because that is what the courts seek. By comparison, the historian seeks evidence—the older the evidence, the closer it is to the event, the better.⁵

Notwithstanding the common law tradition, and notwithstanding the absence of pristine pure lines in our house of law, it was still possible, until the recent era, to identify familiar disciplines of the law as we looked upon its house. Fundamental foundations and structures were always there to see. Although we constantly modified and tinkered with its profile, a physiognomy of the law was there to recognize.

1. H. MAINE, *ANCIENT LAW* 359 (1861).

2. 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* xxxviii (2d ed. 1899).

3. Ely, *The Supreme Court 1977 Term, Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 32 (1978) (citing Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 351-52 (1974)).

4. R.W. EMERSON, *SOCIETY AND SOLITUDE* 92 (1870).

5. Barnes, *Introduction* to 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* at 9 (1982).

We knew much about contracts. We were familiar with tort doctrines of fault liability and due care and foreseeability. We knew that once upon a time there was a property right in a good reputation. We knew that strictures papered our commercial transactions. We knew something about common law trespass, assumpsit, replevin, ejectment and mandamus. We knew precepts of equity, definitions of common law crimes and a touch of constitutional law.

These fundamental legal precepts became either immediately recognizable or reasonably retrievable. There was much of what Oliver Wendell Holmes described as "predictability," of what Karl Llewellyn called "reckonability" to the law. Dean Roscoe Pound summed it up for us:

What we are talking about, then, is the body of authoritative materials, and the authoritative gradation of the materials, wherein judges are to find the grounds of decision, counsellors the basis of assured prediction as to the course of decision, and individuals reasonable guidance toward conducting themselves in accordance with the demands of the social order. This point of view assumes a developed social and economic order and a corresponding development of the legal order, with an organized judicial and administrative hierarchy, definite law giving and law declaring agencies, and above all a developed profession of advisors upon the legal conduct of affairs.⁶

We were able to possess what Hugo Grotius described in the seventeenth century as "a power of discrimination which enables [us] to decide what things are agreeable or harmful as to both things present and things to come."⁷

We knew that a court's expression had the force of law, yet we knew that this force was proficient and efficient only to the extent that its expression was clear and its reasoning persuasive. We knew that public acceptance of judicial expression was directly proportionate to an understanding of what was said and done and why; that this was but a paraphrase of *lex plus laudatur quando ratione probatur* (the law is most praiseworthy when it is consonant with reason). But we also knew that there may be a conflict between justice according to law and the *aequum et bonum* (that which is fair and good). We also knew that the good judge always has an unquenchable thirst for justice.

The brilliance of the common law tradition is that for every decision

6. Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 476 (1933).

7. 1 H. GROTIUS, *THE LAW OF WAR AND PEACE* 13 (1646) (F. Kelsey trans. 1925).

there must be a reason, clearly stated, in which justification appears as a clear-cut syllogism. The major premise takes the form of a broad legal precept that contains a factual subject and a legal predicate. The minor premise, too, is always factual, and it must relate to the subject of the major premise. The conclusion depends either on an agreement or a difference between the major premise and the minor premise.

Have things changed? I think so.

I have an abiding concern that most briefs from lawyers and many opinions from judges seem to have lost their way. Many no longer appear as instruments of persuasion or explanation; rather, they appear as instruments of commentary, resembling more a ritualistic exercise than a decision-making tool.

A promiscuous uttering of citations has replaced the crisply stated, clean lines of legal reasoning. In judicial opinions, especially those of the United States Supreme Court, we see a mishmash of citation in text and footnote. Spewing case after case has replaced a tidy explanation of what is important in the case and a clean description of why it is important. It is not too unkind to suggest that often what poses as a work of scholarship is actually a work of journalism. "[A] pennyworth of content is most frequently concealed beneath a pound of so-called style."⁸

Barbara W. Tuchman recently sounded a call for "clear, easy-reading prose" in today's writing community. She asked all writers to avoid "the Latinized language of academics with their endless succession of polysyllables, their deaf ear for sentence structure, and unconcern for clarity."⁹ Over sixty years ago, Benjamin Cardozo warned that

precedents [should not be] ultimate sources of the law, supplying the sole equipment that is needed for the legal armory, the sole tools, to borrow Maitland's phrase, "in the legal smithy." Back of precedents are the basic juridical concepts that are the postulants of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by process of interaction they have modified in turn.¹⁰

Cardozo condemned, and properly so, the color matching process. He warned against a process of search, comparison and little more, stating:

Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at

8. Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

9. Tuchman, *An Author's Mail*, 54 THE AM. SCHOLAR 313, 322 (1985).

10. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 19 (1921).

hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge.¹¹

A stuffy style and fluffy padding in appellate court opinions (and I sadly include myself among the participants and perpetrators) shows that we suffer from acute pedantry. We seem to forget that all lawyers and judges are professional writers. Professional writers are aware that prose, like any other art, calls for frequent compromise among desirable aims—sound and sense, force and fluidity, clearness and precision, emphasis and nuance, wit and truth. The very need for balance rules out consistency in the use of any component of writing. Each sentence and paragraph is a special case.¹² Yet all of us—judges and lawyers alike—are guilty of bombastic propositions and legal dialectics in “[l]ong sentences, awkward constructions, and fuzzy-wuzzy words that seem to apologize for daring to venture an opinion.”¹³

We know how to be turgid and turbid, without blinking an eye, and indeed, without seeming to know what these words mean. Multisyllabic jargon and verbal distortions are the rule not the exception, and fit within the newly coined word “Haigese,” because former Secretary of State Alexander Haig used them so often. The story is told that one of General Haig’s aides asked for a raise. Haig just could not answer the request with a one word, “No.” Instead he replied: “‘Because of the fluctuational predisposition of your position’s productive capacity as juxtaposed to government standards, it would be momentarily injudicious to advocate an increment.’”¹⁴

We suffer a chronic case of literary hiccups. We insert citations as often as possible, three or four in a simple declaratory sentence, irrespective of how they interfere with the flow of the prose, the rhythm of the presentations or the sense of the argument. Somehow we do not seem to care that such static impedes easy comprehension of a statement of reasons.

I say all this not to suggest that effective legal writing should be

11. *Id.* at 20-21.

12. Barzun, *Behind the Blue Pencil*, 54 THE AM. SCHOLAR 385, 387-88 (1985).

13. Rodell, *supra* note 8, at 39.

14. A. DENNING, THE CLOSING CHAPTER 62 (1983) (quoting Alexander Haig).

graded for literary style for the sake of style. Rather, I emphasize this problem because the purpose of all legal writing is persuasion. Without clear writing, communication is lessened, and to the extent communication is diminished, the powers of persuasion decline.

The purpose of a brief is persuasion, as a lawyer must convince the judicial reader of the rightness of his cause. Similarly, the purpose of a judicial opinion is to convince any reader that sound reasons support the court's decision. In this sense, both lawyers and judges are salesmen. The rebuke that is flung in the face of Willy Loman in *Death of a Salesman* comes to mind: "The only thing you got in this world is what you can sell. And the funny thing is that you're a salesman, and you don't know that."¹⁵ Excessive citation, excessive footnoting, excessive pedantry in bloated awkwardness are at least three horsemen that run against your sole purpose: to sell your argument to your readers.

Unfortunately, the paradigm for stilted writing is found in our Supreme Court. As a judge and a lawyer, there is no Court I admire so much as that one, and no judge I respect so much as those nine justices. I say nothing in derogation of their solutions to difficult decisions and their discharge of profound responsibilities. But as a student of the judicial process, I cannot stand mute as too many courts—state and federal—and too many lawyers—trial and appellate—mimic the United States Supreme Court's opinion writing style. What results is a style that unnecessarily emphasizes minor or trivial points of learning, shows a questionable sense of propriety (or proportion), and fails to recognize the difference between what is important and what is merely interesting. Or, put less delicately, this writing style fails to recognize the difference between what is necessary and what is pseudo-academic show and tell.

I would like to share with you some case histories of acute, if not chronic, "citation-itis." In the recent school prayer case, the Supreme Court had to use 135 citations to state what it concluded to be the obvious;¹⁶ in the recent civil RICO case, 114 citations;¹⁷ in a recent copyright case, 164 citations.¹⁸ The more serious aspect of this problem, however, is that the disease is contagious. Thus, in my own court, in a case involving an award of attorney's fees, there were 199 citations;¹⁹ and in another case handed down the same month, the majority required 188 citations to

15. A. MILLER, *DEATH OF A SALESMAN* 97 (1949).

16. *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985).

17. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985).

18. *Harper & Row Publishers, Inc. v. Nation Enter.*, 105 S. Ct. 2218 (1985).

19. *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897 (3d Cir. 1985).

discuss appropriate sanctions for an attorney's misconduct.²⁰

The common law tradition demands no more than a clear statement of reasons. The judicial process expects no more; the brief reader or the opinion reader deserves no less.

The gift of exquisite writing is precisely that—a gift, either acquired by nature or perfected by years of studious attention. But, unfortunately, if lean, clear expression is not a natural gift, the writer must have the time to contemplate and reflect, to write and rewrite, all at a leisurely pace that is not present in the modern era of the law. Today, time is a severely rationed asset. Yet techniques are at hand to improve writing style. There are methods to use and standards to follow, techniques and methods that can bring about vast improvements in the exposition of the law in both our briefs and opinions.

What is needed is first to terminate the promiscuous citation shuffling in text: those boring expositions of who said what to whom. Take a second look at those awful footnotes that confer a lack of authority in the text or admit that the argument's main structure can, upon closer analysis, prove to be very fragile. Perhaps Francis Bacon was correct when he criticized legal writers who write as philosophers: "They make imaginary laws for imaginary commonwealths; and their discourses are as the stars, which give little light because they are so high."²¹

Every brief and every opinion should ideally begin with a clear statement of the precise flash point of controversy. We must identify precisely where the litigants differ and tell the reader whether that clash concerns the choice of the controlling legal precept or the interpretation of an agreed-upon precept, or—if no dispute over choice or interpretation is involved—a statement that the sole quarrel concerns applying settled law to settled facts. Having identified these contours, we should then proceed to resolve the difficulty and explain why one choice is superior to another or why one interpretation or given application is preferred.

There must be more clarity in the *ratio decidendi*, more understanding of the precise analysis and more selective use of precedent. Lawyers and judges both have an obligation to evaluate the effect of previous cases and to decide what citations do authenticate and which simply duplicate, which are necessary to the argument, and which are used only to validate obvious statements of reason.

20. *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3d Cir. 1985).

21. F. BACON, *THE ADVANCEMENT OF LEARNING*, BOOK II (1605), *quoted in* 3 *THE WORKS OF FRANCIS BACON* 475 (J. Spedding ed. 1876).

I can anticipate the response to this criticism. It would probably follow two lines of attack. First, one might say that the common law tradition demands authority in the brief and in the opinion. One will argue that as the law develops over the years, more authority and more precedent is available for citation, and that this proliferation of authority is the reason why more cases are cited today than in the era of Oliver Wendell Holmes, Benjamin Cardozo and Learned Hand. One could argue that West Publishing Company reports over 62,000 appellate cases each year. One can say that because the common law tradition is an incremental process, the more it develops, the more authority is available, and the more authority, the more extensive the writing.

The second argument would emphasize that we are in the midst of a congressional law explosion and a tournament to see which agency can proliferate the most regulations. At least 100 bills to expand federal jurisdiction are proposed each year. This legislative and administrative blast fattens the body of law and adds more structures, willy nilly, to the house of the law.

I concede the validity of these arguments, but permit me to offer a rebuttal. Upon close analysis, new statutes, regulatory in form, do little more than add a gloss to a small number of long-recognized disciplines of the law. To regulate business practices, these acts simply provide that idiosyncratic definitions such as fraud may be used in conjunction with time-tested tort principles,²² or set standards to interpret contracts²³ or proclaim restrictions in the use of real or personal property²⁴ or restrict liberties²⁵ or declare certain conduct to be an offense against society.²⁶ Most congressional activity in the criminal field is to deem a federal crime conduct that was fairly well recognized as a state crime, or, arbitrarily, to make a violation of a certain federal regulation a penal offense.

22. *See, e.g.*, Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (1982); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982).

23. *See, e.g.*, Investment Companies and Advisers Act, 15 U.S.C. § 80a(46) (1982) ("validity of contracts"); 41 U.S.C. § 10b (1982) (contracts for public works); 29 U.S.C. § 103 (1982) ("yellow dog" contracts).

24. *See, e.g.*, Mineral Lands Leasing Act, 30 U.S.C. § 187 (1982) (restrictions on assignment or subletting of leases); 21 U.S.C. § 123 (1982) (Secretary of Agriculture authorized to quarantine livestock); 21 U.S.C. § 331(f) (1982) (refusal to permit entry or inspection of premises prohibited); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1256 (1982) (permit required to engage in strip mining).

25. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 212 (1982) (prohibition on child labor); 26 U.S.C. § 6702 (1982) (statute used to prosecute tax protestors for filing frivolous tax returns).

26. Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations Act (RICO), tit. IX, 18 U.S.C. §§ 1961-1968 (1982) (federal treble damage remedy for conspiracy to commit fraud).

To the precedent explosion argument, my answer is that very few federal cases really bring about fundamental changes in the law. Most of the federal appellate cases reported each year come within two categories suggested by Cardozo more than sixty years ago: those in which "[t]he law and its application alike are plain" and those in which "the rule of law is certain, and the application alone doubtful."²⁷ In my view, ninety percent of the cases in the Court of Appeals of the Third Circuit fall within these two categories.²⁸ This leaves only ten percent of our swollen caseload "where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law."²⁹

Our British cousin Lord Patrick Devlin would agree. He has suggested "that at least nine-tenths of the judiciary spends its life submerged in the disinterested application of known law. Indeed, to say that one-tenth rises above the waterline that is marked by notice in the legal jour-

27. B. CARDOZO, *supra* note 10, at 164.

28. Cardozo estimated that at least nine-tenths of appellate cases in 1924 "could not, with semblance of reason, be decided in any way but one." B. CARDOZO, *GROWTH OF THE LAW* 60 (1924). In 1961, Judge Henry Friendly wrote: "Indeed, Cardozo's nine-tenths estimate probably should be read as referring to the first category alone. Thus reading it, Professor Harry W. Jones finds it 'surprising' on the high side. . . . So would I. If it includes both categories, I would not." Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 *YALE L.J.* 218, 222-23 (1961) (quoting Jones, *Law and Morality in the Perspective of Legal Realism*, 61 *COLUM. L. REV.* 799, 803 n.16 (1961)).

29. B. CARDOZO, *supra* note 10, at 165. Cardozo stated:

Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. Such cases are predestined, so to speak, to affirmance without opinion. In another and considerable percentage, the rule of law is certain, and the application alone doubtful. A complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. The traveler who knows that a railroad crosses his path must look for approaching trains. That is at least the general rule. In numberless litigations the description of the landscape must be studied to see whether vision has been obstructed, whether something has been done or omitted to put the traveler off his guard. Often these cases and others like them provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome. Finally there remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power. It is with these cases that I have chiefly concerned myself in all that I have said to you. In a sense it is true of many of them that they might be decided either way. By that I mean that reasons plausible and fairly persuasive might be found for one conclusion as for another. Here come into play that balancing of judgment, that testing and sorting of considerations of analogy and logic and utility and fairness, which I have been trying to describe. Here it is that the judge assumes the function of a lawgiver.

Id. at 164-66.

nals would probably be an exaggeration."³⁰

Our infatuation with citing precedent is no new phenomenon. No less a critic than James Boswell had this to say in *Life of Samuel Johnson*: "Dr. Johnson observed that 'authority from personal respect has much weight with most people, and often more than reasoning.'"³¹ Dr. Johnson also said "[t]he more precedents there are, the less occasion is there for law; that is to say, the less occasion is there for investigation principles."³² I suggest that these words can be said to be reporting the state of current legal writing. Although the cases are there to cite by the hundreds, if not thousands, few add very much to legal fundamentals. Moreover, overcitation creates the impression that American law has undergone massive changes. As I shall later emphasize, this simply is not true. Overcitation is both a self-fulfilling prophecy and a self-inflicted wound.

The brute fact is that not all past cases are currently of equal value, and briefs and opinions should reflect an honest rate of exchange. An authoritative gradation of legal precepts does exist. Some precedents are much more important than others. Recognizing that a hierarchy of value exists is essential if judges are to find the proper grounds of decision; lawyers, the basis of assured prediction as to the course of decision; and members of society, reasonable guidance toward conducting themselves in accordance with the demands of social order. But more important—*much* more important—is the necessity to bring more order to the design of law by identifying clearly, and at the earliest opportunity, the fundamental family of law implicated in the case.

Let me return to the house of the law. We must be able to identify its architectural lines. We should know front, rear and side elevations, and floor plans of each component. If each legal decision builds on another, deft hands must stack each building block in its proper place. Our house must appear as majestic as a cathedral and not as a frazzled parcel for urban renewal.

The time has come for the legal profession to simplify, rather than to complicate, current legal issues. The time has come to identify exactly what fundamentals underlie the controversy in each case, and to isolate which is the governing branch of the law's family tree. Our first step in any legal argument must be to look at the tree's trunk and main branches, rather than to concentrate on new twigs that continually sprout in all directions.

30. P. DEVLIN, *THE JUDGE* 4 (1979).

31. J. BOSWELL, *LIFE OF SAMUEL JOHNSON* 615 (1906).

32. *Id.* at 416.

This analysis must be made because the starting point of every judicial decision must be a recognition of the controlling dogma, doctrine and fundamental principles. Only this recognition will permit our decisions to be both consistent and coherent. This call for more simplicity and more order in briefs and opinions will cause us not to regress, but to progress. This call will create better communication between lawyer and judge and between judge and community. This call will seek to remove from judicial decisions that which is idiosyncratic, and in its place will attempt to establish predictability and reckonability.

II. THE FIVE SUPEREMINENT PRINCIPLES

The law explosion—reflected by statute or case law, by the new causes of action churned out by Congress, by the nuances of specialized government regulation, or by the geometric expansion of law school curricula—has *not* spawned a corresponding increase in bedrock concepts upon which modern law and modern litigation rest. Fundamentals of law remain. They still loom large and foreboding, but will be more easily seen once we blow away mists that surround them.

I am prepared to defend the thesis that all substantive law including constitutional law, is but a spin-off of five fundamentals that you and I learned in our first year of law school:

1. Creating and protecting property interests;
2. Creating and protecting liberty interests;
3. Fulfilling promises;
4. Redressing losses caused by breach or fault;
5. Punishing those who wrong the public.³³

To deserve the accolade of “supereminence,” the principles must demonstrate two critical characteristics: Their presence must be vigorously felt and clearly recognized in most current federal litigation, and they must prove a philosophical kinship to some hefty ancestors. In these two very important aspects, I think that the “big five” pass with flying colors. Let me turn now to the first of these.

33. Certainly by 1646, perhaps by 1609, Hugo Grotius had written:

This maintenance of the social order . . . is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfill promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.

1 H. GROTIUS, *supra* note 7, at 12-13 (footnotes omitted).

A. Creating and Protecting Property Interests

Although the supereminent principles form the main structure of the house of the law, I am not prepared to extend the metaphor to suggest that each constitutes a separate room in our mansion. This is because some litigation encompasses more than one major legal discipline. For example, antitrust law always incorporates the supereminent principle of contract law in determining the existence of an agreement, but also embraces tort law in ascertaining damages in civil actions and criminal law where prosecutions have been instituted.

Moreover, because each principle constitutes part of the foundation of our house, we must examine the foundation of each. To know what we are, we must first know what we were; and to appreciate what we were requires a return to the beginnings of each precept. Although such a return is important for all the precepts we will discuss, it is especially important in our examination of property law.

Unlike a liberty interest, where freedom is presumed unless restricted by custom, tradition or positive law, a property right, or more properly a personal right to a property interest, requires some act, performance or effort. Although the earliest acquisitions of these rights are shrouded in unrecorded or fragmented history, we are treated to several interesting theories. First, Blackstone suggested that property rights are originally based upon possession, hypothesizing that "the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership" ³⁴ An aphorism of the German legal philosopher Savigny seems to support this view: all property rights are based on adverse possession ripened by prescription. ³⁵ Yet others would simplify the quality of acts necessary for primitive ownership in the far away dawn of property law. Their theory begins with the concept that everything ought to have an owner and that under Roman law there was a concept known as *res nullius*, an object which is not, or had never been, reduced to dominion. Therefore, the possessor is permitted to become the proprietor from a feeling that all valuable things are naturally the subjects of exclusive enjoyment. The occupant, in short, becomes the owner, not through adverse possession or prescription, but because all things are presumed to be somebody's property and because no one can be pointed out as having a

34. 2 W. BLACKSTONE, COMMENTARIES *3.

35. H. MAINE, *supra* note 1, at 247.

better right than he to the proprietorship of this particular thing.³⁶ Hence, the popular American lay expression: "Possession is nine-tenths of the law!"

Property law is probably the most ancient method of protecting recorded legal rights. In most societal forms, including the present as well as the very old, property law concerns rights of possession, use, alienation and succession. In America most of these attributes are governed by state law and, by far, most property litigation takes place in state courts. But the federal courts also find themselves deeply immersed in this most ancient legal discipline, especially in the recent era. It therefore also deserves its rank as one of the five supereminent principles.

The definition of legally protected property rights evolved largely from the regulation of property ownership and use. In ancient societies, it focused most generally on the rules of succession to, or transfer of, real and personal property. In the Western world there is a large body of written property law, recorded from the promulgation of the Justinian *Institutes* in the year 533 through Blackstone's *Commentaries* in the eighteenth century. As legal systems became more sophisticated over the centuries, however, the nature of legally cognizable interests expanded dramatically. Thus, today property may be an object of physical existence or an intangible, such as a patent right, a chose in action, a right to retain a driver's license, or a right to retain a position in a university tenure stream. In a broader sense a personal right to property goes even further and includes concepts of not causing injury to a person's good reputation, fireside and shelter, spouse, child, cow, Ferrari, or copyright. The concept also includes not interfering with rights to Social Security benefits and not interfering with marital, divorce, inheritance, stockholder, security or partnership rights.

Today protectable property interests transcend traditional notions of the ownership of Blackacre in fee simple absolute or possessing a right to recover for conversion of a chattel. While the federal presence in these traditional areas of property law is comparatively small, federal courts frequently adjudicate disputes implicating modern notions of property. As the Supreme Court has observed:

Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the

36. *Id.* at 248.

worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity."³⁷

So viewed, there exists more architectural uniformity in our house of the law than a cursory examination might reveal. Within the confines of this first supereminent principle, many federal judiciary efforts can be characterized as providing the vehicle by which persons can seek to protect those property interests that have been created through positive law.

Furthermore, special additional protection is afforded those claiming property interests as against deprivations occasioned by governmental conduct. Lavish layers of gloss added to the due process clause of the fourteenth amendment—"[no] State [shall] deprive any person of life, liberty, or property, without due process of law"—have accorded constitutional protection to a variety of state-created property interests. In the extensive body of law interpreting this clause, courts have identified interests in property created by the state and have fashioned wide-ranging protections that prevent the state from infringing upon those rights without first respecting tenets of procedural due process. This means that once a personal right to a property interest is acquired, a high premium is placed on its free use; interference with that use by the state is stayed unless protective proceedings are observed.

B. Creating and Protecting Liberty Interests

It was Benjamin Franklin who said, "[w]here liberty dwells, there is my country." Liberty does dwell in our house of the law, and from the perspective of a federal house of the law, or, if you will, a house of federal law, it boasts a favored dweller status. It rates this special status because, whether viewed as a jurisprudential concept or as a highly treasured private interest, liberty is the spirit in our Nation's law that makes freedom ring.

The private liberty interest that is protectable by the federal courts is

37. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245, 1255 (1965)).

a freedom on the part of one as against another or the state to do or not to do a given act. It is the right to be left alone. It has been defined as "the autonomous control over the development and expression of one's intellect, interests, tastes and personality."³⁸ Unlike many other private interests, liberty to act may be presumed, unless restricted by custom, tradition or positive law. This basic presumption may be traceable to Roman law, especially to the ringing phrases of *The Institutes* of Justinian: "Liberty, from which the expression free men is derived, is the natural ability to do anything one pleases unless it be prohibited by force or law."³⁹ In a more modern era, Eugene V. Rostow makes the point that "[t]he root idea of the Constitution is that man can be free because the state is not."⁴⁰

No less than the exhortatory opening statement of the Constitution catapults the individual liberty interest to the level of our supereminent principles:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁴¹

Constitutional case law has now precisely identified certain liberty interests, for example: freedom of communication and religion,⁴² freedom of the individual, embracing many particulars, such as freedom from slavery or peonage,⁴³ freedom to travel,⁴⁴ freedom of enterprise and contract,⁴⁵ freedom to follow a chosen profession,⁴⁶ freedom for individuals in the expression of their personalities,⁴⁷ and freedom from an establish-

38. *Roe v. Wade*, 410 U.S. 113, 211 (1973) (Douglas, J., concurring in *Roe* and in *Doe v. Bolton*, 410 U.S. 179 (1973)) (italics omitted).

39. *Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas eius quod cuique facere libet, nisi si quid aut vi aut iure prohibetur.*

INST. JUST. 1.3.1. For a translation and commentary on *The Institutes*, see J. THOMAS, *THE INSTITUTES OF JUSTINIAN, TEXT, TRANSLATION AND COMMENTARY* 13 (1975).

40. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 195 (1952).

41. U.S. CONST. preamble (emphasis added).

42. *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) ("The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged.").

43. U.S. CONST. amend. XIII.

44. *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

45. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

46. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976).

47. *Roe v. Wade*, 410 U.S. 113 (1973).

ment of religion.⁴⁸

Long before the current constitutional law explosion, the Supreme Court summarized a liberty interest:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁴⁹

In the modern era we know that a personal right to liberty against state action may be protected by the fourteenth amendment, and that this right may arise from two sources—the due process clause itself and the laws of the states.⁵⁰ And at least where the personal right is a blend of liberty and property interest, we also have been instructed that “traditional common-law remedies are fully adequate to afford due process.”⁵¹ In sum, whether viewed from the Justinian notions that everyone has “the natural ability to do anything one pleases unless it be prohibited by force or law,”⁵² or from the notion of custom or traditions, or by constitutional clause or statute, the liberty interest has to be construed as one of the premier federal law principles. Yet, as I have emphasized elsewhere,

drawing the line between individual liberties and rights, on the one hand, and those of government action for the larger good, is still the perpetual question of constitutional law. And about two thousand years before the Constitution, the same problem bothered an ancient social order which spoke through Heracli-

48. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

49. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

50. *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976).

51. *Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977). The *Ingraham* Court explained:

The right of personal security is also protected by the Fourth Amendment, which was made applicable to the States through the Fourteenth because its protection was viewed as “implicit in ‘the concept of ordered liberty’ . . . enshrined in the history and the basic constitutional documents of English-speaking peoples.” *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). It has been said of the Fourth Amendment that its “overriding function . . . is to protect personal privacy and dignity against unwarranted intrusion by the State.” *Schmerber v. California*, 384 U.S. 757, 767 (1966). But the principal concern of that Amendment’s prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations. See *Whalen v. Roe*, 429 U.S. 589, 604 n.32 (1977).

Id. at 673 n.42.

52. INST. JUST. 1.3.1; see *supra* note 39.

tus: "The major problem of human society is to combine that degree of liberty without which law is tyranny, with that degree of law without which liberty becomes license."⁵³

C. *Fulfilling Promises*

Any house needs housekeeping rules. Our house of the law is no exception. Prominent among our rules is that once the formalities of making a binding promise are made, we will enforce that promise. This housekeeping rule was not very important in primitive society, whether pre-Roman in the Mediterranean area, or post-Roman in the Dark Ages in England and on the European continent. But to the extent that societies confer upon their members the abundant accoutrements of better living and the fruits of expansive commercial intercourse, this rule becomes not only important, but essential. So it is in today's *la dolce vita*.

The increase in the quality of our social environment has bestowed upon society members great benefits, comforts and conveniences. We ride high in an era of rampant "plastic money," the credit-card vehicle of buy now, pay later. In an era not too dimly past, the legal niceties of contract law did not affect the average citizen and primarily attracted the attention of those engaged in mercantile or commercial pursuits. But rapid escalation of sophisticated consumer purchases, in quantity and quality, has increased the number and amount of contractual relations in the retail and wholesale levels as well as in distributing and manufacturing. This effect is seen today in the federal courts, where thirty-five percent of all civil filings sound in contract.⁵⁴ Because of its formidable effect on our economy, the concept of fulfilling promises easily deserves our attention as a supereminent principle.

Modern commentators are surely right when they say that contract law "reaches into the life of the individual, governing to some extent his employment, his purchase and sale of land and goods, the insuring of his possessions and the financing of these transactions. On a vaster scale it enters into practically every aspect of domestic and international trade."⁵⁵

Included within the *quid pro quo* of traditional commercial contract law are related property specialities, such as the sale or rental of good old Blackacre in real estate law or the care and feeding of chattels and business relations proposed under the Uniform Commercial Code (UCC).

53. Aldisert, *On Being Civil to Younger*, 11 CONN. L. REV. 181, 224 (1979).

54. UNITED STATES ADMIN. OFF. U.S. CTS., ANNUAL REPORT 134 (1984) [hereinafter cited as 1984 ANNUAL REPORT].

55. J. CALAMARI & J. PERILLO, CONTRACTS 4 (2d ed. 1977).

Our federal dockets are loaded with these cases, particularly diversity actions based on commercial transactions under the UCC. And technological changes in electronic funds transfers and in investing, banking and finance have added a dazzling myriad of new problems.

Of course, federal statutes have also contributed to the proliferation of federal cases arising under the concept of fulfilling promises. During the past half-century we have seen federalization of employment relationships and contracts under the labor laws, providing federal court protection to practically all aspects of an employment contract, from the initial stages of employee collectivization through bargaining for, executing and enforcing the contract. Labor statutes provided jurisdiction for 11,821 cases before federal courts in 1984.⁵⁶ Added to this profound body of specialized contract law are the relatively new employment features of the Civil Rights Act of 1964, which accounted for another 9748 employment-related cases in 1984.⁵⁷ No less revolutionary in this field have been the antitrust laws, wherein certain types of contracts are completely outlawed. Such agreements were challenged in 1201 civil and criminal cases last year.⁵⁸ Finally, recent federal programs create essentially fiscal promises, or contracts, between taxpayers and the federal government. Normally, because of the intricate hurdles posed by standing requirements, a taxpayer cannot challenge an expenditure of tax funds by the government. Yet there are exceptions, and these exceptions have spawned a plethora of lawsuits. Under the Social Security Act, for example, a covered employee may agree to pay money to the government for a certain number of years or to perform certain services for the government, with the understanding that by doing so he will be repaid in money or services at a certain time as specified by the program. Although some courts may regard these programs as creating quasi-property interests, the overall *quid pro quo* aspect gives these programs a contractual flavor. In 1984, nearly 30,000 Social Security actions were filed in United States district courts.

Although the spectrum of these actions is rather vast, the starting point for analyzing these problems is still the law of contracts, whether at the common law, or, in the federal scheme, as modified by regulatory statutes. More precisely, we must understand that our inheritance here is more Roman than English, more the original practices of the Italian city-states in the development of the law merchant than the contributions

56. 1984 ANNUAL REPORT, *supra* note 54, at 133.

57. *Id.*

58. *Id.* at 133, 172.

of the Normans or Anglo-Saxons.⁵⁹ It is a legal discipline that develops at the pace set by commercial intercourse. So intimately related to society's economic growth, because America is the most highly developed financial and commercial center of the world, this supereminent principle has an importance second to none.

D. Redressing Losses Caused by Breach or Fault

If the prime contractors of the house of the law can be said to be lovers of theory, as we have seen by their construction of property, liberty and contract precepts, we can also say that they were realists. They understood that all members of society would not respect the tenets and that some provision had to be made to furnish a private remedy for those who suffered at the hands of those who breached the law. If, in the most primitive form, we took property belonging to another, the simplest remedy was a court order commanding the malfeasor to give it back. Where such a return was possible, we called it private actual redress of a breach of conduct or fault. We then encountered what can be called the law of Humpty-Dumpty:

Humpty-Dumpty sat on a wall,
 Humpty-Dumpty had a great fall.
 All the king's horses and all the king's men,
 Could not put Humpty-Dumpty together again.

For example, the victim of a breach could not be put "together again" because the stolen horse died or was injured, or the purloined grain was consumed. Thus was created the notion of substituted redress or monetary damages as compensation for the injury.

Like every system of adjudication, our house of the law provides actual or substituted redress for the individual who has been injured by the breach of contract or duty of conduct. The law of compensation is an integral part of federal adjudication. Moreover, it is a supereminent principle that has been present in organized societies in written form at least since Biblical days. At that time, one who "hurt a field or vineyard" was required to "restore the best of whatsoever." This is classic

59. As Sir Frederick Pollock and Frederic Maitland wrote in 1899:

The law of contract holds anything but a conspicuous place among the institutions of English law before the Norman Conquest. In fact it is rudimentary. Many centuries must pass away before it wins that dominance which we at the present day concede to it. Even in the schemes of Hale and Blackstone it appears as a mere supplement to the law of property.

2 F. POLLOCK & F. MAITLAND, *supra* note 2, at 184. Similarly Coke or Littleton have little, if anything, to say about contracts. See E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* (1823).

actual tort redress. There was also substituted redress: He that kindled a fire that burned his neighbor's stacks of corn had to make good the loss. In event of "any fraud, either in ox, or in ass, or sheep, or raiment, or anything that may bring damage," it took the form of "restor[ing] double" to his neighbor.⁶⁰

In federal courts, the law of damages most often takes the form of substituted redress. Thus, although punitive damages are sometimes permitted, compensatory money damages are awarded in the garden variety tort action where fault is a predicate of liability. But recent case law has permitted fault to be presumed, as in the diversity cases implicating strict product liability, or in many regulatory statutes.⁶¹ Moreover, absence of fault may be presumed, as in most defamation cases subsequent to *New York Times Co. v. Sullivan*.⁶² Fault also forms the underpinning of liability that flows from corporate misrepresentations and derelictions. Also, under 42 U.S.C. § 1983,⁶³ fault comprises the basis for recovery not only of compensatory damages, but also for punitive damages in cases where malice is shown.⁶⁴

Several recent developments have increased redress remedies in federal courts. Although the liability aspect of antitrust laws sounds in contract, private relief follows the lead of tort damages; and public relief, the law of crimes. The new federal Racketeer Influenced and Corrupt Organizations Act (RICO)⁶⁵ has created a whole new species of statutory fraud. This remedy has moved the focus of business fraud from traditional common law areas to federal law—thirty-seven percent of civil RICO cases involve common law fraud in a commercial or business setting, forty percent involve securities fraud, and only nine percent involve allegations of organized crime activity.⁶⁶ Recently, Justice Thurgood Marshall questioned whether, in enacting RICO, Congress intended "to federalize a great deal of state common law" which as a result has "brought profound changes to our legal landscape."⁶⁷

Another recent development is the "constitutionalization" of tradi-

60. *Exodus*, 22:5-6, 9.

61. For example, civil liability is assessed and fault presumed in actions arising under various provisions of the Securities Act of 1933, 15 U.S.C. §§ 77a-77bbb (1982) and the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982).

62. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

63. 42 U.S.C. § 1983 (1982).

64. *Abraham v. Pekarski*, 728 F.2d 167, 173 (3d Cir. 1984).

65. 18 U.S.C. §§ 1961-1968 (1982).

66. See A.B.A., SECTION OF CORP., BANKING, AND BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55-56 (1985).

67. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3296 (1985) (Marshall, J., dissenting in *Sedima* and *American Nat'l Bank & Trust Co. v. Haroco*, 105 S. Ct. 1291 (1985)).

tional tort claims under state law, claims that allege violations of the constitution or federal statutes by federal and state officials. Since the Supreme Court approved such actions against federal officials in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,⁶⁸ and—under the auspices of 42 U.S.C. § 1983—against municipal, county and state employees in *Monroe v. Pape*⁶⁹ and its progeny, a broad range of actions have been introduced to the federal forum. Between 1961 and 1984, the number of claims filed in federal district court in a single year under civil rights statutes rose from 296 to 21,219.⁷⁰ These claims range in subject matter from conversion of hobby materials to physical assaults by state officials, a public defender's performance of his counsel duties, harassment of a street vendor, failure of a social worker to foresee injuries inflicted on foster children, failure of state officials to close flood gates on a canal resulting in flood damage to property, failure of public work officials to salt roads in winter causing an auto accident and delay of public rescue services in responding to accidents.⁷¹

An aspect of this extensive litigation has been the unfortunate use of language that confuses claims of constitutional deprivation with claims of mere tortious conduct. In almost a journalistic fashion, certain commentators have described deprivation of constitutional rights as "constitutional torts."⁷² More unfortunately, the Supreme Court has used this expression in at least three opinions.⁷³ Once the semantic floodgates opened, the lower courts jumped on this very questionable expression with the term "constitutional tort" appearing, according to our records, in 710 opinions of courts of appeals and district courts.⁷⁴

A deprivation of a constitutional right is *sui juris*; it is a denial of an otherwise recognized property or liberty interest. It is a doctrine much more sophisticated and global than a tort: The requirements to impose liability differ in theory and practice from the imposition of tort liability. It bears a kinship to tort, to be sure. But that kinship is probably limited

68. 403 U.S. 388 (1971).

69. 365 U.S. 167 (1961).

70. 1984 ANNUAL REPORT, *supra* note 54, at 134.

71. *Id.*

72. Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement*, 46 U. CIN. L. REV. 45 (1977); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980); Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322 (1976).

73. See *Smith v. Wade*, 461 U.S. 30, 35 (1983); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Monell v. New York City Dep't Social Servs.*, 436 U.S. 658, 663-64 n.7 (1978).

74. Search for "Constitutional Tort," on LEXIS, Genfed Library, U.S. App. & Dist. files (Feb. 25, 1986).

less to liability than to the law of damages, including notions of proximate cause and the compensatory/punitive damages dichotomy.

Compensatory damages for breach of contract are familiar and are used often in the federal courts where damages relate to contract law. Here the law of damages seeks to place the aggrieved party in the economic position he or she would have been in if the contract had been performed.⁷⁵ This involves an award of both the "losses caused and gains prevented by the defendant's breach, in excess of savings made possible"⁷⁶ Moreover, the federal courts have utilized remedies of specific redress, implicating common (if not Biblical) law, equitable concepts of replevin, specific performance and the relatively new remedy of declaratory judgment. These methods permit a federal court to order the return of an object unjustly taken, compliance with a contract or a clarification of responsibilities under an ongoing contract. These are unusual remedies, but under proper circumstances they provide the courts with a greater array of tools for doing justice between the parties when substituted redress is inadequate.

E. Punishing Those Who Wrong the Public

History has always allowed the house of the law to be remodeled and altered. In the past, to use the classifications of Blackstone and Justinian, much of the civil law, perhaps ninety percent, consisted of the law of persons, property and inheritance, and contract. But in recent times, nuances of the law of persons have diminished in importance. Thus, the limitations and rights of slaves that occupied much attention in Roman law were old hat by the time of Blackstone; and the eighteenth century English law of persons concentrated more on paternal power, virtually eliminating all rights of the wife against the husband, the son against his father and the infant ward against the guardian. But with the passage of time, community standards change. And as these change, so does the substance of the law. Thus in the surge for total equality in recent decades by federal and state statute and by mighty extrusion of the equal protection clause, older niceties of the law of persons seem to be of historical interest only.⁷⁷ In today's federal courts we do not encounter

75. U.C.C. § 1-106 (1976); 5 A. CORBIN, CORBIN ON CONTRACTS § 992 (1964); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 56 (1935); 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1338 (W. Jaeger 3d ed. 1968).

76. RESTATEMENT OF CONTRACTS § 329 (1932).

77. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000a (1982). See also *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978) (local government units not immune from § 1983 suits); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (discussing whether board of education is immune from § 1983 suits); *Attwood v. Estate of*

much litigation on the rules relating to the creation of property and succession rights, except perhaps the constitutional law cases dealing with property of illegitimates⁷⁸ and statutory and constitutional law decisions dealing with women's rights.⁷⁹ Rather, the bulk of federal litigation involves contracts, the protection of personal rights to property and liberty interests, torts (usually state law ushered into the courtroom through the diversity door) and crimes. It is to the federal law of crimes that I now turn.

There is a great gap in the penal law accounts of primitive jurisprudence. All civilized systems seemed to agree in drawing a distinction between offenses against the community (state) and offenses against the individual. Generally we distinguish between crimes (*crimina*) and wrongs or torts (*delicta*). In the law of ancient communities the so-called penal law was actually a law of torts. The injured person proceeded against the wrongdoer by an ordinary civil action and, if successful, recovered compensation by money damages. As early as the Roman Twelve Tables (450 B.C.), *furtum* or theft stood at the head of civil wrongs recognized by Roman law.⁸⁰ Other civil wrongs included assault and violent robbery, as well as trespass, libel and slander. Book IV of *The Institutes* of Justinian defines as torts: "theft, robbery with violence (*rapina*), wrongful infliction of damage or contumely."⁸¹ By the time of the laws of the Germanic tribes, an immense system of money compensation was in force for all actions which we now consider crimes, including homicide.

Under Anglo-Saxon law, a sum was placed on the life of every free man, according to his rank, and a corresponding sum on every wound that could be inflicted on his person, for nearly every injury that could be done to his civil rights, honour or peace; the sum being aggravated according to adventitious circumstances.⁸²

Attwood, 276 Ark. 230, 633 S.W.2d 366 (1982) (no intrafamily immunity for "willful or wanton" conduct); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (abrogating spousal immunity); Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971) (no intrafamily immunity for intentional torts); Surratt v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971) (abrogating spousal immunity).

78. See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977); Levy v. Louisiana, 391 U.S. 68 (1968).

79. See, e.g., General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

80. J. THOMAS, TEXTBOOK OF ROMAN LAW 350-51 (1976). See also J. THOMAS, *supra* note 39, at 263.

81. INST. JUST. 4.4. See *infra* notes 109 & 110 and accompanying text.

82. R. KEMBLE, ANGLO-SAXONS 177. See H. MAINE, *supra* note 1, at 370.

This is not to say, however, that in more ancient times the concept of a wrong or injury to the state or collective community did not exist. Indeed, there developed a procedure in Roman times, especially during the decline of the Republic, by which the senate delegated certain of its powers to particular *Quaestores* or commissions to investigate a particular accusation and, if it be proved, to punish the particular offender. Gradually these ad hoc commissions became permanent, and by the time of Emperor Augustus a rudimentary form of criminal jurisprudence had been established.

Although I have no empirical data to support this proposition, I advance the theory that the movement from private compensation to public punishment probably followed a change in economics. So long as there was a society of freeholders, or solvent defendants, private compensation to the victim was a satisfactory solution to the wrong. But with immigration and population growth, and an increase in the number of judgment-proof members of society, an alternative to private compensation became necessary. Simultaneously, no doubt, the notion developed that it was the business of the collective community to avenge its own wrongs by its own hand. Thus came into being the doctrine that the punishment of crimes belonged in a special manner to the sovereign as representative and mandatory of his people. Once this authority was established in the Roman sovereign, with all the attendant prestige, the notion was easily transplanted to other societies.

But in the earliest civilizations, private penalties were assessed against those who wronged society in special areas that were most important to its continued existence. Thus, in addition to capital punishment for a number of offenses, including striking one's mother or father, early punishments were based on the system of "[e]ye for eye, tooth for tooth, hand for hand, foot for foot. Burning for burning, wound for wound, stripe for stripe."⁸³ Other crimes involved offenses to property, agriculture and marriage. As societies became increasingly complex, the criminal law was extended to areas that had become important to them. In many instances the criminal law began to include offenses of which ancient civilizations never could have conceived, such as economic crimes with which we are evidencing increasing concern and crimes pertaining to government reporting requirements.

Federal criminal law serves a number of specific functions in our present-day federal-state system. To be sure, it performs some of the usual tasks of any law enforcement system, such as protecting the institu-

83. *Exodus* 21:24-25.

tions and operations of the federal government against criminal activity. But notwithstanding grandstanding activity by many members of Congress, it must be emphasized that federal authorities do not have the basic responsibility of day-to-day maintenance of order in society. That responsibility is the province of local, not federal, law enforcement. Federal law enforcement is designed only to supplement local authorities in the performance of that basic responsibility. Thus, it must be understood that federal law is not limited to conduct that poses a threat to federal institutions or operations. Moreover, the same conduct, to one extent or another, is also the subject of both state and federal sanctions. Professor Louis B. Schwartz has described federal law enforcement as federal auxiliary criminal jurisdiction—auxiliary, that is, to state law enforcement.⁸⁴

Historically, there has been a steady growth in federal auxiliary criminal jurisdiction. Some of it has been sparked by dramatic criminal events—the Lindberg baby kidnapping and the Dillinger spree of bank robberies come to mind—but most of it has resulted from congressional activity after extensive widely-publicized hearings, especially in the era of radio and television. Facts adduced at these hearings have often demonstrated either failure or corruption in local law enforcement. The Mail Fraud Statute was first enacted in 1889,⁸⁵ the Mann Act in 1910,⁸⁶ the Dyer Act, which deals with interstate transportation of stolen vehicles, in 1919.⁸⁷ Shortly thereafter came the kidnapping provision in 1932⁸⁸ and the federal prohibition against bank robbery of a federally-insured bank in 1934.⁸⁹ New anti-gambling laws were enacted in 1961⁹⁰ and in 1964.⁹¹

But many prosecutions are now being brought under relatively new statutes—the Controlled Substance Act of 1970,⁹² the Hobbs Act⁹³ and the Racketeer Influenced and Corrupt Organizations Act (RICO).⁹⁴ Moreover, a favorite device of federal agents is prosecution under the recent Conspiracy Statute.⁹⁵

The number of federal prosecutions continues to rise, from 27,910

84. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, in *LAW AND CONTEMPORARY PROBLEMS* 64 (1948).

85. 18 U.S.C. § 1341 (1982).

86. *Id.* § 2421.

87. *Id.* § 2312.

88. *Id.* § 1201.

89. *Id.* § 2113.

90. *Id.* §§ 1081, 1953.

91. *Id.* § 224.

92. 21 U.S.C. § 801 (1982).

93. 18 U.S.C. § 1951 (1982).

94. *Id.* §§ 1961-1968.

95. *Id.* § 371.

major offenses in 1980 to 35,911 in 1984, with the largest number of offenses being drug abuse; various types of fraud, including income tax, postal and false claims and statements; larceny of United States property; forgery; and bank robbery.⁹⁶

One of the serious problems in federal criminal law is the allocation of prosecution between local and federal authorities. Clearly, matters that are traditionally within state law enforcement should remain there—homicide, theft, assault, fraud and sex offenses. Federal law should be limited to cases in which there is a special justification for federal assistance.

At the present time, Congress has utilized a plethora of techniques upon which to base federal jurisdiction:

(1) use of the mails; (2) use of means of interstate commerce; (3) "affecting" commerce; (4) interstate transportation (a) of the victim, (b) of the proceeds, (c) of the criminal himself; (4) radio broadcasting; (5) status of the offender as a Federal employee; (6) status of the offender as an employee of an interstate carrier; (7) use of facilities of national security exchanges; (8) federal ownership or custody of the property; (9) ownership or custody of the property by institutions licensed by the federal government or under its protection. The list can, of course, be extended almost indefinitely with crimes resting on the tax, war, and other powers of Congress.⁹⁷

Undoubtedly, in the future, the criminal law will continue to expand, coming to apply to areas of conduct that may seem surprising to us today. As society becomes more complex—economically, scientifically and industrially—the criminal law may become a necessary tool for the allocation of scarce resources.

III. THE SUPEREMINENT PRINCIPLES IN HISTORY

It is possible, I am sure, to conjure up certain aspects of federal law which do not neatly fit within the specifics of the five supereminent principles that compose our house of the law. Federal taxation, for example, may come within a fuzzy area. But even here, I believe that most tax litigation centers on regulations governing income from use, sale or purchase of property, or employment contract income. Whether it can be argued that these principles are all-inclusive is not absolutely critical to my basic thesis. This thesis, I must emphasize, is that it is necessary to

96. 1984 ANNUAL REPORT, *supra* note 54, at Table D-2.

97. Schwartz, *supra* note 84, at 79.

clarify and simplify the law—in both lawyers' briefs and judges' opinions—because too many current offerings give an appearance of substantive law much more complicated and eccentric than it is in fact. I believe that the structure of court opinions will be more professional, briefs more clear and the outlines of the house of the law cleaner and more distinct if wholesale dependence on citations gives way to a reference to the relevant primary discipline of the law, to a relation back to fundamentals and to the reasons why these fundamentals exist in the first place.

This reference back to fundamentals brings into focus the second characteristics of the supereminent principles. Beyond their predominance in today's federal litigation, these principles boast a formidable ancestral chain and impressive relationship to legal systems of bygone eras. A brief examination of their role in those systems helps to explain *why* they loom as the dominating principles of the modern era. I offer a caveat at the outset of this excursion into legal traditions past: I do not represent that the treatment of the various legal systems is in any way exhaustive or complete. In fact, I represent the precise opposite. My survey is intended to be cursory and generalized. This is so because I endeavor this historical exercise for the limited purpose of demonstrating my central theme: Our law rests on fundamental bedrock concepts common to most, if not all, of the legal systems societies have created.

These five principles have their roots in formidable legal systems of past societies. Historically, four of these—creating and protecting property rights, fulfilling promises, redressing losses caused by breach or fault and punishing those who wrong the public—can be identified in all recorded societies possessing a social order. The fifth—creating and protecting a liberty interest—has certainly been with us at least since Roman times. A quick glance at the written laws that have governed principal societies in the ancient and modern worlds is illuminating. Regardless of the variations of time and geography, and vicissitudes of incidents and circumstances in particular empires, kingdoms, republics or fiefdoms, considerable resemblances are seen. The ends of law—preserving the public peace, just dispute settlements, maintaining a comfortable social and physical environment, reasonable security of expectations, tolerable adjustment of conflicting social interest and channeling of a social change—have been advanced by different means. Hence a variation of means does exist, but the ends seem to have remained the same. Perhaps more accurately stated, fundamental legal concepts remained the same but their definitions changed as community values changed.

According to Montesquieu, each people or nation develops over a period of time an individual genius or general character, what he called a

“general spirit.”⁹⁸ This “general spirit” is the product of multiple causes:

Men are influenced by various causes, by the climate, religion, laws, the maxims of government, by precedents, morals and customs; from whence is formed a general spirit that takes its rise from these.

In proportion, as in every nation any one of these causes acts with more force, the others in the same degree become weak. Nature and the climate rule almost alone over the savages; customs govern the Chinese; the laws tyrannize in Japan; morals had formerly all their influence in Sparta; maxims of government, and the ancient simplicity of manners, once prevailed in Rome.⁹⁹

A. The Institutes of Justinian

In my view, the Anglo-American legal tradition begins with the promulgation of *The Institutes* of Emperor Justinian on November 21, 529 A.D. An attempt at a contemporary codification of Roman law as it had developed for some 1000 years, *The Institutes* range from eloquent abstractions to very precise statements of legal consequences that followed detailed facts. Thus, Justinian’s introduction reminds us that “[j]ustice is the constant and perpetual desire to give to each man his due right,”¹⁰⁰ and that the precepts of the law are “to live justly, not to injure another and to render to each his own.”¹⁰¹

The Institutes were divided into four discrete books. Book I, dealing with rights of the person, described rights of freed men and slaves, outlined paternal power and family rights, and set forth the law of marriage, adoptions and guardianships. Book II, concerning the law of things, described both corporeal and incorporeal rights, including ownership and possession of real property and chattels as well as usufructs, and set forth the law of wills, gifts and transfers. Book III described intricacies of intestacy and gave us the first details of the law of obligation of contracts. Book IV described the Roman law of torts.

Henry Sumner Maine has written that “[n]either Ancient law nor any other source of evidence discloses to us society entirely destitute of The Conception of Contract,”¹⁰² yet it is apparent that Roman law was the first jurisprudence to raise the enforcement of promises to the legal

98. 1 C. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 363; xix, iv (1748).

99. *Id.*

100. INST. JUST. 1.1.

101. INST. JUST. 1.1.3.

102. H. MAINE, *supra* note 1, at 303.

dignity it enjoys today. Originally, that with which the law armed its sanctions was not a naked promise, but a promise accompanied by a solemn ceremonial. As the Roman jurisprudence of obligation developed, one or two steps in the ceremonial were dispensed with first; then others were simplified or permitted to be omitted on certain conditions; finally, a few specific contracts were separated from the rest and allowed to be entered into without ceremonial form. The selection of these types were influenced by the activity and energy of social and commercial intercourse. Slowly the agreement itself, the mental engagement, isolated itself from technicalities and became the major ingredient of legal inquiry.

Among Rome's greatest contributions to the law was its exposition of the law of obligations. Over the decades, if not centuries, it developed four types of contract—the Verbal, the Literal, the Real and the Consensual. Each class was named for certain formalities which were required over and above the mere agreement of the contracting parties.

As can be expected, the earliest form was the Verbal, and the ceremony required was the stipulation of the parties: a question addressed by the person who exacted the promise and the answer given by the person who made it. It was the promisee who, in the character of stipulation, put all the terms of the contract into the form of a question, and the answer was given by the promisor: "Do you promise that you will deliver to me such and such a stove, at such and such a place, on such and such a day?" "I do so promise."

The Literal contract was one evidenced by a particular writing, a business book entry showing an entry on the debit side of a ledger. To understand this is to understand that in Roman households every single item of domestic receipt and expenditure had to be entered into appropriate books and periodically transferred to a general household ledger.

The Real Contract departed in theory from the ceremonial aspects of the stipulation of the Verbal Contract and the debit entry on the ledger of the Literal. Here, what triggered the obligation was the delivery of the specific thing that was the subject of the agreement. Performance on one side was allowed to impose a legal duty on the other. Roman jurists, according to Hugo Grotius, referred to three reciprocal acts: "I give that you may give; I do that you may do; I do that you may give."¹⁰³

The most interesting, and probably the most important, of the obligation classes was the Consensual Contract, which was used in four specified types of agreements: sale, partnership, agency and hiring. The title "Consensual" derives not so much from consent of the parties but rather

103. 2 H. GROTIUS, *supra* note 7, at 343-44.

from the *consensus* or mutual assent of the parties.¹⁰⁴

Book III of Justinian describes these "four species" of contract and treats each category separately and in great detail.¹⁰⁵ It also treats quasi-contractual obligations, "obligations which, properly speaking, cannot be said to arise from contract but which, since they do not derive their existence from delict, are treated as arising quasi-contractually."¹⁰⁶ Perhaps it is in Justinian that we see the seeds of the controversy that has plagued us down through the centuries—the confusion between implied contracts in which acts and circumstances are symbols of the same ingredients which are manifested by words in an express contract and quasi-contracts which are not contracts at all.¹⁰⁷

Book IV contained the Roman law of torts or *delicti*, defined as a "wrongful act, not deriving from agreement, which causes damage to another for which the latter may recover a penalty from the wrongdoer."¹⁰⁸ These torts were sins of commission only, and not of omission. Named as specific torts were theft, robbery with violence and wrongful infliction of damage or "contumely."¹⁰⁹ "Contumely" was any deliberate affront to another, whether by conduct or by words. It served as the residual tort for wrongs against the personality of another with almost unlimited scope, including assault and battery, defamation, imputations upon a woman's chastity and trespass on another's land.¹¹⁰ A tort also was made

104. See H. MAINE, *supra* note 1, at 327-28:

The extreme importance of this history of Contract, as a safeguard against almost innumerable delusions, . . . gives a complete account of the march of ideas from one great landmark of jurisprudence to another. We begin with the Nexum, in which a Contract and a Conveyance are blended, and in which the formalities which accompany the agreement are even more important than the agreement itself. From the Nexum we pass to the Stipulation, which is a simplified form of the older ceremonial. The Literal Contract comes next, and here all formalities are waived, if proof of the agreement can be supplied by the rigid observances of a Roman household. In the Real Contract a moral duty is for the first time recognized, and persons who have joined or acquiesced in the partial performance of an engagement are forbidden to repudiate it on account of defects in form. Lastly, the Consensual Contracts emerge, in which the mental attitude of the contractors is solely regarded, and external circumstances have no title to notice except as evidence of the inward undertaking. It is of course uncertain how far this progress of Roman ideas from a gross of refined conception exemplifies the necessary progress of human thought on the subject of Contract. The Contract law of all other ancient societies but the Roman is either too scanty to furnish information, or else is entirely lost; and modern jurisprudence is so thoroughly leavened with the Roman notions that it furnishes us with no contrasts or parallels from which instruction can be gleaned.

105. INST. JUST. 3.13.2.

106. *Id.* at 3.27.

107. See RESTATEMENT (SECOND) OF CONTRACTS § 4 comment b (1981) (Quasi-contracts "are obligations created by law for reasons of justice.").

108. J. THOMAS, *supra* note 39, at 262.

109. INST. JUST. 4.4.

110. *Id.* at 4.4.1-12.

out if one sought payment of a debt from a surety which the principal debtor both could and was willing to pay.

Tort redress in Roman law was originally private revenge—actual retaliation by the victim, putting the body of the wrongdoer at the mercy of his victim. The law then developed to permit buying off vengeance by agreement of the parties in a suitable alternative (substituted) redress. Finally, the law came to require a monetary penalty as the primary remedy in all circumstances, whether the quantum was fixed absolutely or to be assessed by the judge in a legal action.¹¹¹

The beauty of the Justinian *Institutes* is its clarity, as well as its order. It is important today as a constant reminder that many legal concepts currently in use in federal courts also were in use in a civilized society more than 1000 years ago. *The Institutes* can be regarded as the cornerstone of our supereminent principle of liberty; thus, the opening first words of Book I:

Justice is the constant and perpetual desire to give to each man his due right.

. . . .

3. These are the precepts of law: to live justly, not to injure another and to render each his own.¹¹²

And as we have previously indicated, from *The Institutes* we derive our basic definition of liberty:

Liberty, from which the expression free men is derived, is the natural ability to do anything one pleases unless it be prohibited by force or law.¹¹³

B. Blackstone and the Law of England

The most popular exposition of our fundamentals, however, took place in England in the four years between 1765 and 1769 when William Blackstone published his *Commentaries*. According to Lord Denning, Blackstone "was the greatest exponent of the common law that we have ever had."¹¹⁴ While the Emperor Justinian announced his promulgation after ten centuries of Roman law experience, Blackstone's efforts came seven centuries after the Battle of Hastings in 1066, the date usually associated with the birth of common law. Obviously influenced by Justinian, Blackstone too utilized four books, but his compilation did not precisely

111. J. THOMAS, *supra* note 39, at 262-63.

112. INST. JUST. 1.1.1-3.

113. *Id.* at 1.3.1; *see supra* note 39.

114. A. DENNING, WHAT NEXT IN THE LAW 13 (1982).

track *The Institutes*. He assembled substantive qualities of rights and wrongs, private and public concerns, and persons and property to give us a symmetrical and durable statement of common law. Even the briefest summary discloses the relationship between four of our five supereminent principles, the law of contracts being essentially ignored.

Blackstone's Book I, *The Rights of Persons*, details most of the ground covered by Justinian, with one major exception—he has virtually nothing to say about slavery, a subject that occupied so much of the Roman law of persons and property. Students of contract law seem unhappy that Blackstone relegated contracts to a relatively insignificant portion of *The Rights of Persons*. They contend that Blackstone did not respect the specificity that this discipline, so amply covered by Justinian, demands. Book II, *The Rights of Things*, bears a close resemblance to Justinian's Book II. It describes the law of property in thirty-two chapters, twenty-two of them dealing with real property.

Book III, *Of Private Wrongs*, summarizes the law of torts, but this book treats procedure more than it does the substantive law. In recalling the society of Blackstone's day, Professor Thomas G. Barnes, of the University of California at Berkeley, offers an explanation for this phenomenon. Professor Barnes reminds us that Georgian England was an "age of fast horses, careening carriages, drunken foul mouths, atrocious fires, a gutter-press, considerable unrest in growing towns and declining countryside, bad food and worse drink, . . . lighted squibs, of quacks, frauds, whores, and monte banks—in short an age well-supplied with tortfeasors."¹¹⁵ We must also remember that Blackstone's books were taken from these lectures, and that those who paid to attend these lectures and subsequently use his materials had an immediate practical interest in how to claim against or defend tortfeasors. Blackstone's final Book IV, *Of Public Wrongs*, is a treatise on criminal law, dealing with an analysis of common law definitions.¹¹⁶

A vital part of English law that was centuries-old at the time of Blackstone was the profound commitment of the English to individual liberty. Blackstone stated:

[T]rial by jury ever has been, and I trust every will be, looked upon as the glory of the English law. . . . [I]t is the most tran-

115. Barnes, *Introduction* to W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* at 21 (1983).

116. That Book IV was not simply contemporary journalism is indicated by the author's experiences when he practiced as a Pennsylvania lawyer in the forties and fifties and as a state judge in the sixties. At that time, many common law definitions of crimes still constituted the law of Pennsylvania.

scendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.¹¹⁷

Although sometimes said to be a charter of liberties only for a small baronage, the *Magna Carta*, signed by King John at Runnymede on June 15, 1215, was subsequently so frequently reissued and confirmed that the Great Charter must be considered the source of liberties under law of all English and American freemen. Because the *Magna Carta* is more often cited than read, the magical Clause 39 deserves to be set forth:

No Free-man's body shall be taken, nor imprisoned, nor dis-seised, nor outlawed, nor banished, nor in any way be damaged, nor shall the King send him to prison by force, excepting by the judgement of his Peers and by the Law of the land.¹¹⁸

It is upon this clause that our own sense of liberty, expressed or implied in the Constitution, is anchored. It served as the philosophical base of the 1628 Petition of Right and the 1689 Bill of Rights.¹¹⁹ Moreover, contemporary due process language appeared as early as 1368, when—to prevent abuses by false accusers—Edward III decreed that: “[N]o man be drawn to answer without presentment before justices, or matter of record, or by due process and original writ, according to the ancient law of the land.”¹²⁰

The constitutional significance of *Magna Carta* is immense. Bryce measured it in profound terms:

The Charter of 1215 was the starting point of the constitutional

117. 3 W. BLACKSTONE, COMMENTARIES *379.

118. MAGNA CARTA, ch. 39. See R. THOMSON, AN HISTORICAL ESSAY ON THE MAGNA CHARTA OF KING JOHN 55 (1829).

119. A young barrister named John Somers drew up a Declaration of Rights for presentation to the new King William who followed King James III. This Declaration became the Bill of Rights of 1689. Macaulay describes the importance of the English Bill of Rights:

The Declaration of Right, though it made nothing law which had not been law before, contained the germ of the law which gave religious freedom to the Dissenter, of the law which secured the independence of the Judges, of the law which limited the duration of Parliaments, of the law which placed the liberty of the press under the protection of juries, of the law which prohibited the slave trade, of the law which abolished the sacramental test, of the law which relieved the Roman Catholics from civil disabilities, of the law which reformed the representative system, of every good law which has been passed during more than a century and a half, of every good law which may hereafter, in the course of ages, be found necessary to promote the public weal, and to satisfy the demands of public opinion.

3 T. MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND 1311 (1914).

120. 42 Edward III c.3 (T. Barnes trans. 1983). See Barnes, *Introduction to MAGNA CARTA* at 6 (1983).

history of the English race, the first link in a long chain of constitutional instruments which have moulded men's minds and held together free governments not only in England, but wherever the English race has gone and the English tongue is spoken.¹²¹

Rudyard Kipling has expressed a similar feeling:

And still, when mob or monarch lays
Too rude a hand on English ways,
A whisper wakes, the shudder plays
Across the reeds at Runnymede.¹²²

C. Hebrew Law

Yet there are laws even more ancient than *Magna Carta* that contain clear resemblances to our present legal system. Ancient Jewish law, for example, is recorded in the first five books of the Bible, the *Pentateuch*. Interpretation and application of this law over early generations developed a rich oral tradition, culminating in a body of writings known as the *Talmud*. Generally, the *Talmud* is a set of books consisting of the *Mishna*, which contains originally oral law supplementing scriptural law, and the *Gemara*, a collection of commentaries on and interpretation of the *Mishna*. Notwithstanding this extensive source, we need look no further than the *Pentateuch* itself to establish the prevalent existence of the five supereminent principles.

To begin with, biblical law governed the succession and characteristics of real and personal property, recognizing the doctrine of primogeniture.¹²³ The eldest male parent appeared to be supreme in his household. The flocks and herds of the children were the flocks and herds of that parent, which he apparently held in a representative, rather than proprietary, character. This property was equally divided at the father's death among his descendants in the first degree. Although the eldest son sometimes received a double share, he was more generally endowed with no hereditary advantage beyond an honorary precedence.

121. A. DENNING, *THE FAMILY STORY* 231 (1981) (quoting Lord Bryce).

122. *Id.* (quoting Rudyard Kipling). Sir Edward Coke, Lord Chief Justice of England, remarked on the occasion of the 400th anniversary of the Magna Carta:

Upon this chapter, as out of a roote, many fruitful branches of the Law of England have sprung As the gold-finer will not out of the dust, threds, or shreds of gold let passe the least crum, in respect of the excellency of the metal: so ought not the learned reader to let passe any syllable of this law, in respect of the excellency of the matter.

Id. (quoting Sir Edward Coke).

123. *Genesis* 38:7-11.

Biblical law further sought to protect the most basic liberty interests of an individual to be free from physical assault and battery. Victims of assault and battery were entitled to compensation for all harm caused, including the amount expended to be cured.¹²⁴

The law of the Hebrews also regulated promises that established a debtor-creditor relationship. For example, the imposition of an usurious interest rate was proscribed if the debtor was poor,¹²⁵ but the practice was expressly allowed if the borrower was not Hebrew.¹²⁶ The law also required that a lender who took as security for a loan the borrower's raiment return this collateral by sundown so "that he may sleep in his own raiment."¹²⁷

Hebrew law embodied as well familiar notions regarding the redress of losses occasioned by fault. In this respect theft was viewed largely as a civil offense, with emphasis placed upon compensation of the victim. One who stole and killed an ox was required to restore to the victim five times the value of the ox.¹²⁸ In this context, the recovery of triple damages under the Sherman Antitrust Act¹²⁹ is not a new concept. Principles of negligence also were evident in Hebrew law. For example, if injury resulted from an animal falling into an open pit, liability attached to the person responsible for the pit.¹³⁰

Finally, while the focus of early Jewish law was to compensate the victim of wrongs, some wrongs were deemed such serious crimes against society as to be punishable by death. These included murder,¹³¹ striking one's mother or father,¹³² cursing one's mother or father,¹³³ and kidnapping.¹³⁴

D. Hindu Law

The *Hindu Institutes*, or ordinances of *Menu*, supposed to have been a body of written law, was translated in 1792 by Sir William Jones.¹³⁵ Because its history is fragmented and lacks much recordation, the *Code*

124. *Exodus* 21:18-:19.

125. *Id.* at 22:25.

126. *Deuteronomy* 23:20.

127. *Id.* at 24:10-:13. See also *Exodus* 22:26-:27.

128. *Exodus* 22:1.

129. 15 U.S.C. §§ 1-7 (1982).

130. *Exodus* 21:33-:34.

131. *Id.* at 21:12.

132. *Id.* at 21:15.

133. *Id.* at 21:17.

134. *Id.* at 21:16; *Deuteronomy* 24:7.

135. W. JONES, *ESSAY ON THE CHRONOLOGY OF THE HINDUS* (1792), referenced in B. Barrett, *Introductory Discourse to THE CODE NAPOLEON* at xx (1811).

of *Menu* has been described "as a whole of suspicious authenticity" and has been questioned by Professor Thomas G. Barnes.¹³⁶ Yet for our limited purposes it is instructive. These laws governed a society (variously 1280 B.C.-880 B.C.) that was the direct antithesis of that described by ringing phrases of our Declaration of Independence: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."¹³⁷

Early Hindu society did not embrace the notion that "all men are created equal." According to them, all men were born into four social classes: the highest and the priestly elite were Brahmens; then followed a military caste, Cshatiya; the farming or mercantile, Vaisya; and the servant class, Sudra. The legal code regulated paternal power, education, marriage, divorce, guardianship, poverty rights, inheritance, debt, interest, usury, pledge, suretyship, deposit, contracts, sale and promiscuous wrongs.¹³⁸ It provided for the adjudication of controversies with a law of evidence and examination of witnesses. Although the administration of justice was committed to the sovereign, if he could not attend to it, he might commit it to others. A court session was opened by doing reverence to the deities, and the cry "Beware O Judge, lest justice being overturned, overturn both us and thyself."¹³⁹

As in other ancient societies, a focal point of recorded law dealt with succession to real property. Hindu law was particularly refined in this respect, distinguishing between, for example, twelve different classifications of sons for purposes of inheritance.¹⁴⁰ But one aspect of the Hindu law of property ran counter to the Western presumption of single property ownership, in which we generally follow the Roman maxim: "No one can be kept in co-proprietorship against his will" (*nemo in communi- one potest invitus detineri*). This concept was reversed in Hindu law, because the norm was the village patriarchal society and an assembly of

136. See H. MAINE, *supra* note 1, at 122. See also T. Barnes, *Introduction to THE CODE NAPOLEON* at 32 (1983). Barnes has written that Barrett's *Introductory Discourse*, *supra* note 135, "besides containing a considerable amount of discrete information, much of which subsequent scholarship has doubtless proven wrong, has the value of any period piece." *Id.*

137. The Declaration of Independence (U.S. 1776). In Jefferson's first drafting of this paragraph, this statement was phrased as follows: "We hold these truths to be sacred and undeniable; that all men are created equal and independent; that from that equal creation they derive in rights inherent and alienable, among which are the preservation of life, and liberty, and the pursuit of happiness." SOCIAL SCIENCE DEP'T, UNIV. OF CHICAGO, *THE PEOPLE SHALL JUDGE* 201 (1949).

138. B. Barrett, *supra* note 135, at xx-xxvii.

139. *Id.* at xxxix.

140. *Id.* at xxxv.

co-proprietors. The result seems to have been a form of property ownership that I find in some respects similar to New York City's law of apartment cooperatives. The Hindu system also provided for inheritances. As soon as a son was born he acquired a vested interest in his father's substance, which generally remained undivided for several generations.¹⁴¹

E. Chinese Law

Chinese law, as reflected in the laws and statutes of the Dynasty of Ching (1644), *Ta Ching Lu Li*, drew heavily upon principles espoused in the *Chou King*, the book compiled by Confucius in the sixth century B.C.¹⁴² This law provided for disposition of real property by sale and exchange and also governed land mortgages.

Apparently, the law of descent was governed by customary law and not by statutes. More recent (yet pre-communist) Chinese law emphasized the family as a unit. The father had control over his sons, his grandsons and their wives. Unlike our modern law, which constantly refines rights of various family members, Chinese municipal (or positive) law did not

greatly concern itself with what takes place within the domestic forum or family group; the head had certain discretionary powers, and unless these powers are grossly abused it will not interfere. In the Father is vested all family property, and he alone can dispose of it. At his death his eldest son takes his place and the family goes on as before.¹⁴³

But by the time of the Ching Empire, family property was often

141. The popular notion is that the Village landholders are all descended from one or more individuals who settled the Village; and that the only exceptions are formed by persons who have derived their rights by purchase or otherwise from members of the original stock. The supposition is confirmed by the fact that, to this day [19th century], there are only single families of landholders in small villages and not many in large ones; but each has branched out into so many members that it is not uncommon for the whole agricultural labour to be done by the landholders, without the aid either of tenants or of labourers. The rights of the landholders are theirs collectively, and, though they almost always have a more or less perfect partition of them, they never have any entire separation. A landholder, for instance, can sell or mortgage his rights; but he must first have the consent of the Village, and the purchaser steps exactly into his place and takes up all his obligations. If a family becomes extinct, its share returns to the common stock.

M. ELPHINSTONE, *HISTORY OF INDIA* 76 (1905), *quoted in* H. MAINE, *supra* note 1, at 263-64.

142. *See generally* B. Barrett, *supra* note 135, at xlviii; G. JAMIESON, *CHINESE FAMILY AND COMMERCIAL LAW* (1970); G. STAUNTON, *TA TSING LEU LEE* (1810); C.K. YANG, *A CHINESE VILLAGE IN EARLY COMMUNIST TRADITION* (1959); K. YANG, *THE CHINESE FAMILY IN THE COMMUNIST REVOLUTION* (1959); Freedman, *The Family in China, Past and Present*, 34 *PAC. AFF.* 323 (1961-62).

143. G. JAMIESON, *supra* note 142, at 2-3.

collectively owned. It was often legally regulated in the form of corporate ownership under the direction and control of the head of the house, and could not be disposed of without the father's consent or until the father's death. Alternatively, alienation could be effected only by the common consent of all sons. Female descendants had no claim on family property. Thus, hereditary official rank descended upon the eldest son and his descendants, but title to all family property, real or personal, apparently vested in the registered family collective or among all male children.¹⁴⁴

Legal remedies took the form of corporal punishment. One who unlawfully appointed and announced an heir and representative was subject to corporal punishment in the form of eighty blows. A trustee or depository was liable for all property entrusted to him; sanctions were imposed for breach of trust in the form of up to 100 blows and three years banishment. The trustee was obligated to restore the entire value of property loss, unless the loss occurred because of fire, water, theft or the sickness or death of entrusted livestock. Interest could be imposed in credit transactions, as much as thirty percent per year. Default resulted in ten to fifty blows, depending upon the lateness of the payment and the amount due.¹⁴⁵

Medical malpractice is not a twentieth century American phenomenon, for Chinese law respected a related rule. If a patient died while under the treatment of a physician, and a group of doctors concluded that the death resulted through error or accident, the physician had to pay a fine for the homicide and was forced to quit the profession but was exempt from capital punishment.¹⁴⁶

F. *The Law of Classical Greece*

Classical Greek society, notably that of Athens, produced the code known as the *Laws of Solon*. As complex as the society it attempted to regulate, the code encompassed fundamental categories of law. It contained explicit provisions on how a person could control private property. Aristotle said "the definition of ownership . . . is to have within one's power the right of alienation."¹⁴⁷ Plutarch records that the right to make wills was granted to the citizens by Solon, adding "[h]e made every man the master of his own property with full ownership."¹⁴⁸

144. *Id.* at 16-17.

145. *Id.*

146. B. Barrett, *supra* note 135, at lxxvi.

147. ARISTOTLE, *RHETORIC I.V.* (H. Tredennick trans. 1958)

148. 2 H. GROTIUS, *supra* note 7, at 265 (quoting Plutarch). Grotius cites as examples of

Mortgages were provided with interest ranging from twelve to eighteen percent.

The *Laws of Solon* also included rudimentary forms of our trespass to property actions. This should not be surprising, as Athens was an agricultural society and the wealth of many of its leading citizens was measured in terms of land holdings. An early nineteenth century commentator observed: "Solon seems to have been particularly attentive to the boundaries and security of each man's property, for the prevention of dispute and mischief, and those little contests so frequently occurring from too near a neighbourhood."¹⁴⁹ Bearing a close resemblance to modern easements for air and light, no wall could be built within one foot of a neighbor's ground, and olive trees had to be planted ten feet from the boundary so that neither the root nor the branching would be an injury to the land of another.

Although Athens engaged in trade with other nations, very little of its law pertained primarily to commercial contracts. Rather, contract law was significant primarily for the marriage relation, which served to protect the stability of society in general and the transmission of individual wealth and family honor in particular. Marriage was essentially a contract between the families of the marriage partners, and could only be contracted between free citizens. The law of divorce required the divorced husband to return the marriage dowry.

The criminal law was a valuable instrument by which Athens' rulers could control the tone of society and promote what they considered to be useful social ideals. Far more than punishing wrongs, the criminal law was used to stifle social dissent. For example, criminal defamation suits were permitted not only against living persons, but against dead persons as well. Whoever was convicted of idleness three times was declared infamous and subject to the penalties attached to infamy. This law ensured that everyone, particularly slaves and members of the lower classes, bore his share of the burden of making Athens the preeminent city-state of its time. Finally, because the sanctity of marriage was deemed crucial to societal order, an adulteress might be punished with death by the offended husband.

G. *The Visigothic Code*

The law of the barbarians, the dark era of the law, shared many

ancient wills: "You will find in Sophocles, *Trachiniae* [lines 1191 ff.], the will of Heracles; in Euripides [*Alcestis*, lines 280 ff.], that of Alcestis, and in Homer, *Odyssey*, XVII [lines 79 ff.], a donation by Telemachus in case of his death, and this is itself a sort of will." *Id.* at 265 n.1.

149. B. Barrett, *supra* note 135, at cx-cxi.

characteristics of modern law and is easily classifiable within our five categories. By "barbarians" I mean the loosely organized Indo-germanic tribes which inhabited northern Europe after the decline of the Roman Empire, consisting of the Ostrogoths, Visigoths, Lombards, Burgundians, Thuringians, Bavarians and other lesser groups. The Visigothic Code, written in approximately 650 A.D., represents the most sophisticated of these legal systems.

As did all the older systems, the Visigothic Code had a well developed set of inheritance and intestacy laws. Because of the German "spirit of equality," the laws were generally not very intricate. Yet because of the society's military emphasis, special provisions regulated land taken in battle, which could not descend to a female. Slaves composed part of the disposable property of their masters, and even marriage had certain property aspects, with "guardianship" of the wife passing to the husband's family after payment of a negotiated nuptial price.

The Visigothic Code did not specifically enumerate liberty interests. However, the Code's "aim" was "to provide the highest degree of safety for both prince and people."¹⁵⁰ All were subject to the laws, even the King. The Code also provided a primitive framework of due process requirements, such as access to a court before a duly appointed judge and the power to appoint an attorney.

The Code contained extensive provisions concerning the enforcement of business promises, particularly those involving the transfer of land. Its law of sales contained a fairly well-developed requirement of formality, requiring a written agreement to be drawn up by a notary and witnessed by as many as twelve witnesses, depending on the value of the article sold. This reflects, of course, the influence of Roman law's use of ceremony as an ingredient of contract jurisprudence. Defective chattels could be returned, and a vendor of land was required to either defend a purchaser from eviction or give him lands of equal value. Once a bargain was struck and earnest money delivered, the vendor could not back out.

The Visigothic Code contained elaborate listings of substituted redress, termed "compositions," for every offense which occurred to the drafters' imaginations as possible to be committed by one man against another.¹⁵¹ In this regard, the Code drafters' objective was to eliminate the socially requisite revenge and the perpetual enmities caused thereby.¹⁵² If the offender had insufficient funds, recourse would be had to his personal property. Enumerated wrongs ranged from defamation,

150. S. SCOTT, *THE VISIGOTHIC CODE* 5 (1910).

151. B. Barrett, *supra* note 135, at ccxxxiii.

152. *Id.*

with a schedule of fines for the various subjects defamed, to violation of corpses, murder and wrongful death, with a schedule of recompense depending on the social rank of the victim. For offenses which engendered animosity, the Code prescribed payment of an additional amount called a "faida," which was analogous to punitive damages. Refusal to pay this amount entitled the person injured to kill the offender.

Notwithstanding the private redress of wrongs, offenses against the sovereign—treason, cowardice and desertion—were considered public acts and punishable by death. Some civil wrongs, such as murder, were also punished by death if the perpetrator could not pay the composition. Further, civil violations sometimes carried an additional fine, called a "fredum," to be paid to the prince or chief due to the prejudice caused by the criminal's acts to the society at large. This fine, a quasi-criminal punishment, would either be specified in the codes for the particular wrong, or would be a set proportion of the composition.

H. Summary

Thus, the five supereminent pillars that support the house of the law are clearly not new. They all boast a rich and prodigious history. Property interests and corresponding rights, however created and protected, can be traced to every society, even the most ancient. Liberty interests have been coextensive with the aspirations of a given civilization, often depending upon citizenship, religious affinity and ancestral caste. Notwithstanding the hiatus in Medieval England, a formal obligation to fulfill promises and a procedure to enforce this obligation has been part of the law sired by ancient Rome. Even the most ancient codes allowed private redress for the breach of an agreement or to compensate for an injury caused by the fault of another. As societies became more sophisticated, punishment by the sovereign was provided for those who wronged the public weal, with penalties taking the form of corporal punishment, banishment or death in place of earlier provisions that called for private redress in kind or in money.

Whatever the level of civilized society, it was, and is, most important that members of the community understand both the nature of the law and the penalties for its breach. The lesson that we derive from all legal societies is that the clearer the exposition of the law, the more it is capable of community comprehension. The more extensive this comprehension, the more adherence to the law can be expected. The more complete this quality of adherence, the more we approach the ideal balance of order and liberty.

IV. THE CRISIS IN THE HOUSE OF THE LAW

The approach to the ideal balance of order and liberty is sometimes quite difficult under the common law tradition, because the flexibility of judicial lawmaking makes it all the more difficult to see the integrity of a body of law characterized by an explosion of statutes, regulations and ordinances. Yet one particularly troublesome and idiosyncratic aspect of today's federal litigation can be isolated. Public authority has usurped more and more causes and matters that traditionally had been in the domain of usage and morals. Many things now codified by statute or regulation previously had been left to social custom, if not to private caprice or force. Now regulated by federal legislation and administrative regulation and refined by courts of justice, these causes of action have generated an astronomical increase in litigation.

But perhaps the greatest change is what may be described as the "constitutionalization" of our society. Three distinct, but related, simultaneous developments of the past quarter century are responsible for this: first, the selective incorporation of the Bill of Rights into the fourteenth amendment;¹⁵³ second, the on-going expansion of the concept of procedural due process;¹⁵⁴ and third, the use of section 1983 of the Civil

153. See *Benton v. Maryland*, 395 U.S. 784 (1969) (fifth amendment right against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (sixth amendment right to jury trial); *Washington v. Texas*, 388 U.S. 14 (1967) (sixth amendment right to compulsory process); *Klopper v. North Carolina*, 386 U.S. 213 (1967) (sixth amendment right to speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (sixth amendment right to confront witnesses); *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment right against self incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment right to counsel); *Robinson v. California*, 370 U.S. 660 (1962) (eighth amendment right against cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment exclusionary rule); *Wolf v. Colorado*, 338 U.S. 25 (1949) (fourth amendment right against unreasonable search and seizure); *In re Oliver*, 333 U.S. 257 (1948) (sixth amendment right to public trial); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (first amendment establishment clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (first amendment free exercise clause); *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939) (first amendment right to petition government); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (first amendment right to assembly); *Near v. Minnesota*, 283 U.S. 697 (1931) (first amendment freedom of press); *Gitlow v. New York*, 268 U.S. 652 (1925) (first amendment freedom of speech); *Chicago Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897) (fifth amendment just compensation clause).

154. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (short term suspension of student from public high school implicates both liberty and property interests requiring a predeprivation hearing); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (interest in a benefit is a "property" interest for due process purposes if rules or a mutually explicit understanding support claim of entitlement to the benefit invoked at a hearing); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (in context of parole revocation, parolee's liberty involved "significant values" within protection of due process clause); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (government welfare benefits are entitlements or "property" and procedural due process is applicable to termination).

Rights Act¹⁵⁵ as a streamlined entry into the federal courtroom. Karl Llewellyn predicted fifty years ago that the future emphasis in litigation would not pit individual against individual, but the individual against the state.¹⁵⁶ This prophecy became a reality with *Monroe v. Pape*¹⁵⁷ and its prolific progeny.

Even more significant is that federal litigation is now dominated by what civil law countries traditionally describe as “public law.” The dichotomy between “public” and “private” law is an inheritance from Roman Law, or more specifically from *The Institutes* of Emperor Justinian. “There are two aspects of this study, public and private. Public law is that which pertains to the Roman state, private that which concerns the well-being of the individual.”¹⁵⁸

If both coherence and consistency are to exist in the law, it becomes essential to relate statutes, regulations and case law to a proper antecedent discipline—to one of the five supereminent precepts—so that as members of society we can determine what we can or cannot do. “Law, such as we know it in the conduct of life, is a matter of fact; not a thing which can be seen or handled, but a thing perceived in many ways of practical experience.”¹⁵⁹ We must at least recognize the law by accustomed signs and works. Most people do not desire to learn the metaphysical analysis of law or legal duty in general, but do want to know and are entitled to some certainty about the rules that the judges of the land will apply. They do not want to know “the why” or “the how” of the law, but merely “the what.” They are entitled to know the general contours of any dispute between members of the private sector and what constitutes a civil or criminal offense against the common weal. They also are entitled to know the price that is to be paid and the manner in which the decision of a court can be enforced. To this extent, at least, we

155. 42 U.S.C. § 1983 (1982). Section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

156. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 464 (1930) (“[T]he focus of study, the point of all things legal has been shifting, and should now be consciously shifted to the areas of contact, of interaction, between official regulatory behavior and the behavior of those affecting or affected by official regulatory behavior.”).

157. 365 U.S. 167 (1961) (eliminated impediments to private litigants bringing actions against state officials acting under color of law).

158. J. THOMAS, *supra* note 39, at 3.

159. 1 F. POLLOCK & F. MAITLAND, *supra* note 2, at xxv.

lawyers and judges have an obligation to make certain that the lay public is kept reasonably informed.

If law is an aggregate of the legal precepts that govern society, we also must say that law is the sum of rules administered by courts of justice. In the common law tradition, we have never said that the rules must be, or always are, uniform or consistent. A uniform and consistent law can be stated as an ideal, but not a reality. Nor is complete symmetry always desirable, because the primary role of the courts is to do justice in each particular case. Inherent equities do in fact differ from case to case, more profoundly in some than in others. Conversely, in some cases the legal rule does not profess to result in perfect justice. When we say that in certain disciplines of the law it is better that the law be settled than be right, we recognize that sometimes certainty is more important than perfection, and that an imperfect rule may therefore be useful and acceptable.¹⁶⁰

If we can agree that substantive law is that which is promulgated by the sovereign and that in our democracy the people are sovereign and have delegated law-making power to the legislature, we also can recognize, even within strictures of the separation of powers, that judicial law-making is acceptable and legitimate because the courts are merely the subordinates or subjects of the sovereign legislature.

In constitutional law, however, the courts have an even more important role, for here the judiciary—especially the federal court of appeals—is not a mere delegate of the sovereign legislature. Here, not the Congress, not the Executive, but the *court itself* is the sovereign force of the people. The awesome importance of a court of appeals' panel decision on constitutional law cannot be overemphasized because, more often than not, a decision by a majority of a three-judge panel is final.

Some statistics illustrate this point. Although our court (the Third Circuit Court of Appeals) has two separate internal procedures whereby the panel's decision may be converted into full court consideration, of the 2501 cases filed in fiscal year 1984, only two were heard en banc by the full court of twelve judges. Moreover, the Supreme Court agreed to consider only eleven, or four-tenths of one percent, of all the cases heard by the court. If the Constitution is to be considered a statement of moral rules, then a panel's formulation of the appropriate moral rule thus be-

160. See, e.g., *Getty Refining & Marketing Co. v. M/T FADI B*, 766 F.2d 829, 833 (3d Cir. 1985) ("The long established rule . . . is a pragmatic limitation imposed by the court upon the tort doctrine of foreseeability. Concededly, we are drawing a fine line, but this approach has the virtue of what Holmes called 'predictability' and Llewellyn, 'reckonability,' by saying that the law shall go thus far and no further.").

comes the promulgation of positive law of the sovereign, at least for the millions who inhabit the territory subject to that court.

Although it is important in any case that the court clearly identify the relevant discipline of law under discussion, this requirement is all the more imperative in constitutional law if we are to avoid decisions by the idiosyncratic vagaries of a one-person panel majority. When ethereal moral ideas are transferred to the reinforced concrete of constitutional dogma, the rules that emerge constitute, in the fullest sense of the word, imperative commands of the sovereign.

I submit the five supereminent principles, not as a taxonomic exercise for academia, for but the very pragmatic purpose of suggesting that federal decisional law would be much clearer if lawyers and judges would always first indicate the specific legal discipline involved in the case; next, outline arguments to fit the demands and defenses available under that discipline; and then relate the relevant controversy to it.

Some modern litigation is extremely complex and complicated, but this is mostly a function of complex and complicated facts. The legal precepts that govern these facts often are not themselves obtuse or esoteric, no matter how convoluted the facts. If the precepts do become obtuse or esoteric it is because the theory of the claim or defense is so innovative that the court is asked to bend legal fundamentals beyond the breaking point. Many, if not most, fundamental legal precepts in operation today are based on the experience of hundreds, if not thousands, of years. When left uncluttered, unadorned and simply stated, these precepts have a time-tested hierarchy of their own, with special gradations ranging from the broad maxims and dogmas through doctrines and principles to rules in the very narrow sense.

As we have seen, these precepts also have a history of their own, a history that reflects the changes of recent years. In our own system, we have seen community values change from a desire to expand and protect commerce, industry and our health professions to a desire to protect consumers. We have seen our substantive law transmuted in the transition from liberal laissez faire governments to modern social welfare states with planned or regulated economies. Case law, in the common law tradition, has lost ground to congressional statute and agency regulation. Judicial decisions have become increasingly detached from their moorings as precedent. Administrative law has encroached on all pre-existing sources of law. "We have entered the age of legislation triumphant, the

judge militant, and bureaucracy rampant."¹⁶¹

Thus, the starting point for analysis must be to locate and identify that which is governed or regulated, not to trudge wildly into semantic marshes where abide ambiguous statute or agency regulation. *Heydon's Case* of 1584¹⁶² may be long in the tooth, but its bite is still mighty strong. That case, you will recall, announced the mischief rule of statutory construction. It posed these questions: What was the law before the making of the Act? What was the mischief and defect for which the common law did not provide? To tailor these questions to circumstances that occur four centuries later is still a good idea. If nothing else, these questions return us in every case to relevant fundamentals. They remind us that on proportion the classic whole depends.

And, if we keep hold of proportion, we can travel far in our quest for the manifest purpose of the statute or regulation. As Lord Diplock has said, we must make "a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them."¹⁶³

We should agree that what we wish to see in the house of the law are predictability and continuity, yet flexibility and growth. We know that these make up the basic framework of our house. We also know that through the years we maintain these lines by the traditional mechanism of case law. But the task has not always been easy because inherent designs in the law—even first principles—do conflict. A great keeper of our house, Dean Roscoe Pound, reminded us that the law must be stable, yet it must not stand still.¹⁶⁴ Traditionally, we have resolved the conflict between the Yin and the Yang by the rationality found in case law. Reason is the catalyst that harmonizes growth with predictability.

Yet we also know that the explosion of federal regulatory law has shattered traditional mechanisms, our traditional ways of doing things. The shatter has come because modern congressional statutes generally are neither stable nor particularly rational. Legislatively-declared law need not be supported by principled or systematic reasons. Frequent amendments do not introduce much flexibility either, because it is not in the nature of the political process to enact or amend legislation on a reasoned or principled basis. Positive law, the command of the sovereign, need not be based on morals, right reason or natural law.

161. M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 240 (1985).

162. 76 Eng. Rep. 637 (1584).

163. *Regina v. National Ins. Comm'rs*, 1972 A.C. 944, 1005.

164. R. POUND, *THE SPIRIT OF THE COMMON LAW* 184-85 (1921).

These are but the brute facts of our tripartite system of government, an aspect of modern political science that puts the federal bench and bar to the test of resolving not only a particular dispute, but also a broader-based social conflict. To be sure, society's demands in these waning years of the twentieth century, as reflected by statute, enactment or regulation promulgation, have produced results that alter the symmetry of an inherited system under which you and I have been trained.¹⁶⁵ But these demands are not fatal to consistency or predictability in the law. To be equally sure, their first import usually produces some disturbance of accepted notions.

Repeated innovations necessarily produce stress on formal organizations and even some distrust of conceptual reasoning in the law. But while

the effect in peripheral cases and in the views of peripheral commentators or interpreters is . . . drastic, . . . so far as the bulk of the lawyers, judges, commentators and teachers are concerned, there is a continuous striving to achieve a fresh consistency or symmetry rather than an abandonment of conceptual reasoning.¹⁶⁶

It is to this continuous striving that we, the federal practitioners and the federal judiciary, must dedicate our efforts.

I do not suggest that this will always be easy. In many cases, it is difficult to reach a conclusion that affords justice to the litigants and at the same time satisfies the competing demands of growth and stability. But though the conclusion may be difficult, the initial approach in each case is clear. First, to identify the family of law implicated—property, liberty interest, fulfilling promises, redressing damages caused by fault or breach or criminal law. Next, where applicable, to either identify the rule at common law and ascertain the mischief that the statute or regulation sought to eliminate, or to ascertain the change in federal law sought by statutory or regulatory amendments. Such initial inquiry sets the legal mood or tone of the case. It forms the conceptual backdrop against which the case or controversy may properly be judged and pinpoints precisely the activity sought to be restricted by statutory or agency regulation. The eloquent Oliver Wendell Holmes may have exaggerated, but only slightly, when he said: “You must see the infinite, i.e., the universal,

165. Such demands include changes in pension contracts under ERISA, new civil actions under RICO, new bankruptcy laws, constant refinements of fourth amendment interpretation, and the imaginative nuances of § 1983 of the Civil Rights Act.

166. M. GLENDON, M. GORDON & C. OSAKWE, *supra* note 161, at 29.

in your particular, or it is only gossip."¹⁶⁷

V. CONCLUSION

This, then, is my personal view of the federal judiciary's house on the eve of the bicentennial of both the Constitution and the Judiciary Act of 1789. I have described a house that is in no danger of collapse, yet one to which the lawyers and the judges must turn a hand to make it more attractive, if not more secure. The lawyers can do this by their written briefs and oral arguments; the judges, by their statements of reasons. In the final analysis, the housekeeping and the appearance of our house are in our hands, not those of Congress. It will be our hands that determine its ultimate design.¹⁶⁸

167. W.H. AUDEN & L. KRONENBERGER, *THE VIKING BOOK OF APHORISMS* 339 (1981).

168. Many tributes have been paid to the house of the law, but probably none as extravagant as that of Lord Henry Brougham in 1828 in a celebrated speech in Parliament on law reform:

It was the boast of Augustus . . . that he found Rome of brick, and left it of marble But how much nobler will be the Sovereign's boast when he shall have it to say that he found law dear, and left it cheap; found it in a sealed book—left it a living letter; found it the patrimony of the rich—left it the inheritance of the poor; found it the two-edged sword of craft and oppression—left it the staff of honesty and the shield of innocence!

A. DENNING, *WHAT NEXT IN THE LAW* 28 (1982) (quoting Lord Henry Brougham).