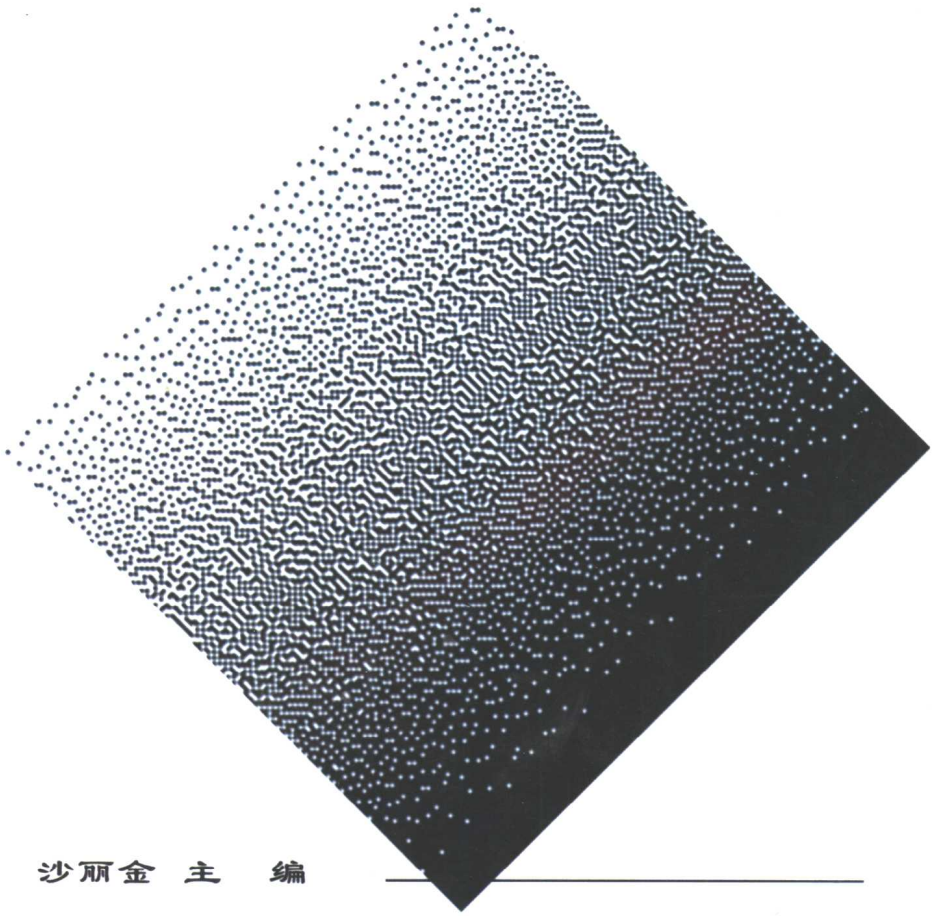
高等政法院校系列教材

# 研究生英语教程

## （法律英语分册）



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中国政法大学出版社

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# 前　言

《研究生英语教程》共分三册：《基础英语分册》、《法律英语分册》及《案例选编》。该套教程由中国政法大学研究生院组织编写。以《非英语专业研究生教学大纲》（试行稿），为指导，力求全面贯彻大纲精神，体现法律院校的特点，把基础英语和法律知识结合起来，突出实用性和科学性，具有鲜明的针对性。

本教程主要面向为法学、法律硕士及硕士学位班硕士研究生，也可供其他专业硕士研究生、同等学力的学生、大学本科高年级学生等其他英语爱好者使用。

《基础英语分册》着重培养学生、听、说、读、写、译五个技能，提高基础英语水平及文学欣赏能力，在语言知识和语言能力方面打下牢固的基础。《法律英语分册》帮助学生掌握法律术语、提高专业阅读技能、具备一定的法律文书写作能力，开拓视野、了解外国法律、为日后独立研究中外法律、进行涉外法律工作打好基础。

为配合法律英语分册的教学，我们编写了《案例选编》，使学生能够在学习语言时接触原版的外国案例，通过对外国司法体系具体运作的基本了解，进一步提高运用法律英语的实际能力。

在选材上，基础英语部分力求既经典又具有时代感，内容涉及文学、经济、科技、教育、社会生活等方面，较全面覆盖大纲中所要求的词汇。法律英语部分以介绍各个部门法为主，同时介绍世界法律体系等方面的内容。《案例选编》集中选择部门法中最典型、最有影响和最新的案例。

该教程均为原文材料，题材广泛新颖，把语言和专业有机地、科学地、系统地结合起来，既可以使学生提高语言水平，又可以为他们提供较丰富的专业信息，从而达到以英语为工具，阅读有关专业书刊，获取相关的法律知识。参与本教程编写工作的教师均有较高的外语水平和较丰富的法律知识。他们大都具有副教授以上职称，从事研究生教学多年，教学经验丰富。《法律英语分册》具体分工如下：

马　静：第一、二、五、六、七课。
王立平：第十八课。
刘艳萍：第三、八课。
李　妍：第九、十、十一、十二课。
张美常：第四课。
沙丽金：第十五、十九、二十课。
林　萍：第十三、十四课。
徐新燕：第十六、十七课。

刑丽华老师为本书的录入做了大量工作，我们在此向她表示衷心的感谢。

由于时间仓促，编者水平有限，教程中缺点和错误在所难免，敬请读者指正。

编　者
2001 年 7 月

# Contents

# Unit 1

## Text

# *The U.S. Legal Tradition in Wes tern Legal Systems*

Gary F. Bell

Because the United States are federation, Americans are usually well aware that the law may vary from jurisdiction to jurisdiction. Politically, it is certainly true to say that each independent jurisdiction has its own independent legal system. However, in terms of legal traditions and legal methods, most of the world's legal systems belong to one of a few legal traditions. In the Western World, and in parts of the world that have been colonized or strongly influenced by the West, there are two main legal traditions or legal families——the civil law and the common law. The U.S. legal system belongs to the common law tradition (Louisiana excepted).

This note will introduce you to the origins and development of the common law and the civil law and to the main distinctions between these two systems, especially in terms of legal methods.

### 1. Origins of the two legal traditions and their diffusion around the world

#### a) the common law

The common law tradition originated in England. A new legal order was established as early as 1066 by the Norman conquest, but the common law did not exist in 1066. William the Conqueror did not abolish the local customs and the local courts. Local courts continued to apply local customs. There was no law common to the whole kingdom. The King did however establish some royal courts at Westminster. Their jurisdiction was at first very limited but eventually expanded to the point where the local courts fell into disuse. The decisions of the royal courts became the law common to the whole kingdom, the common law.

The common law has its source in previous court decisions. The main traditional source of the common law is therefore not legislation but cases. This is so true that when the common law evolved into an unfair set of rigid and formal procedural rules the King, rather than legislate to amend the law, created a new court. When a subject thought that a common law decision lead to an unfair result he (and at the time usually not she) would petition the King. There were so many petitions that the King created the court of Chancery which could grant a discretionary relief "in equity" to correct the common law. The decisions of this court gave birth to a body of law called equity which is also based on previous judicial decisions. Both law and equity are part of what is called the common law tradition.

The British Empire brought the common law to all continents. The common law was "received" in many countries but its reception has been most successful in countries where the European settlers became a majority and imposed their law over indigenous populations. This is the case in Australia, English Canada, New Zealand and the U-

nited States (except Louisiana where the civil law was in place before the United States gained jurisdiction.) The common law was also imposed on many other colonies but usually with some adaption to take into account the local customs. In some cases, the United States imposed parts of the common law on newly entrusted territories (e.g. the Philippines). Still today in Africa and Asia, former British colonies continue to apply the common law. Today, India is the most populous common law country.

Following the Second World War, the economic hegemony of the United States also contributed to the expansion of the common law. Contracts were drafted in common law terms and international arbitrators often applied common law principles.

*A note about the common law in the United States*. Because of the early independence of the United States, the common law here has evolved separately from the common law of England and of other Commonwealth countries. Commonwealth nations became independent only fairly recently, and even long after they were independent, some nations continued to allow appeals to the Judicial Committee of the Privy Council in London (some countries still allow such appeals). This has had a unifying effect on the law of these countries and still today the courts of one country will consider the decisions of the courts of another Commonwealth country as very persuasive. By contrast, only rarely, if ever, does a United States court determining a matter of domestic law invoke a decision of a foreign country's courts. It is therefore even more striking that notwithstanding years of "legal separation" the law of this country still has so much in common with the law of other common law countries.

### b) the civil law

The origins of the civil law go further back. They can be traced to the Twelve Tables of the Republic of Rome (probably in the fifth century B.C.). In its origin, it is the law of the city of Rome, the law applied to a citizen (in Latin, *civis*) of Rome as opposed to the law applied to a non-citizen. The expression "civil law", in Latin *ius civilis*, literally means the law of the citizens of Rome.

After the fall of the Western Roman Empire (476 A.D.), the so-called barbarians brought their law to Rome, and although Roman law continued to apply to the Romans, the Germanic influence grew quickly and the law became more and more a mixture of Germanic and Roman law. This would later be known as the vulgarized Roman law. This law had very little in common with the classic Roman law. Canon law, the law of the Catholic Church, was the only Western legal system that kept intact many elements of the Roman law. However, in 529—534, the Eastern Roman Emperor Justinian published the *Corpus Iuris Civilis*, an articulation and reformulation of Roman law. The Justinian Code and accompanying compendia in force in Byzantium until and even after the fifteenth-century conquest by the Ottoman Turks.

At the end of the eleventh century, the University of Bologna started teaching Roman law, more specifically the *Corpus Iuris Civilis*. This was at first a purely intellectual endeavor since Roman law was no longer the law anywhere in Western Europe. This marked the beginning of what would later be known as the resources of Roman law. Soon other Western European universities followed the Bologna's lead and after a few centuries and for reasons too complex to be considered here, the Roman law was received almost everywhere in continental Europe. It became the *ius commune* (the "common law") of continental Europe.

The Roman law actually "received" was in fact limited to what we call "private law" (property, torts, contracts, etc.). That is why civilian jurists refer to what we call private law simply as "the civil law" (persons, property and obligations).

Although most civil law countries now have a civil code, codification is in fact a fairly recent phenomenon. The first French Civil Code dates back only to 1804 and the first German Civil Code, to 1896 (in force in 1900).

The French and German Codes are the two main civil law models. Napoleon brought his Code wherever he and his armies traveled. The French model has been influential in Latin countries both in Europe and in America (Central and South America, Louisiana and Quebec). It has also influenced former European countries before the Soviet occupation. German law has also been received by Japan.

## 2. Legal methods——a comparison

You must understand that a civil-law legal method course would be completely different from a common-law legal method course. It is important at the beginning of your legal career that you realize that law can take different forms and play different roles in different societies and cultures. What you will be studying is not the law as it necessarily has to be but the law as it is in the United States. Here are a few differences between the civil law and common law.

First and foremost, in common law countries, cases are usually considered to be the primary source of law. Your legal method class starts with the study of cases. In civil law countries, cases are simply not a source of law——at least in theory. The reality might well be that legislation has become extremely relevant in common law countries and that cases are becoming more and more relevant in civil law countries, but the attitudes of civilians and common lawyers toward legislation and cases differ greatly.

Civil law jurists will consider the civil code as an all encompassing document. They will interpret it generously in order to allow it to reach its goal of regulating the whole private law. The code lends itself to this kind of interpretation since its articles are usually drafted in very general and abstract terms.

On the contrary in common law jurisdictions legislation tends to be considered as an exception to the case law. The courts therefore have a tendency to interpret legislation more restrictively. In consequence both the courts and the legislator tend to enunciate legal rules in very specific terms meant to resolve very specific problems. Generally, cases and legislation will not tend to use abstract terms or to enunciate general principles.

Civil law students will read " *la doctrine* " more than cases. The "doctrine" is the cumulated writings of law professors on what the law is or should be. In civil law the "doctrine" is considered to be a source of law and a highly respected one. You have to remember that the University, not the courts, reintroduced the civil law in Continental Europe. It is therefore not surprising that law professors still have an important role in defining the law. Common law professors generally do not enjoy a similar prestige within their own jurisdiction. Here the judges get most of the prestige.

Legal education differs a lot from country to country but it is fair to say that American legal education is very original and in many respects unique. The case method or Socratic method is peculiar to this country. It must be clear to you by now that the "case" method could not have been thought of in a civil law country. In those countries (as in the case in England) law is an undergraduate degree. Legal education tends to be longer than in the United States. The teaching style is magisterial——the professor exposes the law to his or her students, who take notes and do not intervene in class.

## Words and Expressions

federation *n.* a league or union of states, groups or peoples arranged with a strong central authority and no regional sovereignties, though the individual states, groups, or peoples may retain rights of varying degrees

| | |
|---|---|
| jurisdiction *n*. | authority to carry out justice and to interpret and apply laws; right to exercise legal authority |
| common law | the body of law derived from judicial decisions and opinions, rather than from statutes or constitutions; the body of law based on the English legal system, as distinct from a civil-law system |
| legislation *n*. | the process of making or enacting a positive law in written form, according to some type of formal procedure, by a branch of government constituted to perform this process; the law so enacted; the whole body of enacted laws |
| petition *n*. | a formal written request presented to the court or other governmental or official body; some states use this term in place of complaint when referring to a lawsuit's first pleading |
| equity *n*. | fairness; impartiality; evenhanded dealing; the body of principles constituting what is fair and right; the system of law or body of principles originating in the English Court of Chancery and superceding the common and statute law |
| Chancery *n*. | a court of equity. Also termed *court of chancery*; *chancery court* |
| judicial *adj*. | of, relating to, or by the court; in court; of or relating to a judgment |
| Privy Council | body of statesmen, politicians, etc., appointed by the sovereign formerly as advisers on affairs of State, but now (in Britain) more as a personal honor for its members |
| civil law | the civil law of Rome. Also termed *Roman Law*; one of the two prominent systems of jurisprudence in the Western World, originally administered in the Roman Empire and still in effect in continental Europe, Latin America, Scotland, and Louisiana; the law dealing with private rights of citizens, rather than with crime |
| canon law | a body of Roman ecclesiastical jurisprudence that was compiled between the 12th and 14th centuries; a body of religious jurisprudence developed within a Christian church or denomination |
| vulgarize *v*. | to cause (a person, his manners, etc.) to become vulgar; spoil (sth.) by making it too ordinary or well known; popularize |
| magisterial *adj*. | having or showing authority |

## Proper Names

| | |
|---|---|
| Westminster | 威斯敏斯特（英国议会所在地） |
| Emperor Justinian | 查士丁尼皇帝（东罗马帝国皇帝） |
| Justinian Code | 查士丁尼法典 |
| Byzantium | 拜占庭 |
| Ottoman Turks | 土耳其人 |
| Ottoman Empire | 奥斯曼帝国 |
| Privy Council | 枢密院 |

## Notes

1. This passage is contributed by Professor Gary F. Bell of McGill University (Montreal, QC, Canada) to the *Legal Methods* by Jane Ginsgurg who is the Justice of the U.S. Supreme Court.
2. William the Conqueror did not abolish the local customs and the local courts.

   William wanted to be seen as the successor of the previous king and not as a conqueror.
3. The decisions of this court gave birth to a body of law called equity which is also based on previous judicial decisions.

   Today, in almost all common law countries, the same court exercises both the common law and the equity jurisdictions.
4. The common law was "received" in many countries but its reception has been most successful in countries where the European settlers became a majority and imposed their law over indigenous populations.

   "Reception" refers to the process by which one political entity adopts the law of another.
5. Twelve Tables.

   The earliest statute or code of Roman law, framed by a commission of ten men, B.C.450, upon the return of a commission of three who had been sent abroad to study foreign laws and institutions. The Twelve Tables consisted partly of laws transcribed from the institutions of other nations, partly of such as were altered and accommodated to the manners of the Romans, partly of new provisions, and mainly, perhaps, of laws and usages under their ancient kings. They formed the whole later development of Roman jurisprudence. They exist now only in fragmentary form. These laws were substantially codification, and not merely an incorporation, of the customary law of the people. There were Greek elements in them, but still they were essentially Roman.
6. In its origins, it is the law of the city of Rome, the law applied to a citizen of Rome as opposed to the law applied to a non-citizen.

   In the New Testament, St. Paul, because he was a citizen of Rome, was entitled to be tried according to Roman law. In fact, according to the New Testament, Paul was even entitled to be tried in Rome in front of an imperial court.
7. Although most civil law countries now have a civil code, codification is in fact a fairly recent phenomenon.

   Scotland——in many respects a civil law jurisdiction——does not have a civil code.

## Exercises of the Text

### Ⅰ. Answer the following questions according to the text.

1. How was common law established?
2. What does the common law tradition include according to the text?
3. How different is the legal system of Louisiana from the rest of the United States?
4. What does "civil law" mean?
5. What is the main difference between the civil law system and the common law system?

6. What different attitudes do the civil law system and the common law system hold toward case law?

7. What is significant about the American legal education?

8. Who play an important role in defining the law in civil law system, the law professors or the judges? What about the common law system?

## Ⅱ. Translate the following paragraphs into Chinese.

What do we mean when we talk about the legal system? To begin with, the legal system has *structure*. The structure of a legal system consists of elements of this kind: the number and size of courts; their jurisdiction (that is, what kind of cases they hear, and how and why); and modes of appeal from one court to another. Structure also means how the legislature is organized, what a president can (legally) do or not do, what procedures the police department follows, and so on. Structure, in a way, is a kind of cross section of the legal system——a kind of still photograph, which freezes the action.

Another aspect of the legal system is its *substance*. By this it meant the actual rules, norms, and behavior patterns of people inside the system. This is, first of all, "the law" in the popular sense of the term——the fact that the speed limit is fifty-five miles an hour, that burglars can be sent to prison, that "by law" a pickle maker has to list his ingredients on the label of the jar. But it is also, in a way, "substance" that the police arrest only drivers doing seventy instead of sixty; or that a burglar without a criminal record gets probation; or that the Food and Drug Administration is easy (or tough) on the pickle industry. These are working patterns of the living law.

The legal *culture*, in other words, is the climate of social thought and social force which determines how law is used, avoided, or abused. Without legal culture, the legal system is inert——a dead fish lying in a basket, not a living fish swimming in its sea.

## Ⅲ. Choose the correct words from the list below and fill in the blanks.

| | | | |
|---|---|---|---|
| precedent | research | published | case law |
| previous | judge-made | resolve | attorney-influenced |
| appointed | precedent | relevant | U.S. Supreme Court |
| on-line | interaction | cases | |

One considerable difference that exists between common law and civil law countries is the amount of _____ an attorney must do. American attorneys will search to find the _____ relating to a statute before they can say they have thoroughly researched the problem. Without locating and reading the cases that explain the application of the statute or constitutional provision, they have not even begun their research. Modern _____ services have made it faster and more efficient to find cases that might be relevant, but it is still hard work.

Once _____ pertaining to the issue have been found, they have to be analyzed to see if they are _____. Or, if the attorney thinks that his or her case is different from _____ cases, he or she must explain why those cases and their decisions are not applicable.

In this way, case law is not only _____ but also "_____" law. We can say that the common law is the law that is created daily through the _____ of judges and attorneys in the courtroom across the United States at all levels, from local courts to the _____.

All types of judges, whether _____ or elected, have the legal right to make certain types of decisions. Once a judge makes a decision, that decision becomes a _____. Of course, that judge's decision itself was based on the _____ taken from previous decisions of earlier judges. In that way, every decision

can serve two purposes: to _____ the case that the judge is currently hearing and, if the decision is _____, to provide other judges precedent to follow.

## Ⅳ. Writing Practice

### American Legal Education

The American System of Legal Education relies upon two fundamental pedagogical techniques: the "case method" and the "Socratic method." The case method of teaching emphasizes the evolution of law that occurs in the common law and common-law style judicial institutions. The Socratic, or discussion method of teaching is thought to induce young attorneys to think for themselves in finding and developing the law. Legal education, then, reflects many of the fundamental aspects of the American legal process. American law is more dynamic, more moldable by attorneys and courts, than the law of most civil-law, or code-law nations. American legal education attempts, at its best, not to teach students simply the law of today, but to prepare them for a life of ever-evolving law. ( *Law in the United States*——*Cases and Materials*; Charles F. Abernathy)

Do you agree or disagree with the statement that "American law is more dynamic, more moldable by attorneys and courts, than the law of most civil-law, or code-law nations?" Compare and contrast the "Socratic method" with teaching techniques of your country. Compare and contrast the "case method" with teaching techniques of your country.

## Supplementary Reading

### *Case Law: Origins, Nature and Authority*

Jane Ginsburg

#### How Cases Make Law

The decisions of judges, or of other officials empowered by the constitution or laws of a political entity to hear and decide controversies, create case law. As the name "case law" suggests, a particular decision, or a collection of particular decisions, generate law——that is, rules of general application. How is it that a court's determination of the rights and obligations of the particular parties before it can apply to the disputes of persons who were not before the court? From the point of view of parties to a lawsuit or other contested controversy, what matters is the immediate outcome, the result the tribunal reaches in their case. Suppose that A has sued B for damages for asserted breach of contract, and that the court has reached a decision in their case. For A and B, the decision has immediate, and specific significance: B either will or will not have to pay a determined amount of damages to A. In the view of judges, lawyers, and law students, however, the decision takes on broader perspective. The decision becomes a possible source of general applicable case law. In other words, the decision in A v. B becomes authority for deter-

mining subsequent controversies. Just as the court in A v. B will have sought guidance from prior, similar, decisions, so later judges and advocates will look to A v. B for a rule by which to measure later parties' conduct.

The wider authority of prior decisions in individual cases may not seem self-evident at first, but consider the possible proposition. Suppose a society in which every disputed claim is heard and decided on its own individual merits, and with no regard whatever for consistency of the results from case to case. This society offers the means of setting disputes, but the society has no "case law." Each decision presents a result unto itself. Each decision is therefore unpredictable. Unpredictability in adjudication may provoke both instability in social relations, and the fear that little more than personal whim controls the judge's decision.

There is in fact, in most societies, a strong urge to make general law from particular decisions.

How are we to account for this widespread inclination to make general law from particular decisions? Karl N. Llewellyn, the leading spokesman for the group of legal philosophers known as the American Legal Realists, offered the following explanation:

"Case law in some form and to some extent is found wherever there is law. A mere series of decisions of individual cases does not of course in itself constitute a system of law. But in any judicial system rules of law arise sooner or later out of such decisions of cases, as rules of action arise out of the solution of particular problems, whether or not such formulations are desired, intended or consciously recognized. These generalizations contained in, or built upon, past decisions, when taken as normative for future disputes, create a legal system of precedent. Precedent, however, is operative before it is recognized. Toward its operation drive all those phases of human make-up which build habit in the individual and institutions in the group: laziness as to the reworking of a problem once solved; the time and energy saved by routine as a curb on arbitrariness and as a prop of weakness, inexperience and instability; the social values of predictability; the power of whatever exists to produce expectations and the power of expectations to become normative. The force of precedent in the law is heightened by an additional factor: that curious, almost universal, sense of justice which urges that all men are properly to be treated alike in like circumstances. As the social system varies we meet infinite variations as to what men or treatments or circumstances are to be classed as 'like'; but the pressure to accept the views of the time and place remains."

Students will become aware, as their study of law proceeds, that adherence to precedent has its other side. A court that follows precedent mechanically or too strictly will at times perpetuate legal rules and concepts that have outlived their usefulness. The continuing problem in a legal system that recognizes past decisions as authoritative sources of law for future cases is how to maintain an acceptable accommodation of the competing values of stability in a law, served by adherence to precedent, and responsiveness to social change, which may call for the abandonment of an outworn legal doctrine. This problem of stability versus change will be a recurring theme in this casebook.

## The Common Law Doctrine of Precedent

Professor Llewellyn was undoubtedly right in his contention that case law can be found "in some form and to some extent" in every legal system. But case law is uniquely authoritative and influential in a "common law country," which the United States is by inheritance from England. The Anglo-American legal system, unlike the "civil law" system which prevails with variations in most of the other non-Commonwealth countries of the world, explicitly recognizes the doctrine of precedent, known also as the principle of stare decisis. It is the distinctive policy of a "common law" legal system that past judicial decisions are formally and "generally binding" for the disposition of factually similar present controversies. This basic principle, firmly established centuries ago in the royal courts of England, was naturalized as American by the "reception" of common law in the United States.

When, and for what future cases, will a judicial decision or groups of decisions operate as precedent? The term

"precedent" is a crucially important term of art in the vocabulary of our law. Let us note, first, a kind of territorial *limitation*: a judicial decision is a precedent in the full sense of the word only within the same judicial system or "jurisdiction." Thus a decision of the Supreme Court of California is a precedent and so generally binding in future "like" cases in that court and in "lower" California courts, but it is not a full-fledged precedent for future cases arising in the courts of Ohio or Vermont or some other state. Even a decision of the Supreme Court of the United States is not a binding precedent in a state court, say the Court of Appeals of New York, unless the legal issue decided by the Supreme Court decision was a federal question, that is, one involving the interpretation or effect of a federal statute or regulation or of the Constitution of the United States.

Even within the same jurisdiction, a decision is precedent only for "like," that is, factually similar, future cases. To put the matter more precisely, a judicial decision is a precedent, and so generally binding, only in future cases involving the *same material facts*. As the first-year law students will soon discover, this limitation is far easier to state in general terms than to apply in concrete situations. No two disputes will ever be identical in every factual particular. How is one to determine, or argue, that a factual difference between a past decided case and a case now presented for decision is, or is not, a difference in material facts? Case law processes require careful analysis, matching and distinguishing of the facts of cases. By the end of the first semester, the beginning law student will find that case matching and comparison has become a matter of his or her second nature.

Even when the jurisdiction is the same and the pending new case is found to possess the same material facts, some judicial decisions will have greater weight as precedent than others. Thus, for example, the weight or influence of a precedent is greatly affected by the place of the court that decided it in the judicial hierarchy of its jurisdiction, that is, by whether it was a "higher court" decision or a "lower court" decision. Three tiers of courts exist in the federal judicial structure and in the more populous states: (1) trial courts, (2) intermediate appellate courts, and (3) a highest appellate court or "court of last resort," called in most jurisdictions the Supreme Court. Less populous states are likely to have only two tiers in their judicial structures: trial courts and an appellate court of last resort. One should not assign the same force as precedent to the decision of a state intermediate appellate court as to a decision of that state's court of last resort, and should not expect a decision of a United States Court of Appeals to have the same precedent force as a decision of the Supreme Court of the United States. As to the decisions of the trial courts, particularly State trial courts, where most of law's day-to-day business is done, these are rarely published and, even when published, are not likely to have much force as precedent except in future cases in the same trial court. As a result, the overwhelming majority of the cases included in the law school casebooks are decisions of appellate courts.

## "Res Judicata and "Stare Decisis"; "Reversal" and "Overruling"

Every final decision of an appellate court has a dual impact or effect: (1) as an authoritative settlement of a particular controversy than before the court; and (2) as a precedent, or potential precedent, for future cases. A lawyer's Latin expression denominates each of these effects: *stare decisis*, as we have seen, for the impact of the decision as precedent; *res judicata* for its effect as a resolution of the immediate controversy. Do not confuse these Latin terms and the concepts they symbolize. The latter addresses a decision's impact in the individual case; the former, its impact on the legal norm of conduct.

The following example should illustrate the difference. Suppose that P (plaintiff) sued D (defendant) advertiser in State X, for using P's photograph without his permission in an advertisement for breakfast cereal. The trial court decides in D's favor, on the ground that in State X, there is no claim against the non-consensual use of private citizens' private photographs for purposes of trade, nor have the courts have recognized a "right of privacy." The

Supreme Court of V, the court of last resort in that state, affirms the judgment. This decision is a final and conclusive settlement of the controversy between P and D: The case is now *res judicata*, and the losing party, P, cannot bring this claim again.

Now, to make plain the difference between and as legal terms of art, suppose further that the Supreme Court of X, two years later, and in another case involving the non-consensual use of private citizens' private photographs for purposes of trade, is persuaded that its refusal to recognize a right of privacy in this contexts is not a sound legal doctrine for present-day conditions, and so "overrules" P v. D, thus finding against the advertiser in the new case. Although this overruling decision is a deviation from the norm of *stare decisis*, U.S. courts of last resort have never regarded precedents as absolutely binding——only as "generally" binding-and have reserved to themselves a largely undefined authority to overrule even clear precedents when considerations of public policy require a change in the case law.

What, however, of the particular claim of P v. D? Now that the Supreme Court of X has changed the law, and "overruled" the decision reached in P's case two years earlier, should not P be able to bring his suit again, and prevail in his claim? The answer is clear, and adverse to P. His particular claim has been finally and conclusively settled against him; the doctrine of *res judicata* bars him from ever suing on that claim again. As a result, the final decision of a court of last resort can be more conclusive and permanent in its aspect as a settlement of a particular case ( *res judicata* ) than it may be in its aspect as general law for the future ( *stare decisis* ).

It is important here to underscore one other distinction in legal terminology: between "overruling" and "reversal." In the later privacy case, the Supreme Court of X "overruled" its decision in P v. D. The Supreme Court of X did not "reverse" P v. D. The two notions are distinct, and carry different consequences. They are not interchangeable. The highest court of the jurisdiction "overrules" its own precedent. The prior decision continues to bind the parties to it, but the overruled decision is no longer authoritative as to subsequent controversies. By contrast, a higher court "reverses" the decision of a lower court. When a higher court "reverses" a decision, it reviews the lower court's judgment, and concludes that the lower court has reached an erroneous result (on the facts or on the law) in that case. As a result, the lower court's judgment is set aside and is no longer effective as to the parties to that controversy.

A judicial decision, as we have seen, is a "precedent" in the full sense only within the same jurisdiction. In their opinions, however, American appellate courts frequently——indeed, more often than not——cite and draw upon decisions from other jurisdictions. Thus, for example, the Supreme Court of Tennessee, in support of the result it has reached in a case, may quote from or cite decisions from the courts of last resort of Massachusetts, Oregon, Virginia and a half-dozen other states——even perhaps decisions from England and other "common law" jurisdictions. Such outstate decisions are not full-fledged precedents, but they are accorded the status and weight of persuasive authority, which means that they are not "binding" in any sense but may have influence, often very great influence, in cases where there is no local precedent or the local precedents are conflicting or unclear.

The case law process in American courts thus has a considerable comparative-law ingredient: A court of last resort in one state does not consider itself bound to follow another state's case law rules, but it will carefully consider the outstate decisions and, if it finds their reasoning persuasive, make use of them as sources of guidance and justification. This disposition to give persuasive weight to outstate case authority is not surprising. The "reception" of the common law in the United States means that all the case law decisions of each state reflect common law principle.

Because of the important influence of outstate decisions as persuasive authority in American law, law school casebooks, other than those on Constitutional Law and other federal law subjects, usually include cases drawn from many jurisdictions. The law students, as he or she reads cases from different jurisdictions, will find that American

appellate courts exhibit a marked degree of comity, mutual respect, for each other's decisions. Some decisions will have greater influence than others on the thinking of judges in other states. The prestige of the court that rendered the decision, or the prestige of the particular judge (e.g., Cardozo) who wrote the opinion of the court, may also affect the persuasiveness of the decision to the courts of other jurisdictions.

However hospitable a court of last resort may be to persuasive authority from other jurisdictions, an outstate case is not as authoritative and should not be assigned the same force as a true local "precedent." The difference in degree of influence is much like the difference between the holding of a case and dictum in a judicial opinion, the "holding" being fully authoritative and generally binding and the "dictum" only, again, persuasive authority. (*Jane Ginsburg: Legal Methods*)

## Exercises of Supplementary Reading

### Ⅰ. Answer the following questions according to the passage.

1. How is case law created?
2. What does a particular decision mean to the parties to a lawsuit, to the lawyers, judges, and law students?
3. According to Professor Llwellyn, what creates a legal system of precedent? Why and when?
4. What might happen if a court follows the precedents mechanically?
5. What is the problem remaining in the legal system recognizing past decisions as authoritative sources of law for future cases?
6. Explain these two Latin terms: "*stare decisis*" and "*res judicata*".
7. What doctrine bars a person from ever suing on the same claim again?

### Ⅱ. Match the legal terms in Column A with the definitions in Column B.

| A | B |
|---|---|
| 1. overrule | a. a determination of a matter of law that is pivotal to a judicial decision |
| 2. *res judicata* | b. a statement of opinion or belief held to be authoritative because of the dignity of the person making it |
| 3. *stare decisis* | c. a decided case that furnishes a basis for determining later cases involving similar facts or issues |
| 4. pending case | d. the doctrine of precedent, under which it is necessary for courts to follow earlier judicial decisions when the same points arise again in litigation |
| 5. *dictum* | e. the elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to, esp., procedure |
| 6. case law | f. an issue that has been definitively settled by judicial decision |
| 7. precedent | g. a precedent that a court may either follow or ignore |
| 8. binding precedent | h. to rule against; to reject; (of superior court) to overturn or set aside (a precedent) by expressly deciding it should no longer be controlling law |
| 9. persuasive precedent | i. the collection of reported cases that form the body of jurisprudence within given jurisdiction |