



# THE LAW ACCORDING TO THE MOST-CITED LAW REVIEW ARTICLES OF ALL TIME

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**I**N THIS ESSAY I ADDRESS the perennial question of “What is law?” My data is our canon, as measured by citation counts. Per *Green Bag* submission requirements, I limit my compass to the fifty most-cited articles in the modern Anglo-American tradition. I thank Fred Shapiro and Michelle Pearse, the authors of *The Most-Cited Law Review Articles of All Time*, for their essential work.

What is law? This is an ordinary question for Holmes’ bad man. But for either the cognoscenti or President Clinton the question is itself answered with a more rarefied koan: it depends on how you define “law.”<sup>1</sup> I agree this conditional question helps frame our task, but it might not facilitate finding a solution. The law is unstable and relational.<sup>2</sup> “A definition of law is not true or false, any more than a New Year’s resolution or an insurance policy.”<sup>3</sup>

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<sup>1</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1378 (1953) (“That depends on how you define ‘law.’”) (emphasis added) (no. 38 most cited).

<sup>2</sup> Angela P Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586 (1990) (no. 18 most cited).

<sup>3</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 835-36 (1935) (no. 39 most cited).

It can only be useful. We must take the law “into our own hands”<sup>4</sup> and do something with it. What should we do?

“The notion that law exists as a means to an end has been commonplace” for over a century.<sup>5</sup> The ends of law may be noble, intrepid, pure. For the idealist, for the person “who loves creativeness, who can without loss of sleep combine risk-taking with responsibility . . . law [is seen] as a tool to be eternally reoriented to justice and to general welfare.”<sup>6</sup> For others the law is simply there to let one nosh on a shrimp cocktail at peace, without the Hobbesian fear of a gang of voracious interlopers. In the words of Professor Hohfeld: “it is therefore a right of mine to eat shrimp salad which I have paid for, although I know that shrimp salad always gives me the colic.”<sup>7</sup> Already we can delimit the competing values that inform this debate, a conversation as American as talking cars.<sup>8</sup> As for the author, “I may have lived a uniquely sheltered life,”<sup>9</sup> but I still possess the naïve want to provide closure to these ontological concerns. Or if nothing else, this essay can remind us why we do this; perhaps “Nietzsche’s observation, that the most common stupidity consists in forgetting what one is trying to

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<sup>4</sup> Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 261 (1961) (citing aphorism of one “taking the law into his hands” in emergency vigilante situations) (no. 40 most cited).

<sup>5</sup> Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 52 (1936) (writing in 1936 that “the notion that law exists as a means to an end has been commonplace for at least half a century.”) (no. 49 most cited).

<sup>6</sup> Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 397 (1950) (no. 43 most cited). See also Frank I. Michelman, *The Supreme Court, 1968 Tern-Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (rethinking notions of “real equality”) (no. 25 most cited).

<sup>7</sup> Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 34 (1913) (“The eating of shrimp salad is an interest of mine, and, if I can pay for it, the law will protect that interest, and it is therefore a right of mine to eat shrimp salad which I have paid for, although I know that shrimp salad always gives me the colic.”) (no. 50 most cited).

<sup>8</sup> Stewart Macaulay, *Non-Contactual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 64 (1963) (“The American male’s habit of debating the merits of new cars carries over to industrial items.”) (no. 15 most cited).

<sup>9</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14 (1959) (no. 5 most cited).

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do, [still] retains a discomfoting relevance to legal science.”<sup>10</sup>

Is law a science? Professor Galanter offers a technocratic approach to the sociology of litigation: The law is “a body of authoritative normative learning analyzed and applied within the institutional setting of a court.”<sup>11</sup> At the same time his vision supports others who have unsurfaced the subjectivities and biases that inform legal systems. How we choose “between various visions and the values that lie within them is not guided by any determinate organizing principle.”<sup>12</sup> Instead, this underlying choice is contingent and often nefarious. The law can serve the hegemonic function of reifying oppressive power relationships.<sup>13</sup> It can legitimate race and gender disparities.<sup>14</sup> Though Professor Bork also reminds us that *all* laws discriminate.<sup>15</sup> Each law has winners and losers; the relevant question is whether the losers lost for the wrong reasons.

Indeed, the fundamental thing the law does is pick a winner.<sup>16</sup> This is what courts are good at doing.<sup>17</sup> There are other things that courts are less

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<sup>10</sup> Fuller & Perdue, Jr., *supra* note 5 at 52.

<sup>11</sup> Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. (1974) 95, 96 (no. 37 most cited).

<sup>12</sup> Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1346 (1988) (no. 32 most cited).

<sup>13</sup> Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 385 (1987) (“This criticism, that law and legal discourse serve a hegemonic function by legitimizing oppressive power relationships through false or misleading ideologies, is a central theme of legal academia’s new left.”) (no. 8 most cited); see also Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 895 (1963) (“Yet this fact does not lessen, but rather emphasizes, the power of law and legal institutions as an instrument of social persuasion and control.”) (no. 41 most cited).

<sup>14</sup> See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (no. 44 most cited).

<sup>15</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 12 (1971) (“The bare concept of equality provides no guide for courts. All law discriminates and thereby creates inequality.”) (no. 10 most cited).

<sup>16</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972) (“[T]he fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail.”) (no. 6 most cited).

<sup>17</sup> Henry J. Friendly, *“Some Kind of Hearing,”* 123 U. PA. L. REV. 1267, 1302 (1975) (“Courts are good at deciding cases, bad at drafting legislation; typically they see the case at hand

good at, or no longer enjoy. Courts used to manage our federalism. Courts were at one point our central lawmakers.<sup>18</sup> Now Congress makes federal law, which develops in the interstices,<sup>19</sup> the boundaries, the *edges* of overlapping sources of authority. Unfortunately we don't like these liminal spaces: "everywhere in the law we are plagued by the borderline cases."<sup>20</sup> Many judges may retreat from the asymptotic limits of our doctrinal tests or from statutory ambiguities. But who cares what I think many judges might do? "All generalizations . . . are to some degree invalid, and hence every rule of law has a few corners that do not quite fit."<sup>21</sup> When a judge makes law, even if it is ad hoc, or odious,<sup>22</sup> or ideological,<sup>23</sup> it is still law. Or is it?<sup>24</sup>

Another reason not to worry: The law is sublime. Like most origin stories, the birth of a law commonly begins with the face of a beautiful woman.<sup>25</sup> It is also ageless ("the common law, in its eternal youth, grows

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and a few others but not the entire spectrum.") (no. 48 most cited).

<sup>18</sup> Owen M. Fiss, *The Supreme Court, 1978 Term – Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 36 (1979) ("The courts created our law. They were the central lawmaking institutions.") (no. 27 most cited).

<sup>19</sup> Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 545 (1954) ("federal law is still a largely interstitial product") (no. 28 most cited).

<sup>20</sup> Fuller & Perdue, *supra* note 5 at 70.

<sup>21</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (no. 36 most cited).

<sup>22</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 626 (1958) ("Laws, however morally iniquitous, would still (so far as this point is concerned) be laws.") (no. 23 most cited).

<sup>23</sup> Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 77 (1985) ("[T]here is little reason to believe that courts are themselves immune from 'ideology.' The history of Anglo-American law suggests the opposite.") (no. 46 most cited (tie)).

<sup>24</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (suggesting *Roe v. Wade* isn't bad constitutional law because it isn't law at all) (no. 20 most cited).

<sup>25</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 423 (1960) ("All this is a most marvelous tree to grow from the wedding of the daughter of Mr. Samuel D. Warren. One is tempted to surmise that she must have been a very beautiful girl. Resembling, perhaps, that fabulous creature, the daughter of a Mr. Very, a confectioner in Regent Street, who was so wondrous fair that her presence in the shop caused three or four hundred people

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to meet the new demands of society”<sup>26</sup>) but ever adaptive (“one can fairly hope that the growth of the law in a civilized society should be evolutionary”<sup>27</sup>). Fresh cases animate the law, and renew its vitality.

*Stare decisis* anchors us to history. Our continued acquiescence to old law updates the original social contract.<sup>28</sup> The “law must pay some deference to tradition and history, even in derogation of antiseptic rationality.”<sup>29</sup> Judges must at times reject the austere logic of pure reason to fit a case within the tapestry of precedent.

The goal of the common law is to decide like cases in like ways (I can’t claim to know the goal of civil law after completing my survey). “A principle to be vital must be of wider application than the mischief that gave it birth.”<sup>30</sup> This transcendent, impersonal purview is why we let third parties be bound by a decision.<sup>31</sup> Professor Michelman goes so far as to reject idiosyncrasy and factual distinction in certain doctrinal areas.<sup>32</sup>

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to assemble every day in the street before the window to look at her, so that her father was forced to send her out of town, and counsel was led to inquire whether she might not be indicted as a public nuisance. This was the face that launched a thousand lawsuits.” (no. 45 most cited).

<sup>26</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (no. 2 most cited).

<sup>27</sup> William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 696 (1974) (no. 21 most cited).

<sup>28</sup> Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980) (no. 24 most cited).

<sup>29</sup> Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 75 (1964) (no. 31 most cited).

<sup>30</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (no. 9 most cited).

<sup>31</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1080-81 (1984) (“The authority of judgment arises from the law, not from the statements or actions of the putative representatives, and thus we allow judgment to bind persons not directly involved in the litigation even when we are reluctant to have settlement do so.”) (no. 22 most cited).

<sup>32</sup> Frank I. Michelman, *Properti Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1171 (1967) (“This essay differs from what has gone before in its provisional abandonment of the assumption that case-by-case adjudication should or must be the prime method for refining society’s compensation practices.”) (no. 12 most cited).

The law not only shepherds continuity, it also creates. It determines original entitlements.<sup>33</sup> The law makes something property.<sup>34</sup>

Others parry that what happens *outside* of the law is what makes human life special. Elemental goods can't be commoditized or excluded from use. "Certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs."<sup>35</sup> The law only steps in once private ordering breaks down,<sup>36</sup> of course depending on what you think counts as market failure. For example, Professor Manne rejoins that we would undoubtedly have "many more mergers . . . but for our antitrust laws."<sup>37</sup>

Or maybe I should rethink my methodology of looking at scholarship for a master definition of law? The above discussion feels parroted from an airline lounge. And after all, "law professors' black-letter statements of the law, like the testimony of all other criminal accomplices, ought to be received with caution and scrutinized with care."<sup>38</sup> There is an obverse to any canon of construction,<sup>39</sup> an available "humpty-dumpty" textual manipulation.<sup>40</sup> Over time "procrustean analyses" can flatten and obscure any nonconforming thread.<sup>41</sup> This is what we want: for the byzantine proce-

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<sup>33</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (no. 1 most cited); see also Robert H. Mnookin & Lewis Komhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (no. 19 most cited).

<sup>34</sup> Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 739 (1964) ("Property, on the other hand, is the creation of law.") (no. 7 most cited).

<sup>35</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970) (no. 46 most cited (tie)). See also Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (exploring the paradoxes and injustices in the socio-legal determination of what things are alienable) (no. 42 most cited).

<sup>36</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1699 (1976) ("The law intervenes only when things have gone so far astray that all the private mechanisms for adjusting disputes have been tried and failed.") (no. 14 most cited).

<sup>37</sup> Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 119 (1965) (no. 29 most cited).

<sup>38</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 355 (1974) (no. 17 most cited).

<sup>39</sup> Llewellyn, *supra* note 6 at 401-05.

<sup>40</sup> Brest, *supra* note 28 at 225.

<sup>41</sup> Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 2 (1972) (no. 4

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dures of law to sublimate our taste for vengeance<sup>42</sup> and lessen the emotional burden<sup>43</sup> of conflict. Alas, “the larger question is how anyone knows anything in life or in law.”<sup>44</sup> Does either have any meaning?<sup>45</sup>

But there is one jurist who can always point us in the direction of eternal truth, a name that bridges the ideals of scholarship as *wissenschaft* and of judicial practice as *praxis*. That name is, of course, *Holmes*. We might not be able to articulate an effable definition of platonic law, but we can experience the ephemeral joy of highlighting a casebook in the wee hours of Butler Library where we *feel* an “echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law,” in which “all mathematical distinctions vanish in presence of the infinite.”<sup>46</sup> This is the lawyer’s high, our oceanic feeling.

Or to take a more instrumental tack, we can simply quote him for the predictive theory of law: it’s what we think judges will do.<sup>47</sup> Other authors have since speculated on “the law of the future.”<sup>48</sup> Holmes permeates our thinking and provides an endless source of ornaments for our writing. But beware the citable author! (and thus beware this entire essay!): “Mr. Justice Holmes was surely the Supreme Court’s master of epigrams, but he

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most cited). See also William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 805-06 (1966) (“The tide of decisions is apparently sweeping to oblivion the highly metaphysical distinction between the product and the container in which it is sold.”) (no. 30 most cited).

<sup>42</sup> Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372 (1978) (“The object of the rule of law is to substitute for violence peaceful ways of settling disputes.”) (no. 26 most cited).

<sup>43</sup> Mnookin & Komhauser, *supra* note 33 at 972.

<sup>44</sup> Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2362 (1989) (no. 33 most cited).

<sup>45</sup> See generally Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (no. 16 most cited).

<sup>46</sup> Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478, 459 (1897) (no. 3 most cited).

<sup>47</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281-82 (1976) (“Holmes admonished us in one of his most quoted aphorisms to focus our attention on ‘what the courts will do in fact, and nothing more pretentious.’”) (no. 11 most cited).

<sup>48</sup> William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1110 (1960) (in reference to strict liability for food) (no. 13 most cited).

was quick to recognize the spurious seductiveness of the well-turned phrase – even when it was his own.”<sup>49</sup> Have we been on a wayward path of the law?!

Still, there is one bold Holmesian prediction that should continue to define the work of lawyers: “If a given act involves a violation of law, penalties may follow.”<sup>50</sup>



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<sup>49</sup> William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1458 (1968) (no. 35 most cited).

<sup>50</sup> Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1192 (1981) (no. 34 most cited).