Creative Input

The Development of the Common Law on Appeal

By Mary Massaron Ross

The most effective advocates look at far more than the recent or leading case on the legal principle that is at issue.

Oliver Wendell Holmes famously observed that "[t]he life of the law has not been logic; it has been experience." Oliver Wendell Holmes, *The Common Law* 5 (Little, Brown and Company 1963). The common law is judge-made; it develops through judicial decisions issued over time. Published opinions set forth holdings and the rationales for them. These decisions then become the raw material for deciding the appeals that follow. No textual touchstone, such as a statute, constrains the common law courts. Common law reasoning remains fluid. As the Oklahoma Supreme Court explained, "inherent in the common-law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of stare decisis, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying common-law to new situations as the need arose." *Brigance v. Velvet Dove Restr., Inc.*, 725 P.2d 300 (Okla. 1986). Rather than formal logic, the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do with the syllogism in determining the rules by which men should be governed." Oliver Wendell Holmes, *The Common Law* 5 (Little, Brown and Company 1963).

The potential impact of changing societal needs and evolving social and moral beliefs coupled with the greater leeway involved in common law judging provides the advocate with special challenges and opportunities. Developing arguments to support or refute the application of a common law principle or doctrine requires creativity, excellent research skills, and thoughtful analysis because such appeals are decided on the basis of a potentially broad range of jurisprudential concepts and approaches. In all but the easiest appeals, the most effective advocates look at far more than the recent or leading cases on the legal principle that is at issue. Effective advocates study a host of other legal resources and background information. Effective advocates think deeply about the multifaceted analysis implicated in com-

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mon law reasoning, and creatively offer solutions backed by arguments grounded in binding and persuasive precedent, history, social facts, logic, and policy.

Learn the Backdrop of Common Law History

The backdrop of history illuminates the common law principles employed in modern American jurisprudence. The common law can be traced back to the English feudal system as incorporated into the Domesday Book, which was published after the Norman conquest and included a survey of land and its ownership at that time. Theodore F.T. Plucknett, *A Concise History of the Common Law* 11–14 (Little, Brown and Company, 1956). In medieval times, the concept of "law" encompassed both written and unwritten laws. John Hudson, *The Formation of the English Common Law* 2–3 (Addison Wesley Longman 1996). Common law "was thought to be, and pretty much was, an expression of custom and usage." Charles Rembar, *The Law of the Land: The Evolution of Our Legal System* 43 (Touchstone 1981). To early English jurists, it "represented the working out of legal principles through the application of reason by judges." Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 56 (Cambridge Univ. Press 2004). From its inception, the common law was thought to establish a "fundamental legal framework" that controlled even acts of Parliament. Tamanaha, at 57. Later, with the acceptance of legal positivism, law came "to be seen as the product of sovereign legislative will…." *Id.* When a "manner of conduct [becomes] habitual to members of a community to such an extent that it would be unreasonable to expect a person one deals with to act otherwise" a common law court could announce that it is a "binding rule, although there is no precedent found in the books…." Ernest Bruncken, *The Common Law and Statutes*, 29 Yale L.J. 516, 518 (1920). Once a court took that step, later courts would adhere to the custom on the basis that it had become a legal precedent. *Dale v. Pattison*, 234 U.S. 399, 34 S. Ct. 785, 58 L. Ed. 1370 (1914) ("The rule in respect to legality of a trade usage or custom should not prevent recognition of a well established custom as evidence of that which has been recognized by the courts as a part of the law."); *U.S. v. Arredondo*, 31 U.S. 691, 8 L. Ed. 547 (1832) (holding that courts are bound to notice and respect general customs and usage as the law of the land equally with the written law). Today's appellate courts continue to rely on custom and tradition as a basis for deciding common law appeals, and the arguments developed around that reliance can be traced to this early history.

History also offers insight into the basis for distinctions that form the boundaries of today's common law claims and defenses. Early common law principles developed from the forms of action, or writs. *See generally*, J.L. Baker, *An Introduction to English Legal History* 63–83 (Butterworth & Co. 1990). These early forms of action were complex, highly technical, and often hinged on possession or ownership of land. F. W. Maitland, *The Forms of Action at Common Law* (reprint 1962) (1909). The early forms of action have been abolished, and the world view that formed their underpinnings has been irretrievably altered. But the old writs continue to influence the development of the substantive common law. Frederick William Maitland, an early legal historian, wrote, "The forms of action we have buried but they still rule us from their graves." F.W. Maitland, *The Forms of Action at Common Law* 2 (reprint 1962) (1909). Maitland's comment serves as a reminder of how much our present common law is rooted in this past—and that the analysis of common law issues is often informed by this history. A number of useful books on this early history can be found in most law libraries. *See*, *e.g.*, J.H. Baker, *The Common Law Tradition: Lawyers, Books and the Law* (Hambledon Press 2000); Theodore F. T. Plucknett, *A Concise History of the Common Law* 11–14 (Little, Brown and Company 1956); C.H.S. Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens & Sons 1949).

Advocates can strengthen their ability to argue a common law appeal by studying this history. As Benjamin Cardozo explained, "precedents are the basic juridical conceptions which are the postulates of legal reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn." Benjamin N. Cardozo, *The Nature of the Judicial Process* 19 (Yale Univ. Press 1921). Legal history reveals the common law principles that form the basic "postulates for reasoning." *Id.* Legal history also offers insights into subtle distinctions between one common law theory and another that can be advantageous in presenting an argument.

Advocates arguing against expanding the tort of nuisance so that it would encompass social ills blamed on gun manufacturers industry-wide, the effects of climate change, or lead paint injuries have found support in limits to public nuisance claims as articulated by early common law courts. *See*, *e.g.*, Donald G. Gifford, *Suing the Tobacco and Lead Pigment Industries: Government Litigation as a Public Health Prescription* 88–95, 143–48 (Univ. of Michigan Press 2010). Advocates debating the appropriate limits to nuisance and trespass claims have regularly relied on old common law distinctions. *See*, *e.g.*, *Gehr v. Baker Hughes Oil Field Operations, Inc.*, 165 Cal. App. 4th 660, 81 Cal. Rptr. 3d 219 (Cal. Ct. App. 2008); *Smith v. Kansas Gas Service Co.*, 169 P.2d 1052 (Kan. 2007); *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985 (Ohio 1996).

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Reason by Analogy Within the Leeways of Precedent

Common law principles must be understood in light of what Karl Llewellyn called "the leeways of precedent." Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 62–91 (Little, Brown and Company 1960). Llewellyn pointed to an oft-overlooked truth—existing precedent does not necessarily dictate an outcome. *Id.* at 62. According to Llewellyn, "only in times of stagnation or decay does an appellate system even faintly resemble such a pic-

ture of detailed dictation by precedents…." *Id.* Common law precedent in modern times offers a range of "finer shadings" with variations; courts can follow a precedent, expand it, redirect it, avoid it, limit it, narrow it, or "kill" it. *Id.* at 77–91. Within the leeways of these shadings, the effective advocate can find room to structure a winning argument. A creative lawyer's successful effort to limit earlier precedent to its facts, or to avoid a rule because its rationale does not apply, or to extend existing precedent to a present case on the basis of an analogy, prompts gradual and often almost imperceptible change. *See* Melvin Aron Eisenberg, *The Nature of the Common Law* 50–104 (Harv. Univ. Press 1988). Skillful lawyers can use the techniques that Llewellyn described to achieve a victory even when a quick reading of prior decisional authority suggests that governing decisions are adverse. Karl L. Lewellyn, *The Common Law Tradition: Deciding Appeals* 62–120 (1960). *See also* Mary Massaron Ross, *An Advocate's Toolbox: Techniques to Help Appellate Lawyers Evaluate Precedent and Craft Analytically Precise Arguments*, MICH. BAR J. (Aug. 2002).

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Common law appeals are often determined on the basis of reasoning by analogy from the existing precedent. Implicated in the analysis are doctrinal and social propositions. Doctrinal propositions are expressions of legal doctrine set forth as legal rules. Melvin A. Eisenberg, *The Principles of Legal Reasoning in the Common Law*, in Common Law Theory 81, 82–83 (ed. Douglas E. Edlin). The legal rules may be found in official texts that are binding on the deciding court, such as statutes and precedents. They may also be located in official texts that are not binding on the deciding court, such as precedents from other jurisdictions. And they may be found in unofficial texts such as Restatements, treatises, and law reviews. Melvin A. Eisenberg, *The Principles of Legal Reasoning in the Common Law*, in Common Law Theory 81, 82–83 (ed. Douglas E. Edlin).

Analysis of doctrinal propositions offers a useful starting point. They should be examined to determine whether they can be used to create a logical syllogism to support an advocate's position. In other words, can the facts of a case be so closely analogized to the precedent that it governs the outcome? Llewellyn observed that "if the essential pattern of the facts is not seen by the court as fitting *cleanly* within the rule you contend for, your case is… in jeopardy." Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 237 (Little, Brown and Company 1960). But even if your case fits within the rule, "it is plainly not enough to bring in a technically perfect case 'on the law'" because the opposing party is likely to advance a technically perfect case on the other side. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 237 (Little, Brown and Company 1960). An argument that stops with a discussion of the technical law and precedent misses critically important opportunities. In all but the easiest appeals, those in which the only technical argument to be made is on your client's side of the case, an equally correct technical argument can be advanced in support of the other side. *Id.*

Formal logic offers only the starting point. It can tell us, for example, that the different treatment of a like case is inconsistent. But this is nothing more than a tautology. Formal logic does not tell us if a potential point of distinction between the two cases is justifiable within the law. Social propositions provide the basis for arguing that a distinction should or should not be recognized in the law. *Id.* at 84. Social propositions, such as "moral norms, policies, and empirical propositions," are "invoked as *reasons for* rules." *Id.* 82–83 (italics in original). Having set forth the doctrine that arguably applies, the effective advocate must explain why it makes sense in light of these social propositions. This analysis must be coupled with consideration of the underpinnings for the formal rule. What is its rationale? How far does it extend? How far should it extend? What exceptions should be recognized because the circumstances do not fit within the rationale for the rule? What exceptions or limitations should be recognized because some other social propositions also apply to the circumstances and the outcome dictated by those other social propositions will conflict with that suggested by the social norms and policy grounds for this rule? These questions about whether application of the rule makes sense in light of the particular factual dispute represent the heart of the appellate argument. According to Llewellyn, the advocate must satisfy the appellate court "that sense and decency and justice require (a) the rule which you contend for in this *type* of situation; and (b) the result that you contend for, as between these parties." Llewellyn, at 238 (italics in original). If the advocate accomplishes this, the court is likely to accept "your *own* clean phrasing of the rule for the situation…." *Id.* at 241(italics in original).

Common law reasoning involves a complex form of reasoning by analogy. *See generally*, Edward H. Levi, *An Introduction to Common Law Reasoning* 1 (Univ. of Chicago Press 1949). The Sixth Circuit Court of Appeals criticized appellate lawyers who were not prepared to offer analogous decisions at oral argument in *United States v. Strickland*, 144 F.3d 412, 414 n.4 (6th Cir. 1998). Judge Boggs, writing for the court, observed, "While no one could doubt counsel's statement that each case turns on its particular facts, the usual job of the lawyer is to make arguments as to why the case at bar is more like one case than another based on inferred principles that appear to justify judgments in particular cases." Judge Boggs then cited Levi's book, *An Introduction to Legal Reasoning*, pages 1–2 (1947), which offers instruction about how to do so.

Effective common law reasoning often requires courts to decide between competing analogies, the outcome of which turns on the identification of the relevant likeness. Llewellyn called this the "trickiness of classification," which allows both sides to advance a technically perfect argument.

Llewellyn, at 237. When both sides urge a court to analogize to competing lines of authority, the court must decide between them. Doing so requires complex reasoning, often based on examining the underlying common law principles or tracing a doctrine's history back to its original purpose. At this level of reasoning, 'two cases are analogous only as a *consequence* of their falling under the principle." Gerald J. Postema, *A Similibus ad Similia: Analogical Thinking in Law* in Common Law Theory 81, 82–83 (ed. Douglas E. Edlin). Llewellyn, Eisenberg and other scholars have written extensively elaborating on varying methods of reasoning from common law principles. Not all jurists consider this form of argument a form of logic. Judge Posner, for example, contends that it "is not a matter of logically or rationally 'connecting premises to conclusions.'" Richard A. Posner, *The Problems of Jurisprudence* 93 (Harv. Univ. Press 1990). Other scholars and judges have also offered critiques of common law reasoning, complaining that it is indeterminate and fails to predict the outcome as a matter of formal logic. *See*, *e.g.*, Ronald Dworkin, *In Praise of Theory*, 29 Ariz. St. L.J. 353, 371 (1997); Larry Alexander, *The Banality of Legal Reasoning*, 73 Notre Dame L. Rev. 517, 526 (1998).

But whether you agree with the critics or not, versatility with these modes of reasoning or argumentation will enhance your ability to construct a compelling argument based on common law principles, as well as to find flaws in the approach offered by your opponent. One way to practice these skills is to study judicial decisions, particularly from courts of last resort, to identify the doctrinal and social propositions mentioned. Then analyze the precise modes of reasoning employed by the courts to explain why they chose one principle over another, or why they limited the reach of a rule, or expanded it to encompass a new area. Taking the time to figure out the specific tools of decision making employed by courts will allow you to hone your own advocacy skills. It will also offer insight into the favored methods of reasoning in a jurisdiction. Another way is to read, or reread, Llewellyn's great work, which is uniformly praised as the seminal work on common law reasoning. Llewellyn, The Common Law Tradition: Deciding Appeals, *supra*.

Consider the Constitutional Backdrop and Statutory Overlay

Common law principles must also be understood in light of the statutory overlay and constitutional backdrop. Soon after the Declaration of Independence was signed, Virginia enacted a provision making English common law, insofar as it was not local to England, "together with the several acts of the general assembly of this colony now in force," the "rule of decision" that "shall be considered in full force, until the same shall be altered by the legislative power of the colony." 9 Laws of Virginia 126–127 (Hening 1821). Other states followed suit. *See generally*, Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 Vand. L. Rev. 791, 798–98 (1950–1951). New Jersey's constitution provided that "the common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, shall remain in force, until they shall be altered by a future law…." N.J. Const., art. XXII (1776). Similar language was embraced "by the governor and judges of the Northwest Territory" and also enacted by the Indiana territorial legislature. Hall, *supra*, at 802.

State constitutional provisions typically preserved the common law that was in effect before the constitution's adoption. *See*, *e.g.*, Or. Const. of 1857, art. I, §10. Such provisions also ordinarily required the courts to adhere to the common law while giving primacy to conflicting or superseding legislative enactments. *See*, *e.g.*, *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985). Michigan's constitution, for example, still provides that "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended, or repealed." Mich. Const., art. III, §7 (1963). Thus, the common law serves a gap-filling function insofar as it remains in effect, and controls until it has been legislatively abrogated or modified. The courts retain their common law jurisdiction to essentially legislate in those areas unfilled by statutes.

Because state courts retain this common law authority, they are empowered to change common law rules on the basis of traditional common law reasoning. In other words, the judiciary is entitled to change the common law because it is "judge-made and judge-applied, [and] can and will be changed when changed conditions and circumstances establish that it is unjust or has become bad public policy." *Ontiveros v. Borak*, 667 P.2d 200, 204 (Ariz. 1993). *See also McDavid v. United States*, 584 S.E.2d 226, 230 n.4 (W. Va. 2002). Unlike statutory enactments, which remain fixed until amended, repealed, or struck down on the basis of constitutional defects, the common law is predicated on "a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of stare decisis which, if correctly understood, was not status and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose." *Ontiveros v. Borak*, 667 P.2d at *204. The development of the common law is part of a state court's obligation to "critically examine its precedent" as part of its "duty to develop the orderly evolution of the common law of this Commonwealth." *Nunnally v. Artis*, 492 S.E.2d 126 (Va. 1997).

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Because the constitutional provisions confer primacy to the legislature, advocates must consider the impact that the statutory overlay may have on an outcome. A statute may occupy the field, leaving no room for common law principles to govern. In many states, abrogating common law claims "is disfavored and requires a clear repugnance between the common law and statutory causes of action." *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 192 (Tex. Ct. App. 1995, *writ denied*); *See also*, *Waffle House, Inc. v. Williams*, 313 S.W.3d 796,

2010 WL 2331464 (Tex. 2010). Any legislative intent to abrogate the common law must be clearly and plainly expressed, and courts adhering to this approach will not presume such an intent from ambiguous language. *Tomczak v. Planetsphere, Inc.*, 735 N.E.2d 662 (Ill. App. Ct. 2000). A statute also governs the outcome when it conflicts with some common law principle. *In re Estate of Compton*, 919 N.E.2d 1181 (Ind. Ct. App. 2010) (amended statute abrogating common law presumption of undue influence with respect to certain transactions meant that presumption of "undue influence" did not apply). But state courts are reluctant to find a conflict between a statute and a common law principle unless the legislature has specifically abrogated the common law or strongly evidenced its desire to occupy the field. *See, e.g.*, *Evans v. Evans*, 695 S.E.2d173, 2010 WL 2305852 (Va. 2010); *Peterson v. Feldmann*, 784 N.W.2d 493, 2010 WL 2622138 (S.D. 2010).

Courts are often open to arguments allowing them to fill in gaps in one area of law with concepts from another. Don't overlook these opportunities.

Common law appeals sometimes turn on other legislative considerations. Courts often borrow legislative enactments to supply a common law standard, such as the standard of care for a tort theory. They also regularly define statutory terms by looking to a common law term of art or definition. For example, under Texas law, the standard for driving can sometimes be established by a negligence per se submission, which generally only inquires whether a statutory duty was violated and whether that conduct was the proximate cause of the accident. *See Impson v. Structural Metals, Inc.*, 487 S.W.2d 694, 697 (Tex. 1972); *Antee v. Sims*, 494 S.W.2d 215, 217 (Tex. Civ. App. 1973, *writ ref'd n.r.e.*); State Bar of Tex., Tex. Pattern Jury Charges §5.11, at 104 (1969). An unexcused violation of the statute amounts to negligence per se. *Moughon v. Wolf*, 576 S.W.2d 603 (Tex. 1978) (using a negligence per se theory to hold driver liable in tort for crossing a center line in violation of state statute). *See also Wilson v. Maple*, No. CA2005-08-075, 2006-Ohio-3536, ¶13 (Ohio Ct. App. 2006) (using negligence per se theory to incorporate assured clear stopping distance statute into auto negligence litigation). Common law concepts are also often used to give meaning to undefined words in statutes. *See, e.g.*, *Fordyce v. Town of Hanover*, 929 N.E.2d 929, 2010 WL 2682020 (Mass. 2010) (using common law fraud definition to give meaning to use of term in statute governing competitive government bidding). Courts have relied on the common law to assign meaning to language in collateral source statutes, for instance in *Swanson v. Brewster*, 784 N.W.2d 264, 2010 WL 2605951 (Minn. 2010), to consider the meaning of "acts" in a governmental liability statute, as in *Picco v. Town of Voluntown*, 989 A.2d 593 (Conn. 2010), and to define "agent" as used in a statute governing litigation against government employees and agents, as in *Ackerman v. OHSU Medical Group*, 227 P.3d 744 (Or. App. 2010). This complex statutory and common law interplay allows advocates to present creative arguments based on history. Courts are often open to arguments allowing them to fill in gaps in one area of law with concepts from another. Don't overlook these opportunities.

Remember the Institutional Limits on the Judiciary as a Policy-Making Institution

Harlan Stone wrote that statutes were "treated like an alien intruder in the house of the common law." Harlan Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 15 (1936). But over time, statutes have come to predominate. *See generally*, Guido Calabresi, *A Common Law for the Age of Statutes* 1 (Harv. Univ. Press 1982). This fact has important implications for those arguing against an expansion of common law theories of recovery. Some have argued that no continuing role exists for common law jurisprudence because it allows courts to "discover, create, or modify common-law rules—or policy—[which] is entirely inconsistent with normative constitutional policies" vesting policy-making authority in the other branches of government. *See, e.g.*, Robert P. Young, *A Judicial Traditionalist Confronts the Common Law*, 8 Tex. L. & Pol. 299 (2004) ("I tend to think of the common law as a drunken, toothless ancient relative, sprawled prominently and in a state of nature on a settee in the middle of one's genteel garden party"). Academic literature and judicial opinions repeatedly voice concern about the judiciary's institutional disadvantage as a policymaking body. *See, e.g.*, Lillian R. BeVier, *Judicial Restraint: An Argument From Institutional Design*, 17 Harv. J.L. & Pub. Pol'y 7, 9–12 (1994). Unlike legislators, judges lack the ability to gather information broadly, are unaccountable to the electorate for their policy choices, and have no way to listen to all of the affected parties. *Id.* Judicial opinions are ill-suited to crafting rules intended to guide conduct; they are intended to set forth decisions resolving past disputes. Distinct from statutes or rules, judicial opinions are necessarily fact-based pronouncements deciding particularized disputes. While judicial opinions are precedential, they can far less comprehensively guide conduct than well-written statutes.

These arguments offer a strong basis for opposing a dramatic change in a common law principle, particularly one that would recognize broad new duties or a new cause of action. Courts have acknowledged reluctance to embark on such broad-scale decision making. The Hawaii Supreme Court, for example, has urged recognizing "that although courts at times arriving at decisions have taken into consideration social needs and policy it is the paramount role of the legislature as a coordinate branch of our government to meet the needs and demands of changing times and legislate accordingly." *Bissen v. Fujii*, 446 A.2d 429, 431 (Haw. 1970). Similarly, the Vermont Supreme Court has declined to alter the causation standard in medical malpractice cases because the question involved "'significant and far-reaching policy concerns' more properly left to the Legislature, where hearings may be held, data collected, and competing interests heard before a wise decision is reached." *Smith v. Parrott*, 833 A.2d 843, 848 (Vt. 2003). The Michigan Supreme Court recently declined

to overturn a common law rule prohibiting the enforcement of parental preinjury releases for minor children. *Woodman v. Kera LLC*, 785 N.W.2d 1 (Mich. 2010). The court emphasized the importance of modifying longstanding common law rules "because it is difficult for the judiciary to assess the competing interests that may be at stake and the societal trade-offs relevant to one modification of the common law versus another in relation to the existing rule." *Id.* at *2. The decision offers a litany of reasons for common law courts to defer to legislative action even when an issue relates to existing common law principles and doctrine. *Id.* at *7–16.

Consider Other Sources of Information: Restatements, Common Law Maxims, and Social Facts

In addition to working with controlling and persuasive precedent, looking to history, and examining the statutory and constitutional provisions that may be applicable, an effective advocate will think about other sources of law to support a winning argument. The various Restatements of the Law offer useful sources of support for common law arguments. Restatements are prepared by the prestigious American Law Institute's highly regarded academics, judges, and practicing lawyers. The Restatements are intended to codify existing law, and occasionally to offer a suggestion for its improvement. Restatements exist for contracts, torts, trusts, and a number of other critical common law topics. They are a fertile source of authority for arguing common law appeals. An advocate's research should include the Restatement, its history, drafting comments or background material showing disputes about the examined provision, and decisional authority discussing it. Often law review articles will discuss new language in a Restatement that sheds light on its meaning and offer additional arguments about its use.

Another source of support for arguments involving common law appeals are the many common law maxims that courts employ. Those maxims include sayings such as, "An act of God does wrong to no one." Richard Anthony, Maxims of Law, from Christ's Lawful Assembly, http://ecclesia.org/truth/maxims.html. This maxim offers support for an argument that certain kinds of injury caused by unusual weather events do not give rise to liability. Another common law maxim, which an advocate can invoke in support of an impossibility defense, says, "The law requires nothing impossible." *Id.* Common law maxims can also be used to argue in support of evidentiary issues. For example, in discussing a privilege issue, the Connecticut Supreme Court recognized the fundamental maxim that "the public… has a right to every man's evidence." *State v. Orr*, 969 A.2d 750 (Conn. 2009). Another frequently invoked maxim is that "the expression of one thing is the exclusion of another." *State v. Deyo*, 915 A.2d 249 (Vt. 2006). Appellate courts regularly invoke these ancient sayings to support their decisions. Thus, they can be quite effective ways of supporting an argument.

Finally, social facts and policy arguments can be highly effective in supporting appellate arguments about the common law. Social facts include "scientific and technical material" used by courts to shed light on "human behavior…." Thomas B. Marvell, *Appellate Courts and Lawyers: Information Gathering in the Adversary System* 149–150 (Greenwood Press 1978). Social facts must be differentiated from the case facts, which are those facts about a particular dispute. Whenever an appellate court reasons from considerations of justice, equity, fairness, common sense, workability, practical considerations, or other policy-oriented reasons, the court is likely using social facts as a basis for its discussion. *Id.* at 150–51. Such considerations are relevant to the decisions in only a relatively small number of appeals, but when relevant, these arguments are crucial to the advocate's case.

And these considerations are particularly compelling in arguing for a reversal of existing precedent. *Id.* at 155. Since the basis for ignoring stare decisis is often "changed social conditions" or the "unworkability" of existing law, an advocate seeking to make new law must carefully consider and develop social facts that support a change. *See*, *e.g.*, *Sowinski v. Walker*, 198 P.3d 1134 (Alaska 2008); *Harrison v. Montgomery County Board of Education*, 456 A.2d 894, 902–3 (Md. 1983). Modern appellate courts are sensitive to their role as neutral arbiters of the law. Thus, advocates must carefully frame arguments based on policy so that they take the proper common law considerations into account. A blatant jury appeal to sympathy is unlikely to be successful and may well offend a court. But carefully used social facts, which can be submitted to a court in the form of a Brandeis brief, can be powerful, and may be necessary, to show that a fundamental change in the common law is required.

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Common Law Appeals Call for Creative Advocacy

As scholars and judges continue to debate the role of the common law in today's age of statutes, the creative advocate can make an enormous difference to the outcome of a common law appeal. Courts continue to believe that "it is the strength of the common law to respond, albeit cautiously and intelligently, to the demands of commonsense justice in an evolving society." *Madden v. Creative Servs.*, 646 N.E.2d 780 (N.Y. 1995). A creative advocate has the opportunity to demonstrate that those policy considerations support his or her client's position on appeal. This can involve urging a retrenchment or limitation in existing common law statutes in light of new statutes, or an expansion of a common law defense. It can implicate arguments predicated on the institutional limits to the judiciary's ability to affect social change, or its obligation to correct currently unworkable doctrines. Whatever the issues are, you can be sure that a creative advocate's input will enhance the chances for success.