Private Law Realism

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Abstract

Hanoch Dagan argues that the legal realists conceived of law as "a dynamic institution, or set of institutions, that embodies three constitutive tensions: between power and reason, between science and craft, and between tradition and progress." One tension that Dagan mentions but does not emphasize sufficiently is the tension between adjudication and legislation. Understanding the ways judge-made common law influences legislation and the ways that statutes affect the development of common law will improve our understanding of legal reasoning, the rule of law, and the role of judges in a free and democratic society.

"We resolve … that government of the people, by the people, for the people, shall not perish from the earth."
Abraham Lincoln[1]

"Law cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics; [law is not just] doing the … sums right."
Oliver Wendell Holmes, Jr.[2]

Introduction

Legal realism has had a strange career. It is both routinely disparaged and applauded. Critics ridicule legal realism by arguing that it reduces judicial decisions to the whims of the individual judge; they are correct that this neither describes how judges operate nor provides a sensible guide to judging. At the same time, anyone who recognizes reality understands that judges with different philosophies—both jurisprudential and political—often come to different conclusions about legal issues. It is simply true that there is a liberal wing and a conservative wing on the Supreme Court. Does anyone think that Justices Scalia and Ginsburg vote differently because one of them is incapable of understanding legal reasoning or the law? Their divergent views do not reflect incompetence or stupidity on one side or the other; they reflect the fact that both one's perspective and one's values have a significant influence on how one understands the rule of law. The legal realists were completely right about this. Law is not just a matter of incontrovertible logic; it rests, to a very large degree, on what Oliver Wendell Holmes called "experience." On the other hand, fans of legal realism show their own forms of blindness. They praise legal realism's recognition that abstract concepts and rules cannot decide hard cases; yet many advocates

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[1] Abraham Lincoln, Gettysburg Address (1863).

[2] Oliver Wendell Holmes, The Path of the Law, in Collected Legal Papers 167, 180-82, 184 (1920).

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of legal realism resort to substitute formulas that obscure the value judgments they are making as thoroughly as formalism did.

Despite its controversial status, it is true *in some sense* that we are all realists now. By "we" I am referring to lawyers in the United States. American lawyers and legal scholars today do tend to think differently about law than do many of their colleagues in the rest of the world. In much of the world, the focus of legal analysis is on concepts and classification; the result in a case may depend, for example, on whether an arrangement is understood as a contractual agreement or a conveyance of property. In contrast, in the US, when the application of the law is uncertain, we do consult legal doctrine, but when doctrine does not clearly answer a legal question, or leads to a result that we find hard to live with, we decide the case not by classifying the issue but by a process of reasoning that includes a host of factors. We give meaning to concepts, as the legal realists taught us, through thought processes that cannot be reduced to logic or conceptual explication.

To decide cases, we focus on the facts of the case; we analogize the case to prior cases or we distinguish those prior cases; we consider the norms involved in the parties' relationship, the values we want the law to foster, and the consequences of one resolution rather than another. Ultimately, we decide in a way that tries to make the facts, the norms, and the consequences fit within established categories, rules, and doctrines, reinterpreting and even changing the rules and concepts as needed to make sense of the case to the extent we can. We engage in what John Rawls called "reflective equilibrium" among rules, principles, policies, and cases. Americans are, in a word, pragmatic, in the philosophical sense. We cling to the rule of law not because rules decide hard cases but because hard cases allow us to shape the law to promote the norms we affirm, the consequences we seek, and the policies that promote both. The order that law has comes from such complex judgments rather than from categorization, syllogistic reasoning, or logical deduction. The legal realists were perfectly right about all of this.

I. Legal Realism as Ambivalence

Despite this American attraction to pragmatism, Hanoch Dagan offers a trenchant, beautifully crafted argument that, in a sense that matters, we Americans are *not* all legal realists now. In his marvelous book, *Reconstructing American Legal Realism & Rethinking Private Law Theory*,[3] Dagan reinterprets what legal realism was and what it means for us today. In so doing, he argues that not all of us have fully absorbed or adhered to the key insights of the legal realist approach to the rule of law.

Dagan's picture of legal realism is both original and startlingly helpful. To his credit, and unlike legal realism's most extreme critics, Dagan argues for a *charitable* interpretation of what it meant to those who invented it.[4] Rather than focusing on its more extreme voices, he singles out a core group comprising Oliver Wendell Holmes, Jr., Ben-

[3] Hanoch Dagan, Reconstructing American Legal Realism & Rethinking Private Law Theory (2013).

[4] Id. at 2.

jamin Cardozo, Felix Cohen, and Karl Llewellyn; he then reads their scholarship in its best light rather than its worst light. Rather than taking sentences out of context (especially Holmes's striking aphorisms), Dagan considers the entire *oeuvre* of these thinkers in order to understand what they meant and what we can learn from what they taught us. This method of charitable reading is not only refreshing but productive and it leads Dagan to insights on what legal realism was and what it can be for us today and in the future.

Dagan argues that what the legal realists embraced was *ambivalence*. Rather than reducing law to a single value, a single method of reasoning, or a single perspective or stance, the realists conceived of law as "a dynamic institution, or set of institutions, that embodies three constitutive tensions: between power and reason, between science and craft, and between tradition and progress."[5] Law sometimes serves the interests of the powerful but sometimes decision-makers use reason to protect the vulnerable and to shape rules that could be acceptable to all. Law sometimes reflects the wisdom of experts who think systemically, logically, and coherently and sometimes it reflects case-by-case decision-making based on nuanced judgments that cannot be reduced to a formula but depend on "common sense" and normative reflection. Law usually rests on tradition and settled norms and expectations but law also allows for and embraces change, progress, and evolution in light of changing social values and conditions.

To the realists, law was a complex human enterprise that encompassed all the tensions, anomalies, and nuances of any field of human endeavor. The realists taught us that we need to manage the three tensions Dagan identifies. Dagan further argues that the legal realists relied on, and advocated for, a world of plural values that can neither be reduced to a single metric nor applied uniformly across all situations. Life, according to Dagan's legal realists, is complicated, but that does not mean we cannot think about what we should do and reason toward conclusions about how we should live together. Nor did it mean we could not think carefully and wisely about the problem of deciding when it is legitimate to use coercive state power to shape relations among human beings.

II. The Tension Between Common Law and Statutes

In the spirit of Dagan's approach and the insights he suggests, I want to focus on a fourth tension. That is the tension between adjudication and legislation as lawmaking techniques. Although Dagan mentions and analyzes the relationship between courts and legislatures, the tension between common law and statutes as sources of law is not a central feature in his conception of legal realism. Both the legal realists he describes and current scholars tend to view "private law" as the realm of common law while statutes and constitutions constitute "public law" impositions on a private law regime. What exactly is the relationship between these two methods of making law? And how should we understand the role of "public" statutes in shaping the norms of "private law"?

[5] Id. at 3.

Dagan approaches this issue in his chapter on "The Limited Autonomy of Private Law,"[6] but his focus there is on the relation between the kinds of values represented by bipolar private lawsuits and the "social values" associated with public law. He usefully explains how social values and private values overlap just as deontological approaches to moral reasoning may overlap with consequentialist or utilitarian ones.[7]

My point is related but different. The adjudication/legislation dichotomy does not merely reflect a tension between individual justice and social values. Rather, legislation contributes to private law norms in a more fundamental way. Indeed, statutory norms are often a crucial component of the ways in which we "make law" to define the just relations among persons. This does not mean that legislation is superior to common law; while legislation shapes common law, so too does common law shape legislation. In fact, each is a necessary complement to the other. Judges learn things from deciding cases through the common law method that are not obvious to legislators; indeed, legislatures often adopt statutes that codify rules created through common law adjudication. Conversely, judges often modernize common law rules by applying norms, values, and policies found in contemporary legislation. They do so both because of the democratic provenance of statutes and because legislative lawmaking processes bring insights that may be missing in bipolar common law lawsuits.

The tension between legislation and adjudication as forms of lawmaking, or between common law and statutes as sources of law, is fundamental and important. Not only are there both advantages and disadvantages to each form of lawmaking, but we cannot understand "private law" without also attending to legislation. My main criticism of the way common law subjects are conceived, taught, and theorized about today, is that legal scholars pay insufficient attention to legislation. Most private law scholarship focuses on common law and private law norms; it fails to make central to the analysis the norms that can be gleaned from legislation. This makes legislation appear to be peripheral rather than central to the norms governing private relationships. *Yet the opposite is the case.* We have legislation that governs all private relationships, and the statutes that regulate those relationships do not concern peripheral matters. Rather than mere details or glosses on fundamental private law rights, *statutes help to define the minimum standards for private law relationships.* Rather than reflecting only "social" values, statutes help define the basic norms of private law and the legitimate contours of "private" relationships. Let us see why this is so.

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[6] Id. at 104.

[7] See Joseph William Singer, Normative Methods for Lawyers, 56 UCLA L. Rev. 899, 915-21 (2009) (explaining why efficiency arguments are indeterminate in the absence of normative commitments that determine how to measure costs and benefits); Joseph William Singer, Property as the Law of Democracy, 63 Duke L.J. 1287 (2014) (explaining why economic considerations take place within a normative framework designed to reflect the fundamental values of a free and democratic society).

III. How Statutes and Common Law Are Interwoven

There is a tendency to think of private law as a realm of reason embedded in judge-made law while public law is an area of rough-and-tumble politics with legislation based on private interests, special constituencies, compromises, deals, and power plays. If we adopt this view of the relationship between common law and statutes, then legislation appears to be an interloper in a reasoned system of private rights. Alternatively, private law appears to be based on norms of justice between the parties (deontological reasoning) while legislation is generated from looking to social goals with costs and benefits tallied up to improve the environment within which people exercise their rights, which are independently defined by private law.

In the real world, of course, judges often use cost-benefit analysis to shape the contours of common law rules while constituents routinely lobby legislators to protect what they view as their fundamental rights. And many private law theorists eschew deontological or rights-based reasoning, instead using efficiency analysis or economics to identify the rules that best satisfy human preferences. Both scholars and judges use a combination of justice-based reasoning and utilitarian reasoning to develop common law rules, while legislators are frequently moved by arguments about liberty and property rights as well as norms such as the promotion of equal opportunity and protection of individual dignity.

On the other hand, those who theorize about private law tend to ignore the normative content of legislation when they think about the subjects of torts, contracts, and property. It is still true today that casebooks in these subjects overwhelmingly focus on common law, leaving statutory interventions to be handled in upper level courses, as if those statutes were meddlesome interferences with the core norms of those subjects.

In reality, legislation plays a far larger role in private law than most private law theorists recognize. Similarly, private law developments alert legislators to the anomalies and inadequacies of regulation, as well as overgeneralizations and unintended consequences of obtuse statutory commands. If we follow the legal realist method, as taught to us by Hanoch Dagan, we will attend to actual practices in the world, rather than just our theoretical constructs, and we will recognize and embrace the tensions that animate our lawmaking and norm-generating processes. A central tension is our legal system's embrace of two fundamentally different (but complementary) ways of making law. Some examples may help explain why a legal realist approach to law may benefit from explicit analysis of the tension between adjudication and legislation.

IV. What Legislators Teach Judges

Recall that the legal realists were responding not only to the formalism and conceptualism of the era of classical legal thought[8] but to the *Lochner*-era Supreme Court that refused to listen to legislators when they tried to define the core norms of property and contracts. It

[8] Duncan Kennedy, The Rise and Fall of Classical Legal Thought (1975).

was legislators and not judges who passed minimum wage and maximum hours laws. It was judges who held those laws to constitute "an arbitrary interference with personal liberty and private property without due process of law."[9] The judges thought they knew what "contract" and "property" meant. But after the legal realist revolution, the Supreme Court came to its senses in 1937 in the case of *West Coast Hotel v. Parrish* and held that legislators had as much right as judges to make judgments about the norms and values and meaning of the concepts of contract and property.[10]

In *West Coast Hotel,* Chief Justice Hughes wrote that the Constitution does not recognize "an absolute and uncontrollable liberty."[11] Rather, "[l]iberty in each of its phases has its history and connotation . . . [;] liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."[12] Statutes designed to protect the public welfare also protect the liberties of the vulnerable.[13] And the minimum wage challenged in *West Coast Hotel* was set "after full consideration by representatives of the employers, employees, and the public."[14] Those "representatives" had the legitimate power—the *right*—to use democratic means to define minimum standards for economic relationships. In exercising this legitimate political power, they found that inadequate wages "are insufficient to meet the bare cost of living" of workers.[15] Therefore,

> the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met.… The community is not bound to provide what is in effect a subsidy for unconscionable employers.

The Justices who decided *Lochner* in 1905 refused to listen to the legislatures that passed workplace regulations designed to protect workers from unfair and exploitative conditions. The Justices thought they knew what "liberty" and "property" meant and that any legislation that interfered with their conceptions of those concepts must be a "deprivation … without due process of law." The Justices who decided *West Coast Hotel* in 1937 knew better. They realized that moral judgments were involved in setting the ground rules for a market economy and those rules included the common law of contracts and property. Judges are empowered to decide those questions through adjudication and the common

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[9] See Lochner v. New York, 198 U.S. 45, 63 (1905) (striking down a maximum hours statute); see also Adkins v. Children's Hospital, 261 U.S. 525 (1923) (striking down a minimum wage statute).

[10] West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding a minimum wage law).

[11] Id. at 391.

[12] Id. at 391-92.

[13] Id. at 398-99 ("Legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living"); id. at 399 (noting the "exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage").

[14] Id. at 396.

[15] Id. at 399.

law process but legislators are equally empowered to define the contours and meaning of the norms governing economic relationships. While regulation by legislation can always "go too far," as Justice Holmes said in *Pennsylvania Coal Co. v. Mahon*,[16] it is also a crucial mechanism by which the people collectively choose the contours of their relationships by setting minimum standards for human relationships in different social contexts.

Those regulatory laws had—or should have had—an effect on our understanding of the common law of property and contract. Freedom does not mean that private individuals are free to agree on any terms they like. If that were true, we would not have been able to abolish slavery, feudalism, the fee tail, or debtor's prison; nor could we have granted married women the right to contract and control property without their husbands' consent. The political process by which minimum wage and maximum hours laws were approved by majorities in state legislatures redefined the scope, contours, and meaning of private property and freedom of contract. It reminded us that the "freedom of contract" that was so precious to the *Lochner*-era judges was not, in reality, an unregulated zone.

After all, around the same time the Justices were striking down maximum hours laws, they were approving Jim Crow segregation laws that prohibited public accommodations from serving black and white patrons together. *Lochner* was decided in 1905 but *Plessy v. Ferguson* was decided in 1896.[17] The absolute freedom to agree on any terms championed by *Lochner* was clearly absent in *Plessy*'s embrace of forced racial segregation. Nor did the *Lochner* ideology mean that the common law courts could no longer define the "estates in land" that regulated the packages of property rights that could be created in land, as we learn from Justice Holmes's 1893 opinion in *Johnson v. Whiton*,[18] written while he was on the Supreme Judicial Court of the Commonwealth of Massachusetts.

Legislators teach judges many things about the norms governing private law. Consider the iconic case of *State v. Shack*.[19] In that case, the court considered whether it constituted a trespass for a doctor and a lawyer to seek to visit migrant farm workers in their barracks on a privately-owned farm. It should have been an easy case. Owners have the right to exclude non-owners unless their entrance is privileged. No statute expressly gave these outsiders the right to enter the farmer's land. Yet statutes did give them funds to provide services to the farm workers. The Justices on the Supreme Court of New Jersey reasoned that those services could not be provided if the workers were isolated from those who were intended to help them. The policies underlying the statutes suggested that a vulnerable population was in need of aid; allowing the law of property to stand in the way of that aid would make the statute a nullity.

Just as the Supreme Court in *West Coast Hotel* learned from the legislature that no one freely agrees to work for less than they need to live, the Supreme Court of New Jer-

[16] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[17] Plessy v. Ferguson, 163 U.S. 537 (1896).

[18] Johnson v. Whiton, 34 N.E. 542 (Mass. 1893).

[19] State v. Shack, 277 A.2d 369 (N.J. 1971).

sey learned that property law requires "a fair adjustment of the competing needs of the parties, in the light of the realities of [their] relationship."[20] Legislative policy led the court to reinterpret the scope of the owner's property rights. It recalled that tenants have the right to receive visitors, and although the farm workers might not have had the status of tenant, they had the same rights to personal liberty that tenants enjoy. For that reason, "the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens."[21] Reflecting on the reasons for the legislation that provided aid to migrant farm workers, the court concluded that "we find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being."[22]

In each of these cases, common law norms associated with contracts and property were reimagined, reshaped, and redefined in light of the norms underlying statutes. The political process by which those statutes were enacted brought social problems to light; it illuminated the existence of widespread oppression of vulnerable persons. The legislators made judgments about the minimum standards that should govern private relationships. Those judgments, in turn, altered the common law by teaching judges things they might not otherwise have known. The common law was modernized because of the norms adopted through legislation.

The realists taught us that this was a good thing rather than an unfortunate intrusion of politics into the sphere of reason; the realists taught us that this did not amount to the invasion of oppressive "regulation" into a protected sphere of "freedom." Politics and legislation were part of the process by which "liberty" and "property" were debated, conceptualized, *and modernized*. And that is something we should neither fear nor seek to banish or minimize. It is a good thing that legislation affects the common law. And since it does so quite often, it would behoove scholars of "private law" to face this reality. That, after all, was what legal realism was all about.

V. What Judges Teach Legislators

Just as legislators have things to teach judges, the reverse is also the case. Consider the implied warranty of habitability that swept the country after it was adopted in an influential decision by Judge J. Skelly Wright in *Javins v. First National Realty Corp*.[23] The property in that case had more than a thousand housing code violations and the landlord sought to evict a tenant who failed to pay rent because of those violations. Existing law allowed the landlord to recover possession of its property because of the clear breach of the lease. Yet nothing of the sort happened. Why not? No one was evicted because Judge Wright learned something from the legislature and he taught it something in return.

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[20] Id. at 374.

[21] Id

[22] Id.

[23] Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

What did Judge Wright learn from the legislature? It had promulgated a housing code that required landlords of residential property to ensure that residential rental property was safe and provided basic services. To Judge Wright, that meant that landlords have no lawful freedom to provide residential rental premises that do not comply with the minimum standards set by the housing code. But not only did Judge Wright learn something from the legislature, he taught it something as well. What did he teach the legislature? For one thing, the housing code, as created by the legislature, was enforced by administrative proceedings through a local housing inspector. Judge Wright was confronted with a lawsuit that showed the limitations of that enforcement mechanism. He saw a housing code that regulated housing alongside tenants who were the victims of unenforced norms. By focusing on the policies and norms underlying the housing code, Judge Wright concluded that tenants *had a right to housing that complied with the code*. When one pays money for an apartment, one has the right to get what the housing code requires. That meant that the landlord impliedly promises to comply with the code whether he likes it or not.

But if every residential lease contains an implied promise to provide habitable housing, what does that mean for the tenant? Traditional property law saw such a covenant as enforceable by the tenant through a lawsuit for an injunction or damages. Breach of such a covenant would not excuse the tenant from the tenant's own covenants, such as the covenant to pay rent. But Judge Wright reimagined leaseholds as ordinary contracts—contracts to convey possession of real property, of course, but contracts nonetheless. When one breaches material terms of a contract, the promisee is freed from her own obligations under the agreement. Promises are given in exchange for other promises; why should one be bound by a promise given in exchange for another when the promised performance is withheld? That would be like paying money for a truck that is never delivered. And that is precisely what Judge Wright held.

When you pay for an apartment, you are paying for one that is habitable; the tenant "owns" the right to those services. If the landlord fails to provide those services, the tenant has no obligation to pay rent. More than this, the tenant has no duty to leave. The tenant's obligation is contingent on the landlord's obligation and the tenant need not give up her rights entirely just because the landlord has failed to comply with her obligations. Rather, the tenant has the right to stay and to have the landlord comply with the warranty of habitability. Only when the property is brought up to code need the tenant resume rent payments, and the amount of rent due for the interim must be reduced to account for the fact that landlord failed to deliver the quality of property that the tenant owned.

Court procedures brought to light the fact that housing code enforcement was inadequate, that tenants could not easily move to better housing, and that tenants had a legitimate claim to stay in their homes and have those homes brought up to the minimum standards set by the legislature. For these things to happen, the common law "independence of covenants" rule needed to be modernized to make the tenant's obligations dependent on those of the landlord, and the landlord's right to possession contingent on his compliance with the housing code. The housing code, in other words, became an im-

plied term in the rental agreement and the estate in land belonging to the tenant was redefined to include a nondisclaimable warranty of habitability.

Judge Wright's reasoning was convincing, not only to judges in other jurisdictions, *but to legislators themselves.* Over time, most courts adopted the doctrine of the implied warranty of habitability. They were followed by legislative changes that codified the warranty in laws like the *Uniform Residential Landlord and Tenant Act*. Those statutes confirmed in legislation the principle that tenants have a right to habitable housing enforceable in private law litigation *against the landlord* and not just through public law enforcement by the housing inspector.

Judge Wright's reinterpretation of the private rights of landlords and tenants taught the legislature about the consequences of the housing code for private relationships. Because the legislature had focused on administrative enforcement of the housing code, it had not considered what the new regulations meant for the duties owed by landlords to tenants. The regulations redefined property rights but their normative implications on obscure doctrines like the "independence of covenants" doctrine was not something the legislature focused on. It was brought to light by common law litigation. And once articulated by the courts, the legislatures hopped on the bandwagon and adopted statutes designed to protect the rights created by the common law method.

VI. Lawmaking Contexts

Judges, for the most part, do not like to be thought of as judicial activists. They like to apply the law rather than make it. Of course they make law all the time but they prefer to convince themselves and the general public that they are merely applying laws laid down in advance—laws they find either in legislation or in precedent. Yet when legislation is ambiguous, judges must make law. And even when precedents are clear, judges must decide when to distinguish or overrule them. It is no more democratic to defer to the will of a judge who made a ruling one hundred years ago than for a judge to make a ruling today. The fact that a common law rule is old does not mean that one does not "make law" by enforcing it. Common law is not made just once and then exists out there in the world; it gets remade *each time it is applied.*

Legislators have advantages that judges lack. They have greater access to information, they hear from more varied groups of people, they are able to make principled compromises, and they are able to enact norms with an exactness that common law cannot provide. Think of the precise time limits in statutes of limitation compared with the common law's more flexible *laches* requirement that one not delay "unreasonably" in asserting a right. Judges take the cases that come to them while legislatures can choose to regulate an area of life. Because of lobbying, politicking of all kinds, and elections, legislatures are affected by a wide variety of constituencies. Judges are, in contrast, isolated and unable to seek out expert advice. They are limited to the facts established by the parties. Lawmaking by legislature has some advantages.

But the contrary is also true. Judges have advantages the legislatures lack. It is less costly for an individual to bring a matter to a judge's attention than it is to put a matter on the legislature's agenda. All the litigant need do is convince one lawyer that she has a legitimate claim and all the lawyer need believe is that it is economically worth it to do the legal work necessary to bring the claim. Legislatures may be responsive to the people but they are more responsive to some people than others. Court processes can level the playing field a bit.

At the same time, judges can hear a full and detailed story that is shaped and brought to light in many ways, from testimony at trial to oral argument by lawyers. The rules governing the parties are adopted through careful consideration of arguments and counter-arguments, both written and oral. The shape of the rules in question are made, not in the abstract, and not based on the usual or average case, but the precise case before the court. The legislatures that passed housing codes were not experts in property or contract law and did not consider what those new codes might mean for the structure of property rights. It took judges schooled in the common law of property to understand the rule about the independence of covenants in property law and its divergence from the law of dependent promises characteristic of the law of contracts. It was the clash between these sets of legal rules that led Judge Wright to modernize the law of leaseholds to make it consistent with norms set by legislatively-defined minimum standards. In other words, while the legislature affected the judges' views of minimum standards, the judges affected the legislatures' views of contractual relationships in the rental housing market.

The minimum standards set by legislation are translated by common law judges into legal rights that affect private law litigation. Statutes refine and modernize the content of private law. Conversely, when judges modernize common law they teach legislatures about the need for changes in outdated statutes that define private rights in cramped or unjust ways.

The difference might be captured by the fact that legislatures generally act *ex ante* while courts act *ex post*. Legislatures act in a planning mode trying to come up with the best rules in general. They may be responding to social problems but they seek to legislate with a fairly broad brush. Judges see how those rules fall short in specific cases; common law methods allow judges to distinguish or overrule private law standards that do not reasonably apply to the case at hand. Recall the case of *Riggs v. Palmer*, in which the New York Court of Appeals confronted the problem of determining whether a grandson who murdered his grandfather should be able to get his property as the grandfather's will provided.[24] There was evidence that the grandfather was thinking of revoking his will and denying the property to his grandson and that the grandson was aware of this. The grandson murdered his grandfather to avoid that possibility. In other words, the grandson murdered his grandfather in order to get his property. Should the court accommodate the grandson? The legislature had enacted a wills statute authorizing the grandfather to write a

[24] Riggs v. Palmer, 115 N.Y. 506 (1889).

will determining who would own his property after his death, but that statute had no exception for murder. Rather than read the statute literally, the court interpreted the statute not to apply to a case involving the murder of the testator by a devisee. Justice Cardozo reasoned that, if the legislature had thought about the possibility that a potential devisee might murder the testator in order to get his property, it would undoubtedly have amended the statute to prevent that from happening. The court case brought the problem to light and elucidated the appropriate scope of fact situations to which the statute should—and should not—apply. In effect, the fact situation, and the court case, taught the legislature the need for revision or clarification of the statute.

Similarly, the legislature that funded medical and legal services for migrant farm workers in *State v. Shack* had not considered that farm owners might prevent those services from being offered by the simple device of exercising their right to exclude under real property law. The court case brought that tactic to light and common law processes enabled a change in the law of property that was needed to protect the legitimate property rights of the farm workers as well as the farmer.

VII. Realism About Private Law in a Free and Democratic Society

The common law process is a useful way to generate norms and standards for relations among people. It rests on an adversary process by which opposed lawyers try to argue for principles that could be accepted by all as reasonable rules to govern social and economic life. But the common law process is not the only way to generate norms or to create insight into the human condition. We are a democracy and that means that elected representatives have the power to enact laws that define minimum standards for human relationships and economic life. They have done this by passing laws regulating housing, the environment, employment relations, family relationships, insurance contracts, auto accidents, bankruptcy, secured transactions, securities, corporations, partnerships, nonprofit organizations, the various professions… I could go on. The statutes and administrative rules that shape human behavior in these areas of law also affect human relationships. They establish minimum standards for human interaction, for market and family relationships, and for control of land and resources. And far from interfering in some pristine private realm of logic and conceptual clarity, legislation informs private law by collective decision-making that defines what actions, relationships, or arrangements are "subprime" and thus not to be respected or tolerated in a free and democratic society that treats each person with equal concern and respect.

According to Dagan, legal realism is the view that law is not just a matter of formal logic but the practical art of creating a legitimate framework for a free and democratic society. That means that values matter and judges make judgments and we need to attend to multiple values and frames of reference. But it is crucial for private law theorists to recognize that legislation is as important to value creation as is common law adjudication or the work of philosophers and scholars. Legislators respond to some constituencies and values while judges respond to others. But both judges and legislators shape the content

and values underlying private law. We benefit from these alternative, contrasting approaches to lawmaking. Minimum standards established by legislation are not an alien invasion into the logic of a private law system. They are a democratic means to establish the basic rules for social relationships compatible with our commitment to recognizing human beings as free and equal persons. There is a lot private law scholars can learn from studying legislation and we should spend more of our time paying attention to the values and norms implicit in minimum standards statutes.