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# The Corners of the Common Law: Creating Causes of Action

Kelly Kunsch, *Seattle University*



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# THE CORNERS OF COMMON LAW: CREATING CAUSES OF ACTION

Kelly Kunsch\*

*Generally it is the nature of the common law to move slowly and by accretion; swift and massive movements are not impossible, but they are relatively rare.*<sup>1</sup>

Benjamin N. Cardozo

## I. INTRODUCTION

As Justice Cardozo observed, the common's law natural inclination is to move slowly. Even when changes do occur, their impact is not typically dramatic. As discussed later in this article, changes to precedents such as the "mailbox rule" will cause relatively minor adjustments to the procedures of doing business and will not result in a tide of litigation. Of profound difference to this is the creation of an entirely new cause of action, creating a remedy and a liability where there previously was none. This article looks at such "springing" common law causes of actions and analyzes how they have been established and justified.

This article looks at times and decisions that changed longstanding common law rules. The goal is to analyze how courts have articulated or rationalized such changes. As research on the article progressed, it became apparent that legislative activity related to the areas of law in question was many times a component of the court's determination and so the impact and interaction of legislation is discussed as well.

The author readily acknowledges difficulties inherent in discussing "the common law." Because each state has adopted and adapted common law rules over the centuries, there is no single common law in the United States. Therefore, choosing the case or cases that "change the common law" might be questioned. The attempt was to find the case or cases that recognized the decision was changing a longstanding rule and confronted the more abstract topic of changing common law rules as well as changing the particular rule of common law. Often these became leading cases relied on by other state courts in adopting the change within their jurisdictions. The author also acknowledges that the issues and cases covered in the article are an extremely small sample of the universe of common law rules and changes. Still, looking at these cases offers some insight into what the common law is today, ages after its most fundamental principles were defined.

## II. VISIONS OF THE COMMON LAW: CREATION AND EVOLUTION

Although works by Blackstone<sup>2</sup>, Kent<sup>3</sup>, and most conspicuously, Holmes<sup>4</sup> discuss the common law, they are essentially restatements of the common law on various topics.

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\* Reference Librarian; Adjunct Professor: Seattle University School of Law.

<sup>1</sup> BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 24 (1921).

<sup>2</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).

There is limited discussion with respect to how particular rules become recognized, evolve or cease to exist. That task was left to later commentators like Cardozo and Pound.

Over time, views of the nature of the common law have changed. While it continues to be an area of law that develops separately from statutory law, it no longer claims to tie itself exclusively to history and custom as it once did.<sup>5</sup> In resolving disputes, courts often look to current society and future needs. In doing so, decision making has become more prospective and legislative. Within that movement, the “common law cause of action” resides.

The early years are exemplified by Blackstone’s view that the common law existed and judges merely formalized that law. Blackstone explained that common law was the unwritten customs that “receive[d] their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.”<sup>6</sup> Judicial decisions were the principal and most authoritative evidence of the existence of such customs.<sup>7</sup> A judge’s decisions were to be based on known laws and customs and judges were “... not delegated to pronounce a new law, but to maintain and expound an old one.”<sup>8</sup> Blackstone’s judges were strictly bound. Precedent could be ignored only if it was manifestly absurd or unjust. The only explanation for ignoring precedent, according to Blackstone, was that it was erroneously determined and, therefore, *not law* rather than *bad law*.<sup>9</sup> Precedents, unless flatly absurd or unjust must be followed, a point Blackstone illustrates with the custom that a brother of the half blood never succeeded as heir to the estate of his half brother. Even though that law might seem unjust even in Blackstone’s time, a judge had no power to alter it.<sup>10</sup>

As years passed in the common law’s documentation, some commentators recognized that it was not a static body waiting on a slab to be dissected. In 1894, Frederic Maitland elaborated on the “body” metaphor: “We picture to ourselves a being that lives and grows, that preserves its identity while every atom of which it is composed is subject to a ceaseless process of change, decay and renewal.”<sup>11</sup>

Around the 1920’s, jurists such as Roscoe Pound and Benjamin Cardozo urged a more creative judicial force in common law decision-making. Pound defined the common law as “essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules . . . [a process of] molding rules . . . into accord with its principles.”<sup>12</sup> His “judicial empiricism” argued that “not merely the interpretation and application of legal rules but in large measure the ascertainment of

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<sup>3</sup> JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826-30).

<sup>4</sup> OLIVER WENDELL HOLMES, JR., COMMON LAW (1881).

<sup>5</sup> For a detailed history of the common law, discussing its beginnings and early emphasis on custom, see 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 145 *et seq.*, 151 (Methuen & Co. and Sweet & Maxwell 4<sup>th</sup> ed. reprint 1971).

<sup>6</sup> 1 BLACKSTONE *supra* note 2 at 64.

<sup>7</sup> *Id.* at 69.

<sup>8</sup> *Id.* at 69.

<sup>9</sup> *Id.* at 70 (italics in text).

<sup>10</sup> *Id.* at 71.

<sup>11</sup> FREDERIC W. MAITLAND, “Origins of Legal Institutions” in THE LIFE OF THE LAW 6 (1894).

<sup>12</sup> ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 1 (1921).

them must be left to the disciplined reason of judges.”<sup>13</sup> Such “reason applied to experience” was “the means of progress in our law.”<sup>14</sup>

Cardozo’s works recognized the existence of “open spaces” between and beyond precedent and tradition, within which a judge moved “with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made.”<sup>15</sup> Cardozo believed that law always conformed itself to an end but that different eras emphasized different ends.<sup>16</sup> As for adherence to precedent, Cardozo thought that it should be the rule and not the exception.<sup>17</sup> That being said, he was not adverse to abandoning precedent “particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.”<sup>18</sup> Cardozo also phrased it that if there is no pre-existing rule, an “impartial arbiter [should] declare what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and conscience to regulate conduct.”<sup>19</sup>

In the 1960’s, Karl Llewellyn saw even more flexibility in the definition of “following” precedent. He observed “that the range for *different* kinds of action . . . open to an appellate court while it “stands “ on “the things decided” is a vast range, and that the most careful “standing” is therefore . . . continuously, daily, a process of creative choice and of reshaping doctrine and result.”<sup>20</sup>

Many contemporary commentators have moved toward a view of the common law that is less focused on the mundane facts and customs and more focused on abstract principles. Mary Ann Glendon attributes a major change in the way the common law is perceived to the urbanization and industrialization taking place at the end of the 19<sup>th</sup> Century. At that time, she says, “the common law tradition entered a period of severe turbulence.”<sup>21</sup> The rapidly changing society led to an increase in legislation (not in any way bound by precedent) creating a “chaotic mass of decisional and legislative law.”<sup>22</sup> Concurrently, legal education was becoming more formalized with the increased use of law schools as the means of learning the law over apprenticeships. This allowed for widespread adoption of Dean Langdell’s presentation of the common law as a system of “principles and doctrines” rather than a form of custom.<sup>23</sup> Glendon sees the resulting

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<sup>13</sup> *Id.* at 183.

<sup>14</sup> *Id.*

<sup>15</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 115 (1921).

<sup>16</sup> *Id.* at 116.

<sup>17</sup> *Id.* at 149.

<sup>18</sup> *Id.* at 151.

<sup>19</sup> *Id.* at 142-3.

<sup>20</sup> KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 5 (1960).

Emphasis and quotation marks in original. Llewellyn provides a self-professed “incomplete” list of different techniques that were accepted and unchallenged for dealing with precedent later in the book. Four ways of “following precedent,” four ways of “avoidance of the decided,” and two ways for “expansion, redirection or fresh start.” *Id.* at 75-91.

<sup>21</sup> MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 183 (1994).

<sup>22</sup> *Id.* at 184.

<sup>23</sup> *Id.* (citing CHRISTOPHER COLUMBUS LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS VI-VII* (1870)).

practice for judges being to decide each case with a reference to principles that transcend the facts—with a view toward “maintaining continuity with past decisions, deciding like cases alike, and providing guidance for other parties similarly situated; and all in the spirit of caring for the good of the legal order itself and the polity it serves.”<sup>24</sup> Thus, as commentators altered their vision of the common law, judges (at least some judges) have done so as well. In the analysis that follows, this article will look for those trends. However, a brief discussion of the relationship of the common law to legislation is essential before embarking on that journey.

### III. THE COMMON LAW’S RELATIONSHIP TO LEGISLATION

The fundamental principle governing the relationship between the common law and legislation is that statutes in derogation of common law are to be strictly construed.<sup>25</sup> Roscoe Pound traces this principle to the year 1854<sup>26</sup> although the *Sutherland* treatise on statutory construction places it earlier stating it “unquestionably originated as an expression of the jealous disposition of the British judiciary toward parliamentary supremacy.”<sup>27</sup> This maxim has been interpreted to mean that in case of doubt concerning a statute’s meaning or intent, the reading which makes the least, rather than the most, change in common law should be given effect.<sup>28</sup> In addition, to abrogate the common law, the statute must “speak directly” to the common law question addressed.<sup>29</sup>

There is one significant exception to the principle stated above. *Sutherland* states that exception as applying “in the case of a statute which purports to provide a complete system of law covering all aspects of the subject with which it deals, in order to supersede all prior law on the subject, whether common or statutory law.”<sup>30</sup> The justifications for this have varied, including: 1) that such legislative schemes are typically remedial statutes which are given a liberal construction that outweighs the common law rule; and 2) that much modern regulatory legislation is wholly outside and apart from any common law frame of reference.<sup>31</sup> The difficulty in applying the exception comes when a comprehensive legislative scheme fails to mention its impact on common law, either as supplementing it or abrogating it. A prime example of an area where this issue often arises is in the area of workers’ compensation<sup>32</sup> which will be discussed more fully below. Two other areas worthy of analysis and comment are criminal law and discrimination law, particularly employment discrimination.

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<sup>24</sup> *Id.* at 180-81.

<sup>25</sup> NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 61:1 (7<sup>th</sup> Ed. )

<sup>26</sup> Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 401 (1908) finding the statement in Bouvier’s *Institutes*, I Bouvier, Inst. § 88.

<sup>27</sup> SUTHERLAND *supra* note 25 at § 61.1.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* Quotations in text.

<sup>30</sup> *Id.* at § 61:3.

<sup>31</sup> *Id.*

<sup>32</sup> William Keoniakelelani Shutz, *Workers’ Compensation Reform in the State of Hawaii*, 21 U. HAW. L. REV. 807, 809 (1999) stating: “From the start of the twentieth century, state legislatures across the United States abrogated the traditional common law system in employee injury cases by enacting worker’s compensation laws.”

## Criminal Law

A discussion about the common law and crime should begin with a reminder that criminal law in our legal system was originally a creation of common law.<sup>33</sup> From the earliest common law decisions through the 1600s, English judges created and defined the most commonly committed felonies and misdemeanors,<sup>34</sup> and continued to further refine the area of criminal law for more than two centuries after that.<sup>35</sup> In addition to creating and defining crimes, judges also developed defenses to crimes such as self-defense, insanity, infancy, and coercion.<sup>36</sup> In fact, while other nations have codified their criminal laws through history, England never fully exercised that approach.<sup>37</sup>

When the colonies broke away from England and became states, they retained the common law to varying degrees, some by express provision, others without.<sup>38</sup> Thus, the leading treatise in the area notes, “most states in the beginning had common law crimes.”<sup>39</sup> Over the next 200 years, states enacted comprehensive statutory criminal codes usually incorporating common law crimes into their newly created codes. Some of these codes expressly abolished common law crimes;<sup>40</sup> some expressly retained them.<sup>41</sup> In addition, courts in some states have found both an abolition and retention of common law crimes implied by such codes.<sup>42</sup>

Thus, the common law still has some significance in criminal law, the amount of which depends on the jurisdiction. In addition to those impacts mentioned above, LaFave notes that even states that have abolished common law crimes have not necessarily also abolished common law defenses to crimes, particularly when the code does not expressly provide for the defenses.<sup>43</sup> It also bears mentioning that even if the codification mentions

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<sup>33</sup> WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 2.1 (2d ed.).

<sup>34</sup> *Id.* at 104. Those included felonies such as murder, burglary, arson, rape and mayhem; and misdemeanors such as assault, battery, libel and perjury.

<sup>35</sup> *Id.*, at 105, stating that the process of creating new crimes came to a standstill in England around the middle of the nineteenth century.

<sup>36</sup> *Id.*

<sup>37</sup> *See To Codify or Not to Codify—That is the Question: A Study of New York’s Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641, 645-46 (1992) summarizing MAURICE EUGEN LANG, *CODIFICATION IN THE BRITISH EMPIRE AND AMERICA* 42-54 (1924): At the close of the 18<sup>th</sup> Century, the codification movement under Jeremy Bentham became an important force in England. In 1833, William IV appointed a commission to examine the issue of codification of the criminal code. However, the plan was abandoned in 1854. Although it was resurrected in 1864, it was abandoned again in 1867.

<sup>38</sup> *Id.* Recognition was often in the form of a “reception statute.”

<sup>39</sup> *Id.*

<sup>40</sup> *See e.g.*, WEST’S COLO. REVISED STATS. ANN. § 18-1-104; WEST’S WYO. STATS. ANN. § 6-1-102 and 17 MAINE REVISED STATS. ANN. § 3.

<sup>41</sup> *See e.g.*, WEST’S ANN. CODE OF MD. § 8-803 stating for the crime of indecent exposure by inmates: (a) Words or phrases in this section that describe the common-law crime of indecent exposure shall retain their judicially determined meanings . . . “

<sup>42</sup> *See e.g.*, *State v. Pulte*, 12 Minn. 164 (1866), an early Minnesota case that found: “There is nothing in these laws which shows that the territory of Wisconsin [from whose laws Minnesota’s were incorporated] abrogated or repealed the common law as to crimes, but on the contrary, we think they show that it was recognized and adopted in that territory.” The Minnesota legislature abolished common law crimes in 1963. MINN. STATS. ANN. § 609.015.

<sup>43</sup> *Id.* *Accord* CORPUS JURIS SECUNDUM CRIMINAL LAW § 54 and cases cited therein.

the defense, the common law version of it may embody different elements than the codified version.

For those states in which common law crimes were retained, there is a question of how to look for evidence of that common law. Initially, there is a question of the date on which the common law was received. Some states have codified 1607<sup>44</sup> when the first colony was established but others use 1775,<sup>45</sup> when the colonies broke away from England.<sup>46</sup> Still others do not specify a date. And then there is the question of whether any date matters? Some courts use post-1607 (or 1775) precedents despite the mention of those dates in their codes. According to LaFave, most courts that discuss the problems do not limit themselves to those dates and justify the action because later decisions settled the law as, theoretically, it always was.<sup>47</sup> Finally, LaFave mentions “new” situations: issues for which there is no existing statute or precedent from any jurisdiction that is on point. He notes that on the civil side of law, “judges will make (some prefer to say discover) the law to apply to the new situation.”<sup>48</sup> However, in criminal law it is not so clear whether judges “can create (or discover) new crimes for which to punish the ingenious fellow who conceives and carries out a new form of anti-social conduct not covered by the criminal code.”<sup>49</sup>

Although criminal law is one area in which statutes have interacted with common law, civil actions (mostly tort actions) provide the more dominant area for discussing common law, both interacting with statutes and acting alone. Following are examples of civil actions and the common law.

#### Common Law Liability for Furnishing Liquor, Dramshop Acts and other Legislation

One example of the interplay of statutes and the common law is liability for furnishing liquor to minors and intoxicated persons. At common law, no cause of action existed against one furnishing liquor for persons injured by the person furnished.<sup>50</sup> The rationale for the rule was that the drinking of the liquor, not the furnishing of it, was the proximate cause of the injury.<sup>51</sup>

The common law rule remained largely intact in the United States until the temperance movement brought about the Prohibition Era.<sup>52</sup> During this time, many states enacted legislation creating liability in persons and establishments for providing liquor to

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<sup>44</sup> See e.g., 5 ILL. COMPILED STATS. ANN. § 50/1, WEST’S ANN. IND. CODE § 1-1-2-1 and KENT. CONST. Art. 8, § 8.

<sup>45</sup> NEW YORK CONST. Art. 1, § 14. See also *Felter v. State*, 17 Tenn. 397 (1836).

<sup>46</sup> LaFAVE *supra* note 33 at 106, footnote 15, citing Pope, *The English Common Law in the United States* 24 HARV. L. REV. 6 (1910).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Joel E. Smith, *Common-law right of action for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drug to another*, 97 A.L.R. 3d 528 § 2. The earliest case stating the rule found by one court is *King v. Henkie*, 80 Ala. 505, 60 Am. Rep. 119 (1886) (as stated by *McClellan v. Tottenhoff*, 666 P. 2d 408, 409 (Wyo. 1983).

<sup>51</sup> 97 A.L.R. 3d 528 § 2.

<sup>52</sup> The 18<sup>th</sup> Amendment was ratified in 1919. U.S. CONST. Amend. XVIII (repealed in 1933 by U.S. CONST. Amend. XXI).

intoxicated persons or minors.<sup>53</sup> When prohibition ended in 1933, many states repealed these Dramshop or Civil Liability Acts<sup>54</sup> returning the status of the law to the longstanding common law rule. This return to supplier nonliability was contested in court but it was not until the late 1950s when the use and power of the automobile grew that courts responded positively to its challenge.

Although it was not the first decision abrogating the rule,<sup>55</sup> a 1959 New Jersey Supreme Court decision, *Rappaport v. Nichols*,<sup>56</sup> is often cited as a leading case for the change. The plaintiffs in *Rappaport* sued several taverns for serving alcoholic beverages to a minor who drove a motor vehicle and collided with Arthur Rappaport who died of the resulting injuries.<sup>57</sup> The *Rappaport* court initially acknowledged existing decisions from various jurisdictions rejecting liability but then discussed the dissent in a California case which had placed “analogical reliance” on other negligence cases where liability was found against persons loaning cars to intoxicated persons.<sup>58</sup> After following some tangents, *Rappaport* eventually employs its own analogies for finding liability: furnishing firearms to minors and leaving keys in the ignition of unattended vehicles.<sup>59</sup> *Rappaport* also looks at cases where liability was found against those furnishing liquor based on civil damages (liability) statutes.<sup>60</sup> Those cases, according to the court, in effect reject the reasoning of the common law rules. Following this assertion, the court cites the few cases that had rejected the common law rule<sup>61</sup> before employing the analogies mentioned above. Finally, *Rappaport* looks at New Jersey’s relevant statutes. It begins this analysis by citing the repealed civil damage legislation<sup>62</sup> and then looks at an existing statute prohibiting liquor sales to minors but not creating a civil remedy. Of this statute, it concludes: “It seems clear to us that these broadly expressed restrictions were not narrowly intended to benefit the minors and intoxicated persons alone but were wisely intended for the protection of members of the general public as well.”<sup>63</sup> The decision follows this conclusion with citations to statistics from the National Safety Council and other entities emphasizing the foreseeability of drinking and driving accidents in “current times.”<sup>64</sup> The court holds that foreseeability, proximate causation and intervening cause decisions should be left to the jury.<sup>65</sup> In its closing paragraph, it recognizes that it has, in fact, engaged in a policy analysis in altering preexisting common law:

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<sup>53</sup> See Brett T. Votava, *Missouri Dram Shop Liability: Last Call for Third Party Liability?* 69 UMKC L. REV. 587, 593-94 (2001) and Richard Smith, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. Corp. L. 553, 555-56 (2000).

<sup>54</sup> *Id.*

<sup>55</sup> The cases *Schelin v. Goldberg*, 146 A. 2d 648 (PA Super. 1958) and *Waynick v. Chicago’s Last Department Store*, 269 F. 2d 322 (7<sup>th</sup> Cir. 1959) are cited in *Rappaport, infra*, 156 A. 2d at 6.

<sup>56</sup> 156 A. 2d 1 (N.J. 1959).

<sup>57</sup> *Id.* at 3.

<sup>58</sup> *Id.* at 4 (discussing the dissent in *Fleckner v. Dionne*, 210 P.2d 530 (Cal. App. 1949).

<sup>59</sup> *Id.* at 7 (citing *Anderson v. Settergren*, 111 N.W. 279 (Minn. 1907), *Semeniuk v. Chntis*, 117 N.E. 2d 883 (Ill. App. 1954) and *Ney v. Yellow Cab Company*, 117 N.E. 2d 74 (Ill. 1954).

<sup>60</sup> 156 A. 2d at 5.

<sup>61</sup> *Id.* At 5-7.

<sup>62</sup> *Id.* at 8 (citing N. J. Laws 1921, ch. 103, p. 184 and N. J. Laws 1922, ch. 257, p. 628 which were repealed by N. J. Laws 1934, ch. 32, p. 104.

<sup>63</sup> *Id.* at 8.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 9.



We are fully mindful that policy considerations and the balancing of the conflicting interests are the truly vital factors in the molding and application of the common law principles of negligence and proximate causation. But we are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons, will strengthen and give greater force to the enlightened statutory and regulatory precautions against such sales and their frightening consequences, and will not place any unjustifiable burdens upon defendants who can always discharge their civil responsibilities by the exercise of due care.<sup>66</sup>

Twenty-five years later, the Supreme Court of Wyoming decided the issue a similar way in *McClellan v. Tottenhoff*<sup>67</sup> overruling its own prior decision.<sup>68</sup> In its discussion of the common law, *McClellan* emphasized that that body of decisions is not merely those existing decisions but also the “fundamental principles underlying [them].”<sup>69</sup> This clearly signals that the court is giving itself more range in which to work within the parameters of *stare decisis*. Unlike *Rappaport*, the Wyoming court directly addressed the issue of deferring to the legislature: “The rule that there is no cause of action when a vendor sells liquor to a consumer who insures a third party was created by the courts. We see no reason to wait any longer for the legislature to abrogate it. Common law created by the judiciary can be abrogated by the judiciary.”<sup>70</sup> Only later does the court mention the intervening legislative activity in the area. When it does look at the “pertinent statutes,”<sup>71</sup> it is not for purposes of preemption. Instead, it uses those statutes like *Rappaport* to find that they establish a duty toward the general public against the furnishers of liquor that then can be used in a negligence action despite the statute's non-creation of civil liability.<sup>72</sup> The only question to the *McClellan* court is whether violation of the statute constitutes negligence *per se* or is merely evidence of negligence.<sup>73</sup> The court holds it is the latter<sup>74</sup> ruling that cases involving vendor liability “will be approached in the same manner as other negligence cases.”<sup>75</sup> Also like *Rappaport*, the court cites to statistics on alcohol, minors and traffic fatalities<sup>76</sup> and then posits the economic rationale for its decision:

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<sup>66</sup> *Id.* at 10.

<sup>67</sup> 666 P. 2d 408 (Wyo. 1983).

<sup>68</sup> *Parsons v. Jow*, 480 P.2d 396 (Wyo. 1971).

<sup>69</sup> 666 P. 2d at 410.

<sup>70</sup> *Id.* at 411.

<sup>71</sup> *Id.* at 412-13.

<sup>72</sup> The court does not cite a statute that does create vendor liability under conditions that did not apply in *McClellan*. *Id.* at 410 (WYO. STAT. 12-5-502)

<sup>73</sup> 666 P. 2d at 413.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 411.

<sup>76</sup> *Id.* at 415

Refusing to acknowledge a claim for relief against a liquor vendor harms society in two ways. First, it is an unjust doctrine which often limits recovery when an intoxicated minor driver injures someone. Businesses which sell liquor are usually in a more solid financial position than a minor. Second, it is reasonable to assume that the current state of the law places us all at more peril, because there is no effective deterrent to keep liquor vendors from selling liquor to minors or to intoxicated persons. Liquor licenses are seldom revoked. Perhaps the threat of civil liability or increased insurance premiums will serve to make liquor vendors more careful.<sup>77</sup>

The court concludes: “We do not choose to stand by and wring our hands at the unfairness which we ourselves created.”<sup>78</sup>

Another area of law where there has been extensive interaction between statutes and the common law is employment. This includes workers’ compensation and employment discrimination and has resulted in some interesting, if not questionable, legal analysis.

#### A Problem Area: Employment and the Public Policy Analysis

As mentioned earlier, state courts have struggled for decades on the issue of whether workers’ compensation statutes preempt common law tort claims. The workers’ compensation movement began in the United States at the beginning of the 20<sup>th</sup> Century.<sup>79</sup> By 1920, all but eight states had adopted compensation acts and by 1963, Hawaii became the final state to create such a system.<sup>80</sup> These enactments made the compensation system the exclusive remedy for workplace injuries with minor exceptions. The exclusiveness rule relieved employers of common-law tort liability.<sup>81</sup> The classic common law claim that played against a workers’ compensation statute was a well-established tort such as negligence of the employer or of persons under the employer’s control. In addition to the classic types of actions, there later arose claims for wrongful discharge due to an employee’s making claims for compensation under workers’ compensation statutes. These derive from a judicially created “public policy” exception, the evolution of which follows.

The longstanding American rule for the term of employment has been the “at will” rule, that absent a contract specifying an employment period, either the employer or employee could terminate the employment “at will” (at any time and for any reason).<sup>82</sup> In 1959, the California Court of Appeals became the first court to find a “public policy”

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> LEX LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 2.07.

<sup>80</sup> *Id.* § 2.08.

<sup>81</sup> *Id.* § 100.03.

<sup>82</sup> See generally, Jay M. Feinman, *The Development of the Employment at Will, Rule*, 20 AM. J. LEGAL HIST. 118 (1976). The American rule was first articulated by H. G. Wood in 1877. HORACE GAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES § 134, at 272 (1877).

exception to the rule in *Petermann v. Int'l. Brotherhood of Teamsters*.<sup>83</sup> In that case, Petermann brought an action against the Teamster's Union for wrongful discharge. He claimed that he had been employed for as long as his performance was satisfactory and that he had been asked to commit perjury on behalf of his employer. One day after testifying truthfully at the proceeding in question, he was terminated.<sup>84</sup> In a relatively brief opinion, the court began its analysis of the issue by acknowledging that generally such contracts were terminable at the will of either party. The following sentence qualifies this by stating that the right to discharge may be limited by statute . . . or by public policy.<sup>85</sup> It is noteworthy that for the first limitation, a citation is provided to both a statute<sup>86</sup> and a case<sup>87</sup> to support the assertion. There is no supporting authority of any kind for the public policy assertion. Having set that standard, the court made brief observations on the nature of public policy<sup>88</sup> before finding that reprisals against an employee for refusing to commit perjury were clearly against the public policy of the state<sup>89</sup> and allowed the contract action. Discussing the case, one commentator notes that the earliest wrongful discharge cases based on public policy were based in contract rather than tort.<sup>90</sup> Of that, he offers the explanation that none of the cases "articulated a doctrinal basis for allowing a cause of action in contract, rather than tort; the courts simply addressed the cause of action selected by the plaintiffs and . . . the plaintiffs had pleaded their case as a breach of contract action."<sup>91</sup> Since *Petermann*, the public policy exception has been used to support tort actions as well as those sounding in contract.

Over time, the public policy exception has also been conspicuously used in employment discrimination. However, unlike workers' compensation cases, when it comes to antidiscrimination statutes, the issue is whether they actually create previously nonexistent common law claims. Like other statutory schemes, the state legislature can eliminate most of the problems by expressly stating that the statutes either do or don't provide the exclusive remedy in the area. Unfortunately, most states do not give such a clear expression.<sup>92</sup> Without such guidance, courts are forced to ascertain whether implied preemption exists. There is no universally applied test for implied preemption. Various state courts have employed analyses focusing on such issues as timing (looking to whether the tort existed prior to enactment), field preemption (looking at the

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<sup>83</sup> 344 P. 2d 25 (Cal. Ct. App. 1959).

<sup>84</sup> *Id.* at 26.

<sup>85</sup> *Id.*

<sup>86</sup> CAL. ELECTIONS CODE § 695.

<sup>87</sup> *Kouff v. Bethlehem-Alameda Shipyard*, 202 P. 2d 1059 (1949).

<sup>88</sup> The court stated that public policy is broad and vague and cited a variety of authorities talking about public policy in a general ways (both broadly and vaguely): WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS § 546 (no edition or year cited); *Safeway v. Retail Clerks Int'l. Assn.*, 261 P.2d 721, 726 (1953) and 72 CORPUS JURIS SECUNDUM Policy at 212.

<sup>89</sup> The court cited a California statute as the source of the public policy recognized by the court.

<sup>90</sup> LEX LARSON, EMPLOYMENT DISCRIMINATION § 174.04.

<sup>91</sup> *Id.* at .

<sup>92</sup> See Jarod X. Gonzalez, *State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law* 59 S.C. L. REV 115, 123 (2007). The author cites Montana as an excellent example of an antidiscrimination statute that contains explicit preemption language. See MONT. CODE ANN. § 49-2-508(1).

comprehensiveness of the enactments), and same conduct (looking at the elements of the common law action and comparing it to an action under the statute).<sup>93</sup>

Another issue with the public policy exception is determining which laws (or other sources) provide evidence of public policy. Professor Larson limits his sources to statutes and constitutions and states that “roughly speaking,” they derive in two ways from these: 1) in provisions which expressly prohibit such actions but articulate no private right of action; and 2) in provisions lacking any specific proscription but whose purpose or function would be undermined by allowing discharge.<sup>94</sup> An obvious (and intentional) omission in this listing is of provisions that prohibit action but do create a right of action. With respect to those, he later states: “There is a conceptual difficulty with extracting a public policy . . . from a statute that already contains a comprehensive set of administrative procedures, time limitations, coverage exceptions, and remedies. This difficulty consists of the potential for circumventing these features of the state statute, which themselves may be in place as a matter of policy.”<sup>95</sup> Despite Larson’s caution, some states have done just that. One example is the Washington Supreme Court decision in *Roberts v. Dudley*.<sup>96</sup>

In *Roberts*, the Washington Supreme Court confronted the issue of wrongful discharge based on a claim of employment discrimination. Washington had (and still has) a fairly typical statute against discrimination in employment that limits its application to employers with eight or more employees.<sup>97</sup> Because of the limitation, any statutory claim Roberts had against the defendant failed because he employed fewer than eight employees.

Looking more closely at the statute in question, the Washington legislature had enacted its law against discrimination in 1949<sup>98</sup> and limited its application to “employers” who employed less than eight persons.<sup>99</sup> The 1949 legislation was limited to employment and enforcement of it was through a Board of Discrimination rather than by way of private action.<sup>100</sup> The private cause of action was created in 1973.<sup>101</sup> There was some question whether the statute was, in fact, limited to larger employers but that interpretation was confirmed by the Washington Supreme Court in a 1996 decision, *Griffin v. Eller*<sup>102</sup> which also found that such a statute passed constitutional muster. The court’s discomfort with the situation is made clear in the final paragraph of the majority opinion: “In fairness, the Legislature should provide a statutory cause of action to redress employment discrimination, whether a worker is a family member, employed by an employer with fewer than eight employees, or is a private contractor.”<sup>103</sup> That the private cause of action was intended for employees of larger companies is also attested to by a

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<sup>93</sup> See Gonzalez, *id.* at 131.

<sup>94</sup> LARSON, *supra* note 90 at § 174.04.

<sup>95</sup> *Id.* § 114.11.

<sup>96</sup> 993 P.2d 901 (Wash. 2000).

<sup>97</sup> WASH. REV. CODE § 49.60.040.

<sup>98</sup> 1949 Wash. Sess. Laws Ch. 183, codified at Wash. Rev. Code Ch. 49.60.

<sup>99</sup> 1949 Wash. Sess. Laws Ch. 183, § 3, codified at Wash. Rev. Code §49.60.040.

<sup>100</sup> See Frank P. Helsell, *The Law Against Discrimination in Employment* 25 WASH. L. REV. 225 (1950).

<sup>101</sup> 1973 Wash. Sess. Laws Ch. 141, § 3. *But see* Justice Talmadge’s dissenting opinion in *Griffin* arguing that the private cause of action was created by implication by 1957 amendments (1957 Wash. Sess. Laws Ch. 37). 922 P.2d at 799-800.

<sup>102</sup> 922 P.2d 788 (Wash. 1996).

<sup>103</sup> *Id.* at 794.

law review article published shortly after the amendment stating “[t]his limitation is significant since it exempts over 75% of the employers in the state from the provisions of the law, granting them, in effect, a license to discriminate.”<sup>104</sup>

Saddled with the *Griffin* precedent, the *Roberts* court three years later found that the plaintiff had a common law cause of action for wrongful discharge based on sex discrimination in employment.<sup>105</sup> The court said the common law issue was never raised in *Griffin*<sup>106</sup> and cited several statutes evidencing the public policy against discrimination that it used to find the common law cause of action based on public policy.<sup>107</sup> There is also mention of a provision in the Washington Constitution in a concurring opinion.<sup>108</sup> And although there is a small section under the heading “**judicial basis for public policy against discrimination**,”<sup>109</sup> those cases rely on statutes for their policy statements rather than some independently standing common law or other non-statutory source.

The majority labors for several pages citing the above-mentioned evidence of the state’s public policy against discrimination, as though there was some legitimate and powerful argument that the state’s policy was something other than against discrimination. It virtually ignores, however, that there may be countervailing policies as well, in particular that of insulating small business from potentially debilitating lawsuits.<sup>110</sup>

In a concurring opinion Justice Talmadge recognizes the inherent problems of the doctrine:

[T]he majority surveys and deploys an array of *positive law*, none of which affords Roberts a cause of action, to inform and support its conclusion that the *common law* affords Roberts a cause of action. Considerable peril to the doctrine of separation of powers arises when, as here, a court purports to find the genesis of common law remedies among

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<sup>104</sup> James Delman & Linda Hartney Delman, *RCW 49.60: A Discriminating Look* 13 GONZ. L. REV. 190, 202 (Fall 1977).

<sup>105</sup> 993 P. 2d at 911. Washington first adopted the public policy exception in *Thompson v. St. Regis Paper Co.*, 685 P. 2d 1081 (Wash. 1984) joining “a growing majority of jurisdictions [that] have . . . recognized a public policy exception to the common law doctrine.” 685 P. 2d at 1088. In a footnote, the court lists the “growing majority” which consisted of 15 states expressly and two by implication. Certainly one does not need a majority of other states to move the court to adopt or create a new common law doctrine. Even slight precedent may be enough for the court to change the law. Still, the false assertion that the movement was by a growing majority is odd.

<sup>106</sup> 993 P. 2d at 910.

<sup>107</sup> See discussion at 993 P.2d 906-09.

<sup>108</sup> See *Id.* at 912 (Alexander concurring).

<sup>109</sup> *Id.* at 906 (bolding in original).

<sup>110</sup> See e.g., WASH. REV. CODE § 19.85.011 (The Regulatory Fairness Act) with an intent of reducing disproportionate impact of state administrative rules on small business; WASH. REV. CODE §§ 39.29.006 & 43.19.1905 stating a policy to encourage and facilitate state agency purchase of products and services from Washington small business; WASH. REV. CODE § 43.330.0660 finding that small businesses and entrepreneurs are a fundamental source of economic and community vitality for our state; and WASH. REV. CODE § 48.21.045 finding that health plan benefits for small employers exceeds the affordability of such businesses. Some of these were enacted after *Roberts* was decided but the policy of protecting small business certainly existed at that time. One might wonder whether a litigant could argue that later statutory enactments affirming that policy can be used to now argue against applying *Roberts* to small businesses. Based on the Washington Supreme Court’s prior use of statutes, it has at least intellectual appeal.

statutes that actually offer no such remedies. This is breathtaking in its implication. The specter of judicial activism is unloosed and roams free . . .

<sup>111</sup>

Justice Madsen further observes in dissent, “. . . the majority has presumed the role of the Legislature and has created a common law cause of action using a statute that specifically prohibits it.”<sup>112</sup>

By creating the common law cause of action from such a statutory scheme, the court essentially says the only way the Legislature can protect small businesses is to overtly make a statement counter to a clear public policy. The court forces the Legislature to enact language akin to: “Small businesses shall be allowed to discriminate,” or “No statutory or common law cause of action shall lie against a small business for discrimination.” Clearly in the legislative world of linguistic compromise, such statements will never be codified.

Contrast the Washington court’s decision in *Roberts* with a Massachusetts decision on a similar issue more than ten years prior. In that case, a plaintiff brought a common law cause of action for age discrimination against an employer with fewer than six employees. Quoting an earlier case, the Massachusetts court said that “where . . . there is a comprehensive remedial statute, the creation of a new common law action based on the public policy expressed in that statute would interfere with that remedial scheme.”<sup>113</sup> The court went on to explicitly state: “A cause of action which has never existed cannot magically be created . . . .”<sup>114</sup> Similarly, California said of the issue, “It does not follow . . . that in declaring that policy [against discrimination] the legislature intended to create the basis for a common law tort action. . . .”<sup>115</sup> The court concluded: “It would be unreasonable to expect employers who are expressly exempted from the [statute] on age discrimination to nonetheless realize that they must comply with the law from which they are exempted under pain of possible tort liability.”<sup>116</sup>

One question that is largely unanswered is how broadly courts will apply the common law public policy exception. If Washington’s public policy is against discrimination, should there not be tort actions available for discrimination outside of the employment area? If it applies to wrongful discharge, what about discrimination in hiring? Or with insurance, can a discrimination action be brought against an insurance agent for denying or charging different amounts for automobile or health insurance? And what other public policies can attorneys find embodied in their state codes that can be used to create entirely novel claims? At this point, virtually every case using the doctrine does so in the context of employment, usually as a tort action for wrongful discharge. However, there is no compelling reason why it should be applied in such a limited fashion and a few courts have shown their willingness to explore expansion.

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<sup>111</sup> 993 P.2d at 912 (emphasis in original).

<sup>112</sup> *Id.* at 913 (Madsen dissenting).

<sup>113</sup> *Mouradian v. General Electric*, 503 N.E. 2d 1318, 1320 (Mass. 1987) (citing *Melley v. Gillette Corp.*, 475 N.E. 2d 1227, (Mass. 1985).

<sup>114</sup> *Id.* Later Massachusetts courts have found alternative remedies to those found in the state’s statute against discrimination. However, those were based on other statutes rather than the common law. *See e.g.*, *Thurdin v. SEI Boston*, 895 N.E. 2d 446 (Mass. 2008).

<sup>115</sup> *Jennings v. Marralle*, 876 P. 2d 1074, 1082 (Cal. 1994).

<sup>116</sup> *Id.* at 1083.

In *Marzocca v. Ferone*,<sup>117</sup> Freehold Racing (a thoroughbred racetrack in New Jersey) excluded the plaintiff's horse from participating in races at the track under the common law doctrine of exclusion. The court held: "We now limit the common law doctrine by proscribing exclusions that violate public policy. In so doing, we point to our precedent in the area of employment at will."<sup>118</sup> And in an unpublished opinion, the Wisconsin Court of Appeals grappled with public policy considerations and legislative amendments over a strict liability dog bite case.<sup>119</sup> The court noted that traditionally, public policy considerations were used to limit the right of recovery based on common law tort actions. But after reviewing previous decisions, the court stated: "We would be compelled to conclude that judicial public policy analysis applies despite the legislature's allocation of responsibility to the dog owner."<sup>120</sup> In addition to suggesting common law modification of a statute, the court also listed six traditional public policy reasons for not imposing liability despite a finding of negligence and causation and none of them have constitutional or statutory sources.<sup>121</sup> This might indicate yet another type of expansion of the common law public policy analysis. Although decisions like those from New Jersey and Wisconsin are rare, they demonstrate that some courts have applied the common law public policy analysis to actions and defenses beyond merely employment law.

Perhaps the major reason the legal community has not reacted more strongly against such public policy exercises by the judiciary is the courts seem to do this when they have a moral high ground: finding against alleged discriminators or holding vendors of liquor responsible for their intoxicated patrons. But the route to such findings should make the bar uneasy because it strikes at the heart of the legal system. Even so, the dramshop cases and their changes in common law seem less offensive to the separation of powers than the wrongful termination cases in a couple of ways. First and most significantly, they rely on a longstanding cause of action as their basis, specifically negligence. The erosion of an interpretation of proximate cause is not as dramatic as the entirely new action in the termination cases, essentially discrimination. Second, although the courts in the liquor liability cases are clearly cognizant of public policy considerations, they do not readily admit to it. Citations to statistics and statements of policy occur toward the end of the opinion, as though they are being hidden. The wrongful termination cases stand in stark contrast because the legal standard itself is a violation of public policy so proffered evidence of public policy is (or should be) replete in them. Where the cases are equally disturbing (and possibly moreso) is their reliance on statutes in determining what is a public policy. What is possibly more disturbing is relying on superseded statutes for that public policy. One could make the argument that

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<sup>117</sup> 461 A. 2d 1133 (N.J. 1983).

<sup>118</sup> *Id.* at 1137. It bears mentioning, however, that the court did not find a public policy that supported the plaintiff's claim.

<sup>119</sup> *Fandrey v. American Family Mutual Insur. Co.*, 2003 WL 21377834 (Wis. App.).

<sup>120</sup> *Id.* at 3.

<sup>121</sup> *Id.* at 1. The reasons are: (1) the injury is too remote from the negligence; (2) the injury is wholly out of proportion to the culpability of the negligent tort-feasor; (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

the repeal of a statute shows a contrary public policy. Citing cases that relied on the repealed statute should in no way resurrect them.

In addition to its interplay with statutory law, the common law still exists as solely the province of the courts in many areas. Those rules of common law change as well and new actions may be created within that context. Such changes and actions are the next topic of discussion

#### IV. THE COMMON LAW *SANS* STATUTES; ANALYSIS, CHANGE AND CREATING NEW ACTIONS

The common law experiences many changes, most of them far less drastic in impact than the creation of an entirely new cause of action. These changes are often mandated by changes in the mechanisms of society. A typical example is the historical analysis that has accompanied application of the well-known “mailbox rule” in contract law.

##### Change (or Lack of Change) and the “Mailbox Rule”

A staple of first-year contract law courses, the mailbox rule states that acceptance of an offer takes effect upon its dispatch rather than upon receipt by the offeror.<sup>122</sup> This was a departure from the in person rule of when the contract is formed when the offeror hears the acceptance.<sup>123</sup>

It is generally agreed that the mailbox rule derives from the 1818 English case of *Adams v. Lindsell*.<sup>124</sup> The briefly reported decision in *Adams* states that the offeror’s attorneys supplied precedent supporting their argument that no contract existed prior to offeror’s receipt of acceptance.<sup>125</sup> The court chose to ignore that precedent, instead ruling on the practical consideration that “no contract could ever be completed by post” if that argument prevailed.<sup>126</sup> “For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum.”<sup>127</sup> The reported creation of the mailbox rule then follows Professor LaFave’s statement of how a judge decides a case where there is no applicable statutory law: “He may follow . . . prior cases, or

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<sup>122</sup> 1 HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 4.15 at 142 (2011).

<sup>123</sup> The rule is not extensively stated in most treatises or analyzed because it was rarely an issue in face-to-face transactions. It can be inferred, however, from the rule that if the offeree knew or had reason to know that the offeror did not hear the acceptance, a contract is not formed. See 1 ARTHUR CORBIN, CORBIN ON CONTRACTS § 104 (Rev. ed. 1993); 1 RALPH WILLISON, WILLISTON ON CONTRACTS § 82.

<sup>124</sup> See MODERN LAW OF CONTRACTS, *supra* note 122; Valerie Watnick, *The Electronic Formation of Contracts and the Common Law “Mailbox Rule,”* 56 BAYLOR L. REV. 175, 179 (2004) ; Paul Fasciano, *Internet Electronic Mail: A Last Bastion for the Mailbox Rule,* 25 HOFSTRA L. REV. 971, 977 (1997). *Adams* is published at 106 Eng. Rep. 250 (K.B. 1818).

<sup>125</sup> 106 Eng. Rep. at 251.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*



distinguish them, or choose between them.”<sup>128</sup> Once decided, however, the ruling of *Adams* became the overwhelmingly dominant rule in the United States.<sup>129</sup>

Over time, the common law mailbox rule has been confronted with a changing world—in this instance, the methods of communication. With the advent of the telegram, the telephone, email and other internet based forms of communications, the rationale behind the mailbox rules has been called into question. As early as 1932, drafters of the first Restatement of Contracts saw enough importance in the distinction to write a section devoted to “Acceptance by telephone.”<sup>130</sup> The section “restated” the rule as: “Acceptance given by telephone is governed by the principles applicable to oral acceptances where the parties are in the presence of each other.” The second Restatement broadened the language to “Acceptance given by telephone or other medium of substantially instantaneous two-way communication.”<sup>131</sup> Ironically, while the restatements proffered one rule, the actual case law adhered strongly to the mailbox precedent. Although the relevant cases dealt with the location rather than timing of the contract, they still looked at the genesis of the obligation. The case of *Linn v. Employers Reinsurance Corp.*<sup>132</sup> summarizes those cases. After acknowledging the “sound theoretical view” of the restatement position, the court listed several cases saying they were uniform in finding “by analogy to the situations in which acceptance is mailed or telegraphed, an acceptance by telephone is effective, and a contract is created at the place where the acceptor speaks.”<sup>133</sup> Commentators continue to argue the applicability of the mailbox rule to modern communications, looking to policy<sup>134</sup> and courts will weigh policy versus uniformity and predictability until the common law rules changes, if ever, in whole or in part.

Perhaps more difficult to analyze than changes in societal mechanisms are changes in societal viewpoints over time. The concept has already been touched upon earlier in the discussion on actions created by the public policy exception. In those instances, however, there were statutory schemes to look to for guidance. No such schemes existed when courts first addressed the right of privacy.

### Right of Privacy: Revealed or Created?

By most accounts, the right of privacy was first articulated in an 1890 law review article by Samuel Warren and Louis Brandeis.<sup>135</sup> Warren and Brandeis begin their article

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<sup>128</sup> LAFAVE, *supra*, note 33.

<sup>129</sup> MODERN LAW OF CONTRACTS, *supra* note 122. The author of this article acknowledges that the mailbox rule is somewhat atypical of the reception of most common law doctrines in that it was created by an English court after the United States became independent from Britain. Ironically, adherence to it has been stronger in the United States.

<sup>130</sup> RESTATEMENT (FIRST) OF CONTRACTS § 65 (1932).

<sup>131</sup> RESTATEMENT (SECOND) OF CONTRACTS § 64 (1981).

<sup>132</sup> 139 A. 2d 638 (PA 1958).

<sup>133</sup> *Id.* at 640 (citations omitted). Presumably, the contract is created at the time that the acceptor speaks as well.

<sup>134</sup> See Watnick and Fasciano *supra* note 124.

<sup>135</sup> See Dorothy Glancy, *At the Intersection of Visible and Invisible Worlds: United States Privacy Law and the Internet* 16 SANTA CLARA COMPUTER & HIGH TECH. L. J. 357, at 358 (footnote 2); Scott Jon Shagin, *The Prosser Privacy Torts in a Digital Age* NEW JERSEY LAWYER 9, at 9 (Apr. 2008). The

with a brief description of how the common law “in its eternal youth, [has grown] to meet the demands of society.”<sup>136</sup> They point to “early times” when the law provided remedies only for physical interference with life and property. Gradually the right to life became the right to enjoy life and protection from bodily injury was extended to prohibit against attempts as well as actual injuries.<sup>137</sup> Still later, courts further provided protection against offensive noise (nuisance) and protected intangibles such as reputation (libel and slander) and expanded the legal conception of property (such as intellectual property).<sup>138</sup> The authors do not tarry with the change process; they merely state the fact of change and proceed to discuss privacy in detail. The impetus for the necessary common law change to them was technology, specifically, “instantaneous photographs and newspaper enterprise.”<sup>139</sup>

Warren and Brandeis find the right of privacy hidden in precedents concerning publication, and more importantly nonpublication, of manuscripts and works of art.<sup>140</sup> They look to those precedents and assert that although courts claimed to decide the cases on the narrow grounds of property protection, “there are recognitions of a more liberal doctrine.”<sup>141</sup> They conclude that the protection of preventing publication is “the enforcement of the more general right of the individual to be let alone;”<sup>142</sup> not a property right but that of an “inviolable personality.” The authors contend that judges have been “groping for the principle”<sup>143</sup> of protection by implying contracts or trusts<sup>144</sup> but, in fact, that principle is the right of privacy.<sup>145</sup> And thus, thoughts of such a right began in earnest but did not become a part of common law until adopted by the courts.

Obviously, each state court independently decides the common law within its jurisdiction. That being said, a 1905 decision by the Supreme Court of Georgia opened the precedential door for privacy tort actions. By its own profession, *Pavesich v. New England Life Insurance Company*<sup>146</sup> is the first decision by a court of last resort allowing a private tort action involving a right of privacy.<sup>147</sup> *Pavesich* involved the use of a

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article referred to is Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy* 4 HARV. L. REV. 193 (1890).

<sup>136</sup> Warren & Brandeis, *supra* note 135 at 193.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 194.

<sup>139</sup> *Id.* at 195. The authors show stunning foresight into the future in their commentary on the press and “bounds of propriety and decency.” Some of their observations include: “Gossip is no longer the resource of the idle and of the vicious, but has become a trade . . .” “The intensity and complexity of life . . . have rendered necessary some retreat from the world . . . so that solitude and privacy have become more essential to the individual . . .” “When personal gossip attains the dignity of print . . . the ignorant and thoughtless mistake its relative importance . . .” and “Triviality destroys at once robustness of thought and delicacy of feeling. All *id.* at 196.

<sup>140</sup> *Id.* at 198-205.

<sup>141</sup> *Id.* at 204.

<sup>142</sup> *Id.* at 205.

<sup>143</sup> *Id.* at 212.

<sup>144</sup> *Id.* at 210.

<sup>145</sup> *Id.* at 213.

<sup>146</sup> 50 S.E. 68 (GA 1905).

<sup>147</sup> *Id.* at 77. The case actually states that a 1902 New York case, *Roberson v. Rochester Folding Box Company*, 64 N. E. 442 (N.Y. 1902), as the “first and only decision by a court of last resort involving the existence of a right of privacy.” However that case found that the right did not exist.

photograph in an insurance company ad placed in the *Atlanta Constitution*.<sup>148</sup> The photograph of the plaintiff was used without his consent and he claimed it as a trespass upon his right of privacy.

The Georgia court began its privacy analysis by acknowledging that prior to 1890, “every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such a right”<sup>149</sup> but instead was founded on a property right, breach of trust or similarly recognized common law right. That being stated, the court quickly added that the novelty of a complaint is no objection and “although there be no precedent, the common law will judge according to the law of nature and the public good.”<sup>150</sup>

The court then found that the right of privacy is recognized intuitively and has its “foundation in the instincts of nature.”<sup>151</sup> Following some elaboration, it concludes: “A right of privacy in matters purely private is therefore derived from natural law.”<sup>152</sup> The opinion then cites to Roman law,<sup>153</sup> Blackstone<sup>154</sup> and (not surprisingly) Warren and Brandeis<sup>155</sup> to further support the analysis.

Looking directly at common law doctrines, the Georgia court first turned to nuisance, saying that “there is really no injury to property.”<sup>156</sup> Turning to search and seizure laws, the court added that “[t]he refusal to allow such [unreasonable] search . . . is an implied recognition of the existence of a right of privacy.”<sup>157</sup> Finally, the court mentioned the doctrines of privileged communication between husband and wife, and attorney and client as also recognizing a right of privacy.<sup>158</sup> That part of the analysis concludes that: “It therefore follows from what has been said that a violation of the right of privacy is a direct invasion of a legal right of the individual. It is a tort . . .”<sup>159</sup>

Following the general survey of supporting principles within the common law, the Georgia court looks at cases that had considered the right of privacy since 1890. Most of the coverage is devoted to the 1902 decision of the New York Court of Appeals that found the action and right did not exist.<sup>160</sup> The Georgia court finds itself “utterly at

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<sup>148</sup> 50 S.E. at 68-69.

<sup>149</sup> *Id.* at 69.

<sup>150</sup> *Id.* Oddly, the quotation marks above show up in the text of the opinion with no attribution of who the author is quoting.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 70.

<sup>153</sup> *Id.* The citation is to McKelvey’s Roman Law (Dropsie) § 123. Interestingly, Warren and Brandeis mentioned Roman law as well but in so doing, distinguished it from the common law tradition, stating, “but our system, unlike Roman law, does not afford a remedy even for mental suffering which results from mere contumely and insult, from an intentional and unwarranted violation of the ‘honor’ of another. Warren & Brandeis, *supra* note 135 at 198.

<sup>154</sup> 50 S.E. at 70. The references are to 1 Bl. 123 and 1 Bl. 129, 134. The opinion grants that neither Blackstone nor any other writers on the principles of the common law referred to a right of privacy, but allows that the illustrations given by them concerning rights of individuals are “not to be taken as exhaustive.” 50 S.E. at 70.

<sup>155</sup> *Id.* at 74.

<sup>156</sup> *Id.* at 71.

<sup>157</sup> *Id.* at 71-72.

<sup>158</sup> *Id.* at 73.

<sup>159</sup> *Id.*

<sup>160</sup> *Roberson*, 64 N. E. 442 (N.Y. Ct. App. 1902). In fact, Six full paragraphs of the dissenting opinion are cited at 50 S.E. at 78-79.

variance” with the “learned judge”<sup>161</sup> who authored the New York majority opinion and attributes that decision to the “remarkable conservatism” of appellate decisionmaking: “Wherever it was legally possible to base a judgment upon principles which had been recognized by a long course of judicial decision, this has been done, in preference to applying a principle which might be considered novel.”<sup>162</sup> This conservatism, the court said, resulted in straining well-recognized principles and should not extend to ‘refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writing upon the law can be called to demonstrated its nonexistence as a legal right.’<sup>163</sup> Thus, the Georgia court relied on a variety of sources for finding a right of privacy and a tort action based on it: natural law, principles implied within early commentaries and common law doctrines, as well as the “elasticity of common law.”<sup>164</sup>

Although courts from other jurisdictions looked to *Pavesich* in the years immediately after its publication, the right of privacy was not readily adopted at that time. Some states avoided the issue by deciding on other grounds,<sup>165</sup> while other states respectfully declined to follow the decision (possibly deferring to the legislature).<sup>166</sup> Still, some states did use *Pavesich* as a precedent to help establish the common law doctrine in their jurisdictions.<sup>167</sup> Invasion of privacy is now a part of the Restatement of Torts,<sup>168</sup> the comment for which says that it is now recognized in “the great majority of American jurisdictions that have considered the question.”<sup>169</sup> The *Pavesich* type of reliance on policies from sources found largely outside of the common law can be contrasted to cases changing the law of parental consortium.

## Loss of Parental Consortium

A slightly different application of changing common law occurs when the action itself exists within the common law tradition but its utilization is limited. Consider, for example, a series of cases on a child’s loss of parental consortium. These types of cases were originally brought as actions for criminal conversation or alienation of affections

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<sup>161</sup> 50 S.E. at 77.

<sup>162</sup> *Id.* This is the approach that Guido Calabresi is so strongly critical of in the context of statutory interpretation by the courts: “. . . [some] judges have acted aggressively and have used the Constitution or farfetched interpretations to make obsolete laws functional. Not surprisingly, as more judges have taken this road, concern has increased. I would argue that much of the current criticism of judicial activism, and of our judicial system generally, can be traced to the rather desperate responses of our courts to a multitude of obsolete statutes in the face of the manifest incapacity of legislatures to keep those statutes up to date.” GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES at 6-7 (1982).

<sup>163</sup> *Id.* at 78.

<sup>164</sup> *Id.* at 80. The opinion actually states: “The conclusion reached by us seems to be . . . thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law, and . . . thoroughly in harmony with those principles as molded under the influence of American institutions.”

<sup>165</sup> See *Klug v. Sheriffs*, 109 N.W. 656, 657 (Wis. 1906): “We think the case before us does not turn on the so-called ‘right of privacy,’ but upon contract relations.”

<sup>166</sup> See e.g., *Hillman v. Star Pub. Co.*, 117 P. 594, 597 (Wash. 1911) and *Henry v. Cherry & Webb*, 73 A. 97, 109 (R.I. 1919).

<sup>167</sup> See e.g., *Foster-Milburn Co. v. Chim*, 120 S.W. 364 (Ky. App. 1909).

<sup>168</sup> See RESTATEMENT OF THE LAW OF TORTS, 2d § 652A.

<sup>169</sup> *Id.* Comment.

but with the abolition and disfavor of those actions,<sup>170</sup> they currently appear in personal injury and other actions.

The reserved judicial approach denying such claims is illustrated by *Taylor v. Beard*,<sup>171</sup> a 2003 Tennessee case for loss of parental consortium due to personal injury. The *Taylor* court begins its analysis by reviewing the development of the law of consortium.<sup>172</sup> Beginning with Roman law and migrating into early common law, the action was available only to husbands, originally under the theory that a wife's station "was that of a valuable servant . . . who could not sue in her own name."<sup>173</sup> Over time, emphasis shifted away from the services aspect and recognized intangible elements such as companionship and affection.<sup>174</sup> Tennessee adopted the action as part of its common law and when requested to, the courts refused to extend its reach to include wives as well.<sup>175</sup> However, in 1969, the Tennessee legislature responded by codifying the action and making it available to both spouses.<sup>176</sup>

Following its recitation of the action's history, the Tennessee court reviews the decisions of other states, finding "the majority of state courts have refused to recognize a cause of action for loss of parental consortium."<sup>177</sup> It noted that some courts had decided based on policies inherent in the doctrine while others determined that such an issue was a matter for the legislature to resolve. Ultimately, the court adopted the latter rationale, concluding that creating the cause of action would have "potentially far-reaching social and legal consequences in an area that we have consistently left to legislative discretion. This is an issue of public policy and interest balancing in which the legislature has involved itself before."<sup>178</sup>

A 1949 North Carolina case used a similar hands-off analysis in a case brought by children against a defendant for criminal conversation and alienation of affections.<sup>179</sup> That court found that "the problem . . . in its last analysis, is sociological rather than legal"<sup>180</sup> and was "more properly addressed to the legislative branch of government."<sup>181</sup>

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<sup>170</sup> See BARRY LINDAHL LEE, MODERN TORT LAW: LIABILITY AND LITIGATION (2d ed.) § 29:10: "The great majority of states have abolished alienation of affections by statute, while several others have done so judicially;" and § 29:13: "A substantial number of states have abolished criminal conversation by statute or by court decision; others have limited the statute of limitations for such actions or the amount of damages recoverable." See also the discussion on the abrogation of common law doctrines, *infra*.

<sup>171</sup> 104 S.W. 3d 507 (Tenn. 2003).

<sup>172</sup> *Id.* at 508.

<sup>173</sup> *Id.* at 509.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* citing *Krohn v. Richardson-Merrell, Inc.*, 406 S.W. 2d 166, 167 (TN 1966), *cert. denied* 386 U.S. 970 (1967) and *Rush v. Great Am. Ins. Co.*, 376 S.W. 2d 454, 458-59 (TN 1964).

<sup>176</sup> 104 S.W. 3d at 509 citing 1969 Tenn. Pub. Acts ch. 86, § 1, codified at TENN. CODE ANN. § 25-1-106.

<sup>177</sup> 104 S.W. 3d at 510.

<sup>178</sup> *Id.* at 511. *Taylor* also cites at length an Oregon decision, *Norwest v. Presbyterian Intercommunity Hosp.*, 631 P. 2d 1377, 1380 (Ore. App. 1981) and with emphasis added states: "Where the legislature has thoroughly involved itself in an area of the law and where its decisions in that area appear to set discreet boundaries, we think that it should be left to the legislature to change those boundaries, if they are to be changed, and to define the new ones."

<sup>179</sup> *Henson v. Thomas*, 56 S.E. 2d 432 (N.C. 1949).

<sup>180</sup> *Id.* at 434.

<sup>181</sup> *Id.*

“Our province,” the court concluded “is to enforce the law as we find it and to determine the existence or nonexistence of such a cause of action by the state of law as it now exists.”<sup>182</sup>

In stark contrast to the above are cases such as a 1945 Seventh Circuit case, *Daily v. Parker*.<sup>183</sup> The children in *Daily* sued a woman who they claimed caused their father to leave them.<sup>184</sup> Similar to the Tennessee court in *Taylor*, the court begins with a look to history. However, instead of focusing on the cause of action itself, the court looks at the “history of the development of the family and the family relations and the duties and obligations of members of the family.”<sup>185</sup> The court recognizes a slow change over the centuries and finds that “[r]elativity of rights and duties . . . is [the] conception of the family which must constitute our approach to the question at hand.”<sup>186</sup>

The *Daily* court cites very little precedent or other authority supporting its statements about family and change. It does cite to Dean Pound’s call for “judicial empiricism” which it paraphrases as “the common law has been and is sufficiently elastic to meet changing conditions.”<sup>187</sup> It quickly concludes “that a child today has a right enforceable in a court of law [against the defendant].”<sup>188</sup> In comments following the conclusion, the court reasserts that “there has been a change in the accepted view of the status of the wife and children” and that “even in the common law, in 1945, if no precedents be found, courts can hardly be advisedly called radical if they indulge in lawmaking by decisions, or in a word, engage in judicial empiricism.”

*Johnson v. Luhman*<sup>189</sup> is an Illinois Court of Appeals case decided shortly after *Daily* that also adopts this approach. The *Johnson* court cites *Daily*,<sup>190</sup> Pound,<sup>191</sup> law reviews discussing *Daily*,<sup>192</sup> and Cardozo’s statement that a “judge fills the open spaces in the law.”<sup>193</sup> The court holds: “it is the opinion of this court that a frank recognition of the changes within the family unit, which has now become a cooperative enterprise, makes it apparent that much of the ancient law of domestic relations is anachronistic.” The final paragraph is a brief summary of primary law that supports adopting the change.<sup>194</sup>

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<sup>182</sup> *Id.* The court’s opinion was challenged by a strong dissent asserting that inheritance of the common law did not mean the court “acquire[d] a morgue, or a mere dead thing to be administered . . . [but] inherited, or acquired by adoption, the rule by which the common law expanded, and must continue to expand if the result is to be a living law . . .” *Id.* at 435.

<sup>183</sup> 152 F. 2d 174 (7<sup>th</sup> Cir. 1945). Although unstated in the opinion, it was presumably in federal court due to diversity of citizenship of the parties.

<sup>184</sup> *Id.* at 175. The exact cause of action is not stated in the decision.

<sup>185</sup> *Id.* at 176.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 176-77. Although not stated in the opinion, the citation is to Pound’s *THE SPIRIT OF THE COMMON LAW* (1921).

<sup>188</sup> *Id.* at 177.

<sup>189</sup> 71 N.E. 2d 810 (Ill. App. 1947).

<sup>190</sup> *Id.* at 811-12.

<sup>191</sup> *Id.* at 812

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 814.

<sup>194</sup> *Id.* “Not only is this conclusion warranted by a judicious interpretation of the common law, but it is consistent the precedent establish by the Seventh Circuit Court of Appeals [*Daily*], with the principles of law propounded by our [Illinois’s] Supreme Court . . . and with the doctrine of justice embodied in the Illinois Constitution.”

A third case adopting the more flexible analysis was decided substantially later. In 1980, the Massachusetts Supreme Court decided *Ferriter v. Daniel O'Connell's Sons, Inc.*<sup>195</sup> *Ferriter* was a loss of consortium case brought by children against their father's employer for personal injuries caused to him at the jobsite.<sup>196</sup> Like other cases, the court looks at the history of consortium claims. The *Ferriter* court relies more extensively on case law in determining that the master-servant analogy was the foundation for such claims. From there, the court finds that "[t]hese cases supply analogous precedent for a child's right to recover for loss of a parent's society . . .,"<sup>197</sup> although the court does acknowledge that doing so "stand[s] . . . the master-servant analogy on its head."<sup>198</sup> Unlike the other cases deciding in favor of the children, *Ferriter* confronts the issue of deferring to the legislature. Citing its own earlier decision in one of the cases used to decide *Ferriter*, the court says:

As for the argument that we should withhold our hand until the Legislature acts, we need only repeat: "In a field long left to the common law, change may well come about by the same medium of development. Sensible reform can here be achieved without the articulation of detail or the creation of administrative mechanisms that customarily comes about by legislative enactment . . . . In the end the Legislature may say that we have mistaken the present public understanding of the nature of the (parent-child) relation, but we cannot now divine or anticipate."<sup>199</sup>

The boldness of the final statement is remarkable in suggesting that the judiciary not only can, but possibly should, be proactive in its creative lawmaking because the legislature can be reactive to any perceived indiscretions in the courts determination of "public understanding." That type of determination has always been the province of the legislative branch. It is also noteworthy that while the Tennessee court called the issue of consortium "an area that we have consistently left to legislative discretion,"<sup>200</sup> the Massachusetts court called it "a field long left to common law."<sup>201</sup> Of course, both statements may well be true if after adopting English common law, Tennessee's legislature was active in the area while Massachusetts' was not.

Finally, within this area of law there is evidence to support the view that when a court more freely modifies or extends common law doctrines, attorneys are encouraged to make more aggressive arguments for further modification or extension. A case in point is the Kentucky Supreme Court 1997 recognition of loss of parental consortium.<sup>202</sup> It did so despite acknowledging that the legislature had twice enacted statutes in the area<sup>203</sup> and

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<sup>195</sup> 413 N.E. 2d 690 (Mass. 1980).

<sup>196</sup> *Id.* at 691.

<sup>197</sup> *Id.* at 693.

<sup>198</sup> *Id.* at 694.

<sup>199</sup> *Id.* at 695-96 citing *Diaz v. Eli Lilly & Co.*, 302 N.E. 2d 555, at 563 (Mass. 1973).

<sup>200</sup> *Taylor*, *supra* note 171 at 511.

<sup>201</sup> *Ferriter*, *supra* note 195 at 695.

<sup>202</sup> *Giuliani v. Giler*, 951 S.W. 2d 318, 323 (Ky. 1997).

<sup>203</sup> *Id.* at 320 citing KENT. REV. STAT. § 411.145 (enacted in 1970) and KENT. REV. STAT. § 411.135 (enacted in 1968).

had actually considered a bill the previous year on loss of parental consortium.<sup>204</sup> The court justified its actions several times, saying it had “the power and duty to modify and conform [common law] to the changing conditions of society,”<sup>205</sup> “the authority and responsibility to modify . . . common law doctrine when necessary,”<sup>206</sup> and “a responsibility to conform the common law.”<sup>207</sup> The court further found the argument that its action was an invasion of the right of legislature “to be without merit,”<sup>208</sup> and of the legislature’s failure to enact on the subject: “In absence of a legislative decree, courts may adopt and apply public policy principles.”<sup>209</sup> The odd implication of this is that the legislature would have to enact a statute expressing intent not to allow for parental consortium in order to preempt the court.

Having made such statements, Kentucky courts should not have been shocked when in 2003, they were asked to rule on whether an action for loss of consortium could be had for loss of the family dog.<sup>210</sup> Although the appellate court did cite *Giuliani*,<sup>211</sup> it held that the status and regulations of a dog’s existence should “be fixed by the Legislature as it in its wisdom sees proper in the lawful exercise of its police power.”<sup>212</sup>

## V. ABROGATION OF EXISTING COMMON LAW ACTIONS

A final related question (although some might argue the same question) concerns judicial abrogation of a common law cause of action. As previously discussed, common law actions can be and often are abrogated legislatively.<sup>213</sup> However, a court’s elimination of an existing action is an almost singular event. It is so rare, in fact, that commentators have stated that it is a “well-established legal principle that only the legislature, and not the courts, may modify or abrogate common law causes of action.”<sup>214</sup> In some states, this restriction on the courts has been found embodied in the state’s constitution.<sup>215</sup> Still, the same considerations should apply to abrogation as to creation:

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<sup>204</sup> 951 S.W. 2d at 321, stating that Senate Bill 139 did not get out of committee.

<sup>205</sup> *Id.* at 319.

<sup>206</sup> *Id.* at 320.

<sup>207</sup> *Id.* at 321.

<sup>208</sup> *Id.* at 320.

<sup>209</sup> *Id.* at 321.

<sup>210</sup> See *Ammon v. Welty*, 113 S.W. 3d 185, 187 (Ky. Ct. App. 2003). The more typical pet loss case is brought under the well-established common law negligence theory. The question of a pet’s value is then raised as a damage issue. See Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227 (2006), Jason R. Scott, *Death to Poochy: A Comparison of Historical and Modern Frustrations Faced by Owners of Injured or Killed Pet Dogs*, 75 UMKC L. REV. 569 (2006). In *Ammon*, however, the action was brought against the county dog warden who had killed the impounded dog as part of his job routine so presumably no negligence action was available. 113 S.W. 2d at 186.

<sup>211</sup> *Id.* at 187.

<sup>212</sup> *Id.*

<sup>213</sup> See *supra* Section III, “The Common Law’s Relationship to Legislation.”

<sup>214</sup> Steven C. Tourek, Thomas H. Boyd & Charles J. Schoenwetter, *Bucking the “Trend”: The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 IOWA L. REV. 875, 915 (1999) (citing several Minnesota cases as supporting authority).

<sup>215</sup> See *Halenar v. Superior Court*, 504 P. 2d 928, 929-30 (Ariz. 1972) discussing *Kilpatrick v. Superior Court*, 466 P. 2d 18 (Ariz. 1970), finding that courts could not constitutionally interfere with a common law



societal shifts necessitating change balanced against the need for consistency and predictability with a look at legislative activity in that area of law. In abrogation, the party prejudiced by a sudden change in preexisting law is the plaintiff rather than the defendant.

### Alienation of Affections

An example of this uncommon phenomenon comes from family law, specifically the action for alienation of affections. As societal views of the marital relationship changed, many state legislatures abolished the common law action for alienation.<sup>216</sup> It may well be that the legislative activity emboldened courts to break from the common law when they might not otherwise. There is certainly evidence supporting the theory in the first judicial decision abrogating the action. The Washington Supreme Court in *Wyman v. Wallace*<sup>217</sup> cited the statutes of 23 states that had legislatively abolished alienation of affections.<sup>218</sup> Even so, the court expressly asserted its own authority to eliminate an action that it had created:

No doubt has ever been expressed regarding the court's power to abolish this judicially created action for alienation of a spouse's affections. Our original decision in this case recognized that "a role of law which has its origins in the common law and which has not been specifically enacted by the legislature may be modified or abolished by the courts when such revision is mandated by changed conditions."<sup>219</sup>

In addition to citing out-of-state legislation, *Wyman* relied on judicial notice of "the realities of a marital relationship,"<sup>220</sup> scholarly works on alienation of affections<sup>221</sup> and provided policy reasons for abolishing the action.<sup>222</sup> A few other state courts followed Washington's lead and judicially abolished actions for alienation of affections using similar analyses (and adding *Wyman* and its progeny as authority).<sup>223</sup>

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right of an employee to sue a fellow employee. *Halenar* found the principle anchored in three provisions of the Arizona Constitution including Art. 18, § 6: "The right of action to recover damages for injuries shall never be abrogated . . ." See also Michael d. Moberly, *Cranking the Wrongful Discharge Ratchet: judicial Abrogation of Legislative Limitations on the Public Policy Exception*, 24 SET. HALL LEGIS. J. 43 (1999).

<sup>216</sup> See *Russo v. Sutton*, 422 S.E. 2d 750 753, fn. 2 (S.C. 1992) for a listing of state statutes abolishing alienation of affections as of 1992).

<sup>217</sup> 615 P.2d 452 (Wash. 1980).

<sup>218</sup> *Id.* at 453, fn. 1.

<sup>219</sup> *Id.* at 453 (citing *Wyman v. Wallace*, 588 P. 2d 1133, 1134 (Wash. 1979)).

<sup>220</sup> 615 P. 2d at 454.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* The Washington Supreme Court relied heavily on the analysis of the Court of Appeals in much of its decision (*Wyman v. Wallace*, 549 P. 2d 71 (Wash. App. 1976).

<sup>223</sup> See e.g., *Hoye v. Hoye*, 824 S.W. 2d 422 (Ky. 1992), beginning its analysis with a history of the marital relationship, *Id.* at 423, 24, calling the ideas embodied in the action as outdated, *Id.* at 425, asserting the court's power to abolish the action, *Id.*, citing secondary authority and discussing contemporary thought, *Id.* at 425-26, and finally citing other states' legislative and judicial activity on the subject, *Id.* at 426-27 (including citing *Wyman*).

Additional examples of judicial abrogation of common law actions are difficult to find<sup>224</sup> although a Maryland Court of Appeals decision interestingly notes that that state has abrogated judicially some aspects of the common law of accessoryship in criminal law.<sup>225</sup>

## VI. OBSERVATIONS ON CHANGING DIRECTIONS IN THE CORNERS OF THE COMMON LAW

This author's idea at the conception of this piece was to find examples of radical changes in the common law, particularly in the creation of new actions and remedies. The piece would then look more deeply into a sampling of those issues. However, the research for the article suggests that those issues discovered and discussed previously are not so much the tip of an iceberg but rather closer to the iceberg itself. That is, the spontaneous creation of common law causes of action has been an infrequent event.

This infrequency supports the oft-stated maxim that the courts are conservative institutions.<sup>226</sup> It also underscores that the legislative branch generally reacts to the driving forces for change<sup>227</sup> before the judiciary reaches a breaking point. So for example, as society's views on race and discrimination changed, Congress and state legislatures codified those views and created new causes of action for enforcement.<sup>228</sup>

That being said, the article has demonstrated that common law changes have sprung in the past. They may well continue to do so in the future—perhaps even more frequently.<sup>229</sup> Because of this, some general observations on previous changes and what precipitated them merits consideration.

### The Spectrum for Creating Common Law Causes of Actions

The scenarios above show that changes occur within a spectrum of the common law but three distinct points are identifiable: 1) when there is no existing binding precedent and no legislation; 2) when there is contrary binding precedent and no legislation; and 3) when there is legislation.

In the first situation, change is inevitable although it may only be a slight change. The court must make a decision to resolve the dispute between the parties and that will create a precedent which is, in essence, a new law. A court in such a situation can and should look at authorities such as decisions from other jurisdictions, analogies to other

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<sup>224</sup> One of the most convincing pieces of evidence for this is searching a West Key number. Searching the topic of Constitutional Law, Civil Remedies & Procedure, Creation of Rights of Action (92K2503(2)) in state and federal databases, of the 154 headnotes retrieved (as of September 2011), virtually all of them stand for the proposition that such creation is a legislative function and not a matter for the courts.

<sup>225</sup> *State v. Sowell*, 728 A. 2d 712, 722-23 (MD App. 1999).

<sup>226</sup> See Cardozo's quote at the beginning of this article, *supra*. Also, "The wheels of justice grind slowly," (or some variation thereof) is commonly cited though never attributed in judicial decisions and legal scholarship. "Justice travels with a leaden heel, but strikes with an iron hand," is an 1876 quote attributed to Jeremiah S. Black by ELIZABETH FROST-KNAPPMAN & DAVID S. SHRAGER, *THE QUOTABLE LAWYER* at 177 (Rev. ed. 1998).

<sup>227</sup> Driving forces include technology (defined broadly) and changing societal viewpoints. See also Section III, *The Common Law's Relationship to Legislation*, *supra*.

<sup>228</sup> See e.g., 42 U.S.C. 1983 (2006).

<sup>229</sup> The rate at which changes are taking place today is more rapid than that of prior decades or centuries.

areas of law and public policy. Doing so is fair to the parties as well as responsive to the law's needs because for the litigants, their actions were based on uncertainties to begin with. There is an assumption of risk in going to trial and standing for appeal.

In the second situation, with contrary precedent, changing common law becomes more problematic. There is unfairness to at least one of the litigants who may have relied on prior law in choosing a course of action. This article would encourage courts considering such changes to adopt one additional factor in their analysis: the degree of the change in the law. This is where creating a new cause of action would have a much higher threshold for altering the law than changes in procedures or formalities. Of course, as earlier stated, in reality the common law is a spectrum and attorneys and courts that want to can manipulate their arguments and decisions to get the desired result—be it in that particular case or in the body of the law itself. The privacy cases showed how this can be done and how uncomfortable courts often attempt to deal with contrary precedent: they distinguish precedents and create legal fictions such as the constructive trusts used by cases prior to *Pavesich*. There then came a time when changing the rationale for the decision did not seem such a radical change in the law itself (see the framing discussion below).

The final point on the continuum, where there is legislation, is one that courts should avoid stepping into. They are ill-suited to determine public policy. Although they can determine what is *a* public policy, they do not have input into other public policies that may be affected by their lawmaking. Legislators have lobbyists, interests groups and are accessible by their constituents to make certain they have the necessary perspectives before crafting language that will change the law significantly. Public policies such as supporting education and public safety have to be balanced against public policies of reducing taxation or promoting individual liberties. As one commentator states: “[T]hough policy change is not easy in the legislative arena, such changes are expected and even demanded. Far from undercutting their institutional legitimacy, elected leaders are often elected precisely so that they can and will change policy, sometimes radically.”<sup>230</sup> That is not true of our judges.

### Framing Changes

As Cardozo's quote at the beginning of this article observes, the natural inclination of the common law is to move slowly by gradation. It is of little surprise, therefore, that when judges create new actions or remedies, they attempt to do so within the existing system and actions. The creative or destructive act seems less eventful if it is merely an extension of an existing doctrine rather than an entirely new action. For example, loss of parental consortium is founded upon preexisting common law claims for loss of consortium. It is merely an extension of those principles to a different class of plaintiffs. Similarly, actions against dram shops can be characterized simply as negligence claims where the change is the elimination of a common law defense. Even the wrongful discharge action is couched in an existing legal action although the existing wrongful discharge actions had been originally created by legislative enactment instead of judicial decision. This tendency toward minimizing the acknowledged impact of a

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<sup>230</sup> Gordon Silverstein, *Law's Allure in American Politics and Policy: What it Is, What it is Not, and What it Might Yet Be*, 35 *Law & Soc. Inquiry* 1077, 1078 (2010).

decision of and by the courts is also extant when courts do, in fact, create new causes of action. It is the reason why the right of privacy was enforced for years by using doctrines such as nuisance and defamation. By doing so, the courts were able to make it appear that no significant change in the law was taking place. Then, when the rights and liabilities had been established, the elimination of legal fictions by replacing them with a newly stated doctrine seemed a slight change in nomenclature rather than a dramatic change in the law itself. Since judges have taken this approach to framing change, attorneys might be well advised to do the same in making arguments in favor of new actions and remedies.

### Change Agents

Another question to analyze when judges significantly modify the common law is what are the agents of change? The examples given offer two such agents: technology (defined broadly) and societal viewpoints.

Technology was a major agent in creating the right of privacy. The issues in *Pavesich* and its predecessor involving actress Marian Manola<sup>231</sup> were made with a focus on photography. Where photographs had once been posed for in a studio, the camera had become more portable, faster and able to be hidden or unobserved. The *Pavesich* court explicitly stated:

Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form in invitum their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But if it is to be permitted that the portraiture may be put to commercial or other uses for gain, by publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be.<sup>232</sup>

Technology also underlies to some degree creating the liability of dram shop owners. Those cases were decided after automobiles had become more prevalent, went faster, were larger and people drove them further for many purposes (including to and, more importantly from, dram shops). These technological advances brought with them the increase in fatalities and injuries due to collisions. An additional unstated technology in the same decisions is that related to intoxicants: their strength and palatability changed the way people responded to their sale and consumption. Of course, the second change agent (societal viewpoints) played a major part in the law's change as well.

Technological change has also created new actions in areas like medicine. Actions such as wrongful birth did not exist until technology created procedures for

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<sup>231</sup> The case is mention in *Pavesich*, 50 S.E. at 74 and in footnote 13 of Warren & Brandeis, *supra* note 135.

<sup>232</sup> *Pavesich*, 50 S.E. at 78, citing Judge Gray's dissent in *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 450 (N.Y. 1902).

sterilization (first) and testing for birth defects (later).<sup>233</sup> That action and its kin are not discussed in detail by this article because they have been framed as negligence actions and are, therefore, not changes to existing common law doctrines but instead applications of the common law to novel circumstances.

With people living longer, modes of communication changing and technology changing so many aspects of living more rapidly than in the past, it is certainly foreseeable that it will be an agent of change behind future causes of actions.

The second agent of change that is easily identified is societal viewpoints. A prime example of this is the family and familial relationships. When once a wife and children were considered property and later servants, society's views have evolved to see the relationship more like a partnership today. With that, the obligations and duties changed and courts modified the common law in areas such as loss of consortium. Tied to the family relationship is the issue of love or affection. Because of changes in society's views on the subject, doctrines such as alienation of affections and criminal conversation have changed too. Views of family continue to evolve: cohabitation in place of marriage has gained in popularity and acceptance. Same-sex relationships have also gained more acceptance. As views on these and other relations alter, so too might common law doctrines tied to the traditional view of family and marriage.

As mentioned previously, opinions about alcohol, its sale and use has changed dramatically within the last century. Those attitudes were change agents involved in both the legislative and judicial actions surrounding dram shop acts, their repeal and a change in common law liability of sellers of intoxicants.

Additionally, attitudes toward employment have changed. The movement has been toward considering employees as stakeholders in the enterprise in which they work. In fact, the use of the word "stakeholder" as including employees has only come into vogue in recent decades.<sup>234</sup> Although not explicitly state in the public policy cases, this may be a conception behind the erosion of the common law employment "at will" doctrine.

Finally, it is worth noting that the change agents enumerated here are the same ones that often move legislation. They have impacted statutes enacted on family law, drunk driving, employment and innumerable other areas.

## Proving Change

One final question is when courts create new actions or remedies, have they proven change that requires such movement and if so, how? As with framing, observing what judges have used as evidence in their opinions can be useful to attorneys attempting to support their arguments that significant change has occurred.

An obvious source of proof is statistics. For example, the cases finding dram shop owner liability cited statistics relating to increasing rates of traffic fatalities related

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<sup>233</sup> See generally Daniel W. Whitney & Kenneth N. Rosenbaum, *Recovery of Damages for Wrongful Birth*, 32 J. LEG. MED. 167 (2011) and Michael T. Murtaugh, *Wrongful Birth: The Courts' Dilemma in Determining a Remedy for a "Blessed Event,"* 27 PACE L. REV. 241 (2007).

<sup>234</sup> See e.g., John C. Coffee, Jr. *The Uncertain Case for Take Over Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WIS. L. REV. 435, 446.

to drunk driving as evidence that the laws on who should be held accountable needed to change.<sup>235</sup>

Another set of sources that courts relied on to support change were secondary sources such as studies and expert opinions (often found in treatises or law reviews). One noteworthy example of this discussed in this article is the *Pavesich* court's use of the Warren and Brandeis law review article as well as Blackstone's treatise on the need to recognize a right of privacy.<sup>236</sup> Similarly, *Daily v. Parker* cited Roscoe Pound in its parental consortium analysis for the proposition that the common law is sufficiently elastic to meet changing conditions.<sup>237</sup> And the *Wyman* court cited several scholarly works on alienation of affections.<sup>238</sup>

A third source used by the courts to support change was the law of other states. These laws were sometimes the common law of those states, sometimes legislation. They are used to show both a need to change (keep up with the Joneses) and that change has occurred (otherwise the other states would not have acted). For example *Wyman* cited 23 statutes abolishing alienation of affections.<sup>239</sup> This actually covers both uses, showing a growing change in viewpoint about the action and calling for Washington to keep in step with that viewpoint. The dram shop cases cited other state's law also.<sup>240</sup> Intertwined with these sources is the problematic use of statutes as a source of proving change and the propriety of courts stepping into the legislative arena. This article has already discussed the use of same-state statutes as evidence of public policy to change common law.<sup>241</sup> The issue is not entirely the same concerning other state statutes although the inaction of a state legislature can be difficult to evaluate.

A final source courts used in the cases discussed is judicial notice. The court stated it was doing so explicitly in *Wyman* when discussing marriage and the doctrine of alienation of affections<sup>242</sup> but courts do so by implication in other instances when they aver that society has changed but do not provide any authority for the assertion. An obvious problem with this type of proof is that it is much easier for a judge to use in an opinion than for an attorney to argue.

In addition to the sources named above, there are certainly other sources for proving change that can be proffered by attorneys or relied on by judges. However, those listed above are the ones gleaned from the decisions discussed in this article.

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<sup>235</sup> See *Rappaport*, 156 A. 2d at 8 and discussion in section III, subsection on Common Law Liability for Furnishing Liquor.

<sup>236</sup> 50 S.E. 68, at 70, 74. See generally section IV, subsection on Right of Privacy.

<sup>237</sup> 152 F.2d at 176 and discussion in section IV, subsection on Loss of Parental Consortium. Note, however, that Pound was used more as supporting changing common law generally rather than the change surrounding the particular law.

<sup>238</sup> 615 P. 2d at 454.

<sup>239</sup> 615 P. 2d 453, footnote 1 and section V.

<sup>240</sup> See section III, subsection on Common Law Liability for Furnishing Liquor.

<sup>241</sup> See section III, subsection on Employment, Discrimination and the Public Policy Analysis

<sup>242</sup> 615 P. 2d at 455, recognizing that the Court of Appeals decision it was affirming was based on "judicial notice of the realities of a marital relationship." It later approves that approach stating: As the United States Supreme Court's decision in *Trammel* demonstrates, the Court of Appeals had the power to take notice of the social fact in reaching its legal conclusions." *Id.* See also *Trammel v. U.S.*, 455 U.S. 40, 52 (1980).

## VI. CONCLUSION

As Justice Cardozo's quote at the article's beginning states, the common law is slow to change. Yet it does change and occasionally by quantum leaps. To this author, the springing causes of action—most notably torts with no previously existence, are worthy of scrutiny.

The common law does evolve and will continue to do so. The question is how easily those changes occur and, more importantly, how dramatic those changes impact the law. This article has attempted to survey changes in common law rules that occurred within varying legal areas and contexts. In some areas, legislation had been enacted and ironically was used both to defeat common law changes when deferred to and to support common law changes when used as evidence of policy. In other areas, no legislation had been enacted and courts had to justify changes using other authorities and arguments.

The author has already suggested that courts creating new actions should explicitly consider the impact of such decisions as a factor in making such a change. One other issue courts should address is the propriety of using public policy as a basis for changing the common law. Causes of action based on public policy analysis arose almost like marsh gas about a half-century ago and have not yet been utilized to the extent that it appears they might—at least the courts citing it have not stated a limit to its application. Perhaps the conservative nature of the judiciary and its procedures has retarded its growth. Or perhaps members of the bar have not considered its potential application and argued those actions. Assuming public policy is an appropriate decision for a court to determine leads to the question of what authorities can and should a court cite as evidence of a public policy. In response to those supporting courts asserting public policy into their decisions,<sup>243</sup> certainly, courts do create new laws. Their decisions are not all interpretations of existing authority and in creating such law, they may rely on public policy. Acknowledging that, this author is critical of the use of public policy and particularly using same-state statutes as evidence of public policy to create common law causes of actions.

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<sup>243</sup> See e.g., Silverstein, *supra* note 230 at 1086-87 (2010) (stating that a judicial strategy of changing policy may be the only way to achieve certain social goals) and Alan B. Handler, *Judging Public Policy*, 31 Rutgers L.J. 301 (2000).