

### **Three Things to Know about the Legal System of the United States**

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(1) A signal, although often unnoticed, feature of the legal system of the United States is its structural complexity. By “structural complexity” I do not mean the complexity of the concepts used to describe legal rights and duties. Rather, I mean the complexity of the rules that determine, for a given problem, where in the institutionalized legal system the relevant body (or bodies) of law is to be found. This results partly from the existence of a vigorous federalism, which by law or custom puts some matters in the hands of the national government, some in the hands of fifty state governments free to differ from each other, and some in both. It also comes from the fact that within any jurisdiction, law is not codified on any systematic basis; some of it resides in discrete cases, and more can be found in disparate statutes. These statutes are commonly passed individually, often in response to a crisis or political event, and usually without reference to each other; even if formally organized in the law books, they are not systematized in any important sense. Finally, there is the very large body of law created by administrative agencies, all of which are limited by the statutes that created them, which again have been passed in a helter-skelter fashion.

Some very simple practical questions – for example, does the seller of a used car have to disclose to the buyer a known defect in the car, or be responsible for not doing so? – can thus implicate an enormous set of bodies of law – in this case, at least the fifty state versions of the common law of contracts, fifty state consumer protection statutes, federal trade law developed by the Federal Trade Commission, and federal statutory warranty law. Or, to put the matter as seen by the legal professional, much of what constitutes being an expert in any area of U.S. law consists of knowing of the existence of the alternatively applicable bodies of law in that area, and of the rules by which one or the other of them assume primacy in any particular situation. The matter is complicated even as viewed by “native” participants in the system.

(2) What makes this complexity tolerable both for those who make their living from the legal system and for those who are subject to it, is the assumption that all of these different bodies of law, although formally quite distant, will be interpreted and employed from a similar point of view. (At its core, then, the U.S. legal system is not very formal.) This point of view is nowhere spelled out completely, and probably could not be fully articulated by any participant in the system. Naturally, it is subject to shading one direction or another, but that does not seem to undermine its fundamental stability. Lawyers learn it in law school, but it is sufficiently akin to values inculcated elsewhere in the society that (whatever the travails of learning it) it does not appear as a “separate” voice one competently understood. In short, there is an operative cultural congruity tying together the formal statements of the law, their particular interpretations, and the values of lawyers and of the members of the society as a whole.

Many practical operations of the system reveal the assumption that this cultural congruity exists. Just to name two: First, courts in the United States, and

especially the appellate courts, are overwhelming courts of wide, and in many cases fully general, jurisdiction. Intricate bodies of law are meant to be interpreted by generalists. Second, courts (including the United States Supreme Court), when rendering decisions, will often, in addition to their technical analysis, present an explanation of the result stated in lay or common-sensical terms. It seems that the results, even of matters often thought to be highly regulatory, ought to be accessible to the common intellect of the society.

(3) This cultural point of view is complex, and as I already said, cannot be fully articulated. Surely one of its impressive features, however, is the importance it ascribes to individual freedom as freedom would be understood by a 19<sup>th</sup> century liberal. This commitment shows up throughout the law: in commercial matters, in the law's emphasis on voluntary commitment as the essence of transactions; in civil liberties matters, in the law's emphasis on free speech, free association, and freedom of religion; and in social welfare matters, in the law's hesitation to substitute social care for individual choice. Although there are many complicating forces and numerous particular counter-examples, speaking overall, people in the U.S. understand their legal system as enacting a regime of freedom.

It will probably come as no surprise that melding this individualistic view of freedom with the social realities of modern life is not an easy matter. There is room within legal argument in the U.S. to argue that freedom in the 21<sup>st</sup> Century requires a different set of rules from freedom in the 19<sup>th</sup> century. But such arguments tend to take place within a frame that assumes freedom as a paramount (or at least highly important) value. Arguments that begin, for example, from an assumption that economic equality is itself important (rather than that a certain level of wellbeing is necessary to live freely) are much less likely to be made or to prevail.