Foundations of Information Law

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ACRONYMS AND ABBREVIATIONS

AAAAA All Animals Are Adorable Act
AAP Association of American Publishers
ABA American Bar Association
ACA Patient Protection and Affordable Care Act
ACLU American Civil Liberties Union
ACP Affordable Connectivity Program
ADA Americans with Disabilities Act
ADPPA American Data and Privacy Protection Act
AFT American Federation of Teachers
AI artificial intelligence
AKADA All Kittens Are Delightful Act
ALA American Library Association
ANPRM Advance Notice of Proposed Rulemaking
APA Administrative Procedure Act
APACA All Puppies Are Cuddly Act
ASBCA Armed Services Board of Contract Appeals
AWB Average White Band
BD Blu-ray disc
BEAD Broadband Equity, Access, and Deployment
BIPOC Black, Indigenous (and) People of Color
BLM Bureau of Land Management
BLS Bureau of Labor Statistics
CC Creative Commons
CCPA California Consumer Privacy Act
CCPA Court of Customs and Patent Appeals
CRPD Convention on the Rights of Persons with Disabilities
CD compact disc
CDA Communications Decency Act
C.F.R. *Code of Federal Regulations*
CIPA Children's Internet Protection Act
CONTU Commission on New Technological Uses
COPA Child Online Protection Act

COPPA Children's Online Privacy Protection Act
CRC Convention on the Rights of the Child
CRT critical race theory
CTC community technology center
CTEA Copyright Term Extension Act
DHS Department of Homeland Security
DMCA Digital Millennium Copyright Act
DOJ Department of Justice
DOT Department of Transportation
DVD digital videodisc
ECPA Electronic Communication Privacy Act
E-FOIA Electronic Freedom of Information Act
EO Executive Order
EPA Environmental Protection Agency
EU European Union
EULA end user license agreement
FBI Federal Bureau of Investigation
FCC Federal Communications Commission
FDA Food and Drug Administration
FERPA Family Education Rights and Privacy Act
FISA Foreign Intelligence Surveillance Act
FOE Fraternal Order of Eagles
FOI freedom of information
FOIA Freedom of Information Act
FRCP Federal Rules of Criminal Procedure
FTC Federal Trade Commission
FTCA Federal Tort Claims Act
HIPAA Health Insurance Portability and Accountability Act
ICCPR International Covenant on Civil and Political Rights
ILL interlibrary loan
IMLS Institute of Museum and Library Services
IOT Internet of Things
IP intellectual property
IRS Internal Revenue Service
ISP Internet service provider
JD Juris Doctor
JPML Judicial Panel on Multidistrict Litigation
LBPD Library for the Blind and Print Disabled

LD laserdisc
LGBT lesbian, gay, bisexual, and transgender
LGBTQ+ lesbian, gay, bisexual, trans, questioning, and beyond
LMS learning management system
LOC Library of Congress
MLIS Master of Library and Information Science
MPAA Motion Picture Association of America
NARA National Archives and Records Administration
NCAA National Collegiate Athletic Association
NFT non-fungible token
NRA National Rifle Association
NSL National Security Letter
NTIA National Telecommunications and Information Administration
PBS Public Broadcasting Service
PHD doctor of philosophy
PMRC Parents Music Resource Center
PUB. L. Public Law
R registered trademark
SSA Social Security Administration
SNPRM Supplemental Notice of Proposed Rulemaking
SCOTUS Supreme Court of the United States
TEACH ACT Technology, Education, and Copyright Harmonization Act
TM trademark
TOS terms of service
U.S.C. *United States Code*
U.S.C.A *United States Code Annotated*
UDHR Universal Declaration of Human Rights
UK United Kingdom
UN United Nations
US United States
USA PATRIOT ACT Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act
VCR videocassette recorder
VPA Volunteer Protection Act
VPPA Video Privacy Protection Act
WCAG Web Content Accessibility Guidelines
WIPA World Intellectual Property Association
WIPO World Intellectual Property Organization
YA young adult

CHAPTER 1

Searching for Information (Law)

THE LAW

Law is what makes society possible. Long, long before writing existed, small communities of hunter-gatherers established rules of behavior in the community, like no stealing of another's mammoth meat, and fires must be built no more than eight feet from the cave entrance to ensure adequate ventilation. As long as people have successfully lived together, they have needed rules setting the expectations for living together. For most of recorded history, these laws have not necessarily been equitable or just for the majority—enslavement, serfdom, and hereditary monarchies are primary examples. Laws held people together, though often not by choice.

Optimally, laws serve to equitably create safety, security, and consistency for all in social and societal interactions, mostly in ways that are so taken for granted that they become nearly invisible. When laws are successfully implemented, cars going in the same direction all drive on the same side of the road and do not have strobe headlights or dashboard skillets. Restaurants do not place decorative bowls of mercury on the tables. Utilities provide clean and safe water. Building codes typically ensure stable structures. Bagels are not jauntily flavored with arsenic. People do not wander into your home and take your things. You get the opportunity to vote in regular elections. Large corporations are not allowed to maintain their own militaries. The number of ways in which laws are intended to make things work in a modern society are pretty much beyond counting.

However, THE LAW sounds imposing, simply because of all the baggage the term carries.[1] It is scary because it can totally mess with your life, your job, your place of work, your investments, and your family, along with just about everything else that matters to you. It is everywhere, impacting countless activities and interactions, but generally remains invisible as society percolates along. It is also confusing, based on archaic and intentionally oblique terminology, making it difficult for the nonlawyer to understand. Even terminology that you think you understand may mean something different (e.g., if a law "addresses" something, this means that it legally covers a topic, even if the topic is never mentioned). And if you must directly engage with legal processes, they are mind-bogglingly expensive. And to top it all off? THE LAW is often employed in anything but an equitable manner.

LAW AND INFORMATION INSTITUTIONS

So, not only is the law scary and confusing and potentially expensive, but there is also a lot to keep track of. This is particularly true for information institutions—a term that we'll use in this book to refer to libraries, archives, museums, and all other places where information and the public interact for educational purposes. The activities of information institutions are particularly law-intensive, what with the information and all. Myriad elements of the functioning of information institutions and the lives of information professionals are impacted by laws about freedom of access, censorship, freedom of expression, privacy, public forums,[2] filtering, accessibility, copyright, contracts, licensing, fair use, interlibrary loan (ILL), education use, streaming, security, surveillance, advocacy, lobbying, workplace environment, liability, funding, and many others. These various legal issues do not impact all information institutions in the same way; the impact varies depending on the focus of the specific institution and the communities that it serves. We will make such differences clear as we merrily roll along. Though this book primarily focuses on the legal issues related to libraries and librarianship, we also will discuss these issues as they relate to information institutions and professions more generally to provide context.

In the field of information science, there is an unfortunate tendency to approach legal issues as if they were a bunch of unrelated things rather than an interwoven fabric. You'll find plenty of books written in detail about singular legal topics and often for a particular kind of library, such as licensing for academic libraries or filtering in the school library or contracts for catalogers, in a sort of library + law Mad Libs. Privacy and intellectual property seem to be the most frequent subjects. Some of these books are very useful; others, not so much. We'll provide pointers to the helpful ones as we address each aspect of the law.

For information professionals, part of what makes law so challenging to understand is the rather different way in which knowledge is structured, as compared to the natural, social, and information sciences. For example, case reporters, sometimes also simply called reporters, gather together cases in chronological order. The concept of citing to a case reporter, for instance, can be perplexing because (a) legal databases (e.g., Westlaw or LexisNexis) make court cases available before there is even a case reporter citation, (b) the same case may have different citations for different case reporters, and (c) you likely may never actually read the case reporter. All of this is anathema to how information is found and cited in the natural, social, and information sciences.[3] And though as an information science person you may feel comfortable with finding different legal rules from different sources, the typical approaches for assessing and evaluating different sources that contain conflicting information do not apply in law. Instead, you must consider the Supremacy Clause of the US Constitution and concepts such as mandatory authority. And you have to accept the possibility of a circuit split—which means the law is actually different in separate regions of the country—and there's nothing that you can do about it. To help the preceding sentence make sense to a nonlawyer, the Supremacy Clause means that if a federal law and a state law conflict, the federal law takes precedence. A state law, however, can offer additional rights, above and beyond the federal law. As for circuit splits, different federal circuits can interpret the law differently, which is fine, although it can certainly complicate the matter for anyone trying to apply the law. A circuit split exists until the Supreme Court of the United States (SCOTUS) decides to take a case that involves that particular issue. But SCOTUS is not required to resolve a circuit split; rather, the court gets to decide if and when it wants to take up a case. As a result, a circuit split can persist indefinitely.

You must also get comfortable with the idea that a lower court opinion that addresses a legal issue fully and eloquently has no precedential value and may be treated as something

akin to anecdotal evidence. In law, you don't get to decide which sources you perceive to be of higher quality and more trustworthy based on reading them. There's an existing structural hierarchy that emphatically makes those decisions for you, regardless of the actual quality of the various arguments and decisions that you find.

The relatively few books that have attempted to provide information professionals a broader perspective on the law have presented a collection of issues rather than linking them together for the reader to understand the big picture of laws about information. For example, *The Librarian's Legal Answer Book* (Minow & Lipinski, 2003) provided a set of questions and answers grouped by legal topic, with eighty-two questions and answers for copyright, none of which bothered to explain the legal concept of copyright or how it relates to other legal topics. If you were already the long-serving director of an institution, that book was probably useful for dealing with very specific operational questions. If you wanted to understand generally how the law was created and how it shaped your institution's functions and roles within society, then that book might leave you pretty disheartened or at least with more questions than you had before cracking it open, in spite of the question-based format.

Despite this lack of resources for understanding the relationships between law and information, laws impact innumerable aspects of librarianship—as well as all the other information professions, of course—and librarians need to be literate in and comfortable with laws related to the creation, collection, use, dissemination, and preservation of information. And there may be many reasons why you—as an information professional—are interested in law, including that (a) you are/want to be a public, government, or academic librarian, (b) you are/want to be a librarian at a law firm or a law school,[4] (c) you want to understand the legal issues involving your information science research, or (d) you want to do advocacy work related to your core passions in information science. This spectrum of interests leads us, ineluctably, to this book here, in which we will try to make the law relevant, understandable, and knowable to current and future librarians, rather than a terrifying abstraction.[5]

In the digital age, the means by which libraries acquire and distribute information to patrons have become vastly more complicated. Since the 1990s, libraries have enthusiastically embraced the Internet as a means to expand access to information, sharing of resources, support for research, and much else. Libraries soon also became the backbone of public Internet access and the primary source of computer and information literacy education (K. M. Thompson et al., 2014). All these possibilities and responsibilities have drastically reshaped the relationship between libraries and the law as information is provided, controlled, and licensed in new ways; as copyright has become far easier to violate and privacy far harder to protect; as information literacy has become harder to teach; and as new technologies constantly alter the ways in which libraries provide materials for patrons. The explosion of online information has also spurred the creation of far more, and far more expansive, laws related to information, many of which directly impact libraries and the ways in which they can serve their communities.

As a result, the number of laws directly shaping libraries' commonplace activities and operations has increased exponentially, while areas of law that once had little relation to librarianship are now shaping the ways in which a library can engage its community. There is a pressing need for a comprehensive introduction to the major legal issues and considerations of which librarians should be aware, and this book is designed to meet that need for current and future librarians working in a variety of settings.

We should note at the outset that we are a pretty uniquely qualified bunch to tackle this book, no matter how awkweird it is to describe yourself as uniquely qualified. Three authors represent almost the entire set of library and information science faculty members

with both a doctor of philosophy (PhD) degree in the field and a law degree. In various combinations, we have created educational programs and courses related to information and the law; given legislative testimony at the state and federal levels; responded to regulatory rulemaking processes; worked on legal cases as an expert witness; served as a member of a litigation team; worked as a clerk to a judge; developed tools and analyses related to the law for librarians and libraries; and written scores of articles, books, book chapters, conference papers, and reports about various aspects of information and the law. Also, two of the authors seem to have taken up permanent residence in the Foundations book series.[6] We've tried to put all this experience to good use in making the intersection of information and the law understandable for information professionals.

This book was written as a companion to Jaeger and Taylor's *Foundations of Information Policy* (2019), and the two books cover related but very distinct materials. That previous book focused on the information policy ecosystem, which includes laws and many other policy instruments, at the societal and social levels. It presents the historical and contemporary development of policies as a lens for understanding the broad impacts of policy on information institutions and professions. This book, the one you are currently reading, dives deeply into the laws related to information themselves that are at work in the daily activities of information professionals and institutions, providing the means to find, navigate, and live with the law. Although the terms *law* and *policy* are often used interchangeably, they do have somewhat different meanings. If information policy comprises the entire forest that you must walk through, information laws are the really big trees that you definitely do not want to fall on you.

MALPRACTICE

Before we go any further, we feel the need to reassure you that there is no such thing as information malpractice under the law; you cannot be sued for being a librarian doing your job, though legislatures can set parameters on what that job can entail. Information professionals have long been concerned about the possibility of being responsible for unintentionally directing someone to a resource with bad information in it. Fortunately, that is not the case under the law—if a book in the collection or a database that the institution subscribes to contains incorrect information, it is *not* the fault of the institution or the information professionals who work there. Despite recurring fears of "information malpractice" charges, these fears do not stem from real-world events and have, in fact, been effectively debunked within library literature for decades (Dragic, 1989). If you wish to see a thorough deconstruction of the myth of information malpractice, try Paul Healey's 2008 book, *Professional Liability Issues for Librarians and Information Professionals*. If a book seems like too much reading, he also wrote a 1995 article entitled, "Chicken Little at the Reference Desk: The Myth of Librarian Liability,"[7] which gives an overview of the key issues in this space.

A thoughtful and conscientious information professional follows the standards of best practice in the field and adheres to the policies of their institution. And they also avoid giving the impression of expertise in areas where it is lacking, most prominently medicine and law, in which there are laws against nonexperts practicing. That does not mean that the law is unrelated to the daily activities of an information professional, as the rest of this book will, we hope, make clear. For many information professionals, their job may involve regular interaction with legal documents or public policies, which can include working with

gifts and donor agreements, contracts and licensing agreements, issues of provenance, and loans and resource sharing. In such cases, it is obviously essential to be well versed in the laws and standards that impact such work.

Direct interactions with the law may also come through needing to work with law enforcement and public safety concerns if one works at an institution open to the public. And there is always the possibility of law enforcement having their own reasons to want to visit an information institution, perhaps with a warrant in hand. In those situations, you really want to have clear institutional policies that can help guide your actions.

In 2022 and 2023, a number of states passed laws that placed new restrictions on the activities of librarians, accompanied by heavy penalties for the failure to comply with the restrictions. These new laws do not establish any "information malpractice" situations; instead, they create criminal penalties—threat of job loss, large fines, and, in the most extreme states, the possibility of years in jail—for providing access to materials that the state has deemed should not be in library collections (Jaeger, Jennings-Roche, & Hodge, 2023; Jaeger, Jennings-Roche, Taylor et al., 2023). These laws have been created as part of the large number of pro-book ban and anti-library laws that have become alarmingly commonplace in a very short time. So, though you cannot be sued for providing access to a book that contains wrong information, in some states you now can go to jail for letting a patron check out a book that is sold at Target down the street. Sigh. We discuss all these ideas in more detail later, especially the book banning and criminalization of librarianship, but these issues are worth keeping in mind from the outset.

LAWYERS, GUNS, AND MONEY

There's one more thing that we must address at the beginning of this book. For the law to seem more understandable, it's time to acknowledge that most of what you think that you know about the law is wrong or, at the very least, incomplete. It's not your fault; law is a prominent part of the news and many forms of entertainment and is usually presented completely inaccurately, hence the love of "lawyers, guns, and money," in the unbeatable phrasing of Warren Zevon.[8] In reality, though, most of the law revolves around boring stuff that you never see. And you should be thankful for that. A legal drama devoted to the mechanical collection of licensing fees for the use of songs under copyright protection in the soundtracks of video games would be far less scintillating than a program about courtroom battles defending unjustly accused murder suspects, but the former is what the majority of law really looks like in practice.[9]

In reality, most legal actions never go to court in the sense of a judge and jury—criminal cases are typically plea-bargained, and civil cases are generally resolved through settlements or arbitration. You hear about cases that go to court because they are the high-profile and unusual ones. And, as long as we are bursting bubbles, it is also worth mentioning that legal and crime dramas tend to give investigators, forensic scientists, judges, and attorneys staggeringly unrealistic or illegal powers. Although criminal investigative techniques have dramatically improved from one hundred years ago when only one in ten murders was solved, a large number of crimes still go unsolved, unpunished, and, at times, even unnoticed. How can most crimes go unnoticed? Well, how many times have you been punished for jaywalking across an empty street, stopping in a no parking zone, rolling through a stop sign when there were no other cars at the intersection, or downloading a file of uncertain provenance online?[10]

Even though most people associate law most closely with criminal law, the overwhelming majority of what law relates to has nothing to do with crime. It is mostly about civil law, setting the parameters of the transactions and the interactions that allow for a society to function. And the practice of civil law primarily consists of reading over existing case law and statutes, preparing briefs, and writing up contracts.

Consider money, which has almost no intrinsic value since governments stopped minting coins made from precious metals. Societies have evolved to require currency, but that currency can only have value when the members of society agree to give it value, an agreement that is based in trust in the government and legal structures to fairly protect that value. Modern economies rely on this trust for most assets at this point. "We can move our stock of wealth from the imaginary value of dollars to the fictitious value of euros to the mythical value of stock shares to the illusory value of real estate, and so forth" (O'Rourke, 2018, p. 37). So, a government has many reasons to make rules related to money.

If you decide to print your own money, that would obviously be a crime,[11] but there are tons of noncriminal laws—that is, civil laws—related to money that make financial transactions possible. Laws protect inventions and creations to allow creators to earn money from their efforts, laws establish standards that require stores to accept currency, laws prevent price gouging on items in emergency circumstances, laws establish tax rates to collect money to support the government, laws set guidelines for trade between nations, laws prevent monopolies that fix prices and inhibit fair competition,[12] and so on. It may not seem exceptional or exhilarating, or make for breathtaking news coverage or good entertainment, but it is the stuff that creates stability in society.

The law that information professionals typically work with—maybe even pretty much *all* of the law that information professionals work with except under really unusual circumstances—falls into these nonexciting categories, in spite of what some people oddly think. If you are planning a career in public libraries, you should be aware that there is a part of the population that, upon learning that you are a public librarian, will immediately ask you whether the job is like that of the main character in their favorite cozy mystery series that stars a librarian—Cat in the Stacks Mysteries, Library Lover's Mysteries, First Edition Library Mysteries, Bibliophile Mysteries, Aurora Teagarden Mysteries, and the like.[13] Obviously, your answer should be no, unless something has gone horribly wrong and you are regularly solving murders at work that have stumped the local police. If this is the case, we recommend moving and looking for a job at a different library. Even if you're not actively solving the murders, if there regularly are murders at your library, you still will probably want to find a new place of employment in haste.

Instead, you'll be navigating patron privacy, streaming and ILL considerations, and materials challenges, as well as deciding a policy for who has the right to hold meetings in the conference room that is open to the public, all of which usually do not involve murder or other forms of criminal mayhem. Ideally, at least. The biggest problem with the law for information professionals is more along the lines of keeping track of it.

LAW, AND ANYTHING BUT THE LACK OF IT

We can do our best to make the law understandable, but nobody can force it to be coherent. We really need to be clear about that from the outset. Law evolves over time as new legislation is passed, cases working their way through the legal system bring new issues for consideration, and new perspectives change interpretation of existing laws. This is not

necessarily a recipe for coherence, especially if a state has been around a long time with the same form of government. Although there are a great many downsides to the overthrow of a government—bloodshed, parades, devaluation of currency, Marjorie Taylor Greene[14]—new governments do at least provide the opportunity to reconsider the laws and perhaps start fresh.

It is important to take a moment to note some terminology here. Typically, *state* refers to a national-level government. Most states are divided into smaller units called provinces, counties, territories, or regions. The US, however, refers to its smaller units as *states* because the national-level government under the Articles of Confederation was not actually a real national government; it was, in effect, a treaty among thirteen independent states trying to band together while simultaneously preserving their independence. For that same reason, the Articles of Confederation government was a quick and decisive failure. The terminology, however, stuck around, perhaps justifiably because the US constitutional government is still federal in nature, with a large amount of autonomy granted to the states, which we will discuss more later on. As a result, the US is a state that is made up of states, with five long-suffering territories tossed in for variety.

Many of the states that we tend to think of as historically old are not, in fact, that old. Take, for example, Italy and Germany, which are both far younger as actual states than the US, no matter what they try to tell you; the "Italian Renaissance" ended hundreds of years before the nation of Italy began. Other states, though being a state in name, keep throwing out entire approaches to governing. France is a great example of this method; the country initially got rid of its monarchy shortly after the US did but has since burned through numerous systems of democratic governments, several reboots of monarchy, and an ill-considered fling with fascism, all under the banner of "France." The nation is currently on its fifth republic[15] since the US was established. Even places we think of as both an ancient nation and a state may not really be either; Scottish author Stuart Kelly (2010) has lamented that "Scotland is an anomaly. It is a country without a nation, a nation without a state, a state without a voice" (p. 46).

Since the founding of the US, many nations have come into existence and disappeared or changed names and borders repeatedly. "Warfare, however destructive for most people, was a commonplace activity of princes and kings. The borders shifted, blood spilled, dynasties ebbed and flowed" (Siblin, 2009, p. 229). The city of Warsaw provides a sense of how unstable nations tend to be. In the time that the US has existed, Warsaw has been a key city of eight entirely different states: the Polish-Lithuanian Commonwealth, the Duchy of Warsaw of the Napoleonic Empire, Prussia, the Kingdom of Poland, Imperial Russia, Germany, the Soviet Union, and the present-day Republic of Poland. Another example is Sicily, sometimes a nation itself, which managed to be in five different empires in little more than thirty years; between 1700 and 1735, it was a possession of the Spanish under the Hapsburg dynasty, then of the French under King Phillip V, the Piedmont under Prince Victor Amadeus II, then Charles IV of Austria, then back to imperial Spain, and then under the Bourbon dynasty.[16]

So, in a place like the US where the same government structure has been operating without interruption for a quarter of a millennium—in spite of the efforts of enslavers and insurrectionists to the contrary—there is a lot of opportunity for gunk to build up in the legal system. The basic documents of our legal system, which are surprisingly short and vague, were written roughly 250 years ago, and the world has changed a bit in that time. Yet we are bound to basing laws on the thinking of a small group of men, who were pretty monocultural in terms of race, class, ethnicity, religion, and ancestry, many of whom were directly

related, many of whom were enslavers, and all of whom would have been likely horrified by the current composition of American society and the extension of rights broadly.

The US Congress has also had nearly 250 years to make laws that may or may not make sense when considered alongside existing laws or judicial decisions, as well as to give oodles of instructions to federal agencies to make further rules based on those laws. Even if it were to all make sense, the result is an absolutely enormous amount of law.

Perhaps not surprisingly, no one knows how much law there is in the US. In 2013, after fielding innumerable inquiries from the public and other government agencies about how many federal laws there are, the Library of Congress (LOC) on its own blog declared the task virtually impossible, stating that the library will never again attempt to discern an answer to the question (Cali, 2013). Even in a more limited area of criminal law, the Department of Justice (DOJ), the agency in charge of enforcing criminal law, can offer no more exactitude beyond confirming that there are at least 4,400 criminal laws with a minimum of 300,000 provisions with criminal implications at the federal level (Gibney, 2019). Comforting. Indefatigable calculator of improbable answers Randall Munroe (2022) estimates that, if you read legal materials at three hundred words per minute for sixteen hours a day, it would take about forty-five years to read all of the law in the United States—local, state, and federal—that applies to the jurisdiction in which you live. He also helpfully observes that "the law is infinite in length, because it includes not just the words themselves, but society's understanding of what those words mean" (p. 260).

And, just to add to the clunkiness, the US also adopted the common law from the UK, basically the ancient stuff that became law without ever being drafted as legislation. In other words, common law is derived from case precedents. The common law tradition makes it entirely probable that some important, currently-in-use legal principle was based on the claims of a single jurist circa 1200 CE who thought it sounded reasonable. To add to the confusion, legal scholars talk about common law versus civil law, meaning different types of legal traditions . . . but we also talk about civil law versus criminal law, and we mustn't forget civil rights law. Depending on the context, words like *common* and *civil* can have completely different meanings. But let's try to remain civil and common about that. Other than the UK and some of its imperial offspring, the rest of the world relies more heavily on law developed through actual legislation, with jurisprudence playing a role mainly in ensuring that the law does what it is intended to do.

The common law officially began in 1189 CE, when Richard I ascended to the throne. Yes, Richard the Lion-Hearted was also Richard the Legal-Minded. Because Richard I was the one who declared this official start of the memory of the law, his reasoning seems pretty clear. However, there was an enormous need to start somewhere to bring sense to English law at the time. Before the reforms began to take shape, the methods for settling legal disputes were rudimentary at best. Members of the nobility acted as judges and juries in the areas that they controlled, and land disputes were often settled through trial by combat. More successful religious orders often kept a professional champion on the payroll to handle such disputes by literally clobbering the other party. Graham Robb's 2018 book *The Debatable Land* offers a detailed history of how such land claims worked—or more precisely did not work—in the time before a reliable legal system by focusing on the shifting control of a small area that now is split between England and Scotland.

Over the course of hundreds of years, law became more systematized as rulings were recorded and the role of judge was taken over by people more objective and more knowledgeable about the law than members of the nobility. One of these early jurists, Henry of Bracton, compiled about nine hundred pages of holdings and rules in roughly 1250 CE as

The Tract on Laws and Customs of England. This work summarized the laws of the time and explained the reasons behind the laws. The book helped cement the idea of precedent—following upon older holdings with similar circumstances and using older rulings as a guide in navigating new types of legal claims.

There were plenty of bumps in sorting out the common law. One of the most interesting was the various iterations of the jury. It went from being a group of representatives of the crown to being a group of witnesses and eventually winding its way to the idea of a group of impartial people uninvolved with the case. Even that construct required refinement, though, because for a brief period, the common law allowed for the members of a jury to face criminal prosecution for perjury if they got a ruling clearly wrong.

The other major milestone in the early development of the common law was the Magna Carta. Although the great charter is literally about handling disputes between the ruler and the other members of the nobility, it quickly became enormously important for its symbolic value. By placing limitations on the ruler, the charter established that the ruler was not infallible and able to do whatever the ruler pleased. This concept, having expanded far beyond the specific issues dealt with in the Magna Carta, established that the person in charge of the government was not the only person who could decide what the government did. This was a rather earth-shaking development in a world that had previously been defined by absolute monarchs.

The terminology of the law today reflects the development of the common law in some unexpected ways. After the Norman invasion of England in 1066, the ruling classes primarily spoke French, meaning that the law was conducted in French as well. It took nearly six hundred years for the courts to slowly migrate to using the English language, far slower than every other part of government in England (Flanders, 2020). Many legal terms we still use are the direct progeny of "law French." It can be found in words like *jury* and *parole*, as well as in phrases and titles that reverse the word order of standard English, the most famous of which may be the job of *attorney general*.

If you think common law does not seem like such a bad approach, let's spend a moment with the doctrine of sovereign immunity. This legal principle holds that the federal and state governments cannot be sued for doing things as the government, unless they waive that immunity. And, as you can imagine, they're not likely to do that. In practice, this doctrine means that a federal agency could accidentally spill something very toxic onto, or inadvertently dig a giant sinkhole under, your local community, but that you and your neighbors, the surviving ones at least, might not have the right to launch a bevy of lawsuits. The government might politely decide to clean up the mess, but you could not necessarily go to court to force it to do so unless the government waived its protection from legal responsibility.

Sovereign immunity is a mighty, mighty level of protection. Logically, you'd think it must be in the Constitution. Nope. There is no foundational statute either. Sovereign immunity is a recognized law in the US because jurists in the UK, back in the 1300s, decided that the king was immune from lawsuit for damages caused in the course of governing the country, which at the time was in a perpetual state of civil war (Jaffe, 1963). For perspective, that time frame is when William Shakespeare, who died almost four hundred years ago, set many of his historical plays—the 1300s was the olden days in the 1600s. Ironically, the common law is less a burden in its country of origin because the UK has constructed a legal system that mostly avoids writing the important things down. The country's constitution is unwritten, for goodness' sake, which only seems like a good idea if your goal is not knowing what your most fundamental rights are.[17]

But you might point out that this concern over sovereign immunity is merely fretting in the abstract because the government does not make a habit of undermining or dumping goop on communities in the US. Sadly, though, sometimes the government does do things like that. Further, the idea of sovereign immunity has also been extended to the president while in office, deriving from the common law tradition that the sovereign as an individual can do no wrong, legally speaking. In the abstract, this is a terrible idea because not everyone is a considerate person. "Jerkery, like stupidity and death, is an ontological constant in our universe" (Stamper, 2018, p. 242). This questionable bit of common law played out numerous times between 2017 and 2021 as the then president openly and repeatedly broke the law—such as by committing obstruction of justice and destruction of government records by ripping them up and flushing them down the toilet on a regular basis—and remained in office and then absconded with classified documents upon leaving office and apparently kept them in a basement storage closet behind the fall decorations.

In spite of the huge amounts of law that have been created in the US, the basic framework on which it is all built is pretty slim and not terribly precise most of the time. If you happen to visit the main building of the National Archives and Records Administration (NARA) in Washington, D.C., where the original copies of the sainted founding documents of the US are kept on display, you will notice the unmissable fact that the Declaration of Independence fits comfortably on a page and the Constitution makes it all the way to four pages. We realize this is speaking with the advantage of hindsight, but a few more details would have been super helpful, especially from January 2017 through January 2021.

The unique combination of the common law tradition, the written founding documents that can seem frustratingly brief, and the creation of a lot of written legislation means that the judiciary in the US gets to spend a lot of time interpreting the law. This leeway opens the door to judges doing basically whatever they feel like. If that sounds like an overstatement, take a look at the decisions in any US Supreme Court ruling. It is not uncommon for the majority and dissent to reach diametrically opposite conclusions, despite using the exact same documents and precedents.

Over time, the batting average for the Supreme Court has been truly dreadful on major issues. At various points, when given the opportunity to strike down laws allowing enslavement, segregation, ethnic internment camps, racist immigration laws, voter suppression, the execution of minors, the imprisonment of pacifists for the crime of being pacifists, the immunization of police brutality, race-based curtailments of voting rights, the protected status of unlimited anonymous campaign donations as free speech, the criminalization of homosexuality, and the involuntary sterilization and lobotomization of disabled people, among other gems, the Supreme Court has decided that these were all totally cool.[18]

The justices even ignore their own rulings when they feel so inclined. In the truly embarrassing *Bush v. Gore* case from 2000 (531 U.S. 98), the majority handed the presidency to the politician from their own party, writing that their ruling could not be used as precedent for any future case. The Supreme Court, inevitably, has since used the ruling as precedent in its own holdings. At other times, the Supremes will zig the other direction and greatly expand rights. The thinking often can be very hard to follow, but, at a minimum, it certainly raises the question of the wisdom of lifetime appointments and bathrobes as professional attire.

Much, much of this messiness, however, also is inevitable because the US was the first nation to be founded on ideas and principles. Not a government based on the absolute power of a conqueror or inbred dynastic ruler, but a government with power derived from agreement of the people who are being governed. These were entirely new concepts in the 1700s, at least since small city-states of the ancient past, and they were as bold as bold could

be at the time. In fact, if you consider how few countries even try to live up to those ideals today, such concepts remain pretty freaking bold.

The US is a republic that can entirely "be traced back to its original founding document—the Declaration" (Puleo, 2016, p. xiii). The first shot of the American Revolution was fired in 1775 and the last in 1783, but the undisputed founding year of the nation is 1776, when the Declaration of Independence was written and published. The Constitution started as a mere 4,543 words, and now with amendments is still a trim 7,591 words; yet in this amazingly small number of words, it very clearly defines the ideals of the government, the human rights of the people, and the responsibilities of both.

The founding of the US is the written expression of its ideas in the Declaration of Independence and then the Constitution, an occurrence which remains utterly unique in human history (Murphy, 2018). And that literate foundation of the nation reflects the literate nature of its people. By 1800 the US already had the highest literacy rate of any nation in the world, with Maryland and nearly every state to its north having laws that mandated the teaching of literacy to all children regardless of socioeconomic class, race, religion, or any other characteristic (Monaghan, 2005; Sokoloff & Engerman, 2000). The US invented free public education for children, spelling bees, and Scrabble; it was the first nation to extend higher education beyond the elites; and it has the most librarians per capita of any nation in the world (Murphy, 2018). It is the only nation that includes a lexicographer among its key founders (Kendall, 2010). Fittingly, the early best sellers in the young nation focused heavily on government and on self-improvement (McHugh, 2021).

An odd element of our nation's being based in principles and built on literacy is that this enthusiastic adoption of literacy and principles has not necessarily always translated into clearly articulated policy and law. In a 1950 essay entitled "The Thud of Ideas," E. B. White observed that "Americans are willing to go to enormous trouble and expense defending their principles with arms, very little trouble and expense advocating them with words" (2019, p. 94). One giant exception to this observation, however, is the joy that the framers of the Constitution felt about their creation.

After the adoption of the US Constitution, the American government was so proud of its creation that it sent copies around the world, as did many elected officials individually, leading an eruption of the generation of constitutions worldwide (Colley, 2021). Freedom of the press was the most likely right to be enshrined in new constitutions—if not necessarily honored—with freedom of religion a close second; freedoms of assembly, speech, and trade were far less frequently protected. By the unusual happenstance of having a captain who also was a progressive-minded scholar of the new phenomenon of constitutions aboard a ship docked at Pitcairn Island when the tiny island nation decided to create its constitution, it wound up with what would stand by a wide margin as the world's most progressive constitution. Captain Russell Elliot helped the people of Pitcairn draft a constitution that guaranteed universal education until age 16; preservation of the island's environment and native species; universal suffrage for those age 18 and older; no abridgments of rights based on race, ethnicity, gender, or any other characteristics; and limitations on the actions of the elected executive to only those approved by a vote of the people.

Any government of ideas and principles perhaps will necessarily be not only a work perpetually in progress but a work striving for what is next and what is better. Given the extent of the US system's influence on every free nation founded after its stupendously unlikely birth, the ideas and principles are clearly worth the effort. For a nation built of ideas and words, it seems most appropriate for there to be lots of law and perpetual questions about it.

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