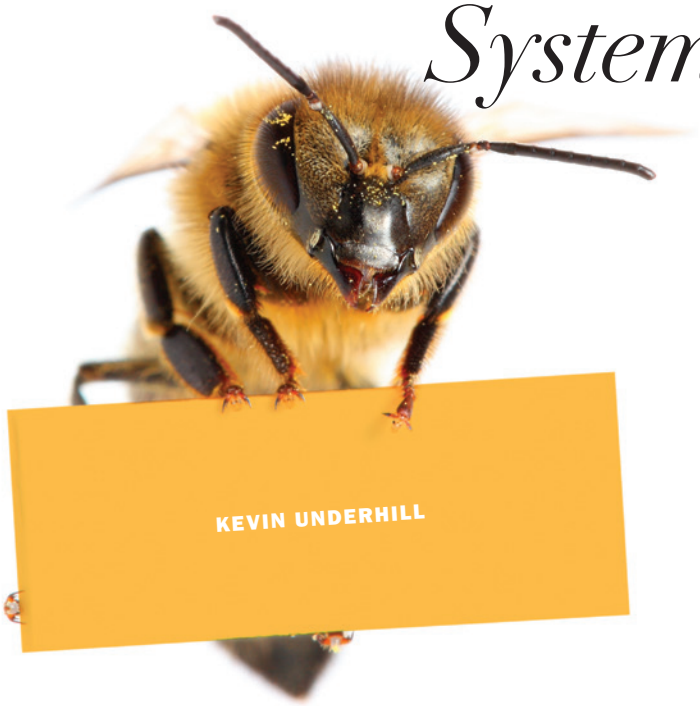
Way Less Than You Need to Know About the Civil- and Common-Law Systems



When I was asked to write a short article about the world's two primary legal systems, my first thought was that it would be very difficult to cover that topic in just 2,000 words. But then I remembered I knew almost nothing about one of them, and I realized 2,000 words would be plenty.

Of course, in one sense "common law" has been around for thousands of years, because common sets of rules or customs existed long before formal legal systems did. For example, the very first such rule was "you can use the water hole for now, but when I start screaming it's our turn," and I admit that's based on the beginning of *2001: A Space Odyssey* and not actual research, but it sounds right to me. Normally, though, we use the term "common law" to mean the legal system that developed in England during medieval times and that the English later kindly bestowed upon about a billion other people who did not yet have their own legal systems, or guns, or both.

Most of you are probably familiar with the common-law system, and frankly, if you're not, I'm not sure why you're reading this magazine. Did it end up in a doctor's office somehow? So let's start with the civil-law system.

The term "civil law" comes from *jus civile*, the Latin term for the law that applied to Roman citizens. The primary example of this is the *Corpus Juris Civilis*, which is a modern term for the huge effort to codify Roman law that was carried out in the sixth century by the emperor Justinian. (Well, *he* didn't do it, his lawyers did. But guys who can hand out unappealable death sentences tend to get most of the credit for things.)

While part of "Justinian's" effort involved compiling things that smart and/or important people had said about the law, what really distinguished it was the attempt to create a comprehensive written code that would govern just about everything. It wasn't the first written law code by any means, nor was it the only one out there. But it was much more comprehensive than most, and it's the one that most influences the civil-law tradition today.

That's mainly because it inspired the Napoleonic Code, developed by the French in the 19th century and then kindly bestowed upon about half a billion people the British hadn't gotten to yet. To be fair, many countries have *voluntarily* adopted some version of the civil-law system, often based on the Napoleonic Code, because it was actually pretty good. Each country, of course, modifies that example to create something unique to match its own culture and tradition, but the influence of the earlier codes is clear.

Now, this idea of creating a code that would contain a written rule for every possible situation may seem ridiculous. Because it totally is. For an example, let's talk about bees.

Ever since the first human or semi-human being figured out bees make honey—probably by watching bears, and frankly it's a little embarrassing that bears figured it out first—people have wanted to own bees. But for the entire time people have wanted to own bees, bees could not have cared less. To this day, bees will, occasionally, just decide to pick up and leave as a group without even asking. So let's say you have some bees and they suddenly fly off into the countryside. Are they still "your" bees? What if somebody else finds them? It's not like you labeled them all or made them little T-shirts, genius. What if they land on somebody else's property? What if they shack up with other bees? *What then?!* Calm down. We're getting to that.

In a common-law system, one would not expect to find a specific law covering the bee-departure scenario. The tendency would be to search for a judicial decision that applies a more general rule, often but not necessarily a statute, to the facts of any particular bee-related dilemma. And, in fact, I found no statute addressing swarmal abandonment anywhere in the United States (or territories), with one exception: Puerto Rico. *See* 31 L.P.R.A. § 1953. This is no coincidence, because Puerto Rico used to belong to Spain, a civil-law jurisdiction; section 1953 is based on Art. 612 of the Spanish Civil Code. (In an obvious oversight, the Napoleonic Code itself did not specifically mention bees, which may be why Louisiana doesn't have a similar statute.)

On the other hand, judicial decisions on bee law go back to the very beginning of the Republic. *See, e.g., Merrils v. Goodwin*, 1 Root 209, 1790 WL 80 (Conn. Super. Ct. 1790) (holding that "a swarm of bees going from a hive, if they can be followed and known, are not lost to the owner, but may be reclaimed."). And once you have such a thing, it becomes part of "the common law" in the sense that it may help persuade other judges to rule the same way in the same situation. *See Title in Bees Settling on*

Another's Land, 52 Harv. L. Rev. 834 (1939) (citing *Merrils* and two similar cases). If the decision was rendered by the same or a higher court, *stare decisis* might even require such a ruling. But in a common-law system the law proceeds mostly from these decisions, not because it's written down beforehand in a formal code.

By contrast, in a civil-law system, one *might* expect to find a specific law that covered the bee-departure scenario, and if one would not have expected that, thinking it to be ridiculous, one would have been wrong. In the German Civil Code, in fact, there are no fewer than *four* such laws: governing "Loss of Ownership of Bee Swarms," the "Right of Pursuit of the Owner," "Merging of Bee Swarms," and the "Intermixture of Bee Swarms." German Civil Code §§ 961-65. Thus the Germans have provided for all possible apicultural outcomes (that I know of). This is at least the theory of a civil-law system—the code is the primary source of law, not "common law" or judicial decisions.

While judges do make rulings in a civil-law system, of course, one of the biggest differences between that and a common-law system is that judicial decisions are not binding in other cases: there is no *stare decisis*. So don't go in waving around another judge's decision like you might in the United States, because a civil-law judge's first instinct will be to look at the code anyway. He or she might find that other decision useful, but it will be much less important.

Another major difference is the role played by the judge and the lawyers. In the common-law model, judges tend to be viewed as referees who enforce the rules of contests between parties and their attorneys. In the civil-law model, judges are much more involved. There is an "investigating judge" who prepares a file for a "sitting judge" who will try the case, and trials are not adversarial. What? Yes. *Not* adversarial. The court, not the lawyers, will call and question witnesses, and there (generally) are no jurors at whom a lawyer might argue. This structure means, among other things, that the papers and pleadings are correspondingly more important than they are in our system.

Of course, there is no bright line. Is there ever? Many jurisdictions have a mixed system that combines elements of common and civil law. For example, several civil-law jurisdictions now have juries for at least some kinds of cases. And the idea that, unlike civil-law systems, common-law systems *don't* try to have a written rule for everything might amuse someone familiar with the umpteen volumes of the U.S. Code and approximately one zillion pages of accompanying federal regulations. The fact is that the two systems have always borrowed from each other, as you might (but probably don't) remember from the days when some professor forced you to read that fox case. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

That's the case where Post found and started to chase "one of those noxious beasts called a fox," and whilst he was still chasing it Pierson ran up and took it for himself. Mad about getting foxblocked, Post sued, presenting the question whether one has a *right* to a wild animal just because one is in the process of chasing it. Post said yes, because the common understanding is that the chase shows you have "declared the intention" of appropriating it. Pierson said no, citing Justinian's rule from almost 1,300 years before that, even "if you have wounded a wild beast, so that it could be easily taken," it "does not become your property until you have captured it." *Institutes*, Book II, tit. 1, § 13. That citation was good enough for the *Pierson* majority (the dissent is better known, because it's funnier), who thus incorporated that particular code provision into American common law. Where it remains, by the way. *See, e.g., Sheffield v. City of Fort Thomas*, Ky., 620 F.3d 596, 607 (6th Cir. 2010) (holding "field-dressing" ordinance not preempted by state hunting laws because that action is not part of the "hunt" itself; citing *Pierson* for possession rules); *but see Bilida v. McCleod*, 41 F. Supp. 2d 142, 151 (D.R.I. 1999) (holding plaintiff had no right to raccoon because *Pierson* rule had been supplanted by state statute). So there's an example of a rule that went from common law to civil law, and then back into common law, until (in Rhode Island) it was evicted by a state law code. Obviously, the two systems cross-pollinate.

Speaking of bees (yep, that just happened), the very next section of the Roman code covered them specifically, saying, among other things, "A swarm which has flown from your hive is still considered yours as long as it is in your sight and may easily be pursued; otherwise it becomes the property of the first person that takes it." *Institutes*, Book II, tit. 1, § 14. Yes, it is pretty much the same rule the Germans have now, well over a millennium later: assuming you have already exerted control over the bees and they then vacate, you have to pursue them immediately or else they become "wild" again, subject to the first Pierson who comes along.

Well, congratulations. If you got this far, you learned a couple of things about the world's two primary legal systems, and you definitely know more than anybody else in this doctor's office about bee and raccoon law. I think it's fair to say you got your money's worth.

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