Using statutes and cases in common and civil law

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ABSTRACT

This paper demonstrates that reasoning with statutes and reasoning with cases are actually one and the same intellectual activity. Further, the reasoning practice of the courts in Germany, California, and England and Wales is identical. This finding contradicts a widely held opinion that the legal reasoning of civil law lawyers differs fundamentally from the legal reasoning of common law lawyers.

KEYWORDS  Legal reasoning; statutory interpretation; legal method; ratio; comparative law

1. Introduction

This paper compares how judges in civil and common law jurisdictions construct arguments based on statutes and cases.

The authors begin by showing how civil and common law judges fashion justificatory arguments from statute law. In consonance with the German methodology of statutory construction, the statutory arguments illustrated in this part fall into four categories: textual, historical, functional and analogical. The authors then turn their attention to judge-made law. Here they demonstrate that the arguments used by both civil and common law judges to justify those decisions that are based on judge-made law, not statute law, can similarly be grouped into the same four categories. After citing numerous examples, the authors conclude that arguing or ‘reasoning’ with statutes and reasoning with cases are actually one and the same intellectual activity.\textsuperscript{1}

While this conclusion might seem obvious to many readers, the authors of this paper have been unable to find any other source in which this claim is
explicitly made. Further, this conclusion will be of particular interest to German scholars, who have yet to agree on an interpretive methodology for case law.

The authors’ conclusion—that is, that reasoning with rules is the same intellectual activity irrespective of the source of the rules—is arguably even more important for the discipline of comparative law, for it contradicts a widely held opinion that the legal reasoning of civil law lawyers differs fundamentally from the legal reasoning of common law lawyers.

Indeed, countless comparativists, beginning apparently with Zweigert and Kötz, have declared through the years that civil lawyers reason deductively, while common lawyers reason by induction or by analogy. Here are just a few of the scores of opinions on this point:

- ‘Thus, in sharp contrast to the deductive approach of the civil legal system, common law employs inductive logic.’
- ‘Common law legal reasoning is inductive; it moves from the specific case to the general rule. Civil law legal reasoning is deductive; it involves the application of abstract principles to specific cases.’

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2 One author comes very close, however:

My analysis of common law and statutes casts doubt on the traditional view that common law reasoning resembles induction and statutory reasoning, deduction … [I]t is unhelpful and misleading to distinguish these two basic forms of legal reasoning by calling the first inductive and the second deductive.

Richard A Posner, ‘Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution’ (1986) 37(2) Case Western Reserve Law Review 179, 190. Other authors merely say that the two processes are similar, eg Benjamin N Cardozo, The Nature of the Judicial Process (Yale University Press, 1921) 20: [T]he work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute.

3 See Eduard Picker, ‘Richterrecht und Rechtsdogmatik: Zur rechtsdogmatischen Disziplinierung des Richterrechts’ in Christian Bunke (ed), Richterrecht zwischen Gesetzesrecht und Rechtsgestaltung (Mohr Siebeck, 2012).

4 Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law (Oxford University Press, 1998) 193.

5 David W Neubauer and Stephen S Meinhold, Judicial Process: Law, Courts, and Politics in the United States (Wadsworth Publishing, 6th edn 2012) 27; Jean Louis Goutal, ‘Characteristics of Judicial Style in France, Britain and the USA’ (1976) 24 American Journal of Comparative Law 43, 6, 45:

More typical and frequent is the use by English judges of inductive reasoning … At the opening of the opinion [in France, on the other hand], a perfectly abstract and general principle will be stated, from which the court will reach its decision through a strictly deductive process.

6 Beth A Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (Cambridge University Press, 2009) 72; Jutta Lashöfer, Zum Stilwandel in richterlichen Entscheidungen: Über stilistische Veränderungen in englischen, französischen und deutschen Urteilen und in Entscheidungen des Gerichtshofs der Europäischen Gemeinschaft (Dissertation, University of Münster 1992) 9–13:

For a civil law system differs from the outset from a common law system as rationalism differs from empiricism and deduction from induction. According to deductive methodology, the solution to the individual case is derived from a higher principle, whereas a jurist who proceeds inductively begins with the individual case, and develops legal principles from it. [Author’s translation]
‘This type of reasoning in common law is called case-based reasoning, which is inductive in nature ... Civil law relies more on rule-based reasoning, which is deductive in nature.’

‘[C]omparative law confronts the common law student with deductive reasoning ... In civil law systems the reasoning process is deductive, proceeding from pertinent provisions of a code, occasionally supplemented by stated general principles or customary law. In contrast, the judges of common law systems apply inductive reasoning, deriving general principles or rules of law from precedent or a series of specific decisions extracted to an applicable rule and applied to the given case.’

As the examples marshalled below will demonstrate, these characterisations of common law reasoning are misleading at best. In the conclusion to this paper the authors will explore the reasons why these and other academics believe that the thinking process is different, and then explain why that school of thought is unconvincing.

All of the examples in this paper are drawn from three jurisdictions: Germany, California, and England and Wales. California was chosen because the first author studied and practised law there. Examples from England, where the second author studied law, were added to an earlier draft of this paper at the suggestion of Jan Smits at Maastricht University, who questioned whether California could be said to be truly representative of the common law world. Germany, as a classic example of a civil law jurisdiction, was chosen because of the expertise gained by the first author in teaching German legal theory and methodology for over a decade. The observations in this study of Germany can be extended to other civilian jurisdictions, such as France, even though it would be more difficult to find examples in France of the use of all four categories of justificatory arguments employed in this study. This is primarily so because French judicial decisions

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7 Fleurie Nievelstein, Tamara van Gog and Frans J Prins, ‘Learning Law: The Problems with Ontology and Reasoning’ in David Jonassen and Marcy Driscoll (eds), Handbook of Research for Educational Communications and Technology (Lawrence Erlbaum Associates, 2nd edn 2008) 553.

8 Kai Schadbach, ‘The Benefits of Comparative Law: A Continental European View’ (1998) 16 Boston University International Law Journal 331, 343, 369; TM Cooper, ‘The Common Law and the Civil Law—A Scot’s View’ (1950) 63 Harvard Law Review 268, 471: ‘A civilian system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles’. See generally Rupert Cross and JW Harris, Precedent in English Law (Oxford University Press, 4th edn 1991) 192; Grant Lamond, ‘Analogical Reasoning in the Common Law’ (2014) 34(3) Oxford Journal of Legal Studies 567; EH Levi, An Introduction to Legal Reasoning (University of Chicago Press, 1948), 1–3; L Weinreb, Legal Reason: The Use of Analogy in Legal Argument (Cambridge University Press, 2005) 1–5.

9 Any subsequent references in this paper to ‘England’ or ‘English law’ should be taken to mean ‘England and Wales’ and ‘the law of England and Wales’.

10 The late H Patrick Glenn wrote: ‘Legislation [in California], moreover, receives broad, liberal interpretation, in keeping with civilian doctrine ...’. H Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law (OUP, 4th edn 2010) 264.
are often very short and devoid of facts, making it difficult to discern the *ratio decidendi*\(^\text{11}\) and to employ the historical approach, described below. It is also worth noting that the frequency of use of the four approaches described in the following paragraph varies considerably by jurisdiction.

According to classical German legal methodology as posited by Savigny,\(^\text{12}\) and as updated by Larenz,\(^\text{13}\) statutory interpretation employs four basic methods (*Methoden*): the grammatical, systematic contextual, subjective historical and objective teleological. All of these methods, including the systematic contextual method,\(^\text{14}\) are also known in both California and England.\(^\text{15}\)

The authors prefer to combine the systematic contextual method with the grammatical method because the systematic contextual method, like the grammatical method, employs exclusively textual arguments.\(^\text{16}\) Because these two methods employ exclusively textual arguments, such as definitions, they are referred to in this paper as the textual approach. The textual approach, simply said, asks, ‘What was said?’. When used to interpret statutes, the textual approach is usually referred to as the plain-meaning rule in both California and England.\(^\text{17}\)

The subjective historical method will be referred to here as the historical approach. The historical approach asks, ‘What did they [that is, the authors of the rule] mean?’. When this approach is applied to statutes in Germany,

\(^{11}\)See Rupert Cross and JW Harris, *Precedent in English Law* (Oxford University Press, 1991) 13.

\(^{12}\)Friedrich Karl von Savigny, *System des heutigen Römischen Rechts*, Vol 1 (Aalen, 2nd reprint 1981) §33, 212–6; see also Reinhold Zippelius, *Juristische Methodenlehre* (CH Beck, 11th edn 2012) 42–6.

\(^{13}\)Karl Larenz, *Methodenlehre der Rechtswissenschaft* (Springer, 3rd edn 1995) 187–261.

\(^{14}\)See *Walnut Creek Manor v Fair Employment & Housing Comm’n*, 54 Cal 3d 245 (1991) 268: ‘The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible’.

\(^{15}\)Zenon Bankowski and Neil MacCormick, ‘Statutory Interpretation in the United Kingdom’ in Neil MacCormick and Robert Summers (eds), *Interpreting Statutes: A Comparative Study* (Darmouth University Publishing Ltd, 1st edn 1991) 364.

While most German judges and academics believe that these four approaches exhaust all of the conceivable arguments for applying rules to particular factual situations, it is not necessary for the reader to share this belief in order to make comparisons on the basis of these approaches. See, eg, 11 BVerfGE 126: ‘The goal of [determining the intent of the legislation] is served by interpretation based on the statutory wording (grammatical interpretation), on its context (systematic interpretation), on its purpose (teleological interpretation), and on the legislative materials and history (historical interpretation)’ [author’s translation].

\(^{16}\)The only difference is that the systematic contextual method employs arguments from other statutory texts as well as from the text of the statute at issue, in order to ensure that the interpretation is consistent, that is, that the legal system does not contain contradictions. Because both the grammatical and the systematic contextual methods employ exclusively textual arguments, they will be referred to in this paper as the textual approach. Other German academics prefer to lump the systematic contextual method together with the objective teleological method. See Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz* (Duncker and Humblot, 2nd edn 1983), 88–95; and Rolf Herzberg, ‘Kritik der teleologischen Gesetzesauslegung’ (1990) 45(21) *Neue Juristische Wochenschrift* 2525, 2530.

\(^{17}\)For California, see *Hunt v Superior Court*, 21 Cal 4th 984, 1000 (1999). As illustrated below, the plain-meaning or textual approach is also routinely used with case-based rules, although its use in this context is not referred to as the plain-meaning rule. For England, see *R v City of London Court Judge* (1892) 1 QB 273, 290.
it is sometimes referred to as the subjective method because it constitutes an attempt to discern what the legislators themselves would do if presented with the facts of the case at the bench.

The objective teleological method will be referred to in this paper as the functional approach. The functional approach asks, ‘What should the rule mean?’ The mischief rule of the common law, first announced in *Heydon’s Case*, is one elaboration of the functional approach: what was the mischief (problem) that the legislation was designed to address? As stated by the California Supreme Court, ‘The provisions of the code must be construed with their intent and purpose, and the mischief at which they were aimed in view’. This approach is often referred to as the teleological method in Germany, from the Greek word ‘telos’ meaning goal, end or purpose. It is also described as seeking the *Sinn und Zweck* (‘sense and purpose’ or ‘spirit’) because this approach focuses on the policies behind the statute. Other authors refer to this approach as the objective method in order to draw a contrast to what they refer to as the subjective method of looking to the legislative history.

These three approaches—the textual, historical and functional—are different ways of fashioning arguments, more or less closely, around rules as articulated in statutes. Accordingly, as is the case in Germany, these approaches can be portrayed as being deductive processes: one subsumes the facts of the case under the terms of the rule (which are often given a historical or functional gloss) in a way similar to the logical syllogism. This process of subsumption is identical in Germany, California and England, although it is usually described in California and England as applying the law to the facts, or sometimes as employing the syllogism. In consonance with the German terminology, the authors of this paper also describe the textual, historical and functional approaches as deductive, but remind the reader that if these approaches are deductive when employed in Germany, then they must also be deductive when employed in California or in England; further, as

18 *Heydon’s Case* (1584) EWHC Exch J36, 76 ER 637.
19 *Evans v Selma Union High School Dist of Fresno County*, 193 Cal 54 (1924). See also *Kramer v Intuit, Inc*, 121 Cal App 4th 574 (2004) 579: ‘The courts resist blind obedience to the putative “plain meaning” of a statutory phrase where literal interpretation would defeat the Legislature’s central objective’.
20 See Karl Larenz, *Methodenlehre der Rechtswissenschaft* (Springer, 3rd edn 1995) 153–9; Rolf Wank, *Die Auslegung von Gesetzen* (Vahlen, 5th edn 2011) 69–72; Karl Engisch, *Einführung in das juristische Denken* (Kohlhammer, 8th edn 1983) 88–96; criticised in Robert Alexy, *Theorie der juristischen Argumentation* (Suhrkamp, 2012) 302–7.
21 This is a style of argument containing both a general statement (such as the statement of a legal rule made up of various elements) and a specific statement (such as the statement of one of the elements of the legal rule) from which a conclusion can be deduced.
22 See in California: *In re Guardianship of Estate of Vaughan*, 207 Cal App 4th 1055, 1067 (2012) (‘applying the law to the facts’); *Balsam v Trancos, Inc*, 203 Cal App 4th 1083 (2012) 1107 (‘syllogism’); and *Bozzi v Nordstrom, Inc*, 186 Cal App 4th 755, 762 (2010) (‘syllogistic reasoning’). See in England, *Humber Oil Terminal Trustee Ltd v Sivand, Owners of Ship* (1998) EWCA Civ 100 (‘applying the law to the facts’).
illustrated in Part Two of this paper, these approaches must be deductive whether the rule has its source in a statute or in a case decision.23

When judges employ any of these three, basic approaches (i.e., the textual, historical, or functional) with a statute, they are commonly said to be applying, construing or interpreting the statute. However, courts in Germany employ statutes in one manner that is practically unknown in California or England: when faced with factual situations in which there is no statutory law that can be applied by means of any of these three approaches, German judges will often look to other areas of law for a statute which regulates competing interests which are similar to the competing interests in the case before them.24 Having found a suitable donor statute, they will infer an overriding principle that they can then apply to the factual situation before them. This borrowing, which is referred to as a ‘statutory analogy,’ is illustrated in the discussion that follows. An understanding of what is meant by statutory analogies is crucial to the resolution of the question of whether common law judges are more prone to analogical reasoning than their civil law colleagues.25

The use of statutory analogies is not one of Savigny’s classical methods of statutory interpretation. Savigny’s methods are tied much too closely to the text of the statute to allow for statutory analogies. Consequently, it could be argued that referring to statutory analogies as statutory interpretation is inaccurate. It is not necessary for the purposes of this paper to explore this objection in depth, much less to take sides in this debate. Nevertheless, if one realises that the textual, historical and functional approaches are not logical legal corsets but merely styles of argument using statutes, then one can properly include an appeal to a statutory analogy in a list of styles of statutory arguments, even if it does not deserve to be called statutory interpretation. Further, illustrating statutory analogies alongside illustrations of the textual, historical and functional approaches, as is done in the following discussion, reinforces the insight that the thinking process involved in employing all of the four approaches—the textual, historical, functional and analogical—is the same. All of the approaches are forms of argument, not logical processes which dictate certain results. All of the approaches employ rules for the purpose

23 By describing these approaches as deductive, the authors do not mean to suggest that the approaches logically dictate certain results in any particular case. They cannot be said to dictate results if for no other reason than the fact that judges are free to choose which approach they will employ. In fact, the approach judges choose to employ is the one that will best enable them to reach the result that they consider to be correct and just. Consequently, a more accurate way to think about these approaches to the application of rules is that they constitute styles of argumentation to justify the results that the judges have decided to reach.

24 When employing a statutory analogy, courts are by definition treading far beyond the text, history and functions of the borrowed statute. For if they could subsume the case under the borrowed statute by means of the statute’s text, history or functions, there would be no need to resort to a statutory analogy.

25 Although analogies are not usually described as deductive in nature, they do in fact become deductive (in the same sense that textual, historical and functional arguments are deductive) when it comes to the application of the induced, overriding principle to the facts of the case before the court.
of justifying a result that the judge considers to be right and just. In this vein, instances of analogical reasoning with statutory rules will be cited in Part One of this paper after presenting examples of textual, historical and functional arguments.

Part Two constructs a bridge between the use of rules from statutes and the use of rules from judicial case decisions. By means of examples, it will be shown that statutory rules and case-based rules are very often indistinguishable.26

Part Three is predicated on the recognition that, if there are only a limited number of approaches to the use of legislatively articulated rules, and if judicially articulated rules are very often indistinguishable from legislatively articulated rules, then there must be only a limited number of functionally identical approaches to the use of judicially articulated rules.

Part Four estimates the frequency of the use of the various approaches in the three jurisdictions, and suggests reasons for the divergences in frequency.

2. Part One: four basic approaches to using statutes

Once the judge has identified a rule that he or she believes may find application to the factual situation at the bench, the judge will apply the rule to the facts of the case and will justify his or her result by various arguments, four varieties of which (textual, historical, functional and analogical) will be examined here. Before proceeding, it should be remembered that all of these approaches overlap to a considerable extent, and that they are often used in concert.27

2.1. The textual approach using statutes

In Germany, one classic example of a statute being applied textually involves Penal Code section 242(1):

Whosoever takes from another person a movable thing [bewegliche Sache] that belongs to that person with the intent to unlawfully appropriate it for himself or a third person shall be punished by imprisonment not exceeding five years or by fine.

Is electrical current a ‘movable thing’ for purposes of section 242(1)? In a well-known case from 1899, the Reichsgericht, the predecessor of the Federal Supreme Court, held:

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26 This is true for both kinds of case-based rules that are analysed here: judicial glosses and pure common law. Judicial glosses are judicial renderings or re-articulations of a statute that serve to concretise the meaning of the statute. By ‘pure common law’ the authors intend to refer to case-based rules that have no statutory source. This is also the definition employed by Konrad Zweigert and Hans-Jürgen Pufputtkerken, ‘Statutory Interpretation—Civilian Style’ (1970) 44 Tulane Law Review 704, 717.

27 This is so because the text of a rule is the result of historical human activity and because a statute might be extended to situations not covered by its textual or historical meanings (so-called teleological extensions) or even extended to related subject matter areas (statutory analogies).
The term ‘thing’ [Sache] is to be understood as a physical thing. It is commonly understood in this way in [legal] science and case decisions, and as repeatedly expressed by the Reichsgericht ... According to the prevailing natural understanding [of the term], which understanding corresponds to the findings and the terminology of the natural sciences, the nature of a physical thing implies substance, matter that fills space, that is the body [Körper] in a physical sense. [Consequently, on this textual approach, electrical current cannot qualify as a ‘thing’ for the purposes of the section.]

The same approach was followed in a Californian case where the court was called upon to decide whether an intended bride who broke off her engagement was entitled to keep the expensive wristwatch that the bridegroom’s parents had given her as an engagement present. At issue was the proper construction of Civil Code section 1590, which reads:

Where either party to a contemplated marriage in this State makes a gift of money or property to the other on the basis or assumption that the marriage will take place, in the event that the donee refuses to enter into the marriage as contemplated or that it is given up by mutual consent, the donor may recover such gift or such part of its value as may, under all of the circumstances of the case, be found by a court or jury to be just.

Although section 1590 speaks of a ‘party to a contemplated marriage’, the would-be bridegroom urged the court to apply the statute liberally to allow him to recover the expensive wristwatch. In the terminology employed in this paper, the son was urging the judges to extend the statute teleologically, or by analogy. The California Court of Appeal refused to depart from the language of the statute:

The clear meaning of [§ 1590] is that the donee of an engagement ring is entitled to retain possession thereof when the marriage contract is breached by the donor without any fault on the donee’s part ... [As to the gift from the appellant’s parents], appellant could not in any event recover the watch as it was not a gift made by a party to the contemplated marriage.

The textual approach to statutory interpretation, first fully articulated in England by Lord Escher MR in R v City of London Court Judge, was (previously) applied in Whiteley v Chappell, which concerned a statute that was aimed at stopping electoral misconduct. The statute made it a crime to ‘impersonate ... any person entitled to vote’ at an election. The defendant was found not guilty because the person that he impersonated was not living, and dead people are not entitled to vote.

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28 A similar approach can be seen in England. As discussed in James Holland and Julian Webb, *Learning Legal Rules* (Oxford University Press, 8th edn 2013) 267, in Low v Blease [1975] Crim LR 513, ‘the Division Court held that electricity was not “appropriated” ... by switching on the current, nor, the court said, could electricity constitute “property” within s. 4 of the Theft Act’.

29 Simonian v Donoian, 96 Cal App 2d 259, 262 (1950).

30 R v City of London Court Judge (1892) 1 QB 273, 290.

31 Whiteley v Chappell (1868–1869) LR 4 QB 147.
2.2. The historical approach using statutes

In Germany, California and England, the historical approach to statutory construction typically involves a resort to legislative history. This generally implies an examination of legislative records.\(^{32}\) It sometimes happens in California that courts will consider testimony of members of the California Legislature after passage of the bill about what they meant by particular statutory language.\(^{33}\) In Germany, such post-enactment evidence of legislative intent has also occasionally been employed.\(^{34}\) In England, the courts are able to make reference to proceedings in Parliament recorded in *Hansard*, although this ability is not regularly employed.\(^{35}\)

The historical approach in Germany can be seen in a case construing a newly enacted law that required all those who raise vertebrates to obtain a licence. The law granted an exemption for ‘farm animals’ (*landwirtschaftliche Nutztiere*). A mink farmer contended that he was exempt from the licencing law because minks are farm animals for the purposes of the statute. In rejecting this contention, the Federal Constitutional Court stated that the legislative history showed that the *Bundesrat* (the upper house of the German parliament), which proposed the exemption for farm animals, did not intend to exempt fur-producing animals:

[The Bundesrat] considered that the breeding and raising of exotic animals, fur-producing animals, and the like often present problems. Persons who raise and breed such animals often have no, or at least insufficient, knowledge of feeding, care, housing, and breeding requirements, which sometimes leads to substantial abuses of the welfare of the animals.\(^{36}\)

An example from California employing the historical approach concerns the proper construction of the newly enacted section 2782 of the Public Utilities Code that authorises the California Public Utilities Commission (CPUC) to permit public utilities in the state to adopt home insulation financing programmes. The CPUC not only permitted such programmes, it made them mandatory. In concluding that the CPUC had exceeded its authority, the

\(^{32}\) See California Evidence Code section 452(c): ‘Judicial notice may be taken of [o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States’.

\(^{33}\) The Californian practice is described and criticised in Marc R Perman, ‘Statutory Interpretation in California: Individual Testimony as an Extrinsic Aid’ (1980) 15 University of San Francisco Law Review 241.

\(^{34}\) See Holger Fleischer, ‘Comparative Approaches to the Use of Legislative History in Statutory Interpretation’ (2011) 60(2) American Journal of Comparative Law 401, 434; and H Fleischer, ‘Gesetzesauslegung durch Befragung von Bundestagsabgeordneten?’ (2012) Neue Juristische Wochenschrift 2087–2091, citing 81 RGZ 276, 282 (1913). The latter case is discussed in Thomas Finkenauer, *Das entstehungsgeschichtliche Argument als Etikettenschwindel: Zwei Beispiele aus der Rechtsprechung des Reichsgerichts zum Bereicherungsrecht, Das Bürgerliche Gesetzbuch und seine Richter: Zur Reaktion der Rechtsprechung auf die Kodifikation des deutschen Privatrechts (1896–1914)* (Klostermann, 2000) 305.

\(^{35}\) The original rule is found in *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3. Courts may only cite *Hansard*; no other report of Parliamentary proceedings may be cited. See, eg, Criminal Procedure Rules II.20.

\(^{36}\) BVerwG 3 C 7.04, 9 December 2004.
California Supreme Court specifically mentioned the fact that the legislative history supported the Supreme Court’s interpretation of the newly enacted provisions:

The Legislature gave careful consideration to the financing provisions of the Home Insulation Assistance and Financing Act … The legislative history and specificity of the financing provisions belie the commission’s assertion that the Legislature intended for the commission to be authorized to impose different financing terms.37

The question of whether section 34 of the Crime and Disorder Act 1998 had abolished the defence of doli incapax (the presumption that a child under 10 years of age cannot be held criminally responsible) was at issue in an example from England. The House of Lords concluded that, when read in isolation, the meaning of section 34 was ambiguous. Their Lordships ruled that, following Pepper v Hart,38 they could legitimately employ the legislative history found in Hansard in seeking clarification. Hansard revealed that the parliamentary intention behind the clause had, indeed, been to abolish the defence of doli incapax. Accordingly, their Lordships held that the defence could not be used in the case at hand.39

2.3. The functional approach using statutes

When the functional approach is employed, the usual result is that the words of the statute under consideration will be stretched beyond their ordinary meaning to encompass a related situation to the situation described in the text of the statute. An example of such stretching is provided by the judicial construction of section 623 of the German Civil Code, which requires that ‘termination of employment by notice of termination or by separation agreement’ must be in writing to be effective. What about a reassignment of an employee to a position at a lower pay scale? Must that reassignment too be in writing? By its terms, section 623 would appear not to apply. The German courts, however, have held that a reassignment at a lower salary falls within the protection of section 623, meaning that it too must be in writing to be effective.

The example in the preceding paragraph is referred to as a teleological extension because it extends the language of the statute. However, a teleological extension might also be described as an application of the analogical approach. For example, in the last example, the judges in effect connected the situation covered in the text of the statute (termination of employment) with the situation presented in the case (reassignment at a lower salary).

37 Southern Cal Gas Co. v Public Utilities Comm’n, 24 Cal 3d 653 (1979) 659–660.
38 Pepper (Inspector of Taxes) v Hart [1992] UKHL 3 ruled that when judges are interpreting ambiguous statutes, they may refer to statements made in Parliament without breaching parliamentary privilege.
39 R v JTB [2009] UKHL 20.
The unarticulated overriding principle that combines these two results is that all changes to employment contracts to the detriment of the employee must be in writing.

One example of a teleological extension in the German sense from California concerns a young man who was removed from the premises of a shopping centre in the 1960s, allegedly because of his long hair and his unconventional hippie dress. The young man claimed a violation of Civil Code section 51, which at the time read:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever.40

In its defence, the shopping centre argued that any discrimination against the young man on its part had not been motivated by any of the characteristics prohibited in section 51. The court rejected this defence, holding that the characteristics enumerated in section 51 were illustrative rather than exclusive. The statute, according to the court, prohibits ‘all arbitrary discrimination by business enterprises’.41

A teleological extension was employed by an English court in a case concerning the Street Offences Act 1959. Several prostitutes were alleged to have been soliciting contrary to section 1(1) of that Act. The accused had been standing on a balcony or behind windows of a property, attracting the attention of male passers-by and inviting them in. The Act prohibited soliciting ‘in a street’. Lord Parker CJ held that, whilst the accused were not ‘in a street’ as they solicited, the purpose of the Act was to ‘enable people to walk along the streets without being molested or solicited’.42 Consequently, the prostitutes were found guilty of soliciting contrary to section 1(1) of the Act.

Just as there are teleological extensions, there are also teleological reductions. These are cases in which the court, following the functional approach, concludes that the language of the statute is broader than necessary to accomplish the goals of the statute. For example, German Civil Code section 613a provides that, in the event that a company is sold, all of the employment contracts pass to the buyer. Does this mean that the present employees are forced to accept the new management? Alternatively, do the employees have a right to terminate their employment contracts, and thereby become eligible for termination benefits and unemployment

40 The statute in its present form also covers disability, medical condition, genetic information, marital status and sexual orientation. Cal Civil Code §51.
41 In re Cox, 3 Cal 3d 205 (1970) 216.
42 Smith v Hughes [1960] 1 WLR 830, 832.
compensation? The Federal Labour Court held that the employees have a right to terminate their contracts, in effect reducing the broad sweep of the statute:

The court cannot presume that the legislature intended by this new regulation to deprive an employee of these protections. At least when a company is sold to a new owner, the purpose of the act, which is to ensure the survival of the employment contracts, does not compel continuation of the employment relationship over the objection of the employee.43

An example from California of a teleological reduction is a recent judicial interpretation of Civil Code section 1747.08. Enacted 20 years prior, this provision prohibits the requesting or requiring of ‘personal identification information’ as a condition to accepting a credit card as payment.44 Violation entitles a civil plaintiff to recover statutory damages. In the present case, a consumer brought an action against Apple, Inc. for requiring him to provide his address and telephone number in order to purchase media downloads online with his credit card. In affirming the dismissal of the consumer’s action, the California Supreme Court wrote that the statute’s text, structure and purpose suggest ‘that the Legislature could not have intended section 1747.08 to apply to this type of transaction’.45

A famous example of a teleological reduction from England can be seen in a case concerning a herd of sheep that were being transported by ship. Tragically, there was a terrible storm and all the sheep were washed overboard. The defendant ship owner had failed to keep the sheep in pens, as required by the Contagious Diseases (Animals) Act 1869. The plaintiff sued for breach of this statutory duty, claiming that if the sheep had been kept in pens, as they should have been, they would not have been lost overboard. The court held in Gorris v Scott46 that the Act had been enacted for the purpose of preventing the spread of diseases amongst animals; it was not enacted to prevent sheep from going overboard. Accordingly, there could be no remedy, even despite the fact that the sheep would have been saved if they had been penned in according to the statute.

### 2.4. The analogical approach using statutes

The term ‘analogy’ in discussions of legal reasoning is often defined or employed in different ways. For the purposes of this paper, the term analogy refers to the deliberate or unconscious fashioning of a broader,
overriding principle that encompasses two or more fact patterns, where only one of the fact patterns can be subsumed under a previously articulated rule. This is illustrated by the hypothetical example in the following paragraph.

Assume the existence of the following Unwholesome Food Ordinance (UFO): ‘It is illegal to sell any food that is diseased, unwholesome, or injurious to health. Anyone who violates this ordinance is liable for the injury caused’. There is nothing in the historical record to suggest that the UFO was meant to cover pets. Assume that John buys a pet hamster from David and gives it to his friend Pamela as a pet. A few days after bringing the hamster home, she becomes seriously ill from a disease. Expert testimony establishes that Pamela contracted the disease from the hamster. Can Pamela sue David on the basis of the UFO? From a textual standpoint, certainly not: a pet hamster is not ‘food’. Nor is there anything in the historical record to support using the historical approach. As to the functional approach, it seems clear that the purpose of the UFO is to protect consumers from diseased food, not from diseased pets. If a court were nevertheless to rule in Pamela’s favour, and there were no other plausible causes of action, such as negligence, the court could conceivably employ the statute analogically. The broader, overriding principle that connects the hypothetical facts to the fact pattern covered by the UFO is the protection of consumers from diseased animals.

The dividing line between a teleological extension and an analogy is a blurred one. Indeed, one could view the reasoning approaches as lying on a continuum. To this end, examples of teleological extensions that significantly stretch the language of the statute are sometimes referred to as statutory analogies in the common law world. This is because common law statutory analogies tend to be less extreme than those seen in civil systems. This is demonstrated by the fact that neither of the authors was able to find an example of a statutory analogy, that is, an analogy that goes far beyond the language of the statute, in either California or England.

Statutory analogies are employed in Germany to recognise causes of action available to plaintiffs who are only remotely related to the textually intended

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47 As will be seen in the example from Germany that follows, judges who use analogical arguments usually do not state the principle that encompasses the two fact patterns. Nevertheless, analogical reasoning with legal rules always presupposes the existence of a mutually overriding principle, whether articulated or not. In common law jurisdictions, the use of analogies is usually understood in the general sense of treating like cases alike, which is very different from the more specific use and understanding of the term ‘analogy’ in Germany. The authors have chosen to use the term in accordance with the German understanding in order to be able to explain and illustrate the German approach to using analogies, which is often misunderstood in common law circles and to make the comparison between jurisdictions more accurate.

48 See Estate of Mary Mason v Fairbank, 62 Cal 2d 213 (1965) 217, discussed below: ‘Accordingly, we adopt for the distribution of the estate in such a case the rules set forth in sections 750–753 of the Probate Code’.

49 The one exception to this statement is perhaps the practice of borrowing a statute of limitations when none can be found that expressly applies to the factual situation before the court. But these borrowings do not go so far as to create new causes of action, as do statutory analogies in Germany.
beneficiaries of the statute. For example, the Federal Labour Court holds that employers must compensate their employees for damage that the employees cause to his or her own property in the course and scope of employment. As there is no statute on the subject, the Federal Labour Court resorts to an analogical application of Civil Code section 670. Yet, by its terms, section 670 only applies to unpaid agents, not even to paid agents, much less so to employees:

If the mandatary (Beauftragter = unpaid agent), for the purpose of performing the mandate, incurs expenses that he may consider to be necessary in the circumstances, then the mandator is obliged to make reimbursement.

This analogical application is predicated upon an unstated, overriding principle that unites the two factual patterns. That overriding principle might be articulated as follows: ‘Unpaid agents and (underpaid?) employees may recover for their losses’ or, even more broadly, as ‘People who are following instructions from a person in a personal contractual relationship may recover for their losses’. This latter principle is roughly the justification furnished by the Federal Labour Court when it applied section 670 to the employee/employer relationship for the first time:

Section 670 applies to agency agreements. One sees the same general idea of activity on behalf of another person. But even if one follows the weight of authority and refuses to classify an employment contract as an agency agreement, and only sees it as an independent activity of an economic nature within the sphere of influence of another’s economic activity, the result cannot be otherwise. For the principle [of reimbursement] behind Civil Code section 670 is so obvious and in the nature of things so necessary that it is to be applied even without express legislation.50

The first author was unable to find an example in California of a true statutory analogy, that is, of an extension of a statute that goes far beyond the language of the statute.51 The generous interpretations of statutes found in California, such as in the two cases that follow, are more properly termed teleological extensions.

The first example concerns sections 750 through 75352 of the California Probate Code, which provide that the executor of a will must first exhaust all

50 BAGE 12, 15; see also BAG (1962) NJW 411, 414; ’§670 BGB’ Münchener Kommentar (Beck, 2012) margin note No 3.
51 Applying statutes of limitation by ‘analogy’, as it is called, is not the type of analogy discussed in this paper. In this paper, statutory and case law analogies are employed to create rights or causes of action in previously unregulated areas. Borrowing a statute of limitation, on the other hand is a method of justifying when a statutory right or cause of action should lapse. Further, to the authors’ knowledge, no party to a civil action would seriously contend that his or her right or cause of action should never be time-barred under any circumstances, that it should survive for all eternity; rather, they will argue for a longer or shorter limitations period, just as they would do in an equitable action, when the question is one of laches.
52 These provisions are now found in Probate Code §§521400–21403.
other assets before selling specific testamentary gifts. In the case before the court, the testatrix had provided in her will that Mr Fairbank should inherit her house. The testatrix later became mentally incompetent and a guardian was appointed for her. The guardian sold the testatrix’s house and used almost all of the proceeds of the sale to pay for the living expenses of the testatrix. On the death of the testatrix, the trial court ordered that the small amount of money left over from the sale of the house be distributed to Fairbank, and that the remainder of the estate, which included a much larger sum of money, be distributed to the residuary legatees. Fairbank appealed, claiming that the testatrix’s living expenses should have been paid from the testatrix’s other assets, not from the proceeds of the sale of her house.

Finding no statute which by its terms applied to this situation, the California Supreme Court made reference to sections 750 through 753 of the Probate Code which by their terms are addressed only to executors of wills, and not to guardians. The Supreme Court reasoned as follows:

> [E]xpenses of guardianship during an incompetency from which a testator does not recover are not substantially different from expenses and debts of a decedent’s estate. Indeed, if guardianship expenses are not paid before the death of the incompetent, they become debts of his estate. It should make no difference in the distribution of an estate that a guardian rather than an executor paid those expenses, for it is no more the function of a guardian than it is of an executor to modify the decedent’s testamentary plan.53

Accordingly, Fairbank was entitled to inherit the proceeds of the sale of the home with no deduction for the testatrix’s living expenses.

The second example from California is a case involving a contract to sell land. The contract at issue provided that the vendor would retain title to the property until the vendees had paid the purchase price, which they were allowed to pay in instalments. When the vendees wilfully failed to make payments, the vendor elected to terminate the contract and thereafter refused the vendees’ offer to pay off the debt in full. In their suit for specific performance, the vendees argued that they were entitled to redeem the property under equitable principles, for the contract should be treated as a mortgage, and the sole remedy against a mortgage under California law is foreclosure. Holding that the wilful breach of the land contract entitled the vendor to terminate, the trial court refused to order specific performance. On appeal, the Supreme Court held that the land contract did not constitute a contract to which contract principles applied. Rather, a contract for sale of land constitutes a mortgage for purposes of section 726 of the Code of Civil

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53 Estate of Mary Mason v Fairbank, 62 Cal 2d 213 (1965).
and as such, the vendees were entitled to redeem in accordance with equitable principles. To hold otherwise would be to allow vendors to circumvent the protective purposes of section 726 by the simple artifice of drafting a document to transform a mortgage into a contract.

As was the case for California, the second author was unable to find an example of a statutory analogy in English case law. Nonetheless, there are examples of broad teleological statutory extensions that illustrate that the dividing line between teleological extensions and analogies is a blurred one. One such example is the *Fitzpatrick v Sterling* case. The case concerned the question of whether a surviving homosexual partner can succeed to a tenancy upon his or her partner’s death according to the Rent Act 1977. The Act provides that a claimant can do so if he or she has lived with the deceased partner, the original tenant, ‘as his … wife or husband’ or if he or she was ‘a member of the original tenant’s family’. The first instance judge adopted a textual approach and ruled against the claimant. The Court of Appeal agreed with the first instance result, but felt that Parliament should consider the matter since the current state of the law offended the wider principle of ‘social justice’.

When the case reached the House of Lords, the majority rejected the ‘spouse’ alternative on textual grounds: the words of the Act are clear in assuming that spouses are of different genders. Lords Nicholls and Slynn then framed their allowance of the appeal on the second alternative, ‘family member’, in functional terms. The third member of the majority, Lord Clyde, made reference in his speech to the ‘purpose of the legislation’, but drew heavily on ‘changes in social habits’ and ‘updating construction’ of the statutory provision. The remaining two members of the House dissented, arguing instead that it must be up to Parliament to change the Act. The fact that these dissentients in the House of Lords, along with some of their peers in the Court of Appeal, preferred to leave the development of the law to Parliament indicates just how big a judicial leap it was to apply the Act to cover a homosexual partner. Indeed, the move to bring homosexual relationships under the Act required the adoption of a significant change in policy from the date of enactment of the Act to the date of the trial at hand. The ultimate reasoning in the case is therefore clearly neither textual nor historical. The authors of this paper categorise this case as demonstrating

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54 There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be [an action for foreclosure] in accordance the provisions of this chapter.

55 *Petersen v Hartell*, 40 Cal 3d 102 (1985).

56 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

57 Rent Act 1977, Schedule 1, (2(2)) and (3(1)).
a teleological extension under the functional approach, and not as a statutory analogy, because the argumentation revolves around the language of the statute; and because, ultimately, the court construes the statute to include homosexual partners as family members within its terms.

3. Part Two: two sources of judicial rules

This paper distinguishes between two types of judicial rules according to their source: glosses on statutes and pure common law rules.\(^{58}\) By a ‘gloss on a statute’ is meant a judicial rendering or re-articulation of the statute which serves to concretise the meaning of the statute. Glosses therefore are holdings (also known as ratios) that are derived from statute. As illustrated below, these glosses may consist of definitions of statutory terms and even of statutory interpretations that reduce or extend the reach of the statute.

The second type of judicial rule that is treated in this paper encompasses those rules which have no statutory source. These judge-made rules are referred to here as pure\(^{59}\) common law. These judge-made rules are termed Richterrecht in German because they are praeter legem or beyond the frontier of statute law.\(^{60}\) The California Legislature instructs the courts in such cases to follow ‘[t]he common law of England’,\(^{61}\) which might at first glance seem to constrain the courts more than in Germany, where Richterrecht is developed without resort to a body of law. However, it should not be forgotten that German academics, judges and practising lawyers often write articles on developing topics and that these articles serve a similar function to references to the common law of England, which has been interpreted by the Californian courts to include the common law of the American states.\(^{62}\) Neither the

\(^{58}\) For the purposes of this paper, ‘rule’ is used in the sense of ‘norm’ as defined by Kelsen: a rule which prescribes or permits certain human behaviour. See Hans Kelsen, *Principles of International Law* (The Lawbook Exchange Ltd, 1952) 6.

\(^{59}\) Recognising, of course, that they are far from pure if one considers how they arose from, and are still influenced by, the writ system and by statute and constitutional law.

\(^{60}\) Karl Larenz, *Methodenlehre der Rechtswissenschaft* (Springer, 3rd edn 1995) 177, 252–362; see also Robert Alexy and Ralf Dreier, ‘Precedent in the Federal Republic of Germany’ in Neil MacCormick and Robert Summers (eds), *Interpreting Precedents: A Comparative Study* (Dartmouth University Publishing, 1997) 17–64.

\(^{61}\) Cal Civil Code §22.2, first enacted in 1850:

> The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

> The Californian courts construe ‘common law’ in section 22.2 to include not only case decisions, but also statutes enacted by Parliament prior to the time of separation of the American colonies from Great Britain. *Moore v Purse Seine Net*, 18 Cal 2d 835 (1941).

\(^{62}\) The decisions of English courts are not considered to constitute the common law in and of themselves, but merely to provide evidence of what the common law is on any particular point, in the same way that judicial decisions of other American states constitute evidence of what the common law is. *Callet v Alioto*, 210 Cal 65 (1930).
common law of other jurisdictions nor the opinions of authors are binding on
the German or Californian judge, but they may well be persuasive. Huge
swathes of law in England are governed entirely by ‘pure’ common law,63
but the common law of other jurisdictions and opinions of authors can be per-
suasive on the English judge, although not binding.64

Before proceeding, it would be useful to illustrate that the rules articulated
by German, Californian and English judges, whether they be judicial glosses
or pronouncements of pure common law, are indistinguishable in content
and scope from statutory rules. Consider the following examples, some of
which are legislative enactments, and some of which are judicial pronuncia-
tions. By merely reading the isolated rules, it is impossible to know which is
which:

(1) No one shall take advantage of his own wrong.
(2) One must not injure his neighbour.
(3) Damages shall be awarded for substantial injury to the right of personality
   of another.
(4) A manufacturer is strictly liable in tort when an article he places on the
   market proves to have a defect that causes injury to a human being.
(5) If a labour union calls a strike for better working conditions, an employer
   may not terminate the contracts of employees for taking part in that
   strike.
(6) An employer shall compensate his employee for damage to the employ-
   ee’s property at the workplace.
(7) If the marriage does not take place, each engaged person may require the
   other to return what the former gave as a present or as a sign of the
   engagement.

The first rule above was fashioned by the courts of equity in England, but it
has been codified in California since 1872 in Civil Code section 3517. The
second rule is Lord Atkins’s ‘neighbour principle’ from Donoghue v Steven-
son.65 The third rule is the holding of the Herrenreiter case of the German
Federal Supreme Court.66 The fourth rule is taken from Greenman v Yuba
Power Products,67 the case in which the California Supreme Court unani-
mously adopted strict liability for manufactured products. The fifth
and sixth rules are holdings of the German Federal Labour Court.68

63 See, eg, the law of restitution and many areas within the law of tort.
64 On precedent generally, see Zenon Bankowski, Neil MacCormick and Geoffrey Marshall, ‘Precedent in
the United Kingdom’ in Neil MacCormick and Robert Summers (eds), Interpreting Precedents: A Com-
parative Study (Dartmouth University Publishing, 3rd edn 1997) 315–354.
65 Donoghue v Stevenson [1932] UKHL 100.
66 BGHZ 26, 349.
67 59 Cal 2d 57 (1963).
68 See BAG of 28 January 1955, (1955) Neue Juristische Wochenschrift, 882.
The seventh and final rule above, which applies to gifts in contemplation of marriage, is section 1301 of the German Civil Code.

3.1. Glosses on statutes

When faced with a new factual situation, judges in all three of the considered jurisdictions will apply a statute if they conclude that the statute supplies the rule of decision. In doing so, they will sometimes put a gloss on the statutory language, which results in an explicit or implicit re-articulation of the statutory rule. This can be illustrated by case decisions from Germany and California construing similar statutes. Both cases articulate a definition of negligence in the context of sporting injuries.

The statute involved in the illustrative German case is section 823(1) of the Civil Code, which is the most important tort statute in Germany:

One who intentionally or negligently injures the life, body, health, freedom, property, or other right of another in an unlawful manner is required to compensate the other [person] for the resulting damage.  

How is the term negligence to be defined in the context of an injury suffered by a participant in a sporting event such as football? When faced with this question, the Federal Supreme Court held that liability under section 823(1) can only attach if the injuring player in a game of football acted with ‘impermissible unfairness’, which in most cases will require that the player had broken the rules of the particular sport. While German judges, academics and lawyers would say that this statement of the Federal Supreme Court is merely an example of statutory interpretation, in California one could also say that the Federal Supreme Court was putting a gloss on the statute by concretising its meaning in this particular context.

Putting a gloss on a statute can be seen in the following example from California, in which the California Supreme Court was called upon to interpret section 1714(a) of the Civil Code in the context of an injury suffered by a participant in a similar sporting event. Section 1714(a), which is the most important tort statute in California, reads as follows:

Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.

69 This is a quite literal translation by this paper’s first author.
70 See OLG Hamm judgment (6 U 241/11) of 22 October 2012.
71 See Günther Hirsch, Rechtsanwendung, Rechtsfindung, Rechtsschöpfung: Der Richter im Spannungsverhältnis von Erster und Dritter Gewalt (Müller, 2003) 4–6.
In a case involving touch football (of the American variety), the California Supreme Court held that the term negligence in this context means ‘reckless conduct that is totally outside the range of the ordinary activity involved in the sport’.72

From a methodological standpoint, both a German judge in the first instance (that is, in the trial court) who applies re-articulated rule from the Federal Supreme Court (‘impermissible unfairness’) and a trial judge in California who applies the re-articulated rule from the California Supreme Court (‘reckless conduct that is totally outside the range of the ordinary activity involved in the sport’) are engaging in exactly the same activity. But how should this activity best be described? Would it be accurate to say that these judges were applying the statute, or would it be more appropriate to say that they were applying a judge-made definition or standard? In Germany, one would undoubtedly say that the judge in the trial court is applying the statute. In California, on the other hand, one would most likely say that the judge is applying a case-based definition.73 The only difference between these two jurisdictions in this respect is the terminology used to describe this identical judicial activity.

3.2. Pure common law rules

There are situations in which German, Californian and English judges will grant relief even when there is no statute that can arguably be said to provide the rule of decision for resolution of the case. In doing so, it is the practice of the judges in each of these jurisdictions to announce the rule underlying their decision. For example, the above list contains two rules that were articulated by judges in the absence of statutory legitimation. In adopting strict product liability in California, the court announced the following rule: ‘A manufacturer is strictly liable in tort when an article he places on the market proves to have a defect that causes injury to a human being’. In recognising a right to strike in Germany, the court ruled: ‘If a labour union calls a strike for better working conditions, an employer may not terminate the contracts of employees for taking part in that strike’. What the courts are doing in these cases is identical: they are fashioning a rule beyond the frontiers of any explicit statutory authority.74

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72 Knight v Jewett, 3 Cal 4th 296 (1992) 318. In England, which has no general tort statute, the courts come to a similar conclusion based on the common law. See Caldwell v Maguire and Fitzgerald [2001] EWCA 1054.

73 See Michael J Fabrega, ‘The California Supreme Court’s Insertion of a No-Duty Rule into the Field of Sports Torts: A Futile Exercise Achieving Inequitable Results’ (2011) 33 Whittier Law Review 181, 182: when judging a case arising out of a sports context, the trial judge ‘will turn to the rules established in two seminal cases in sports torts jurisprudence: Knight v Jewett and Shin v Ahn’.

74 Other, of course, than the authority of Californian courts to apply the common law of England. See Cal Civil Code §22.2.
Here, too, one finds a difference in terminology for something that is identical in substance. In both California and England one would say that the judges are employing their inherent authority to develop the common law. In Germany, when judges decide cases in the total absence of a legislative enactment they are said to be acting ‘beyond the law’ or *praeter legem.*

4. Part Three: four basic approaches to using cases

Statutory rules are very often indistinguishable from rules from case decisions that is, from judicial glosses and pure common law. Consequently, the approaches to reasoning with statutes must apply with equal merit, if not equal frequency, to rules derived from case decisions. This conclusion is illustrated by the examples that follow.

4.1. The textual approach using case decisions

The textual approach using case decisions asks, ‘What did the judges actually say?’ Except when it comes to the Federal Constitutional Court, the use of cases in legal reasoning in Germany is almost always confined to what is written about a case as recorded in a legal commentary. Legal commentaries in Germany are hybrid primary–secondary reporting sources, written by scholars and practitioners. These publications reproduce statutes alongside citations to judicial decisions and the opinions of authors based on those statutes. Citations to judicial decisions ordinarily make up at least 90 per cent of a commentary. In this regard, legal commentaries are much like legal encyclopaedias in the common law world. However, in almost all references to case decisions, the commentators in Germany merely quote or re-state the relevant headnote (*Leitsatz*) that contains the judges’ ruling. There is virtually no mention, much less discussion, of the factual situations and the reasoning used by the courts in reaching their rulings. Because the cases are stripped of their facts and the judges’ reasoning, it is difficult to use the historical and functional approaches when citing a legal commentary. As a consequence, use of a German legal commentary tends to force the reader to employ the textual approach when applying judicial rulings found in commentaries.

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75 Karl Larenz, *Methodenlehre der Rechtswissenschaft* (Springer, 6th edn 1991) 366.
76 See also FH Lawson, ‘Comparative Judicial Style’ (1977) 25 *American Journal of Comparative Law* 364, 371:

English counsel and writers on law are repeatedly warned by the judges not to take the lapidary pronouncements of famous judges literally as though they were sections of a statute. That is precisely what, in contrast, as it seems to me, French lawyers do with the pronouncements of the Cour de Cassation.
An example of this phenomenon can be seen in the definition of ‘producer’ for purposes of the Product Liability Act.\(^{77}\) Section 4(1) of that Act defines ‘producer’ as ‘the person who produced [herstellen in German, also meaning “manufactured”] the final product, a raw material, or a component part of the product …’. Does the definition of ‘producer’ include someone who does no more than properly assemble the final product? The Federal Supreme Court remarked in a case concerning a crane that someone who assembles a crane might indeed in certain circumstances be classified as a producer. This remark can be found in one of the headnotes. However, the court went on to hold that the assembler of the crane in the case before the court was not liable for a latent defect in the boom of the crane.\(^{78}\)

The leading commentary on the Product Liability Act, Palandt, quotes the remark of the Federal Supreme Court to the effect that someone who assembles a product can be classified as a ‘producer’. It does not refer to the holding of the court. As a consequence, an appellate court in Dresden, relying on Palandt, held that the owners of a family run bicycle shop were liable for injuries caused by a latent defect in the rear wheel hub of a bicycle that they had properly assembled.\(^{79}\)

In California, the textual approach is probably also the usual approach used in employing the holding of a precedential case decision to a new factual situation. Consider the following holding of the California Supreme Court in Greenman v Yuba Power Products, Inc:  

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.\(^{80}\)

Applying this holding, would a developer who constructs a pedestrian pathway, and then dedicates it to a municipality, be liable under strict product liability principles if the pathway is defective and causes injury? Employing basically a textual argument, the First District of the California Court of Appeal held in favour of the developer on this point:

Highways, and by analogy, pathways, are not ‘products’ placed in the stream of commerce for profit, but are more akin to a service. Strict liability principles are therefore inapposite.\(^{81}\)

If the California Court of Appeal had consulted the leading legal commentary in California, Witkin’s Summary on California Law,\(^{82}\) it would have found not

\(^{77}\) Produkthaftungsgesetz.

\(^{78}\) BGH BB 77, 1117 [author translation]. In the parlance of the common law, the remark in the headnote would be termed an obiter dictum because it was not necessary to the resolution of the case.  

\(^{79}\) Ibid.

\(^{80}\) 59 Cal 2d 57 (1963), 62.

\(^{81}\) Fisher v Morrison Homes, Inc, 109 Cal App 3d 131 (1980) footnote 2.  

\(^{82}\) Witkin, Summary of California Law (10th edn).
only the holding of the precedential case, but also the factual background and the reasoning of the judges, making it easier to apply the holding of the case using the historical and functional approaches, in addition to the textual approach, if the First District had been inclined to do so.

The same is true in England—a textual approach is probably the most common approach when using rules derived from pure common law. This is exemplified in the use of the rule in *Rylands v Fletcher* in the later case of *Read v Lyons*.\(^{83}\) In *Rylands*, as articulated by Mr Justice Blackburn, the court held:

> We think that the true rule of law is that the person who for his own purpose brings on to his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage that is the natural consequence of the escape.\(^{84}\)

The court then applied this in *Read v Lyons*, which concerned an explosion on the defendant’s land. It was held that there could be no liability under *Rylands* since there had been no ‘escape’ from the land since the explosion occurred on the defendant’s land and remained within its boundaries.\(^{85}\)

### 4.2. The historical approach using case decisions

The historical approach asks, ‘What did the authors of the precedential opinion mean when they announced their holding? Asked another way, ‘How would those judges decide the case at issue?’ The use of the historical approach with a precedential case consequently demands a careful reading of that case. This will be illustrated by examples from Germany, California and England.

In the Journal Case, the German Federal Constitutional Court let stand (due to a 4:4 split) a judgment of the Federal Supreme Court that allowed into evidence incriminating, journal-like notes that the accused had made in the course of psychotherapy before the homicide was committed, and which he later voluntarily turned over to the police during the investigation of the homicide. In a later homicide case, the police, after obtaining a search warrant, recorded the accused making self-incriminating remarks like ‘we killed her’ when talking to himself in his car. Are these remarks admissible? The Federal Supreme Court held that they were not. These utterances, according to the court, go to the core of personal privacy, which is entitled to absolute protection from state intrusion. In so holding, the Federal Supreme Court distinguished the Journal Case of the Federal Constitutional Court, whose decisions are made binding by statute.\(^{86}\)

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\(^{83}\) *Rylands v Fletcher* [1868] UKHL 1; *Read v Lyons* [1947] AC 156.

\(^{84}\) *Rylands v Fletcher* [1868] LR 3 HL 330, 339–340.

\(^{85}\) [1947] AC 156, 168.

\(^{86}\) §31 BVerfGG.
While the place in which the notes were made in [the Journal] Case was irrelevant to the question of the admissibility in a criminal proceeding of the thoughts recorded in writing, because the notes were voluntarily taken into police custody with the accused’s consent, in the present case the criterion of the non-public nature of the place in which the thoughts were uttered is of considerable import. While the fleetingness of the spoken word played no role in the journal decision because the person affected had written down his thoughts and in so doing had perhaps corrected them, the fleetingness of the spoken word takes on particular significance as a distinguishing feature in the present case. Furthermore, considerations of prevention were also relevant to the question of admissibility in the journal case because the journal notations in question were made before the offense was committed, and might conceivably have been of use in preventing the offense as a measure of protection of the public. In contrast, the possibility of prevention … plays no role in the present case.87

In the above passage, the Federal Supreme Court is in effect arguing that the judges of the Federal Constitutional Court who decided the Journal Case would agree with the result that the Supreme Court reached in the case before it. This is the same type of argument that judges employ when they cite legislative history to support their conviction that the legislators who enacted a statute would agree with their interpretation of the statute. Note too that, in distinguishing the Federal Constitutional Court’s ruling in the Journal Case, the Federal Supreme Court is reducing the reach of the holding of the Journal Case. This is the same intellectual process as the teleological reduction of a statute.

In California, the historical approach to using precedential case decisions is quite widespread. The factual setting of a case might provide the historical context, which enables subsequent judges to apply the holding of the case in a manner more consistent with the intentions of the judges who decided the precedential case. This can be seen in the reasoning, quoted below, of a judgment of the Third District of the California Court of Appeal. At issue was the application of the Robins case of the California Supreme Court, which held that ‘speech and petitioning, reasonably exercised’ are constitutionally protected in shopping centres, even when they are privately owned. In holding that the right to speak and petition did not extend to the premises of a bank which was located on a city street, the Court of Appeal argued that the Supreme Court would agree with its holding:

While the general holding of Robins would appear to end our inquiry, it does not. In Robins, the [California Supreme] court remarked: ‘It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment’. … Subsequently, the Supreme Court has never elaborated on this remark and has not revealed if it means the holding of Robins does not apply to modest

87 BGH 2 StR 509/10 of 22 December 2011; (2012) Neue Juristische Wochenschrift, 945.
retail establishments. In the meantime, however, the Court of Appeal has determined that the Supreme Court at least intimated the holding does not apply to modest retail establishments and, consequently, has not applied the holding to what it determines are modest retail establishments.\(^8^8\)

Just as in the German case from the Federal Supreme Court above, the California Court of Appeal is distinguishing the holding of the California Supreme Court by reducing the reach of the holding. Both courts are arguing that the judges who decided the precedential cases (the Federal Constitutional Court in Germany and the Supreme Court of California) would agree with the result that they are reaching in the cases before them. These are examples of the historical approach.

In England, the historical approach is commonly used to apply case precedent. Consider the Court of Appeal holding in *Merritt v Merritt* on intent to create legal relations.\(^8^9\) The case concerned an agreement between spouses, which do not normally giving rise to legal relations under the principle in *Balfour v Balfour*.\(^9^0\) However, this particular couple were not on good terms; indeed, the husband had left his wife to be with another woman. Upon separation, the husband and wife made an agreement that he would pay her a monthly sum of money and would transfer to her the full title to the house if she kept up the mortgage payments. When this dispute came to court, the husband argued that, following the *Balfour* case, this agreement was not intended to give rise to legal relations since it was between spouses. Rejecting this, Lord Denning, speaking for the Court of Appeal, held that:

> It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations.\(^9^1\)

Lord Denning and his peers in the Court of Appeal found that there was an intention to create legal relations and, therefore, held in favour of the wife. In doing so, the Court adopted a historical approach to the previous case law, as seen in Lord Denning’s treatment of one particular piece of precedent:

> Counsel for the husband then relied on the recent case of *Gould v Gould*, when the parties had separated, and the husband agreed to pay the wife £12 a week ‘so long as he could manage it’. The majority of the court thought that those words introduced such an element of uncertainty that the agreement was not intended to create legal relations. But for that element of uncertainty, I am sure that the majority would have held the agreement to be binding.\(^9^2\)

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\(^8^8\) *Bank of Stockton v Church of Soldiers*, 44 Cal App 4th 1623 (1996) 1629.
\(^8^9\) *Merritt v Merritt* [1970] EWCA Civ 6.
\(^9^0\) *Balfour v Balfour* [1919] 2 KB 571.
\(^9^1\) *Merritt v Merritt* [1970] EWCA Civ 6, per Lord Denning.
\(^9^2\) Ibid.
This consideration of precedential case law and how previous courts might treat a legal problem is a prime example of the historical approach as adopted in the English courts.

4.3. The functional approach using case decisions

For some of the same reasons mentioned above, the functional approach does not find widespread application when using the holdings from case decisions in Germany. As mentioned above, German commentaries strip the cases of whatever factual (historical) and functional context that is found there. In general, the recitation of the facts in the cases themselves is fairly sketchy by common law standards. In addition, the case decisions seldom articulate the purposes and policies (ie functions) that motivated the court to decide in the way that it did.93

The following cases may serve as examples. In 1958, the Federal Constitutional Court in Germany reviewed the constitutionality of an injunction that had been issued against Erich Lüth, ordering him to cease his calls for a boycott of a film directed by a man who had co-written and directed anti-Semitic films for the National Socialists. The Federal Constitutional Court held that an expression (Meinungsäußerung) that contains a call for a boycott does not necessarily constitute a violation of public standards (gute Sitten), and may under the circumstances of the case be constitutionally justifiable under freedom of expression. Remarking that the ‘statements of the petitioner must be viewed in the context of his overall political and cultural-political efforts’, the Constitutional Court held that the call for a boycott by Lüth was constitutionally protected.94

In a case from 2004, an appellate court in Bamberg was presented with a case in which a television programme had exposed the cruelty involved in killing animals for food. In holding that the programme was entitled to constitutional protection, the court employed the rationale (function) of the Lüth decision:

The slogan ‘Eat vegetarian, forget meat!’ can be viewed as a call for a boycott to the disadvantage of the meat-packing industry. However, this will only violate [public standards] if it is not protected by the constitutional right of expression … In addition to commercial interests, the appellant is undeniably being motivated by concerns for animal protection, and as such is being active in the area of social and political questions in which, according to a long line of decisions of

93 This latter shortcoming (from the authors’ standpoint) hinders, but by no means prevents, readers from employing the purposes that motivated the judges in reaching their precedential decisions. One must not forget that the vast majority of statutory rules do not specifically articulate the purposes that underlie them and yet those who wish to apply the statutes in a functional manner are capable of divining and articulating the underlying purposes. Consequently, it cannot be prohibitively difficult to divine and articulate the purposes and policies underlying the holdings of case decisions.
94 BVerfGE 7, 198; 1 BvR 400/51 of 15 January 1958.
the Federal Constitutional Court [beginning with Lüth], is entitled to special protection under article 5(1) of the Basic Law.95

An example of the functional approach from California is provided by a criminal prosecution based on cocaine and other illicit drugs found in a warrantless search of the tent-like structure that a criminal defendant had erected around his vehicle at a campsite. The legal issue was the proper application of the prohibition against unreasonable searches and seizures found in the 4th Amendment to the US Constitution. According to the courts, the purpose of the 4th Amendment is to protect ‘an individual’s reasonable expectation of privacy against unreasonable intrusion on the part of the government’.96 Was the defendant’s expectation of privacy in the present case reasonable? In deciding that it was reasonable, the California Court of Appeal employed a number of arguments, including a functional one:

As the Colorado Supreme Court reasoned in Schafer, ‘Whether pitched on vacant open land or in a crowded campground, a tent screens the inhabitant therein from public view. Though it cannot be secured by a deadbolt and can be entered by those who respect not others, the thin walls of a tent nonetheless are notice of its occupant’s claim to privacy unless consent to enter be asked and given. One should be free to depart the campsite for the day’s adventure without fear of this expectation of privacy being violated. Whether of short or longer term duration, one’s occupation of a tent is entitled to equivalent protection from unreasonable government intrusion as that afforded to homes or hotel rooms’.97

The functional approach can be seen in an English example involving the common law economic tort of procuring breach of contract.98 The appellant, GWK, had a contract with ARM to use their tires in a display. Dunlop, a rival tire manufacturer, crept into the display at night and changed the ARM tires for Dunlop tires. While this action by Dunlop put GWK in breach of its contract with ARM, Dunlop did not literally procure or induce GWK to do anything. The Court of Appeal asked, is this an example of procuring breach of contract? It was held, yes, by extension. While this action by Dunlop does not constitute procuring in a literal sense, the purpose of the economic tort was to protect contractual relationships and deter third parties from interfering with such contractual relationships.99

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95 OLG Bamberg 9 June 2004, 3 U 233/03; see LMRR 2004, 42.
96 Eq People v Jenkins, 22 Cal 4th 900 (2000) 971.
97 People v Schafer 946 P.2d 938 (1997) 944.
98 GWK v Dunlop (1926) 42 TLR 376; also see Lumley v Gye (1853) 118 ER 749.
99 It should be noted that the House of Lords in a later case, OBG v Allen [2007] UKHL 21 (per Lord Hoffmann), pointed out that GWK v Dunlop was wrongly reasoned, since the requirements of the tort were not made out—there was no inducement to breach contract, merely interference with contractual relations. Nonetheless, the case does still serve as a demonstration of the English courts applying a functional approach to reasoning with a common law rule.
4.4. The analogical approach using case decisions

If a statutory analogy is a use of a statute that goes far beyond the language, history and functions of the statute, then a case-based analogy must involve the use of case-based rule that goes far beyond the language, history and functions of the rule. In order to find examples of case-based analogies, one would have to search for holdings and ratios of pure common law that have been extended to related subject matter areas in the same way that statutes are extended analogically to related subject matter areas. Christian Hofmann at the National University of Singapore suggested the following example: in 1908, the Imperial Chamber Court of Germany held that a partner might under certain circumstances bring a derivative action (actio pro socio) on behalf of the partnership, even though there was no statute providing for this procedure. After the establishment of the Federal Republic of Germany the German Supreme Court, which is the successor to the Imperial Chamber Court, continued this line of cases and even extended the doctrine, analogically one would say, to corporations.

As shown in the following example, sometimes German appellate courts will cite another judicial decision in support of their resolution of the central issue in the case facing them. These references have sometimes been wrongly considered to be examples of the analogical approach. It will be seen in the following example that such references do not constitute case law analogies because the judges in these cases are not purporting to apply the rule of the other case to the case before the court. Rather, they are signalling that the referenced case can be profitably compared to the case before the court. Consequently, these references are referred to here as comparative references. By referring to the previous case of their own court or another court, the judges hope to raise the plausibility and acceptance of their decisions.

Consider the following two examples of comparative arguments from German case law involved interpreting section 86a(1) of the German Criminal Code, which reads:

Whoever ... domestically distributes or publicly uses ... symbols of [prohibited] organizations ... shall be punished with imprisonment for not more than three years or a fine.

100 RGZ 70, 32 (34) (1908).
101 See BGHZ 25, 47 (49) (1957); BGH 2 ZR 199/81 of 28 June 1982; NJW 1990, 2627 (2628); Markus Gehrlein, 'Die Gesellschafterklage und § 46 Nr 8 GmbHG – ein ungelöstes Problem?' (1993) Zeitschrift für Wirtschaftsrecht 1525; Thomas Barnert, Die Gesellschafterklage im dualistischen System des Gesellschaftsrechts (Mohr Siebeck, 2003), 101–2.
102 The reference is ordinarily preceded by vgl, which is an abbreviation for vergleiche, which means 'compare'.
103 Strafgesetzbuch §86a.
The ‘prohibited organization’ in both cases was Hitler’s National Socialist German Workers Party. The ‘symbol’ in the first case, the Hitler T-Shirt Case,\(^{104}\) was a photograph of Hitler himself in uniform, printed on a t-shirt below the words, in English, ‘Adolf Hitler European Tour, 1939–1945’. On the back of the t-shirt were printed various dates corresponding to the German advances during the Second World War, starting with ‘September 1939 Poland’. Next to a printed ‘September 1940’, the word ‘England’ was crossed out, and the word ‘cancelled’ was printed next to it in red. The same was true for the word ‘Russia’ next to the ‘August 1942’ printed date. The last entry ‘July 1945 The Bunker, Berlin’ had ‘sold out’ written after it.

In the Hitler T-Shirt Case, the person who printed the t-shirts was convicted of violating section 86a(1). On appeal, the Federal Constitutional Court reversed the conviction, holding that the t-shirt’s message was satirical. The headnote of the court decision reads, ‘Satirical representations of National Socialist symbols are protected by … the Basic Law.’\(^{105}\)

In the Swastika Case,\(^{106}\) the appellant was convicted under section 86a(1) for manufacturing stickers and various other items with black swastikas printed on them, which would by itself have violated the law. However, this man superimposed red circles with a line drawn through them over the swastikas. Upon conviction, the man appealed to the Federal Supreme Court. The Federal Supreme Court reversed the conviction in 2007, holding that section 86a(1) was ‘obviously’ not intended to cover the use of National Socialist symbols ‘in a way that expresses opposition to the organization and that attacks its ideology’. This holding is followed by a reference to the 2006 opinion of the Federal Constitutional Court:

> A reduction in the reach of the statute in such cases also gives due consideration to the constitutional right of free expression of art. 5(1) [freedom of expression] of the Basic Law … If an action—such as the one here which uses symbols in a clear and obvious antagonistic way—obviously did not violate the protective purpose [of the statute], it would be constitutionally questionable to criminalise such behaviour and in that way limit the freedom of citizens who want to protest against the revival of National Socialist objectives in a way that singles out the symbols of such undesirable objectives for attack … \(^{107}\)

The persuasive value of the comparative reference to the previous case is clear: both cases concerned messages that were critical of National Socialists. Only messages and symbols which promote prohibited organisations are prohibited by the statute.

Why does the reference to the previous case not rise to the level of a case-based analogy? First, the latter case does not purport to apply the rule of the

\(^{104}\) 1 BvR 680, 681/86.

\(^{105}\) BVerfGE 82, 1 1 BvR 680, 681/86.

\(^{106}\) 3 StR 486/06.

\(^{107}\) Compare BVerfGE 82, 1 1 BvR 680, 681/86, Hitler European Tour case.
previous case; it construes the statute to avoid the constitutional issue, which it identifies as freedom of expression. Second, even if the latter case did purport to apply the rule of the previous case, that application would more properly be called a teleological extension because the subject matter in both cases (satire and criticism, respectively) is closely related. Finally, the holding of the previous case—that satirical representations of National Socialist symbols are protected as artistic freedom—is what is described in this paper as a statutory (in this case constitutional) gloss, and statutory glosses are not examples of pure common law because by definition there is a statute in the background; it is the statute that is being applied by analogy, not the statutory gloss.

Probably because there are few areas of pure common law in California, the first author was unable to identify a single example of a case-based analogy. Nevertheless, comparative references of the kind found in Germany can also be found in California, such as in the use of the Tarasoff rule of the California Supreme Court in a subsequent case decided by a federal court, which is charged with applying California law.

In Tarasoff, the California Supreme Court, construing Civil Code section 1714, which is quoted above, held:

> Once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, the therapist bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.\(^{108}\)

In Molsbergen v United States the federal 9th Circuit Court of Appeals applied the Tarasoff rule, which addresses the duty of a therapist, to an employer who later learned that certain former employees had been exposed to asbestos:

> When an employer gains information about a serious danger to which a readily identifiable former employee has been exposed in the course of his employment, … a duty to warn exists.\(^{109}\)

The persuasive value of the reference to the Tarasoff case is clear: both cases concerned persons in a supervisory position.

Although the reasoning in Molsbergen might at first glance look like a case-based analogy to Tarasoff, it is not a case-based analogy because both Tarasoff and Molsbergen are applying section 1714 of the Civil Code. The comparative reference to the Tarasoff case in Molsbergen is parallel to the comparative reference to the Hitler T-Shirt Case in the Swastika Case.

However, Molsbergen court also cites Labor Code sections 6408, 6491 and 6403(c) in support of its judgment. Section 6408 expressly requires employers to provide employees with information about exposure to harmful materials,
but does not mention former employees. Sections 6491 and 6403(c) provide that employers ‘do every other thing reasonably necessary to protect the life, safety, and health of employees’, but it does not mention former employees. By relying on these provisions from the Labor Code, the Molsbergen court is teleologically extending the reach of those provisions to protect former employees.

English examples of ‘pure’ analogical reasoning as regards case decisions also proved very difficult to find. Nonetheless, the approach can be seen in the judgment of Lord Brett MR in the Heaven v Pender case from the nineteenth century. The case concerned a dry-dock owner who had set up a stage on the outside of a ship in order for the ship to be painted. The plaintiff, who was not the ship owner, but a contractee of the ship owner, was injured when the stage collapsed whilst he was painting the ship. The facts showed that the ropes suspending the stage had not been in a fit state to be used when the stage was erected. Since there was no contract directly between the dry-dock owner and the plaintiff, the case could not be considered under the law of contract. The case was also heard some 50 years before the seminal case of Donoghue v Stevenson, which recognised the overarching law of negligence for the first time in English law. Consequently, there was no obvious form of liability under which the facts might fall. Rather, there was a series of disparate cases, each of which involved the imposition of liability for one person’s act putting another, foreseeable, person in danger of loss or injury.

Lord Brett MR dealt with each of those cases, concluding that they all demonstrated an overriding principle that,

Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.111

Lord Brett MR distilled this principle from cases such as Langridge v Levy, a case concerning the purchase of a gun by a father, which was then to be used by the son. The court in that case dealt with the issue under fraudulent misrepresentation, but Lord Brett MR presents it as being better described by his proffered principle. Similarly, Lord Brett MR used this principle to describe Corby v Hill, a case concerning building materials left by the defendant on a road that he knew to be frequented by the plaintiff in such a way as to be dangerous to anyone travelling along it, and Longmeid v Holliday, which concerned a defective lamp. Neither of those cases was decided in anything like

110 Heaven v Pender, Trading as West India Graving Dock Company (1883) 11 QBD 503.
111 Ibid, 507.
112 Langridge v Levy (1837) 2 M and W 519.
113 Corby v Hill (1858) 4 CB (NS) 566, 140 Eng Rep 1209; Longmeid v Holliday (1851) 6 Ex 761.
Lord Brett’s terms. The Master of the Rolls induced his overriding principle from a selection of cases, each concerning very different facts and employing different common law rules, before applying it to yet another different factual situation in *Heaven v Pender* itself.

Lord Brett’s peers in the Court of Appeal agreed with his finding in favour of the appellant ship painter, but did not concur with his reasoning. Lord Justice Cotton, with whom Lord Justice Bowen agreed, said that he was ‘unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived’. Rather, their Lordships preferred to decide the case upon the grounds of there being an obligation ‘as to things supplied by the dock owner for immediate use in the dock’ (ie the stage), a duty established in previous precedent. Whilst the court as a whole did not employ the analogical approach, its use in England can clearly be seen in the reasoning of Lord Brett MR.

5. Part Four: frequencies of use of the various approaches

It is probably impossible to draw an accurate picture of how often each of the four approaches is employed in the respective jurisdictions for statutory and case-based rules. Nevertheless, a few estimates can be made based on the experiences and observations of the authors and of others.

The discussion that follows will first attempt to judge the frequency of use of the four approaches when using statutes, and then it will look at the frequency when using glosses from cases and the holdings or ratios from pure common law. This part concludes with a short discussion of the reasons for these similarities and differences.

5.1. The frequency of use of the four approaches using statutes

One way to estimate, albeit roughly, the frequency of use is to look at the comparative effort expended by the authors in finding examples. Using this yardstick, it was easy for the first author to find German examples of all four approaches to statutes, including examples of teleological extensions and reductions. While this suggests that all of these approaches are commonly used in Germany, the ease of finding examples might simply be attributable to the fact that the terminology used in this paper is essentially German, that numerous examples are to be found in the academic literature, and

114 Fraudulent misrepresentation is based in the common law. For the classic definition, see *Derry v Peek* (1889) 14 App Cas 337, per Lord Herschell.

115 *Molsbergen v United States* (n 109) 515.

116 *Indermaur v Dames* (1866) LR 1 CP 27; and *Smith v London and St Katharine’s Docks Co* (1868) LR 3 CP 326.
that the first author has been teaching this subject in Germany for over a
decade.

Another way to estimate the frequency is to consult the academic literature. According to Zweigert and Puttfarken, German courts eschew the textual rule when applying statutes.117 Whether this observation is true or not is difficult to judge. It can at least be said that the functional approach is favoured by practically all legal academics in Germany,118 but this does not necessarily mean that the functional approach is employed more often than the textual.

When it comes to the use of the historical approach in Germany, the academic literature suggests that the use of this approach is not uncommon.119 Finally, research conducted in the 1970s in Germany revealed that 1 in 20 judgments of the Civil Division of the Federal Supreme Court employed, or sometimes rejected, an explicit or implicit statutory analogy.120 Although use of statutory analogies in the other judicial jurisdictions in Germany is probably not as widespread as it is in the Civil Division,121 in general it can be said that use of the analogical approach is quite common in Germany.

The search in California for examples of the four approaches to the use of statutes was considerably more difficult than in Germany. The academic literature on legal methodology in California is comparatively sparse. Almost all of the writing on the subject seems to be devoted to American, not Californian, legal methodology. Nevertheless, it was easy to find examples of the textual approach, which is generally known in California and the common law world as the plain-meaning rule. And it was also easy to find examples of the historical approach, as this approach has been the subject of a number of law review articles.122 The relative ease of finding examples of the historical approach suggests that use of this approach in California is not uncommon.

It was fairly time-consuming to find examples of the functional approach used with statutes in California. This is somewhat surprising in that there are numerous statutory provisions in California, some dating back to the nineteenth century, which exhort the courts to apply code provisions

117 See K Zweigert and HJ Puttfarken, ‘Statutory Interpretation—Civilian Style’ (1969–1970) 44 Tulane Law Review 704, 712–3.
118 Winfried Brugger, ‘Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View’ (1994) 42 American Journal of Comparative Law 395.
119 See Bernd Rüthers and Christian Fischer, Rechtstheorie: Begriff, Geltung und Anwendung des Rechts (CH Beck, 5th edn 2010), marginal note 796, marginal note 800. ‘In legal fact, the Federal Constitutional Court of Germany generally attributes particular, often even pivotal significance to the historical argument in its statutory interpretations’. For an in-depth analysis of the case law see Michael Sachs, ‘Die Entstehungsgeschichte des Grundgesetzes als Mittel zur Verfassungsauslegung in der Rechtsprechung des Bundesverfassungsgerichts’ (1984) DVBl 73.
120 Elmar Bund, ‘Die Analogie als Begründungsmethode im deutschen Recht der Gegenwart’ (1978) Zeitschrift für vergleichende Rechtswissenschaft 115, 122.
121 Ibid.
122 See Marc R Perman, ‘Statutory Interpretation in California: Individual Testimony as an Extrinsic Aid’ (1980) 15 University of San Francisco Law Review 241.
The most prominent of these are found in the Penal Code, the Code of Civil Procedure, the Commercial Code and in section 4 of the Civil Code, which reads:

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.

While the number of recorded cases that cite these provisions is very large, examples of clear teleological extensions of the statutory language are not particularly easy to find. Nevertheless, it might well be the case that use of the functional approach is more popular in California than it is in other American States. For according to the classic text Sutherland Statutes and Statutory Construction, American judges are reluctant to rely on statutory policies and principles to extend the reach of statutory language.

As was pointed out above, statutes in Germany are quite often used analogically, which made it easy for the first author to find examples. The situation in California is dramatically different. A search by the first author of perhaps 20 hours in length turned up only one example; and the example found by the first author would not be characterised as a statutory analogy in Germany. It therefore can be concluded that the analogical use of statutes is extremely rare in California. Considering the relative reluctance of the Californian courts, compared to German courts, to extend the reach of statutes using the functional approach, it should come as no surprise that analogical applications of statutes in California are even rarer.

The search for English examples of the four approaches to statutes was mixed in difficulty. The academic literature on legal methodology in

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123 According to a search in Westlaw’s unannotated Californian statutory database ‘CA-ST’ conducted on 30 April 2013, there are 5 constitutional and 390 statutory provisions in which the words ‘liberally construed’ appear.
124 Cal. Penal Code §4:

The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.

125 Cal. Code of Civ. Proc. §1859.

In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

126 Cal. Comm. Code §1103(a). ‘This code shall be liberally construed and applied to promote its underlying purposes and policies’.
127 Norman J Singer and JD Shambie Singer, ‘Extension of Statute by Analogy and Implication’ in Norman J Singer and JD Shambie Singer (eds), Sutherland Statutes and Statutory Construction (Thomson Reuters, 7th edn 2012).
England tends to focus on the ‘literal’ (textual) and ‘purposive’ (functional) approaches to statutory interpretation. Consequently, examples of these two approaches were easy to find. These two approaches are used frequently, with the courts adopting the textual approach where possible and, where not, looking to the functional approach. Seeking examples of the historical approach was also straightforward since the use of Hansard is now widely known and accepted in English law. Nonetheless, the list of cases reported as citing the rule in Pepper v Hart is short, which suggests that this approach is not used at all often.

The term ‘analogy’ crops up regularly in English law, but there it holds a very different meaning to that used by German lawyers and, indeed, in this paper. This made the search for English statutory analogies difficult. Just as for California, it took the second author a considerable time to find merely one example of what might be termed an English statutory analogy, although it does not meet the definition used in this paper of a statutory analogy. One might conclude, therefore, that the English courts rarely apply this mode of reasoning. The reason for this may be that, when faced with a request to take such a big judicial leap, the courts very often—and increasingly so—explicitly defer to Parliament in the interest of not overstepping their role as the judiciary.

5.2. The frequency of use of the four approaches using cases

One can conclude with some confidence that the textual approach is the approach most frequently employed in Germany when dealing with rules from cases. This conclusion follows from the wide use of commentaries, which usually do nothing more than restate the headnotes of leading cases. These restatements, in turn, are typically applied in a textual manner. The textual approach is probably the most popular approach in both California and England as well. Students of the law in these two jurisdictions learn the names and holdings of cases, and lawyers keep abreast of legal developments by noting the holdings, if not the names, of recent cases. And should the Californian lawyer feel the need to consult Witkin’s Summary of California Law, he or she will find that the vast majority of references to case citations in Witkin are textual in nature, just like those that are found in any leading practitioners’ book on English law, such as Halsbury’s Laws of

128 See Rebecca Huxley-Binns and Jacqueline Martin, ‘Statutory Interpretation’ in Rebecca Huxley-Binns and Jacqueline Martin (eds), Unlocking the English Legal System (Routledge, 3rd edn 2010); Gary Slapper and David Kelly, ‘Statutory Interpretation: Sources of Law’ in Gary Slapper and David Kelly, English Legal System: 2012–2013 (Routledge, 13th edn 2012); Elliott and Quinn, English Legal System (Pearson, 13th edn 2012), Part 1(3).

129 Pepper (Inspector of Taxes) v Hart [1992] UKHL 3 ruled that when judges are interpreting ambiguous statutes, they may refer to statements made in Parliament without breaching parliamentary privilege.

130 Witkin, Summary of California Law (10th edn).
England.131 Discussions of the facts of the case, and of the reasons given by the judges, are reserved for the leading cases. All other things being equal, German lawyers and judges might be said to use the textual approach to cases comparatively more often than their Californian or English colleagues for the simple reason that the historical approach, discussed in the next paragraphs, is more frequently employed in both of these jurisdictions than in Germany.

The historical approach to using precedential case decisions is quite widespread in California. Lower court judges in California employ the historical approach whenever they ask themselves, ‘How would the appellate judges who authored the earlier decision most likely rule in my case?’ A judgment of a trial court from California (where they are called superior courts) would be useful to illustrate this proposition. However, these judgments are not ordinarily reported. Nevertheless, the proposition can also be illustrated by decisions of the federal trial and appellate courts in cases in which the federal courts are called upon to apply the law of California. Here is a succinct statement of the historical approach made by the federal court (9th Circuit Court of Appeals), which hears appeals from the federal trial courts (called district courts) in California:

When interpreting state law, federal courts are bound by decisions of the state’s highest court. In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance. However, where there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state’s intermediate appellate courts.132

Use of the historical approach is evident whenever judges in a later case argue that the judges who decided the earlier, precedential case would agree with their resolution of the case at bench. Often this argument is buttressed by remarking on the similarity of the operative facts of the precedential case to the facts of the case before the later court.

In England, as in California, the historical approach is very common when using case precedent, particularly in situations where precedent is distinguished. The English courts often do not expressly articulate that they are adopting a historical approach, but the method is clear: how would the judges from the precedential decision decide the case at hand? Again, as in California, such arguments are often supported by reference to a similarity

131 Halsbury’s Laws of England (5th edn 2008).
132 Lewis v Tel. Employees Credit Union, 87 F. 3d 1537, 1545 (9th Cir. 1996) [internal quotations and citations omitted]. Compare the following statement of the California Supreme Court on the same proposition: ‘After examining the pertinent California decisions and finding them in conflict, the Ninth Circuit had to predict how our court would resolve that conflict in state authority, and it did so …’. Flanagan v Flanagan, 27 Cal. 4th 766 (2002) 773.
of material facts between the cases. While some German observers have apparently confused this method of argumentation with analogical reasoning, this is actually the same process of argumentation that is used by courts when they delve into the legislative history of an enactment to find that the legislators had considered factual situations similar to the one before the court.

In Germany, the historical approach is very uncommon when referring to the case decisions of the vast majority of appellate courts. This is in large measure due to the limited reporting of the facts of the cases in the cases themselves and in the commentaries and articles that discuss the cases. However, resorting to the historical facts is not uncommon when referring to case decisions of the Federal Constitutional Court, such as in the example of the Diary Case in the discussion above.

As mentioned in the discussion above, the functional approach to cases does not find widespread application in Germany. This is due in part to the paucity of cases that articulate the purposes and policies behind the decisions, and to the relative lack of a discussion of policies and purposes in commentaries and journals. These phenomena are probably due in part to the German perception of the role of the judge as someone who for the most part merely applies the law in a policy-neutral manner. According to this perception, the judge only applies the policies and purposes of the legislature or legislators. The policies and purposes pursued by the individual judges are irrelevant and impermissible.\footnote{Thomas Lundmark, ‘Legal Science and European Harmonisation’ (2014) 130 Law Quarterly Review 68.}

The roles of the judge in California and England seem to be somewhat different from the role of the judge in Germany, but not dramatically so. In California, as in Germany, it is very difficult to find subject matter areas of law in which there is no statutory guidance. In contrast, in England such areas absent of any statutory guidance are plentiful. In Germany, administrative law was judge-made law until the passage of the Administrative Procedure Act in 1976. Today, the German law on industrial action (also known as job action and the right to strike) is still judge-made law. In California, strict product liability law and conflict of laws are comparable examples of judge-made law. While there are surely other minor subject matter areas in each of these two jurisdictions where there is no statutory law, all of the major areas of law in both Germany and California possess at least some statutory law.

That being said, the perception of the role of the judge is indeed somewhat different in Germany and California, and certainly as between Germany and England. In Germany, people seem to believe that their constitution and statutes produce, for the most part, predictable judicial outcomes, whereas people in California tend to believe that judges have considerable
discretion.134 Perhaps because of this somewhat different perception of the role of the judge, judicial decisions in California tend to use more policy-oriented arguments, which in turn make it easier to find and use these policies in framing functional arguments based on earlier case decisions. The judicial approach and the perception of it in California bear many resemblances to that of England, where there is a great deal of judicial discretion and where arguments based on policy are relatively commonplace.

The authors were unable to find a single example of an analogy using a case-based rule, that is one which employs a pure common law rule rather than a statutory gloss, in either Germany, California or England. This should probably come as no surprise for Germany and California, where there are very few areas of law in which there is no statute law. Yet even in England, where there are more areas of pure common law, it does not appear that it is common at all to extend pure common law rules beyond their textual, historical and functional meanings.

When it comes to the use of comparative references to statutory glosses, however, the situation changes dramatically. This style of argumentation is very common in Germany, even more common than the use of statutory analogies. The usual way that comparative references are drawn in German judicial decisions is by citing a precedential case preceded by vgl., which is an abbreviation for vergleiche which means ‘compare’. Occasionally the reference will include historical facts from the previous case, usually in parentheses, which might also suggest a historical argument. But usually there is no such suggestion, which indicates that the reference to the cited case is exclusively comparative in nature. The functional equivalent in both California and England is the use of the word ‘see’ before citations to judicial decisions in order to signal that the referenced case can be usefully compared to the case at bench. Although it is difficult to judge, such comparative references to previous case decisions seem to appear with approximately the same frequency in Germany and California, although perhaps slightly less frequently in England.

6. Conclusion

Four approaches to legal reasoning were surveyed in this paper: the textual, historical, functional and analogical. The first three are almost universally described as being deductive in nature, and even the analogical approach becomes deductive when it comes to the application of the induced, overriding principle to the facts of the case before the court. The examples cited above demonstrate conclusively that all four of these approaches are employed in civil law as well as common law jurisdictions, and that they are employed irrespective of whether the legal rule stems from a statutory provision or has its

134 Thomas Lundmark, Charting the Divide between Common and Civil Law (Oxford University Press, 2012).
roots in case law. That is not to say that these four approaches are used with the same frequency in different jurisdictions. Indeed, the authors’ research suggests significant differences between the three jurisdictions considered in this paper.

How, then, does one explain the quotations at the beginning of this paper to the effect that deductive reasoning is in such ‘sharp contrast’ to common law reasoning that law students in the common law world have to take a course in comparative law just to be ‘confronted’ with deductive reasoning? Some comparativists apparently think that, because common law jurisdictions accept judge-made law as a source of law, then the judges in common law jurisdictions must be doing something different than the judges in civil law jurisdictions, where judge-made law is often not considered a source of law.

There is a certain amount of superficial logic to this line of thinking: applying rules is considered to be a process involving deduction, but making the rules is not. Consequently, at least to the extent that common law judges are indeed making law by announcing rules, and not merely applying rules, they must be using some other, non-deductive process, which many authors call induction. These authors apparently apply the label ‘induction’ because common law judges announce their rule in the context of the case presented to them; and it might be said that, in doing so, they first ‘induce’ a rule and then announce it, much in the same way that the legislature might respond to a particular social problem by ‘inducing’ a remedy and enacting remedial legislation.

While there are actually many misunderstandings wrapped up in this line of reasoning, let us address only the most important. As has been exhaustively demonstrated in this paper, merely applying the law is a deductive process. So perhaps these misguided comparativists assume that all common law judges are involved in law-making activity. If this is indeed what they assume, they are badly mistaken. Trial court judges (first instance judges) only apply existing law. They do not make new law.

If there is a statute that provides the rule of decision, then trial court judges apply the statute, which is a deductive process. If the statute has been interpreted by an appellate court (a judicial gloss), the trial court judges, in the process of applying the statute, will apply the holding from the decision of the appellate court in the same manner as they would apply the statute itself: that is, deductively.

If there is no applicable statute, trial court judges will look for an appellate case announcing the rule of decision, and, having found it, they will apply that rule of the appellate case as if it were a statute—yet still deductively. And the same process even holds true for most of the decisions reached by the appellate court judges themselves: in justifying their decisions, they merely apply existing law, whether statute law or case law. That is why almost none of the decisions of the trial courts are published, and why a
large majority of the decisions of appellate courts are not published. The judges are merely applying existing law, whether statute or case-based law. Also, even in the published decisions of the appellate courts, most of the issues have already been decided, as witnessed by the numerous citations to statutory and case law authorities on preliminary and tangential issues. There is no ‘inducing’ going on when they cite these authorities: the authorities are merely accepted at face value, that is, textually (and deductively). Thus almost all judicial decisions involve merely applying existing law deductively, not making it inductively or otherwise.

Perhaps these misguided comparativists are confused by the fact that common law judges sometimes will not content themselves with merely applying the text of the holding; they will actually discuss the case in which the holding is found, including the reasoning of the judges and the facts of the case. Is this, then, inductive reasoning? No, it is not. It is an example of a willingness to go beyond the text of the rule, and to look at its judicial history, including the travaux préparatoires of the rule. Just as they do when considering the legislative history of a statute, after the judges have examined the judicial history, which might involve consulting more than one case decision just as legislative history might involve consulting more than one source, the judges might decide that the holding of the precedential case should or should not be applied to the case before them. This judicial inquiry would be described as part of a deductive process if the applicable rule were a statute, so it must also constitute a deductive process if the applicable rule is a holding.

But what if the court that is applying the holding is the same court as that which announced the original holding? This actually happens quite often, but in the vast majority of such cases, the holdings announced in the earlier cases are not tampered with. These are the cases, mentioned above, that are cited on preliminary and tangential issues for established propositions of law that are taken at face value. However, very occasionally, an appellate court like the Supreme Court of the United Kingdom or the United States Supreme Court will re-examine one of their earlier holdings and modify it. And on rare occasions, they will declare that the holding is no longer good law by overruling the previous case. Is modifying and overruling cases inductive?

Before answering the question, let us remind ourselves that we are now talking about an extremely small number of the cases being decided by judges throughout the common law world on a daily basis. Consequently, even if the answer to the question is ‘yes’, this cannot in any way prove that all common lawyers reason by induction, and not deduction. Yet that is precisely the claim made by many comparativists, including the ones quoted at

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135 The overruling practices of the German Federal Constitutional Court and the United States Supreme Court are very similar. Thomas Lundmark, Charting the Divide between Common and Civil Law (Oxford University Press, 2012) 395, 401–2.
the outset of this paper. But, of course, the answer to the question posed is not a simple ‘yes’. Let us look first at modifications and overrulings of precedents that construe statutes before turning our attention to modifications and overrulings of ‘pure’ common law. Consider the situation in which an appellate court modifies a holding that constitutes a judicial gloss on a statute. The initial gloss would be considered simple statutory interpretation in the civil law world, and would therefore qualify as being deductive in nature. Similarly, if the modified gloss had in fact been the initial gloss, then it too would have been classified initially as deductive in nature. Can it make a difference which judicial gloss came first, and which was second? Does the timing of the judicial gloss dictate how it should be classified? Obviously not. Consequently, the modification of a judicial gloss on a statute cannot be counted as an example of inductive reasoning. The same conclusion must be reached for the overruling of a previous case which constitutes a gloss on a statute. By definition, case decisions that merely redefine or put glosses on statutes are, according to civil law statutory methodology, examples of deductive, not inductive reasoning.

In our search for inductive reasoning, we come now to the last category, that of ‘pure’ judge-made law or Richterrecht, such as product liability law in California and the right to strike in Germany, where there are no statutes that judges can cite in support of their decisions. Must these decisions, and the modifications and overrulings of these decisions, be classified as inductive in nature rather than deductive? The answer is ‘yes’, but this is nothing unique to the common law world. It also holds true for civil law jurisdictions.\footnote{Contra Reiner Schulze and Ulrike Seif, ‘Einführung’ in Reiner Schulze and Ulrike Seif (eds), Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft (Mohr Siebeck, 2003) 8:}

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