THE CASE FOR THE COMMON LAW

Evelyn Keyes

“The hedgehog sees one great thing, while the fox sees many different things.” quoted from the ancient Greek poet Archilachus by Isaiah Berlin as the epigram for The Hedgehog and the Fox, and requoted by Ronald Dworkin as the epigram for Justice for Hedgehogs (2011).

I am a state court appellate judge, and the view of the law from my bench is that of a forest composed of many different trees. Some are hardwoods destined to survive for half a millennium; some are softwoods good only for the short haul; some, evergreen; some, deciduous; some, fruit or nut-bearing; some, good for furniture or ship or house-building. Among the trees are vines and shrubs of many sorts suited to the climate, and in the clearings are grasses and wildflowers. All are necessary to the healthy growth of the forest over time. Together the trees make a home for many creatures and birds, large and small. They make a lair for foxes. Yet the trees that make up this forest of the common law are neither seen nor valued by those federal judges and academic legal philosophers who prefer the orderliness of an orchard planted and tended by skilled gardeners and bounded by orderly hedgerows in which a hedgehog may shelter and see the forest as a perfected whole. Today it is hedgehogs, not foxes, who dominate legal Anglo-American legal philosophy. Very few foxes are anywhere to be seen on the philosophical landscape, and when they are spotted it is in an obscure journal
where their outdated ideas still seem to be worthy of filling a few pages. And yet one may ask, “Is there a place in this brave new world for foxes?”

American and Anglo-American legal philosophy has not been developed by state court common-law judges; they are generally too busy and too little inclined to theory to develop a comprehensive philosophy of law when there is the great task at hand of incrementally applying the law, case by case and controversy by controversy, trying to do justice for the parties before them, or, if you will, making their way carefully among the trees. Instead, the theory of just adjudication—or the role of judges in implementing the laws of a just society—has largely been developed by academics, like H.L.A. Hart and Ronald Dworkin, or by federal judges, like Antonin Scalia, and Richard Posner, with only a rare bow from a Charles Fried, who has served both as a state court supreme court justice and as a professor of law or, earlier, from an Oliver Wendell Holmes.

Most of these philosophers have not had much patience with the common law. Indeed, Ronald Dworkin, virtually universally acknowledged as the greatest contemporary Anglo-American legal philosopher, aptly titled his last work *Justice for Hedgehogs.*[^1] It opens with the provocative statement that, in it, Dworkin

[^1]: RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (Harvard U.P. 2011) [hereinafter DWORKIN, JUSTICE FOR HEDGEHOGS].
defends “a large and old philosophical thesis: the unity of value.” ² Quoting the 
epigram cited above, he says:

The fox knows many things, but the hedgehog knows one big thing. Value is one big thing. The truth about living well and being good and what is wonderful is not only coherent but mutually supporting: what we think about any one of these must stand up, eventually, to any argument we find compelling about the rest. I try to illustrate the unity of at least ethical and moral values: I describe a theory of what living well is like and what, if we want to live well, we must do for, and not do to, other people.³

The idea that ethical and moral values support one another and form a coherent whole, Dworkin tells us is a creed that proposes a way to live.⁴ But more specifically for our purposes, this is the theory that underlies Dworkin’s legal philosophy, which from his seminal work, Taking Rights Seriously, published in 1978,⁵ to his last was guided by a theory of rights, specifically legal rights grounded in moral rights, through which the just society was to be realized.

Dworkin’s underlying political and legal theory is made clear immediately when, on page two of Justice for Hedgehogs, he turns to the concept of justice and declares:

Equality. No government is legitimate unless it subscribes to two reigning principles. First, it must show equal concern for the fate of every person over whom it claims dominion. Second, it must respect fully the

² Id. at 1.
³ Id.
⁴ Id.
⁵ RONALD DWORIN, TAKING RIGHTS SERIOUSLY (Harvard U.P. 1978).
responsibility and right of each person to decide for himself how to make something valuable of his life. These guiding principles place boundaries around acceptable theories of distributive justice—theories that stipulate the resources and opportunities a government should make available to people it governs…. Given any combination of personal qualities of talent, personality, and luck, what a person will have by way of resource and opportunity will depend on the laws in the place where he is governed…. And for Dworkin, the legitimacy of government is secured by judges—especially Supreme Court justices—who decide cases in ways that will effect the principles of justice—or, as Dworkin states, the true principles of democracy. 6 This theme dominates Dworkin’s philosophical works, of which Justice for Hedgehogs is the culmination.

In Dworkin’s view, adherence to precedents in the positive law with all of its limbs, and branches and twigs and leaves, is mere “conventionalism” that cannot provide any justification for the resolution of issues that have not been settled one way or the other by whatever institutions have conventional authority to decide them. 7 Foxes, alas, do not decide cases according to the sweeping general principles of fairness put forth by theories of distributive justice. They decide cases and controversies one by one on their facts and according to precedent; and, when the rule established as precedent is unclear, given the facts, they decide them by—well, let us leave that answer for later. And, of course, there may be

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7 Ronald Dworkin, Law’s Empire 114-17 (Harvard U.P. 1986) [hereinafter Dworkin, Law’s Empire].
something fundamental that underlies all those precedents and provides a haven for foxes.

Justice Antonin Scalia—who is at the other end of the philosophical spectrum from Dworkin as an originalist in construing constitutional texts and a textualist in interpreting statutes—is strikingly similar to Dworkin in his contempt for the common law and common law courts, which he deems to have two functions: “to apply the law to the facts” and “to make the law.” He opens his classic, *A Matter of Interpretation*, with the image of the common-law judge as a broken-field runner who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him for the rear, until (bravo!) he reaches the goal—good law.

Justice Scalia does go on to say:

My point in all of this is not that the common law should be scraped away as a barnacle on the hull of democracy. I am content to leave the common law, and the process of developing the common law, where it is. It has proven to be a good method of developing the law in many fields—and perhaps the very best method. An argument can made that development of the bulk of private law by judges … is a desirable limitation upon popular democracy…. But though I have no quarrel with the common law and its process, I do question whether the *attitude* of the common-law judge—the

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9 Id. at 9.
mind-set that asks, “What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?”—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law…. ‘Even private law, so-called, [has been] turning statutory. The lion’s share of the norms and rules that actually govern[] the country [come] out of Congress and the legislature…. The rules of the countless administrative agencies [are] themselves an important, even crucial, source of law.’ This is particularly true in the federal courts, where, with a qualification so small it does not bear mentioning, there is no such thing as common law. Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution. 10

But this view of the law leaves Justice Scalia no room to look for justice in the law or for justification of the law beyond the words themselves—words whose authoritative source of understanding is the text itself fairly interpreted, no more and no less. And it is unfair to the common law, because it implies that once common law turns statutory it ceases to inform the interpretation of texts and, indeed, ceases to exist. Perhaps it is the other way around. Perhaps when statutory interpretation enters into case law it becomes part of stream of the common law, which has always absorbed statutory construction in the long run. Or so it seems to foxes.

Posner, legal philosopher and former chief judge of the federal Seventh Circuit Court of Appeals, calls himself a pragmatist, and he is no proponent of the common law approach to judging, even though his particular target is adjudicative

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theory grounded in moral philosophy (principally Dworkin’s). “[M]oral philosophy,” he argues, responding to Dworkin, “has nothing to offer judges or legal scholars so far as either adjudication or the formulation of jurisprudence or legal doctrines is concerned”; indeed,” it has very little to offer anyone engaged in a normative enterprise, quite without regard to law.”11 However, “it is particularly clear that legal issues should not be analyzed with the aid of moral philosophy, but should instead be approached pragmatically.”12

For Posner, the proper methods of inquiry for judges and legal philosophers are “those that facilitate pragmatic decision-making—the methods of social science and common sense.”13 The moral theorists are worth flaying, he asserts, not because they are influential with judges—they are not—but because “their influence is pernicious; it is deflecting academic lawyers from the vital role … of generating the knowledge that the judges and other practical professionals require if they are to maximize the social utility of law.”14 Posner calls for the development and application of scientific social theories to law and to the collection of data about how the legal system operates and at what cost and with what consequences. 15 He calls, in sum, for a sociological approach to law.16 But

12 Id.
13 Id.
14 Id. at xi.
15 Id. at xiii.
this does not mean that Posner thinks common-law judges employ those methods. Indeed, he takes pains to distinguish the pragmatist judge from what he calls the “judicial positivist,” or, in most people’s conception, the traditional common-law judge.

The judicial positivist, Posner claims, “would begin and usually end with a consideration of cases, statutes, administrative regulations, and constitutional provisions—the ‘authorities’ to which the judge must defer in accordance with the principle that judges are duty-bound to secure consistency in principle with what other officials have done in the past.” 17 Such judges, he states, do not go against the authorities without compelling reasons, as to do so would violate a duty to the past—the most compelling reason for doing so being that two lines of cases diverge so that one line has adopted a principle inconsistent with the authorities relevant to the present case. 18 In such a case, Posner states, the positivist judge will compare the two lines and by “bringing to bear other principles manifest or latent in case law, statute, or constitutional provision, … find the result in the present case that would promote or cohere with the best interpretation of the legal background as a whole.” 19 The judicial pragmatist, by contrast, would seek to make “the decision that will be best with regard to present and future needs,”

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16 Id. at 241.
17 Id. at 241-42.
18 Id. at 242.
19 Id.
utilizing precedent, statutes, and constitutional text as sources of potentially valuable information about the likely best result of the present case,” but not as sources of the rule of decision for the present case—a position he claims to share with Dworkin.²⁰

So we have a united front across the legal philosophical landscape: common-law judges, and the common law itself, are inadequate to resolve the great moral or social or political—in short, the philosophical—legal questions. Judges must go outside the common law—to moral theory, to rules of construction, to sociology—to solve hard cases. And this is the case even though our lives are shaped to a very great extent by the laws which we make for ourselves through our elected representatives and our judges and to which we are subject—laws it is the duty of judges to interpret and apply in cases and controversies that affect us all. The proper construction of the law as made by the people for their own governance is too important, we are told, to be left to judges simply following other judges, who are theoretically learned in the law and elected or appointed on the basis of their legal credentials, but are not necessarily learned in legal and political theory and its applicability to judging. At least where it counts. At least in important or “hard” cases.

²⁰ Id.
To be truly just, the best minds agree, legal decision-making must be informed by philosophical theory and construed and applied so as to effect philosophically approved ends—the true conditions of democracy, or the original intent of the drafters of the text, or the best sociological goals and practices. There is no conception that perhaps the people have built their own moral principles—call them the principles of the “common morality” or their own conception of justice—into the laws they have made and that they might have a legitimate expectation that the judges they appoint or elect to construe and apply the law should adhere to those principles and not substitute their own conceptions of better laws according to their own personal beliefs. (Justice Scalia, I believe, would exempt himself from this critique, saying that his textualist reading of the law through interpretive conventions is the only scientific method for preserving the people’s intent in making the law, if not their morality.\textsuperscript{21})

But perhaps our leading legal theorists are simply too busy envisioning or shaping the forest to see the trees. Or even to see that it takes the trees to make the forest. Or to ask where the forest came from, or what happens if you trim or thin it severely, or leave only pollarded lindens planted in formal rows between regular and proliferating garden paths, or raze the forest altogether to plant a more

fashionable parterre. To quote a famous politician: ‘What difference does it make at this point’ if we put the common law behind us?

Dworkin, the hedgehog, lies curled under a hedge beyond the boundary of the forest, seeing it as one and dreaming of a perfect forest, one where every tree is made to flourish equally by the latest and best methods of forestry. Scalia and Posner are woodsmen: Scalia hewing down all but the primeval oaks to revive the original Eden; Posner clearing the land for cultivation according to the latest scientific methodology. No one argues that the forest is worth preserving for its own sake—for the foxes and all the other creatures that flourish in its shade, frolic in its clearings, partake of its bounty, and rest at last beneath its boughs. Someone needs to make the case for the common law. This is, therefore, an argument for foxes.

What Is the Common Law?

‘Common law’ or ‘the common law’? Is there just ‘common law’ and more rigorous or disciplined or systematic or theoretical law, or is there something called ‘the common law’ that actually has a referent somewhere below absolute Truth, or God, which takes no article adjective—something on the level of the Sovereign or the Rule of Law? What is the common law?
Scalia tells us confidently that the common law is just ‘case law’—judge-made law—and thus tainted with a whiff of the fairly disreputable, the arbitrary and capricious, the definitely inferior and all too feeble efforts of mere circuit riders who do not learn and objectively report the “original meaning” of statutes and Constitutions as commonly understood at the time the law was decreed by the drafters. For Posner and Dworkin, the common law is a hodgepodge of cases that, along with statutes, administrative regulations, and constitutional provisions, constitute the ‘authorities’ to which the legal positivist judge defers. And for the legal theorists before them, the legal positivists and realists, it is much the same.

Even Justice Oliver Wendell Holmes, the great philosopher of the common law, writing over a century ago, called the common law merely “a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds,” in whose “sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall.” Holmes had great reverence for the common law, and he did not believe that legal decisions could be derived deductively from legal precepts—a notion characteristic of the then reigning formalists or—dare I say it?—common-law theorists. Holmes famously wrote, "The life of the law has not been logic; it

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22 See Posner, Problematics, supra n. 11, at 241-42.
23 Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harvard Law Review 457, 457 (1897) [hereinafter Holmes, The Path of the Law].
has been experience,”24 and, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."25 Thus, he wrote, “courts do and must legislate from the bench” when prior legal decisions fail to provide answers.26 Like his legal positivist successor, H.L.A. Hart, Holmes also insisted upon the distinction between “ought” and “is,” or the distinction between morality and the positive law. 27 And, anticipating Posner, and indeed Scalia, he looked forward to the day when more scientific and systematic approaches to judicial interpretation would be developed, writing, “For the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”28

For H.L.A. Hart, the foremost legal positivist of the mid to late twentieth century, and the teacher against whom Dworkin specifically rebelled, the positive law (again including the common law) consisted largely of rules established through settled cases, but “the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between

26 Id. at 221.
alternatives.” 29 Thus, in his view, as in Holmes’s, judges ultimately become legislators when the settled law—the positive law—runs out.

All of these philosophers, except Holmes, take little account of the common law—where it comes from, what it is actually composed of, how it is continually made and continues to grow, and, most critically, how it functions and why that matters. In short, no contemporary legal philosopher today seems to ask, “What is the common law anyway, and why should I want to preserve it?” This, however, is no unimportant question.

The first great expositor and defender of the common law was Sir Edward Coke, Chief Justice of the Common Pleas, the highest judge of the common law court dedicated to the rights of the people, and subsequently Chief Justice of the King’s Bench, the court that protected the King’s rights, under James I of England. Coke, in his Institutes, traced the common law to Magna Charta as “for the most part declaratory of the principall grounds of the fundamentall laws of England,” the Charta de Foresta, a great charter concerning the laws of the forest, and “the laws and statutes of diverse kings before the conquest.” 30

But the classic authority on the origin of the common law remains Sir Matthew Hale, whose treatise, *The History of the Common Law of England*, was published posthumously in 1713. Hale, Lord Chief Justice of England under Charles II and a jurist for most of his adult life, defined the common law as “the Law by which Proceedings and Determinations in the King’s *Ordinary Courts* of Justice are directed and guided.” And he set out the formal constituents of the common law, namely: (1) “Usage and Custom,” comprising received and accepted portions of ecclesiastical canon law and admiralty law; (2) “Acts of Parliament” lost over time and thus “not now to be found of Record”; and (3) “Judicial Decisions.” These last—judicial decisions—says Hale, do bind, as a Law between the Parties thereto, as to the particular Case in Question, ‘till revers’d by Error or Attaint, yet they do not make a Law properly so called, (For that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho’ such Decisions are less than Law, yet they are a greater Evidence thereof than the Opinion of any private Persons, as such, whatsoever.

Finally, Hale tells us that judicial decisions are of three kinds: (1) those resting solely on “the Laws and Customs of this Kingdom”; (2) those that

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32 *Id*. at 17.
33 *Id.* at 44-45.
34 *Id*. at 45.
35 *Id*. 
interpret the laws and deduce judgments from them; “[a]nd herein the Rule of Decision is, First, the Common Law and Custom of the Realm, which is the great Substratum that is to be maintain’d; and then Authorities or Decisions of former Times in the same or the like Cases, and then the Reason of the Thing itself,” and (3) decisions that “seem to have no other Guide but the common Reason of the Thing, unless the same Point has been formally decided.”

With respect to all three kinds of judicial decisions, Hale assures us, “the Judge does much better herein, than what a bare grave Grammarian or Logician, or other Men could do; for in many Cases there have been former Resolutions, either in Point or agreeing in Reason or analogy with the Case in Question; or perhaps also, the Clause to be expounded is mingled with some Terms or Clauses that require the Knowledge of the Law to help out with the Construction or Exposition,” so that “a good Common Lawyer is the best Expositor of such Clauses.” And on these laws, Hale tells us, there are only two restrictions: “that they be not dependent upon any Foreign Power” and “[t]hat they taste not of Bondage or Servitude.”

It should be noted also that, even at the time Coke and Hale were writing, the English common law was understood to be supplemented by principles of

36 Id.
37 Id.
38 Id. at 46.
39 Id. at 47.
equity—one might say, moral or ethical principles or, more strictly, principles of justice or fairness—and courts of equity—chancery courts—had evolved in the fifteenth and sixteenth centuries to supplement the common law courts. These courts dealt with matters such as trusts, inheritance, and the protection of the insane; and they authorized judges to use their discretion to apply recognized impartial principles of equity, or justice, to resolve disputes fairly, and thus justly, when strictly legal solutions would operate harshly. Courts of chancery have been abolished, even in England, but the maxims of equity upon which they relied have been absorbed into the common law, and even into rules of decisions and into statutes, where they continue to play an integral role in shaping judicial decisions, hence in contributing to the common law.

The common law, then, as it has been carried forward to this day, consists of case law, just as Justice Scalia says it does. But, critically, it consists of all judicial decisions that have not been overturned at a given time, including all decisions interpreting and applying statutes and constitutional provisions from Magna Carta and the Carta de Foresta in England—the acknowledged bases of the unwritten British Constitution—to the present day in the United States, where all judicial decisions of American state and federal courts with precedential value are to be found recorded in official “reporters” that line the walls of law libraries or, electronically reproduced, are available on-line in semi-official and unofficial
sources. And these decisions are informed not merely by the substantive and procedural legal principles built into them but also by the equitable principles that likewise have been absorbed into the common law. This body of law forms a substratum for the determination of the law, as Hale said—a substratum composed of abstracted rules and principles “that is to be maintain’d” by the application of “the Reason of the Thing.” That is, the common law forms a body of law for judges to call upon in particular cases to determine whether a proposed decision rationally and equitably fulfills the purpose of the law under the facts of the case. And, for this process, “Authorities or Decisions of former Times in the same or the like cases” are an indispensable guide to sound decision-making. Moreover, it is only through these recorded judicial decisions, together with codified and annotated constitutional provisions, statutes, orders, and administrative decisions inferior in force to judicial decisions, that the positive law is preserved for future interpretation, application, and enforcement.

Yes, it is possible to draw clean lines between constitutional law, statutory and regulatory law, and the common law, or case law, as Justice Scalia does, and as theory-driven jurists do when they condemn case law as “judge-made law” or as “backward looking factual reports” that cannot resolve the novel and controversial
moral issues presented by legal cases. It is possible to agree with Justice Scalia that statutes mean what they say and statutory interpretation is, by definition, not common law, but statutory law, and constitutional law is not common law, but constitutional law. It then follows that a legal system like that of the United States is not a common law system but a hybrid legal system in which common law, statutory law, and constitutional law are all separate legal tracks with their own modes of interpretation. The problem is that, even on this purist approach, the common law, along with the legal rules and principles derived from it, the principles of equity long absorbed into it, and long-established standards and rules, is interfused throughout the interpretation of statutes and constitutional provisions, as well as contracts and torts, so that ultimately it is futile to insist on such purity. A simpler and more practical definition of the common law is simply “case law.”

Now it is true that some case law will remain relevant only to the interpretation of a single statutory scheme, growing more and more articulated, specialized, settled, and conventional as the statute is successively interpreted by different courts over time. Think of the federal Employee Retirement and Income Security Act of 1974 (ERISA). But this is no argument against defining even ERISA case-law as merely another nook in the forest of the common law, one that

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40 See DWORKIN, LAW’S EMPIRE, supra note 7, at 114–17, 225 (describing traditional jurisprudence as mere “conventionalism” and arguing that it cannot provide any justification for the resolution of issues that “have not been settled one way or the other by whatever institutions have conventional authority to decide them.”
may lead nowhere else but is nonetheless approached by the same paths carved out by past cases and controversies, paths that may branch off in some different direction when a fork is reached. Moreover, insofar as recourse must be had to enduring rules or general principles of law to construe a statute or a constitutional provision—or a contract or a duty in tort—these enduring rules and principles are the very fabric of the common law, and they are preserved, protected, and defended in case law, which consists of nothing but the reported decisions of judges.

So, given this integration of constitutional, statutory, and case law, in which the one constant is judicial decision-making in light of precedent, it ultimately makes no sense to try to draw a clean line between the common law and the strains of statutory and constitutional law that twist together with judicial decisions in case law to make up the substratum of the laws that define the public conception of justice. And so it is this general term—the common law—that has become attached to the system of precedential judicial decision-making that interprets and applies the whole of the positive law in particular cases and controversies and thus defines the parts and the boundaries of the positive law. And it is the common law that constitutes the forest we see when we survey case law as a whole—the forest the hedgehog sees as one big thing (in need of shaping) and the fox sees as a self-sustaining ecosystem, in different parts of which dogwoods, apples, magnolias,
poplars, pines, beeches, oaks, cedars and sequoias all flourish and to whose sustainability all contribute.

Thus, it literally makes no sense for federal judges or legal philosophers to abjure the common law—or the case law in which it is memorialized—as somehow less than “true” law or—critically—as placing no, or too rigid, backward-looking, and readily dispensable, parameters on the interpretation and application of the law. The reports of judicial decisions that comprise the common law—the body of precedents interpreting prior cases, orders, statutes, and constitutional provisions—constitute, along with the texts of extant administrative codes, statutes, rules, and standards of proof and review, an integral part of the positive law and the principles it embodies and carries forward. So it is no mean thing to assert that these precedents may be readily discarded when judges are faced with “hard” cases in complex or novel situations.

Yet surely precedents, together with constitutional and statutory texts, procedural rules, rules of construction, and standards, cannot give us the answer to every substantive judicial question. Sometimes the appropriate construction of a term or a phrase is in doubt, or there is no precedent for the interpretation of a newly enacted law or a genuinely novel and not easily analogized set of circumstances calling for the application of law. Sometimes precedents conflict.
Sometimes they give absurd results or results that offend our sense of justice. Adjustment is required. How are these adjustments made?

Dworkin would direct us to the best thought of contemporary legal and social philosophers in the egalitarian progressive tradition without regard to text or precedent other than as the text embodies great moral principles. Posner would take precedent as a guide but would also look to the judge’s best estimation of the sociological consequences of the decision in the case according to available data. Scalia would direct us backwards, to the original meaning of the language of a constitutional provision or statute when parsed according to rules of construction, which he elevates to uniquely powerful rules of decision. None would recognize the constraints of precedent on judicial decision-making as either authoritative or sufficient to achieve the purpose of the law.

I suggest that a common law judge views his role as something quite different from the role any of these philosophers would have him play. I suggest that he perceives his role as preserving over time and under different empirical circumstances, through interpretation and application, the integrity and purpose of the positive laws the people have made through their legislatures and customs as memorialized in case law and upon which they rely to restrain the powers exercised by private persons against each other and by governments against all; laws to which the people have consented to govern the public relations of society
and to serve as guides for future judicial decision-making; laws which they have
deeded necessary and proper to further their own conception of the common
good—their own safety and happiness—and their conception of fairness or justice.

Traditional common-law judging is not a matter of the judge’s deciding a
case in accordance with his own personal values, or the philosophically best values
as determined by legal philosophers, or sociological theory, or the reconstruction
of original intent as determined by recourse to semantic rules. Traditional judges
are neither social engineers nor servants of a contemporaneously reconstructed
original Eden. They are servants of the law and the people as they find them; and
they are charged with faithfully executing the trust reposed in them so that they
maintain the integrity, functionality, and purpose of the positive law over time
under dynamic empirical circumstances. Therefore, the guiding maxims of the
traditional common law judge are: First, do no harm to the law or the people.
Second, do justice within the constraints of the law to preserve the integrity and
functionality of the law and to further its purpose.

How the process works can be seen if we consider how a common-law judge
actually does decide a “hard” case.
WHAT THE COMMON LAW JUDGE DOES

The essential difference between a traditional jurist and a theory-driven jurist is that, rather than taking an active constructive approach to the law, a traditional judge decides cases on the understanding that the role of a judge is to further the purpose of the laws the people themselves have made through their representatives and ratified by their consent, consistent with a fair and rational interpretation and application of the law as judged by the consequences of its application for the law and the people. So what are the constraints the positive law imposes upon judicial interpretation?

At the most general and abstract level of the positive law in the United States are constitutional principles and fundamental common-law principles (such as those of tort, contract, and property) deemed essential to the concept of ordered liberty. These abstract principles are the great enabling and constraining concepts that shape the contours of the positive law, but their empirical scope is almost entirely undefined other than by constitutional text and precedents in the common law. Subordinate to these are rules of law abstracted over time from the

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42 Chief Justice Marshall recognized this essential feature of the American Constitution in McCulloch, 17 U.S. at 406 (“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.”).
application of the law in innumerable sets of factual circumstances. These define the limits, or extensions, of situations that fall within the scope of principles and rules. These are defined by precedent and are always subject to empirical adjustment by new case law and new legislation.

Standing apart, but integrated into all common-law legal decision-making, are the great and enduring principles of equity, or fairness and impartiality—especially procedural equality under the law and procedural due process of law. These apply to adjust the boundaries of legal concepts to assure that they accord with fundamental principles of fairness to parties and justice for all and further the happiness and safety of all as the people have proposed to further them. And, likewise standing apart from the great general principles and subordinate rules in the positive law are purely conventional procedural rules and standards of evaluation. Rules, both substantive and procedural, and standards of evaluation define the relationship between broad abstract intellectual concepts and their practical application to the facts in different types of cases.

I have suggested that a common law judge looks first to precedent to decide the substantive law of the case under the circumstances presented. When precedents conflict, or when there is no precedent, he looks to rules of construction, analogy, dissociative reasoning, and similar means of extending and contracting the scope of the rule to encompass a wider or narrower set of
materially similar circumstances to which the law applies. He then reasons deductively from the relevant legal principles and rules to a conclusion of law, looking to the foreseeable results of his decision to determine the effect upon the parties and the relevant area of law, hence the substantive justice of his decision.

In all “hard cases,” or cases requiring the exercise of judicial discretion, the judge’s first task is to determine the scope, or extension, of unclear or overlapping legal concepts in light of the totality of the material circumstances of the particular case or controversy and the relevant principles, rules, and standards in the positive law, and then to derive the logical conclusions from that interpretation and to evaluate alternatives rationally to find the best—or most logical and functional and productive—fit between the law as applied and the law going forward. When logically justifiable alternative outcomes of the application of relevant legal principles will predictably produce absurd or harsh outcomes, or when one outcome will better serve the purpose of the law than another, the common-law judge will apply principles and rules of equity to choose the outcome that will predictably best impartially preserve and further the safety and happiness of the people affected by his ruling and the safety and happiness of those who will rely on that decision in the future. And if the results of that decision turn out to be harmful for the people or the law, rather than beneficial in applicable terms, the rule as
instantiated will be repudiated or modified—perhaps immediately by a higher court or perhaps subsequently by future case law or by legislation.

The repeated exercise of such categorically legal reason by judges in particular cases and controversies defines and redefines the boundaries of the liberties the members of a group or society are free to exercise against each other and the constraints of the positive law—the publically recognized law—upon individual liberties and upon the powers of government itself. And it creates a dynamic body of judicial opinions and judgments that function organically together as an ongoing, self-creating and self-adjusting social compact over time. Needless to say, however, any judgment that depends upon the interpretation of legal concepts or the evaluation of outcomes under empirical standards, rules, and principles in different circumstances over time will be to some degree subjective and indeterminate, and thus subject to correction by successor or higher courts, or to modification or overruling by legislatures as its effects are considered either good or bad for the people and the law. Thus, the law remains at once objectively structured and public and yet flexible and capable of growth.

The common law—the case law—so made and continually adjusted constitutes a dynamic body of judicial decisions construing and applying prior laws under accepted rules and standards that together form an organic whole which both defines the ordered liberties of the people and constrains the license of judges to
make the laws they please. The common-law judge does not move beyond these substantive and procedural constraints of the positive law to decide the case in accordance with the dictates of moral theory or social utility as he “best” construes them. Nor does he find a warrant in the law for paring away all past decision-making that does not conform to his own reconstruction of the original intent of the drafters of a statute (while inconsistently relying on such precedents in construing private, non-statutory law). 43

The interpretive and evaluative constraints of the positive law upon adjudication apply even at the level of constitutional construction upon which most jurisprudential theory concentrates. For example, in construing the Equal Protection Clause of the Constitution, no court cognizant of its own responsibility to maintain the functionality, integrity, and purpose of the law—indeed, the fairness of the law—and no judge cognizant of his oath to uphold the laws of the United States or of his responsibility and accountability to the parties and the law in saying what the law is, could simply ignore the language of the clause, precedent constraining its interpretation, the facts of the case before him, the comparative and deductive tools of legal interpretation, evaluation, and prescription—such as those rules of construction condemning intentionally discriminatory, or overbroad, or constitutionally vague statutes, or requiring a

43 See SCALIA, A MATTER OF INTERPRETATION, supra n. 8, at 10.
rational relationship between the language of the statute and a constitutionally legitimate state interest, or requiring that a statute be “narrowly tailored” to further a “compelling” state interest—and the foreseeable results of the decision for the parties, the social fabric, and the law itself.

Rules of law in the common law system are thus not merely “predictions” of what a future court will do; nor are they informational guides to be consulted but not obeyed when they conflict with the judge’s construction of the original meaning of the text, or with sociological considerations, or with the aims of social justice theory. And the opinions and judgments that follow upon the application of the rule of law are not “ruleless,” as some theoreticians have suggested, because they are not theory-driven. Nor is traditional common-law jurisprudence backward-looking and incapable of resolving “hard cases” presented by new circumstances.

Rather, “hard” cases are all those cases that present an empirical nexus in which the scope of two or more legal concepts overlaps or the scope of one or more legal concepts is unclear under the circumstances of the case, and thus the case must be resolved by interpretation and evaluation in accordance with the principles, standards and rules in the positive law, or in which different resolutions are logically sustainable but one is better under principles of equity, or justice, to

44 See, e.g., CASS SUNSTEIN, LEGAL REASONING & POLITICAL CONFLICT 10-11, 13, 21 (1996).
avoid harsh or absurd consequences that violate traditional concepts of procedural fairness and service to the common good as the laws define it. In other words, all cases that present genuine material issues of law or fact are hard cases; and all can be, and should be, resolved by observing the law and adhering to the traditional common law process. It takes the trees to make the forest of the common law, and it takes common law judges to tend the trees.

Yet it is clear that a mere recitation of how common-law decisions are made and how they carry forward the intent of the people in formulating the positive law does not answer the question that has dominated Anglo-American legal theory at least since Holmes: how does the positive law assure justice—an undeniably moral concept? Or, more generally, what is the relationship between law and equity, or law and justice, or, most broadly, law and morality?

**LAW, MORALITY, AND THE SOCIAL COMPACT**

The legal realists and positivists assure us that any link between law and morality is purely fortuitous, at best rudimentary and uninteresting (Hart) or, at worst, the source of much confusion between the law that actually is and the law as we think it should be (Holmes). 45 Dworkin, on the other hand, tells us that “true” law is nothing but abstract morality into which all enumerated legal rights collapse.

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Laws—or at least legal rights—collapse into moral principles and then collapse again into the two great moral concepts of liberty and equality, which collapse even further into the concept of equal liberty, which expresses the ultimate value of justice, the “one big thing” the hedgehog knows. The pragmatist tells us that law is social science that maximizes utility. And the originalist does not address the morality of the law at all.

But is the relationship between law and morality really fortuitous and confusing, or elemental and uninteresting, as Holmes and Hart argue? Is the positive law really nothing more than a system of conventionally enacted rules without moral force so that we must go to moral theory to correct its shortcomings, as Dworkin argues? May we just remain silent about the morality of the law, as Scalia does? Because if morality has no integral relationship to law, why should we give the law our allegiance? Why ought we to obey it? Would we not be merely perpetuating convention in defiance of truth and justice? And how, then, could we say that traditional common law adjudication is fair or yields justice?

I think common-law judging responds to a fundamentally different idea of the relationship between law and morality from that of any of these legal

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46 See, e.g. DWORKIN, FREEDOM’S LAW, supra n. 6, at 73.
47 DWORKIN, JUSTICE FOR HEDGEHOGS, supra n. 1, at 1.
philosophers. I think *common law judging is the tie that binds the social compact to a shared conception of the just society*. Common law judging ensures that a society whose laws are founded on *just principles*, made in a *fair process* by the people to reflect their own conceptions of the laws necessary to *further their own safety and happiness*, and *impartially applied and adjusted* as proper to continue to further those ends, remains a *just society* over time and is not subverted or manipulated to the private ends of political factions or corrupt and self-interested or theory-driven officials.

First, judging is an essentially *normative* process, a term which implies that it proceeds from standards of some sort, whether moral or merely conventional—which makes it particularly shocking when Posner says that morality “has very little to offer anyone engaged in a normative enterprise, quite without regard to law,” and that “it is *particularly* clear that legal issues should not be analyzed with the aid of moral philosophy, but should instead be approached pragmatically.”348 One wonders what he thinks morality is or what role he thinks it plays in setting standards for society at all.

Second, common-law judging, like moral decision-making, takes place within a body of positive laws self-created and self-perpetuated through a dynamic process actualized and implemented through concrete applications. And, just as

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348 Posner, Problematics, supra n. 11, at viii.
moral codes are derived from great moral principles applied in empirical circumstances by moral actors acting in accordance with formal principles of moral, or practical, reason in a variety of situations to effect good ends, so the principles legal reason applies, the standards, rules, and precedents by which it interprets and applies them, the rights, obligations, and penalties a legal judgment instantiates, and the actions it prescribes are all part of the body of the positive law that persists over time, whether in the form of reports of legal opinions, or in texts of statutes, or in state or federal constitutional provisions, or in some inferior form, such as in administrative regulations and decisions or executive orders, or in merely conventional, but efficacious, rules and standards. And when those judgments cause harm in their application, the legal process will be called upon again to correct the fault and to redirect the law toward the good.

In this process of applied legal reason, legal judgments, as Holmes said, do not merely follow by deductive logic from the application of legal principles, standards, and rules under given circumstances—although their deductive relationship to extant principles ensures their rationality, hence their validity. But the guidance offered by past decisions and the judicial process does not run out either, leaving judges only the choices of legislating or following their own best lights. Rather, legal judgment requires that judges interpret value-laden concepts and evaluate alternatives under the facts and given standards of evaluation—as
well as applying *deductive logic* to resolve conflicts *rationally*, therefore *validly*—
to reach *sound* prescriptions for action, or *just* practical legal judgments.

Within the system of the positive law, no legal opinion or judgment stands alone. Each relies upon past opinions and judgments; utilizes recognized principles, rules, and standards in the law; and contributes to the ongoing, organic, self-creating, self-sustaining, and self-correcting—or *autopoietic*—system\(^\text{49}\) of publicly enforced legal principles, standards, and rights—the system of positive laws—in which it takes its place. Far from its being the legitimate province of judges to “say what the law is” unfettered by rules and precedents,\(^\text{50}\) judges are constrained to adhere to this complex process so that the legal judgments they reach will be accepted as both *valid* and *sound*—and therefore as both *rational* and *just*—by the parties and the public. Tested within the legal process and over time, each judgment of each court that has not been overturned by a higher court or later law contributes to the integrity and functionality of the system of publically enforceable laws of which it becomes a part and tends to advance the self-created empirical ideal of the *common good* of the people.

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\(^{49}\) The term “autopoiesis” is derived from the Greek word for “self-creating.” It was coined by biologists Humberto Maturana and Francisco J. Varela to describe living systems, or autonomous and strictly bounded systems that are shaped by their interactions with the environment over time so as to maintain the system and the relations between its parts. See H.R. Maturana and F.J. Varela, *Autopoiesis and Cognition* 78-79 (1980).

\(^{50}\) See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (stating, “It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.”).
The system of the positive law thus created is not accepted by the people merely because it is conventional or authoritative or coherent and functional. Rather, in a constitutional representative democracy, founded like our own to ensure the safety and happiness of its members and constitutionally grounded in moral principles of liberty, equality, and justice for all, there is an integral relationship between the personal and social moral codes of the members of the society and the laws they make. The commonly accepted moral code that is reflected in the Constitution incorporates the principles of equality under the law and procedural due process of law, and it respects the right of the people to make those laws they themselves deem most conducive to their own safety and happiness, to retain for themselves those individual liberties, or rights, they have not mutually agreed to subject to societal constraint, and to adjust the empirical application of the law. \(^5\) It is the recognition and enforcement of the self-imposed societal constraints upon individual and governmental liberty embodies in the positive law that constricts the liberty of judges of integrity to say what the law is, ensures the viability of the law, and ultimately ensures the acceptance of the law by the people subject to it.

It is hard to conceive of a more idealistically moral conception of the purpose of the social compact, the justification for rebellion from an existing social

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\(^5\) See Marbury, 5 U.S. (1 Cranch) at 176.
order, and the founding of a new state on principles that express the self-creating empirical ideal of a sovereign people than that set out in America’s founding documents. The United States was intentionally founded on principles of justice as expressed in its Declaration of Independence and Constitution and on the original right of a free and equal people to establish for themselves a government of those laws they themselves deem most conducive to their own safety and happiness. The Declaration of Independence justified separation of the republic from the British crown on the ground that “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness, [t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,” and “[t]hat whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

The preamble to the Constitution expressly states that the Constitution was promulgated and approved by delegates of the people “in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty

\[52\] **THE DECL. OF INDEPENDENCE** para. 2 (U.S. 1776).
to ourselves and our posterity.”53 And, in *Marbury v. Madison*, Chief Justice Marshall reaffirmed the “original right” of a people to establish a government subject to those principles they themselves deem most conducive to their own collective happiness, stating, “That the people have an original right to establish for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.”54

The Constitution, as adopted, interpreted over time, and continually ratified by successive generations, has remained the central structural document of the positive law, hence of the social compact compounded of the positive procedural and substantive laws. It not only creates the institutions of government and allocates delegated and enumerated powers among them, it assures the people’s ultimate responsibility for ensuring that the government is kept morally and politically just through their votes. In addition to the original moral and political right of self-government, the Constitution sets out what the Founders deemed to be fundamental structural principles of ordered liberty, and it confers upon the federal government those powers deemed necessary and proper to best further the safety and happiness of the people as a whole. Finally, through the Bill of Rights, it ensures fundamental substantive individual rights of the American people against

53 U.S. CONST. pmbl.
54 *Marbury*, 5 U.S. (1 Cranch) 137, 176 (1803).
public infringement.\textsuperscript{55} Thus, the process for guaranteeing just government
dedicated to the common good as the people themselves perceive it to be is
expressly built into the Constitution, which, in turn, underpins and justifies all
valid subordinate laws.

The Constitution grants all legislative powers to the legislative branch,
empowering Congress to \textit{enact general laws}\textsuperscript{56} to carry out its mandate. It vests the
President and the executive branch with power to \textit{execute the laws}.\textsuperscript{57} It grants the
courts jurisdiction to \textit{decide particular cases and controversies}\textsuperscript{58}, and it implies the
principle of \textit{judicial review} of the laws.\textsuperscript{59} But it does not provide—either
expressly or implicitly—that judges may exercise their own wills to legislate
according to their personal conception of the good and the valuable, or their

\textsuperscript{55} Procedurally, the Fifth and Fourteenth Amendments incorporate the two great principles of \textit{liberty} and \textit{equality}
intrinsic to the process of practical reason as constitutional constraints on all governmental decision-making,
whether by the legislature, or by judges, or by the executive branch, ensuring fundamental procedural \textit{fairness} in the
making, interpretation, and enforcement of the law. But the duty of judges to maintain these two great principles of
procedural fairness in all judicial decision-making does not remove from the people the right to readjust the
empirical objectives of a just society over time under changing circumstances and the moral means of achieving
them within the constitutional constraints they have imposed upon themselves. Rather, Article Five of the
Constitution ensures the people’s right to amend the Constitution. U.S. Const. Art. V. The “Necessary and Proper
Clause” grants Congress the power to promulgate laws to implement the delegated powers in the Constitution. U.S.
Const. Art. I, Sec. 8. The Fourteenth Amendment expressly reserves to Congress the “power to enforce, by
appropriate legislation, the provisions of this article.” U.S. Const. amend. XIV, Art. 5. The Ninth and Tenth
Amendments secure against intrusion by the State the substantive personal liberties traditionally held by the people
but not enumerated in the Constitution. \textit{See} U.S. Const. amend. IX (providing, “The enumeration in the
Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); U.S.
Const. amend. X (providing, “The powers not delegated to the United States by the Constitution, nor prohibited by it
to the States, are reserved to the States respectively, or to the people.”). And the Tenth Amendment assures to state
legislatures the “police power” that protects public health, safety, welfare, and morals.

\textsuperscript{56} U.S. CONST. ART. I, Sec. 1.

\textsuperscript{57} U.S. CONST. ART. II, Sec. 1.

\textsuperscript{58} U.S. CONST. ART.III, sec. 2.

\textsuperscript{59} \textit{See} Marbury, 5 U.S. at 176-77; \textit{The Federalist} No. 83 465-67 (Alexander Hamilton) (Clinton Rossiter ed.,
1961) (stating that “the courts were designed to be an intermediate body between the people and the legislature in
order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the
laws is the proper and peculiar province of the courts.”).
estimation of general social utility, or their personal conception of how an objective observer would have construed a constitutional or statutory provision at the time of drafting. Rather, the Constitution structures a government of ordered liberties composed of intrinsically fair structural and enabling principles and concomitant constraints upon the power of the State and each of its offices. The Constitution establishes the parameters of the Rule of Law. And it empowers judges to construe and apply that rule fairly and impartially to do justice and to maintain the integrity of the whole in pursuit of the common good as the people themselves have defined it. It empowers judges to preserve, protect, and defend the Rule of Law.

The role of a judge in a democratic constitutional republic is thus not that of a policy-maker, social engineer, or archeologist of original intent, but that of interpreter and implementer of constitutional, legislative, and common law principles and rules within the context of particular cases over time and in such a way as to maintain the integrity, functionality, and purpose—hence, the built-in morality—of the law. A common law judge fulfills that role by reasoning from the facts of the particular case and the applicable law, in accordance with the intrinsically moral principles incorporated into the law; and he thereby reaches judgments that instantiate the individual rights and obligations of the parties before him fairly and justly and in a way that is consistent with, and becomes part of, the
positive law and is available to guide future cases in materially similar circumstances, subject to adjustment to better further the common good. Thus, together with its counterparts, a rational and fair legislative process, and impartial administration of the law, traditional common law adjudication assures not only the legal but the moral integrity and purpose of the law over time.

At its core, the positive law that embraces the common law—the body of case law interpreting constitutional provisions, statutes, and prior cases according to “strict rules and precedents” and to the principles of justice built into the law—\(^{60}\) is a system of mutually agreed and publically enforceable moral directives promulgated by a sovereign people to further their own common good, to which end they mutually consent to subordinate their own private wills and personal liberties within the constraints of delegated powers and enumerated rights. And it is by adhering to the heteronomous rules and principles in the positive law within the procedural and substantive constraints incorporated into the law and the methodology by which it is applied that judges fulfill their constitutional function of adjusting and protecting the boundaries of the laws made by the people, rather than substituting their own private and personal judgments for those sanctioned by the people. Indeed, the integrity and functionality of the system depends upon the shared expectation that law-makers and judges will play by the rules of the game—

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\(^{60}\) The Federalist No. 83 (Alexander Hamilton), supra note 58, at 471.
that they will follow the rules and precedents produced by the system itself and will not change the rules to fit their own personal conceptions of the “best” construction of the requirements of morality or to achieve the “best” social consequences or the “best” semantic interpretation of the text of the law.

THE JUSTIFICATION FOR COMMON-LAW JUDGING

The purpose of the interpretation and application of the common law by traditional common-law judges is ultimately not merely to preserve the integrity and functionality of a legal system, regardless of how that system was conceived and the ends it serves. The purpose of common law judging is to preserve the integrity and functionality of a system that is fair to all and directed to the common good as understood by the people themselves and expressed in their self-made laws. Think of those nobles gathered at Runnymede near Windsor Castle in 1215 to force King John to sign the Magna Charta recognizing their inherent rights as Englishmen. Think of the drafters of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution guaranteeing newly freed slaves rights equal to those of all other citizens against the states. And say then that the morality of the drafters is not built into the Constitution and the laws and that the moral understanding of the people who have consented to the laws as amended and construed over time precisely because they find them just may simply be
disregarded by those who interpret and apply the law in pursuit of their own private and more enlightened conceptions of justice.

Traditional common-law judging serves at least eight functions vital to the flourishing of a civil society of free and equal members:

(1) it leads to the development of a consensus regarding the fundamental structural principles of a flourishing civil society designed to secure the safety and happiness of all, which can be then formally embodied in a written constitution and subordinate statutes;

(2) it formalizes and keeps alive a dynamic set of common principles of adjudication and substantive law as a social compact;

(3) it publishes the law by which future interpretations are to be guided so that it is available to be recognized and followed by all and transgressions punished by all in accordance with principles of adjudication recognized by all; thus, it serves as a means for checking individual impulses detrimental to the health of the community of all;

(4) it constrains the formidable powers of government within their constitutionally prescribed framework;

(5) it maintains the reliability and predictability of the rule of law;
(6) it maintains both the stability and the flexibility of the law over time;

(7) by fairly and impartially interpreting and applying the laws enacted by duly elected representatives of a sovereign people in consonance with legislative intent, with the body of ongoing law, and with the foreseeable material consequences of each decision, and by providing for the revision of the law when it ceases to further the people’s conception of good law, it assures the legitimacy of the law and earns the consent of the people to the law; and, thereby,

(8) it guarantees the Rule of Law.

Finally, for those who actually are moral philosophers, I offer this thought. The making of a judicial decision by a common law judge is structurally parallel to the making of a second-order, or societal, officially sanctioned moral decision in essentially Kantian terms, as adapted in empirical circumstances.\(^6^1\) The judge treats both those who have made the laws and those who are subject to the laws as ends in themselves—as autonomous moral beings whose conception of those laws most conducive to their own happiness and that of the community in which they

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\(^6^1\) For Kant’s formulations of the categorical imperative referenced in this passage and a strong scholarly analysis, see IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (1789), Mary Gregor, Jens Timmermann (trsls.), Christine Korsgaard (Intro.) (Cambridge U.P. 2012), Preface (3-8), Section I (9-20). I have explored the thought set out here more fully in my article, “The Just Society and the Liberal State: Classical and Contemporary Liberalism and the Problem of Consent,” 9:1 Georgetown J. of Law and Public Policy (Winter 2011).
live are worthy of respect.\textsuperscript{62} He asks himself, in light of his knowledge of the law and the consequences of his decision for the law itself and for those affected by it, whether he could will the principle he applies to be a \textit{universal law} to be applied to all impartially under materially similar circumstances.\textsuperscript{63} And he not only treats the makers of the law as legislators in a universal realm of ends, but he also acts, himself, as such \textit{a legislator in a universal realm of ends} by willing a body of the law, supplemented by his own decision, as a set of universal prescriptions fit to govern a realm of ends.\textsuperscript{64} These prescriptions, being designed to further empirical ends are all heteronymous. But as the ends furthered are the moral ends of those subject to the law, the consequences of such judicial decision-making redound upon and further the purposes of a kingdom of ends and are themselves judged accordingly. And, just as a moral agent makes himself worthy of respect as such by acting morally, so a judge makes his judgments worthy of respect by making them justly, inspiring confidence in those affected by the judgment that the law itself is just.

If a judicial decision is not impartial, if it does not respect the equality of all persons under the law and the equal right of all to procedural due process, and if its presence in the law does not further the common good of those who are subject to

\textsuperscript{62} \textit{Id.} at 40, 41.

\textsuperscript{63} \textit{Id.} at 17, 34.

\textsuperscript{64} \textit{Id.} at 43.
the law as they mutually define it, the decision is not moral but *unjust*, and the law as amended by the decision is, to the extent of the modification, unjust and subject to revocation or amendment. The ultimate justification of common law judging is thus *moral* justification. And common-law judging is radically unlike judicial “strategies” that substitute the judge’s own private and personal will—his own conception of a just society, or maximum social utility, or the “best” meanings of original texts—for the *impartial moral will* to make those judgments that best further the conception of a just society of those who made the laws and are subject to them.

So perhaps the forest of the common law is not merely an untamed thicket, wild, impenetrable, and filled with marauders unpredictable and ready to pounce upon hedgehogs, or with noisome woodland creatures that nibble away at the roots of the hedgerows, enemies to the orderly shaping of society to admirable ends. It may be that the forest of the common law, guarded and respected by common-law judges who move unnoticed among the trees, is ecologically sound. It may be that it provides a haven for foxes and hedgehogs alike who seek a balanced environment where all can flourish. But today the trees are threatened by woodsmen who would hew them down, failing to recognize their value, and rangers who would consult regulations to determine the best scientific method of controlling the forest, and dreamers who would bring down the forest to raise up a
parkland subject to the perfected will of sovereign virtue as the dreamer perceives it. Speaking as a common law judge, I say we should train our eyes to look into the forest to see its beauty and to recognize its own intrinsic value. We must take responsibility for its protection. Or we may lose what it provides that is quintessential to the maintenance of a self-governing society of free and equal people: the overarching canopy of the Rule of Law. So I say, “Save the forest!” And let us rally behind a new slogan: “Justice for foxes!”

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