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Evolution and the Common Law: An Introduction

The law must be stable, but it cannot stand still.[1]
ROSCOE POUND

By its nature, of course, genius defies easy understanding or simple elucidation. This is particularly so with the common law; its reputed genius is much vaunted but little explained. However, the common law's peculiar forte is seen to lie in its capacity to allow for change and innovation in an overall process that emphasizes the importance of continuity and stability. Indeed, the legal community insists that a large part of adjudicative activity involves reliance on the legal past, whether by way of substantive results or argumentative consistency, to resolve present problems and to influence future results. This way of proceeding is adopted and defended, at least in part, as a means to keep judges in check and to preserve the legitimacy of an unelected bureaucracy in a system of governance that claims to set great store on the importance and priority of democratic processes and values. Nevertheless, although operating within an official culture of institutional conservatism, all judges and jurists not only acknowledge that the law does indeed respond and change to new circumstances and fresh challenges, but they also celebrate and champion the law's capacity to do so. If not for its rather continental flavor, the motto of the common law might be a slight twist on the old adage that *plus c'est la même chose, plus ça change*. This, of course, leads to an obvious dilemma that continues to haunt and energize jurisprudential inquiry: How do we explain change in an institution whose controlling motif is still that judges largely apply law rather than create it? Or, in a way that better captures the deeper tensions of the

[1] Roscoe Pound, *Interpretations of Legal History* 1 (1967).

common law, how do we balance the restraining push of tradition and the liberating pull of transformation?

It is my objective in this book to offer a convincing response to this central and persisting conundrum. However, in so doing, I maintain that my first task is to dispense with almost all the past and present efforts to provide a theory of common law adjudication and development. Contrary to received jurisprudential wisdom, there is no grand theory that will satisfactorily explain the dynamic interactions of change and stability in common law's history. Indeed, it is this continuing commitment to the belief that there is some grand theory that will both explain the workings of the common law and, by that achievement, also command our political allegiance that discredits the traditional jurisprudential project. Accordingly, in order to provide a satisfactory response to the perplexing conundrum of balancing continuity and variation, I find it necessary to reframe the underlying issues and rephrase the questions to be answered. Once this is done, I find it possible to offer a more convincing and fruitful account of the common law's workings. In order to achieve this, my critical focus is less about how to explain change in an institution that claims to ground itself on its stability. Instead, I concentrate more on how it might be possible to account for stability in a process that is marked by its dynamism and organic quality. Once it is grasped that transformative change is at the heart of the common law process, it will be for jurists to determine whether the common law can or should be used to advance particular political initiatives or interventions. In facilitating such an appreciation, jurisprudence might regain something of its practical usefulness and subversive potential.

The Common Law Tradition

Nineteenth-century positivists' savage assessment of the common law is as good a place as any to start. As unabashed enthusiasts for legislation and codification, they were no friends of the common law. Bentham and Austin's extended and uncompromising analysis led them to the firm conclusion that "as a system of rules, the common law is a thing merely imaginary" and that it is a "childish fiction employed by our judges that . . . common law is not made by them, but is a miraculous something made by nobody, existing . . . from eternity, and merely declared from time to time by the judges."[2] They were

[2] J. Bentham, *A Comment on the Commentaries* 125 (J. Everett ed. 1925) and J. Austin, *Lectures on Jurisprudence II*, 634 (5th ed. 1885). It should be clear that I use the term *common law* to denote those whole systems of law that derive from medieval English practice

particularly concerned with the fact that the rules of law were nowhere available in any accessible or agreed-on manner. For them, any effort to enumerate such rules or to pin down their content was doomed to failure. Moreover, any attempt to apply those putative rules in an objective manner to different fact-situations was a hopeless undertaking. Nevertheless, Bentham and Austin's critique shares more with the objects of their wrath than it pretends. At bottom, they lament the law's failure to live up to the quixotic standards that are claimed for it. In this way, they naively believed that law could be clear, but that its common law format was unable to attain this desirable ideal: It was necessary to effect wholesale statutory codification.[3] Accordingly, they were disappointed romantics, not the hard-headed realists that they often pretended to be and that they are still occasionally portrayed to be. Indeed, although a perverse few might want to take exception to their charge, almost every modern jurist would be prepared to concede the general force of Bentham's and Austin's point about the common law's elusiveness. However, their strategy is one of confession and avoidance – they acknowledge that the common law cannot be adequately represented as "a system of rules" whose precise structure and practical application is uncontroversial, but they insist that the common law does exist and can be operated in a sufficiently objective manner. Moreover, they take Bentham's point not as a criticism, but as a compliment: The common law is not a static body of norms but is a flexible and evolving entity; its nuanced and organic quality is the common law's strength, not its weakness.

Within the jurisprudential community, it has become almost trite to acknowledge that law is neither only about rules (i.e., it also comprises principles, policies, and values) nor, even if it is about rules, a system (i.e., it is far from being complete, organized, and certain). Indeed, while debate is intense and hostile over the nature of the common law as a source of institutional norms, most jurists do not think about the common law as only an entity, systematic or otherwise. There is considerable agreement that the common law tradition is as much a process as anything else. Some observers go so far as to insist that common law "is something we do, not something we

and can be contrasted to European civil law jurisdictions. In this way, it encompasses those rules and principles that are statutory, equitable, or constitutional in origin and operation.

[3] See J. Bentham, Supplement to Papers Relative to Codification and Public Instruction, 29 *Edinburgh Rev.* 105–08 (1817) and M. Romilly, Review of Bentham's Papers Relative to Codification, 29 *Edinburgh Rev.* 217 at 223 (1817) ("the judges, though called only expounders of law, are in reality legislators"). Indeed, some reformers expected codification to make the law clear to laymen as well as to lawyers. Bentham touted codification as a means of making "every man his own lawyer." Bentham, id. at 115.

have as a consequence of something we do."[4] Although this assessment will be too strong for many commentators, it does capture the crucial idea that common law adjudication is a dynamic and engaged activity in which how judges deal with rules is considered as vital to the political legitimacy of the legal performance as the resulting content of the rules and actual decisions made. Consequently, the common law is largely characterized by the craft-skills that judges bring to their task. This is not to reduce common lawyering or judging to a purely technical proficiency, because the best craftspeople are those that bring vision and imagination as well as technique and rigor to the fulfillment of their discipline. Accordingly, when it is viewed in this way, the activity of being a common lawyer involves not only the deft utilization of particular analytic tools but also an accompanying perspective or frame of mind that offers the intellectual component of the practical activity and that pervades all that lawyers do.[5]

Understood as much as an intellectual mind-set to lawmaking as a technical practice, the common law approach tends to transform a natural tendency to utilize past performance as a guide to future conduct into an institutional imperative. It is in this sense that the common law is a tradition. However, if law was only thought of as a repository of rules, principles, and methods that can be accessed by its practiced adepts, law would be no different than many other traditional practices. What distinguishes the common law is that it is not only a tradition but also a traditional practice that embraces the idea of traditionality – the common law accepts that its past has a present authority and significance for its participants in resolving present disputes and negotiating future meaning. By way of the doctrine of *stare decisis et non quieta movere* (let the decision stand and do not disturb settled things), the common law method insists that past decisions are not only to be considered by future decision makers but also to be followed as being binding. Judges accept the responsibility to curb their own normative instincts and to respect the limits of extant decisions: "The principle of stare decisis does not apply only to good decisions: if it did, it would have neither value nor meaning."[6] This means that lawyers and judges assume an

[4] P. Bobbitt, *Constitutional Interpretation* 24 (1991). For other accounts of the common law as an exaltation of method over substance, see V. Curran, Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union, 7 *Colum. J. Eur. L.* 63 (2001) and A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* 25 (1997).

[5] See D. Sugarman, Legal Theory, the Common Law Mind and The Making of the Textbook Tradition, in *Legal Theory and Common Law* 26–61 (1986).

[6] *Jones v. DPP*, [1962] AC 635 at 711 per Lord Devlin. See also J. Newman, Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values, 72 *Cal. L. Rev.* 200 at 204 (1984) ("The ordinary business of judges is to apply the law as they understand it

institutional obligation to justify their present actions and arguments by reference to those results and arguments that are recorded in the official documents and materials of the law. In this way, judging is a very traditional practice that gives central importance to the normative force of traditionality; "the past of law . . . is an authoritative significant part of its presence."[7]

This commitment to the so-called traditionality of the common law tradition is often premised on the unstated notion that there is something normatively compelling or worthy about what has come before; the past is not followed simply because it precedes but because it is superior to present understandings. Having withstood the test of time, tradition binds not simply because it has not been replaced or altered; it binds because it has its own normative force. For common lawyers, therefore, the legal past is not simply a store of information and materials but an obligatory source of value and guidance. In this strong version of traditionality, past decisions possess a moral prestige and accumulated wisdom that are entitled to be given normative preference over present understandings and uninhibited ratiocination; the past is what makes society into what it is today, and the decision to respect it is what gives meaning to the lives of future generations. Thus, the common law is traditional in the conservative Burkean sense that "we are bound, within whatever limits, to honour the past for its own sake, to respect it just because it is the past we happen to have."[8] When this quality is added to the fact that judges have independent institutional justifications for steering clear of open-ended and creative decision making, the claims of tradition and traditionality are very strong in defining the appropriate approach and limits to common law adjudication. By viewing themselves as custodians rather than creators of tradition, judges can fulfill their controversial roles with seriousness and safety. However, while this strong defense of the common law's strictly backward-looking nature receives considerable

to reach results with which they do not necessarily agree") and generally R. L. Brown, Tradition and Insight, 103 *Yale L. J.* 177 (1993).

7 M. Krygier, Law As Tradition, 5 *Law & Phil.* 237 at 245 (1986). See also *The Invention of Tradition* (E. Hobsbawm and T. Ranger eds. 1983) and R. Williams, *Keywords* 320 (1981). For a good example of the difference between tradition and traditionality, see *Rutan v. Republican Party of Illinois*, 497 US 62 (1990). Whereas Scalia J looks to the actual practices alone, Stevens J seeks to incorporate a critical normative element to those practices.

8 A. Kronman, Precedent and Tradition, 99 *Yale L. J.* 1029 at 1037 (1990). Burke talks about "the great primeval contract of eternal society" in which "the partnership . . . between those who are living and those who are dead, and those who are to be born." E. Burke, *Reflections on the Revolution in France* 85 (J. Pocock ed. 1987) and, also, F. Hayek, *Law, Legislation and Liberty: The Political Order of Free People* 153–76 (1979). For more jurisprudential work in this vein, see also C. Fried, The Artificial Reason of the Law; or What Lawyers Know, 60 *Texas L. Rev.* 35 (1981); A. Watson, *The Evolution of Law* (1985); and C. Fried, Constitutional Doctrine, 107 *Harv. L. Rev.* 1140 (1994).

lip service in the law reports and academic literature, it cannot claim to provide a viable descriptive account of the common law. Indeed, it offers an entirely implausible explanation of the common law's actual development – the law does change and often in ways that mark a sharp discontinuity with the past.

What is most important is that, although it is framed in the language of tradition, such a strong traditionalist view misunderstands the whole idea and purpose of traditionality. When treated as a tradition of traditionality, the common law must be distinguished from both history and custom. Whereas tradition has a normative and prescriptive dimension, history and custom tend to be only descriptive (or, more accurately, aspire to be as detached and impartial as is possible under the contentious circumstances under which all history has to be written). Because tradition has a critical and judgmental character, it is less than the sum total of accumulated decisions and more than the extant practices of the legal system. As well as being an attitude to those precedents and how to utilize them in the present process of decision making, the common law tradition comprises a whole repertoire of techniques for the selection, maintenance, transmission, and change of its substantive holdings: It involves an evaluative assessment of what does and does not work and what should and should not persist. As Lord Diplock put it, "the common law subsumes a power in judges to adapt its rules to the changing needs of contemporary society – to discard those which have outlived their usefulness, to develop new rules to meet new situations."[9] However, lawyers need not apologize to historians for their poor historical method; they are not trying to be historians, but lawyers. Whereas the historian is interested in trying to understanding the past on its own terms, the lawyer is interested in utilizing the past for present purposes. Accordingly, the common law is a tradition that treats its own traditions seriously. By demanding a normative commitment to select and transmit aspects of past practice, the common law decides among and between the different (and often competing) substantive traditions to which the mass of decisions have given rise.

When understood in this way, the common law is more realistically grasped as a tradition-respecting process rather than a past-revering obsession; it is critical tradition that is not averse to change for its own sake, but only change that ignores the past as a matter of course. Moreover, such a posture allows

[9] *Cassell & Co. Ltd. v. Bloom*, [1972] AC 1027 at 1127 per Diplock LJ. See also *De Lasala v. De Lasala*, [1980] AC 546 at 557. For a jurisprudential rendition of this, see F. Schauer, Precedent, 39 *Stan L. Rev.* 571 (1987) and generally E. Shils, *Tradition* (1981).

for a more honest and suggestive response to the most pressing challenge that confronts the courts. In a rapidly changing world, the judges must be able to operate the system of precedent so that the need for stability is balanced off against the demand for change: They must not allow formal certainty to eclipse substantive justice. The success of such an undertaking cannot be judged in technical terms alone; it calls upon the substantive discourses of ideals and ideology. In an important sense, the common law is to be found in the unfolding struggle between the openings of decisional freedom and the closings of precedential constraint. Consequently, in order to ensure that the common law does not grind to a halt and begin to slide into irrelevance and injustice under the weight of its own backward-looking mind-set, the courts have developed a whole series of techniques that allow them to avoid or loosen the binding force of precedent. In a manner of speaking, institutional necessity has been the parent of judicial invention. There are several important and acknowledged devices that courts use to circumvent inconvenient or undesirable precedents – the court that rendered the earlier decision was not a superior court; the precedent was given *per incuriam*; the precedent has been subsequently overruled or doubted in other cases; the precedent was based on a faulty interpretation of earlier cases; the scope of the precedent is unclear; the precedent can be distinguished; social conditions have changed; and the precedent has been criticized by academic commentators (although this may be just wishful thinking by academics).[10]

Nevertheless, the availability of such tradition-cutting techniques threatens to undermine the whole legitimacy of the common law tradition. So powerful are these tools that they are capable of destroying the very tradition that they are designed to protect and enhance. If used without any respect for the legal tradition within which they are supposed to function, they will jeopardize the continued existence of the common law as a tradition of traditionality. Not only will cases and precedents be merely informational rather than influential, but judges will be left to do whatever they think is best in cases before them. Accordingly, the courts and commentators have cultivated an attitude and approach to their usage that is decidedly traditional in orientation and operation. While acknowledging the occurrence

[10] See, for example, R. Cross and J. W. Harris, *Precedent in English Law* (4th ed. 1991); J. Stone, *Legal System and Lawyer's Reasoning* (1964); R. W. M. Dias, *Jurisprudence* (5th ed. 1985); M. D. A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed. 2001); W. Huhn, *The Five Types of Legal Argument* (2002); S. J. Burton, *An Introduction to Law and Legal Reasoning* (1995); R. Case, *Understanding Judicial Reasoning* (1997); M. Golding, *Legal Reasoning* (1984); A. Halpin, *Reasoning with Law* (2001); and L. H. Carter and T. F. Burke, *Reason in Law* (6th ed. 2002).

and need for change in the substantive law, the pervasive spirit of the common law is that such change will be occasional and exceptional. The law reports and secondary literature are full of admonitions and sentiments to the effect that "the system is based on precedent, and centres on individual decisions and building up principles by a gradual accretion from case to case."[11] Indeed, in the great bulk of situations and for the greatest part of the time, judges do claim to follow past decisions with little or no reflection on the common law's deeper rationale(s) or its broader structure of fundamental rules; common law decision making is very much about the apparent routine application of rules and precedents and the belief that this will result in substantive justice in the individual case.

While this is credible as far as it goes, the problem is that it does not go anywhere near far enough; any claims to credibility are fatally undermined. Most deferences to tradition are more properly characterized as veiled approvals of the substantive content of a tradition because it chimes with the present political commitments of the judge. It is entirely unclear what it means to respect the past for its own sake. There is no compelling reason why a decision to follow the past is any less political than a decision to ignore the past. Both strategies depend on a much thicker theory about the worth of the past as a substantively attractive vision of present and future arrangements for social living than the traditionalists offer. Moreover, the past is not the monolithic entity that defenders of a tradition-based approach to common law adjudication insist or pretend it is. It is not realistic to imagine accepting or rejecting the past holus-bolus. Like the social past on which it draws, the law's traditions are rich, multiple, and competing; they are notoriously difficult to pin down with any specificity or precision. Like anything and everything else, traditions do not speak for themselves but must be spoken for. It is hard to see how they control or require certain decisions when they themselves must first be interpreted. As has been constantly reiterated, "regard to what history teaches are the traditions from which [the United States] developed as well as the traditions from which it broke."[12] This is true not only for the American constitutional tradition but also for any society or jurisdiction that has an advanced legal system. The only real choice for tradition-committed judges is not whether to follow the past but to determine which aspects of that past they intend to emphasize or treat as

[11] J. Beatson, Has the Common Law a Future?, 56 *Camb. L. J.* 291 at 295 (1997). See also Lord Goff, The Search For Principle, 50 *Proc. Brit. Acad.* 169 (1983).

[12] *Poe v. Ullman*, 367 US 497 at 542 per Harlan J (1961). For a punishing application of this insight, see J. Balkin, Tradition, Betrayal, and the Politics of Deconstruction, 11 *Cardozo L. Rev.* 1612 (1990).

dominant in their interpretations. In other words, there is no way that judges can simply follow the past in a mechanical or legal way without taking some critical and political stance about the particular past they intend to follow, its present meaning, and its implications for future activity. Therefore, the stark resort to tradition is an avowedly political stance rather than a hedge against politics. Of course, contemporary jurists have sought to resist this result with all the theoretical might and means at their disposal.

An Evolutionary Method

It is not so much that contemporary accounts of common law adjudication have abandoned their commitment to the doctrine of precedent, but more that they have relaxed and reworked the nature of law's backward-looking stance. Jurists have recognized that the traditional virtues of precedential authority (i.e., it produces certainty, allows reliance, curbs arbitrariness, effects equality, and encourages efficiency) are not to be underestimated. They understand that any explanation of what common law judges do or should do in a democratic system of governance must involve a strong attachment to such formal qualities. Nevertheless, it is largely recognized that, while the legal past must and should play a central role in the law's present and future development, resort to the legal past need not be restricted to particular decisions made or a mechanical application of them. Incorporating but not restricting itself to such decisions, the modern perception of common law development emphasizes that the most appropriate use of the legal past is less about a formal and technical enforcement of precedential authorities and more a dynamic and expansive meditation on their underlying rationales and structure. It is accepted that the past matters, but there is considerable disagreement over why and how it matters. Taking as their slogan Holmes' statement that "it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV,"[13] modern jurists look as much to the substantive values that animate and integrate the law as to the formal attributes of stare decisis.

Accordingly, common law adjudication is viewed as an exercise in principled justification in which the body of previous legal decisions is treated as an authoritative resource of available arguments, analogies, and axioms. Judges are considered to judge best when they distill the principled spirit of

[13] O. W. Holmes, Jr., *The Common Law* 5 (1881). For discussions about the cherished virtues of precedential constraint, see R. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* 56–83 (1961); P. Atiyah and R. Summers, *Form and Substance in Anglo-American Law* 116–20 (1987); and F. Schauer, supra, note 9 at 595–602.

the past and rely on it to develop the law in response to future demands. As Lord Scarman put it, "whatever the court decides to do, it starts from a baseline of existing principle and seeks a solution consistent with or analogous to a principle or principles already recognized."[14] From a more theoretical standpoint, the prevailing idea is that it is the task of legal theory and also the responsibility of adjudication to understand the accumulation of legal decisions as fragments of an intelligible, if latent or implicit, plan of social life and to extend law in accordance with the plan so that it becomes less fragmentary and more intelligible. In a dangerously close to bootstrapping argument, the claim is that, although there are recalcitrant areas, the common law is best understood as being the practical expression of connected and abstract principles: The task of the judge is to elucidate those deeper ideals and to extend that structure so as to better render the common law more practical and coherent. Although there are many advantages to this more sophisticated way of proceeding over an old-style practice of stare decisis, the pressing challenge remains the same: How is it possible to balance stability and continuity against flexibility and change such that it results in a state of affairs that is neither only a case of stunted development nor a case of 'anything goes'?

The traditional set of answers to this balancing conundrum is that, by and large,the law evolves according to its own methodology. Indeed, the evolutionary methodology of the common law is defended and celebrated by almost all traditional jurists and lawyers. Eschewing notions of revolution or stasis, most judges and jurists insist that law evolves incrementally rather than leaps convulsively or stagnates idly. Glossing over its apparent messy, episodic, and haphazard workings, they would choose to treat and defend the common law as a polished, integrated, and teleological process that gives rise to a resourceful, flexible, and just product. Although there is much disagreement among traditional scholars about the precise dynamics and thrusts of this process, there remains the unifying commitment to demonstrating that not only can the common law balance the competing demands of stability and change, but that it can do so in a legitimate way that respects the important distinction between law and politics. In doing this, jurists strive to move beyond a discredited formalism to a more sophisticated account of adjudication as a creative and disciplined practice without turning it into an open-ended ideological exercise. Accordingly, although the

[14] *McLoughlin v. O'Brian*, [1983] AC 410 at 430 per Lord Scarman. In Holmes' famous phrase, the common law develops "from molar to molecular motions." *Southern Pacific Co. v. Jensen*, 244 US 205 at 221 (1917).