BOOK REVIEW

LEGAL THEORY AND THE COMMON LAW


Reviewed by George Rutherglen*

This book stands in the tradition of Benjamin Cardozo, Karl Llewellyn, and Lon Fuller1 as an attempt to explain and defend the processes of the common law and to unify the disparate reasons that judges actually use in justifying their decisions. By treating decisions under the common law as a distinctive mode of judicial reasoning—indeed independent of statutory interpretation and constitutional adjudication—it raises questions about what this tradition still has to offer us. Professor Eisenberg takes issue with the modern versions of legal positivism proposed by H.L.A. Hart and Joseph Raz2 and the theory of legal rights proposed by Ronald Dworkin.3 His own theory of the common law stands uneasily between these more general theories, with the foreseeable consequence that adherents of each will agree with him only in his criticism of the other. The principal value of his book, however, lies not in setting forth yet another theory of law, but in suggesting the difficulties encountered by any abstract theory that seeks to explain or to justify the common law. In particular, Eisenberg offers a candid analysis of the tension between protecting the existing rights of the parties before the court and pursuing the more general aims of developing the common law. Partisans of any legal theory would do well to pay close attention to his careful description of the intricate processes by which lines of judicial decisions develop.

Professor Eisenberg takes the entire common law as his subject, but he quickly narrows his focus to torts and contracts, with occasional examples

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from property law. Even so, he does not emphasize the extent to which the common law has been displaced by statute.\textsuperscript{4} The Uniform Commercial Code, for instance, has codified much of contract law, the law of negotiable instruments, and security interests, although, of course, it adopted many of its rules from the common law and it has spawned an imposing body of judicial interpretations.\textsuperscript{5} Tort law, too, has been influenced, if not displaced, by statutes on a wide range of subjects from no-fault automobile insurance to medical malpractice.\textsuperscript{6} Few areas of the common law have completely resisted the encroachment of statutes, or so Eisenberg seems to concede by his choice of examples, mostly classics such as MacPherson v. Buick Motor Co.,\textsuperscript{7} Vincent v. Lake Erie Transportation Co.,\textsuperscript{8} and Section 90 of the Restatement (First) of Contracts.\textsuperscript{9} Even such a prominent statement on the technique of overruling as Moragne v. States Marine Lines, Inc.\textsuperscript{10} is deeply embedded in statutory law in both its context and its consequences. The issue in that case was the effect of state wrongful-death statutes upon recoveries for deaths within state territorial waters, and its principal doctrinal implications have concerned the interaction between claims for wrongful death under general maritime law and several federal statutes, such as the Death on the High Seas Act,\textsuperscript{11} the Jones Act,\textsuperscript{12} and the Longshore and Harbor Workers' Compensation Act.\textsuperscript{13} The area of law that has remained freest of statutory influences, of course, has been constitutional law. Occasionally, Eisenberg acknowledges the relevance of arguments from constitutional law to the exercise of judicial power under the common law. He disputes, for instance, John Hart Ely's claim that judges are incapable of analyzing conventional morality or, at least, less competent than legislators in doing so.\textsuperscript{14} Ely's argument has frequently been advanced against judicial review based upon "the evolving standards of decency that mark the progress of a maturing society," as the Supreme

\textsuperscript{4} The seminal discussion of this issue is in G. Calabresi, A Common Law for the Age of Statutes 1-15 (1982).
\textsuperscript{8} 109 Minn. 456, 124 N.W. 221 (1910); M. Eisenberg, supra note 7, at 99-100.
\textsuperscript{9} Restatement (First) of Contracts § 90 (1932); M. Eisenberg, supra note 7, at 135-36.
\textsuperscript{10} 398 U.S. 375 (1970); M. Eisenberg, supra note 7, at 112.
\textsuperscript{14} M. Eisenberg, supra note 7, at 19-21.
Court has formulated this standard under the eighth amendment. But Eisenberg fails to address the more general relationship between the exercise of judicial power in constitutional cases and in common law cases. A court that finds little difficulty in declaring statutes unconstitutional is not likely to be troubled by the prospect of overruling its own precedents. The recent history of the California Supreme Court provides an apt illustration of how activism in one field supports activism in the other. Still, these fields have more than judicial attitudes in common. Substantive doctrines also develop in parallel in both constitutional and common law. For example, the tort of invasion of privacy preceded, by some decades, the development of constitutional protection for privacy under the fourth amendment, while the common law field of libel has been virtually taken over by constitutional decisions under the first amendment. Summary remedies for breach of contract illustrate a still more complex development because they are creatures of both statutory and common law but were restricted by a series of decisions under the due process clause.

The growth of both statutory and constitutional law suggests, first, that the scope of pure common law has rapidly diminished, and second, that decisions within a single field of law, based on different sources in statutory, constitutional, or common law, may exhibit greater similarity than decisions in different fields based on a single source of law. Constitutional and common law decisions on defamation have more in common than either has with decisions based on the same sources in property or family law. It would be a mistake, however, to infer from the shrinking scope of pure common law that the significance of judicial decisions has also diminished. On the contrary, the significance of judge-made law has increased as its scope has expanded beyond the traditional common law subjects. These developments make Eisenberg's book less a general survey of typical techniques of judicial decisionmaking than the study of a special, almost idealized, case of wholly judge-made law. Such a study nevertheless remains valuable because it presents questions of judicial method in their purest form.

Eisenberg argues that even in their purest form, however, common law methods fail to resolve entirely the tension between deciding a particular case and laying down a general rule of law. In the era of Critical Legal Studies, this is not a startling conclusion, but it is surprising to hear it from a

16 See P. Stolz, Judging Judges: The Investigation of Rose Bird and the California Supreme Court 76-84 (1981).
17 See Prosser & Keeton, supra note 6, at 849-67 (discussing the four forms of invasion of privacy).
18 See id. at 804-12.
19 J. Friedenthal, M. Kane & A. Miller, Civil Procedure 172-75 (1985).
critic who is plainly sympathetic to the common law. Eisenberg follows the Legal Realists at least to the extent of rejecting legal formalism. He locates the source of the common law not in doctrinal propositions, which purport to state legal rules, but in social propositions, which include propositions of conventional morality, policy, experience, and indeed everything but doctrinal propositions.\textsuperscript{20} The distinction between doctrinal and social propositions is not entirely clear, especially when doctrinal propositions are expanded to include statements of general legal principles,\textsuperscript{21} which often overlap with equally general principles of morality. Even so, Eisenberg asserts that the principal constraints upon common law judges are imposed by the ideals of social congruence, systemic consistency, and doctrinal stability, all of which depend primarily upon social propositions.\textsuperscript{22} Social congruence requires legal rules to "correspond to the body of legal rules that one would arrive at by giving appropriate weight to all applicable social propositions and making the best choices where such propositions collide."\textsuperscript{23} Systemic consistency requires legal rules, such as a general rule and its exceptions, to be reconciled according to applicable social propositions.\textsuperscript{24} These ideals are qualified by the requirement of doctrinal stability, but this, too, depends upon social propositions about evenhandedness and reliance.\textsuperscript{25} From these three ideals, more concrete techniques, principally those of reasoning from, distinguishing, and overruling precedent, are derived.

Eisenberg introduces this analysis with the claim that "all common law cases are decided under a unified methodology, and under this methodology social propositions always figure in determining the rules the courts establish and the way in which those rules are extended, restricted, and applied."\textsuperscript{26} The method that he proposes might be unified, but if so, it hardly yields determinate results. Although he claims that the institutional principles of adjudication generate a single body of rules that constitute the common law at any one time,\textsuperscript{27} he also frankly acknowledges the prominent role of inconsistent decisions in the development of the common law. Eisenberg believes that jagged development occurs when an announced rule fails to satisfy the requirements of social congruence and systemic consistency.\textsuperscript{28} More concrete techniques, such as signaling that a precedent has been weakened, pro-

\textsuperscript{20} M. Eisenberg, supra note 7, at 1-3.
\textsuperscript{21} Id. at 77.
\textsuperscript{22} Eisenberg also recognizes a limited role for formal constraints. Id. at 61-63.
\textsuperscript{23} Id. at 44.
\textsuperscript{24} Id. at 44-45.
\textsuperscript{25} Id. at 47-49.
\textsuperscript{26} Id. at 2-3.
\textsuperscript{27} Id. at 46, 154.
\textsuperscript{28} Id. at 70-74.
spective overruling, and drawing inconsistent distinctions, all contribute to the development of better law by sacrificing consistent treatment of the parties immediately before the court. It is difficult to imagine how these techniques could be applied, even in principle, to generate only a single body of ideal common law rules. Although Eisenberg is right to insist that judges do not look backward for the authoritative statement of common law rules, he does not give us any reason to believe that when they look forward to how the common law should develop, they would inevitably settle upon a single set of rules.

In relying so heavily upon social propositions, Eisenberg makes judges appear to be little different from legislators, except that judges work, to paraphrase Justice Holmes, in the interstices of the law. Thus judges are free to consider policy, in the sense of the general welfare, and experience, in the broad sense of how the world works. In considering morality, they do not consult their own critical moral judgment but rather look to the conventional morality that prevails in their society, much as legislators consult the views of their constituents. The requirement of social congruence—the need for legal doctrine to conform to social propositions—appears to constrain legislators as much as judges. Judges may be more constrained by the requirements of systemic consistency and doctrinal stability, but conscientious legislators cannot afford to ignore these constraints either. To the extent that these requirements impose greater constraints upon judges, they appear to amount to the requirement, to paraphrase Holmes again, that judges legislate in molecular instead of molar fashion. If judges just engage in legislation on a small scale in making decisions under the common law, a unified method for judging is highly unlikely, even within the narrow scope of the common law today, because there is no unified method for legislating.

For this reason, it is easier for a model of adjudication such as interstitial legislation to accommodate the inconsistent course of common law developments that Eisenberg discovers in his analysis of several classic decisions. Even the legal theorists most insistent upon consistency in judicial decisions recognize that political theory imposes much weaker constraints upon legislation. In his analysis of MacPherson v. Buick Motor Co., Eisenberg argues that Judge Cardozo’s opinion only superficially reconciles earlier decisions on the same subject and creates some risk of inconsistency in later deci-

29 Id. at 121-24, 127-32, 136-40.
30 Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).
31 M. Eisenberg, supra note 7, at 26.
32 Id. at 37.
33 Id. at 21-26.
34 Southern Pac. Co., 244 U.S. at 221.
The earlier decisions imposed liability upon the manufacturer of something that had caused injury to someone other than the immediate purchaser only when the manufactured object was "dangerous." Cardozo does not abandon this doctrine, but instead redefines "dangerous" as "reasonably certain to place life and limb in peril when negligently made." The only problem with this definition is that it fails to account for the results in fully half of the earlier cases, in which liability was not imposed upon the manufacturer. Moreover, Cardozo's retention of the doctrine that a third party can sue only if the object is "dangerous" causes some of the lower courts in New York to refuse to impose liability based on the earlier cases now thought to have been overruled by MacPherson. Although this decision is rightly regarded as a masterpiece of common law reasoning, it cannot be regarded as the source of an immediately consistent series of decisions; instead of overruling past inconsistent decisions, Cardozo chose to preserve superficial doctrinal stability, with the attendant risk of inconsistent decisions in the future. Whether or not we regard such a judicial tour de force as a good thing, and Eisenberg has his doubts, it represents an accepted judicial technique that sacrifices consistency in the short term in order to secure the better development of the law over the long term.

Where does the acknowledgment of inconsistency leave Eisenberg's theory of the common law? Perhaps as exactly the sort of theory that we most need: a more or less systematic collection of recommendations, fleshed out with concrete examples, about how judges should decide common law cases. These recommendations do not have the pretensions that surround the grander statements of most legal theories today, but probably for that reason they are more likely to be useful and enlightening. As Paul Samuelson has remarked about similar disputes over methodology in economics, "Gresham's Law holds in the form, 'Hot air drives out cold.' " Eisenberg has given us a refreshing recognition of the actual role that inconsistency plays in the development of the common law, a greater role than most theorists are willing to admit. If inconsistency plays such a large role in the common law, it is likely to play an equally important role in interpretations of statutes or the Constitution—legal texts that introduce other sources of inconsistency into the judicial process.

By insisting upon an accurate description of the processes of the common law, Eisenberg has set a standard that other theories of adjudication must meet. Careful description of what judges actually do is no less important—

36 M. Eisenberg, supra note 7, at 132-35.
38 See M. Eisenberg, supra note 7, at 134-35.
and more fundamental—than the grand generalizations about what they should do that pass so frequently for legal theory. It is this close attention to the diverse and often contradictory sources and methods of the common law that Eisenberg shares with his eminent predecessors. Like them, he takes legal reasoning as it is found in reported decisions, not as it might be revised to conform to legal theory. In doing so, he has renewed a great American tradition in jurisprudence.