

BOOK REVIEW

The Truth and Consequences of the Common Law as Social Propositions

The Nature of the Common Law; by Melvin A. Eisenberg.* Cambridge, Massachusetts: Harvard University Press, 1988. Pp. 197, with notes. \$22.50 cloth.

*Reviewed by Kevin R. Johnson***

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Oliver Wendell Holmes¹

INTRODUCTION

Holmes' famous words are but a single, albeit deep, insight in the long-standing debate about the relationship between law and the external world. If one assumes that law is not an iconoclastic body of doctrine wholly independent from the workings of society, the struggle then is to articulate a standard or principle that convincingly distinguishes judicial decisionmaking from political fiat. That task is all the more daunting when analyzing the common law. The language of stat-

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¹ O.W. HOLMES, THE COMMON LAW 1 (1881).

utes passed by legislatures and constitutions adopted by acclamation arguably prevent judges from imposing their political will. However, courts adjudicating cases under the common law method do not appear to face similar constraints.

To simplify the complexities of the common law, jurisprudential theories by necessity attempt to demarcate boundaries limiting the arbitrary power of judges. The positivist school of thought views the common law as a rational system of positive rules influenced by social life but separate and apart from morality, natural justice, or politics.² In *The Nature of the Common Law*,³ Professor Melvin Eisenberg offers a valuable elaboration on positivist thought. Through lucid examples often from the law of contract and corporations (areas in which Professor Eisenberg's prominence is well known), the book ambitiously endeavors to articulate "a theory of common law adjudication."⁴ Societal views of morality, policy, and experience — which Professor Eisenberg refers to collectively as "social propositions" — constitute the foundation for that theory. Most importantly, social propositions serve as the constraints on judicial power. Judges make decisions by reference to social propositions. At any one time, the law strives to reflect the prevailing social propositions. Changes in social propositions fuel changes in the law. Through this dynamic process, the law follows a positivistic path toward rationality.

The Nature of the Common Law elucidates the process by which courts look to social propositions in common lawmaking. By so doing, it serves as a positivist rebuttal to the Legal Realists' challenge that law is simply a function of social forces⁵ and to the Critical Legal Scholars' more far-reaching cry that law is a fancy word for politics.⁶ While Professor Eisenberg provides a rich and rewarding description of the common law, he downplays its blemishes.

First, Professor Eisenberg fails to address the inherent problems of

² See, e.g., H. HART, *THE CONCEPT OF LAW* (1961).

³ M. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988).

⁴ *Id.* at vii.

⁵ See, e.g., K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960); Llewellyn, *Some Realism about Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). However, Professor Eisenberg spends little time directly responding to Realist theory. Indeed, he seems to underestimate the general influence of the Legal Realists on jurisprudence, which some believe to be quite great. See W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 382 (1973) (expressing view that "Realism is dead; we are all realists now.").

⁶ See, e.g., R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); *THE POLITICS OF LAW* (D. Kairys ed. 1982).

judges assuming the role of social barometers. Isolated from the very social milieu that their judgments are supposed to mirror, judges cannot be expected to divine accurately the most popular social propositions. Therefore, one would expect judges to err in determining society's view on particular propositions, especially propositions raised by difficult cases. Moreover, the entire analysis assumes that social propositions substantially limit the discretion of the common law judge. Even in Professor Eisenberg's idealized vision of the legal world, judges making common law enjoy great latitude in selecting, applying, and reconciling inconsistent and often competing social propositions. Indeed, in the common case in which more than one (and perhaps many) social propositions compete for primacy, social propositions at best limit the court to a series of options, rather than to a single predetermined result.

Second, even assuming that judges have the capability of correctly selecting the dispositive social proposition, judicial adherence to society's most popular views in deciding cases and making law raises a major concern. Social propositions that find majority support in public opinion tend to be those of the dominant. The views of the dominant, however, may not necessarily reflect the hopes and aspirations of many in American society, including political and racial minorities and women. Indeed, as some of the book's illustrations show, the history of American law is replete with examples in which courts following the dominant social propositions have created, maintained, and reinforced an inequitable social structure. By describing judicial reliance on the most popular social propositions, *The Nature of the Common Law* describes without criticizing the very process by which the courts have subjected the less powerful to the will of the dominant.

To allay our fears, Professor Eisenberg would shift responsibility for "highly charged and divisive" issues that implicate power relationships in society, such as race relations, from the common law to the realm of statutes and constitutions.⁷ Similarly, unless sanctioned by the majority, individual rights apparently have no place in the common law. Even if possible to define objectively a narrow category of "highly charged and divisive" issues inappropriate for common law adjudication, the attempt to create this safety valve is unavailing. That tack assumes, contrary to the basic thrust of the book, that courts interpreting statutes or constitutions make decisions without considering social propositions. Unless one accepts this questionable assumption, the attempt to elude a troublesome category of cases fails.

⁷ M. EISENBERG, *supra* note 3, at 26.

I

The strength of *The Nature of the Common Law* is its lucid description of common law adjudication. Few would disagree that, in deciding cases, judges make law and establish rules that will govern future cases. Although the legitimacy of judges making law may be subject to debate, Professor Eisenberg focuses on the elements that factor into the law-making process:

To determine the content of the common law, courts . . . begin with a set of institutional principles and work forward to generate legal rules. *These institutional principles instruct the courts that in determining the law they should take account not only of doctrinal propositions promulgated by officials of the relevant jurisdiction, but also of the criticism and understanding of those propositions expressed in the professional discourse, doctrinal propositions established in the professional literature, and applicable social propositions.* The rules generated by the interplay among those propositions under the institutional principles of adjudication are what courts conceive to be law, and properly so.⁸

Although doctrine and professional discourse figure into the process, social propositions are the centerpiece of *The Nature of the Common Law*'s theory of common law adjudication. To help explain the symbiotic relationship between law and social propositions, Professor Eisenberg distinguishes between *doctrinal* propositions — “propositions that purport to state legal rules,”⁹ — and *social* propositions — “all propositions concerning the world other than doctrinal propositions, such as propositions of morality, policy, and experience.”¹⁰ The central thesis of the book is that “[s]ocial propositions *always* figure in determining” doctrinal propositions.¹¹ Rather than being wholly separate and independent as some have opined, legal doctrine and social propositions are inextricably intertwined.

By incorporating social propositions into the law, judges fulfill a social function. To illustrate, Professor Eisenberg contrasts two diametrically opposed views of common law adjudication. Under the “by-product” model of adjudication, judges decide only those issues raised squarely by the dispute between the parties. In other words, “courts establish legal rules only as an incidental by-product of resolving disputes.”¹² In the “enrichment” model, judges not only resolve disputes between parties but also “enrich” the legal system by establishing more

⁸ *Id.* at 156 (emphasis added).

⁹ *Id.* at 1.

¹⁰ *Id.* at 1-2.

¹¹ *Id.* at 2-3 (emphasis added).

¹² *Id.* at 6.

general rules applicable to society at large.¹³ *The Nature of the Common Law* convinces us that the enrichment model is truer to the real world and explains how it is more desirable than the by-product model.¹⁴ Most importantly, rules created by common law adjudication help satisfy the "enormous demand for legal rules that private actors can live, plan, and settle by."¹⁵ Thus, common law adjudication regulates social conduct through the creation of legal rules.

To this point, Professor Eisenberg's description seems uncontroversial. The problems arise when the book attempts to identify *which* social propositions the courts may consider. Common law judges cannot freely adopt their personal views of the *best* social propositions.¹⁶ Instead, judges must look to objective social propositions,¹⁷ which "have a requisite degree of social support."¹⁸ For example, in order to consider morality, "the courts should employ social morality," which has "substantial support in the community."¹⁹

¹³ *Id.*

¹⁴ *Id.* at 6-7.

¹⁵ *Id.* at 4-5.

¹⁶ *Id.* at 3. At this point in his analysis, Professor Eisenberg appears to part company with the views of Professor Ronald Dworkin. See R. DWORKIN, *LAW'S EMPIRE* (1986). Dworkin's ideal judge, who views "law as integrity," see *id.* at 114-50, 226-312, strives for "the *best* constructive interpretation of the community's legal practice." *Id.* at 225 (emphasis added). The "best constructive interpretation" requires reliance on society's immanent values as reflected in its institutions and traditions. See *id.* at 225-28, 410-13. However, in a society with many different strands of seemingly contradictory values, the court must construct as much as discover society's morality. In that process, the morality of the interpreter necessarily comes into play. See *id.* at 243, 254-58, 410-13; see also Fallon, *Of Speakable Ethics and Constitutional Law: A Review Essay*, 56 U. CHI. L. REV. 1523, 1539 (1989). Thus, unlike Eisenberg's judge, Dworkin's judge is not constrained by society's judgment at any fixed moment in time, but must determine those enduring societal values and through his own moral lens determine the best decision. Moreover, it is unclear whether in Professor Eisenberg's view the judge's personal morality should figure at all in the decisionmaking process.

¹⁷ M. EISENBERG, *supra* note 3, at 8-10.

¹⁸ *Id.* at 35; see *id.* at 17, 21. Professor Eisenberg's reliance on generally accepted social propositions suggests an interesting insight about the selection of judges, an issue that he hints at but does not discuss. See *id.* at 167-68. Under his theory, a judge's personal views about the world apparently should not deviate too greatly from those generally held by society. If they do, that person should not be permitted to serve as a judge. Professor Tribe has advanced a similar approach to the evaluation of nominees seeking confirmation as justices on the United States Supreme Court. See L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985).

¹⁹ M. Eisenberg, *supra* note 3, at 15. Professor Eisenberg, however, fails to distinguish carefully between enduring social propositions and those that represent a temporary flux in public opinion. See, e.g., Wellington, *Common Law Rules and Constitu-*

The Nature of the Common Law lauds the benefits of the common law's adherence to the general standards of society. Lawyers can "replicate" the court's reasoning process and predict how courts will decide cases. "Replication" allows various actors to structure their conduct to ensure compliance with the law.²⁰ If the court errs in selecting the appropriate social proposition, judges, law professors, and attorneys will criticize the decision. In future cases, the court will be obligated to correct any error.²¹

One might question the ability of anyone, including attorneys or law professors, to replicate a court's reasoning or, at bare minimum, to predict with certainty the outcome in a case. To be fair, Professor Eisenberg does not equate replicability with complete predictability.²² Nonetheless, he suggests that, because attorneys can replicate judicial reasoning, they frequently are able to predict accurately how a court will decide a particular case. Indeed, that suggestion is central to his theory of replication. If a court's decision cannot be predicted with some degree of accuracy, then attorneys certainly cannot be expected to counsel clients on the legality of certain conduct. The problem is that the ability to predict the ruling, much less the reasoning, of a trial court, an appellate court, or the United States Supreme Court often is easier said than done.²³

tional Double Standards: Some Notes on Adjudication, 83 YALE L.J. 221, 248 (1973) (arguing that judges must "disengag[e]" themselves "from contemporary prejudices which are easily confused with moral principles"); Wright, *The Role of the Supreme Court in a Democratic Society — Judicial Activism or Restraint?* 54 CORNELL L. REV. 1, 12 (1968) (stating that "maintaining . . . 'enduring general values' of the community is a task for which the Court's structure makes it peculiarly well suited"). His theory suggests that courts should embrace enduring social propositions, not popular sentiment on a given day. However, a judge attempting to separate enduring social propositions from the rest would face a difficult task filled with discretion. *See infra* notes 30-39 and accompanying text.

²⁰ *See* M. EISENBERG, *supra* note 3, at 10-12.

²¹ *See id.* at 18, 41-42, 46-47.

²² *See id.* at 12.

²³ *See* Llewellyn, *supra* note 5, at 1241 (stating "there is less possibility of accurate prediction of what courts will do than the traditional rules would lead us to suppose"). *See generally id.* (analyzing process of deciding appeals). As Justice Douglas observed long ago:

Even for the experts law is only a prediction of what judges will do under a given set facts — a prediction that makes rules of law and decisions not logical deductions but functions of human behavior. There are usually plenty of precedents to go around; and with the accumulation of decisions, it is not a great problem for the lawyer to find legal authority for most propositions.

Professor Eisenberg's insight proves most keen in his observation and explanation of the fact that legal doctrine tends to reflect both *social congruence* (congruence between law and social propositions popular in society) and *systemic consistency* (different doctrines of law tend to reflect the same social propositions).²⁴ The continued viability of a common law doctrine depends on whether it continues to reflect the majority's social propositions and the propositions reflected in other legal doctrines.²⁵ Few would disagree that, during any given time frame, law ordinarily moves toward some sort of equilibrium with society's dominant values and that legal doctrines progress toward at least the appearance of logical consistency. The examples are all too numerous.²⁶

Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) (footnote omitted).

²⁴ M. EISENBERG, *supra* note 3, at 44-45.

²⁵ *Id.* at 152-53.

²⁶ One example from the law of civil procedure is irresistible. In deciding *Pennoyer v. Neff*, 95 U.S. 714 (1877), the popular view about the sovereign powers of the state undoubtedly influenced the Supreme Court in defining the power of state courts to exercise *in personam* and *quasi in rem* jurisdiction. *See id.* at 722. On the one hand, a state court could not exercise *in personam* jurisdiction over a defendant who was not personally served with a complaint in that state. *Id.* at 733-34. On the other hand, a state court could exercise *quasi in rem* jurisdiction over an owner's property located within that state, even if the property owner was not present in the state. *Id.* at 733. The principle underlying both jurisdictional doctrines was that the state undisputedly had sovereign power over persons or property found within its borders. *Id.* at 722-23.

In the seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Supreme Court discarded the strict notions of state sovereignty, focusing more on concerns of fairness to the parties, and overruled *Pennoyer* with respect to *in personam* jurisdiction. *Id.* at 316. The Court held that due process permitted a state court to exercise jurisdiction over a person if that person had "minimum contacts" with the state, even if that person was not served in that state, so long as the exercise of jurisdiction was consistent with "traditional notions of fair play and substantial justice." *Id.* One explanation for the Court's decision in *International Shoe* is that changing social propositions about federalism and individual rights in a modern national economy required a corresponding change in personal jurisdiction doctrine. *See generally* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE §§ 3.2-15 (1985) (discussing development of doctrines of territorial jurisdiction). The Court did not make a corresponding change in the *quasi in rem* aspect of *Pennoyer*, however, because that issue was not before the Court. In its next major decision involving *quasi in rem* jurisdiction, the Court overruled that aspect of *Pennoyer*. It held that due process required that a person whose rights would be affected in the proceeding must have "minimum contacts" with the state before a state court could exercise jurisdiction over that person's property, even if that property was located in the state, and that the exercise of jurisdiction must be fair. *See Shaffer v. Heitner*, 433 U.S. 186, 211-12 (1977).

In *International Shoe* and *Shaffer*, the Supreme Court changed the legal doctrine to reflect the change in social propositions from an emphasis on state sovereignty to one of fairness. Professor Eisenberg described this phenomenon as *social congruence*. In *Shaf-*

Of course, the desire for "doctrinal stability," particularly the doctrine of *stare decisis*, tempers the rate of legal change.²⁷

II

The Nature of the Common Law's theory of common law adjudication requires judges to determine which social propositions are popular in society at large. Professor Eisenberg neither defends the legitimacy nor discusses the difficulties of that role. Assuming that a single social proposition governs the outcome of every case, the role of the courts (traditionally viewed as the least democratic branch of American government)²⁸ in deciding the majority's social propositions is troublesome. Because judges are distanced both economically and socially from society at large, they are ill-suited for the role of evaluating society's views on morality, policy, and experience. Even pollsters and sociologists often find that their conclusions about popular opinion are prone to error.²⁹ Therefore, one should not be surprised if judges are incorrect in the determination of social propositions. A painful example drives that point home.

In *Furman v. Georgia*,³⁰ the Supreme Court ruled that the imposition of the death penalty, as authorized by Georgia and Texas statutes, was unconstitutional.³¹ However, the Court declined to hold that the death penalty constituted cruel and unusual punishment in all cases.³² In separate concurring opinions, Justices Brennan and Marshall argued that, because the death penalty was out of sync with contempo-

fer, the Court made consistent the due process requirements for the exercise of *in personam* and *quasi in rem* jurisdiction and ensured that both doctrines reflected the proposition favoring fairness. Professor Eisenberg described this occurrence as *systemic consistency*.

²⁷ M. EISENBERG, *supra* note 3, at 47-49.

²⁸ See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986). But see Chemerinsky, *The Supreme Court, 1988 Term — Foreward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 77 (1989) (arguing that "the usual characterization of executives and legislatures, but not the courts, as majoritarian exaggerates the differences between the institutions and distorts analysis").

²⁹ Cf. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1265 (1987). "Judges and other constitutional interpreters are not, for the most part, prophets or even moral philosophers. For them to conceive their role in that way could subtly transform the judicial function into one that lawyers and judges are not trained to fill and are unlikely to fulfill successfully." *Id.*

³⁰ 408 U.S. 238 (1972) (per curiam).

³¹ *Id.* at 240.

³² *Id.*

rary community values, it was unconstitutional *per se*.³³ They seem to have seriously misjudged popular sentiment. During the next four years, the legislatures in thirty-five states resurrected the death penalty by passing statutes designed to cure the infirmities identified by the Court in *Furman*.³⁴ In *Gregg v. Georgia*,³⁵ the Court upheld the imposition of the death penalty under Georgia's new statute.³⁶ In reaching that conclusion, a plurality of the Court relied heavily on the "marked indication of society's endorsement of the death penalty" as shown by the almost immediate reaction by a majority of states.³⁷ However, the debate was not complete. In dissent, Justice Marshall relied on a study that "confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty."³⁸ Whichever side of the debate is correct, the Supreme Court's death penalty jurisprudence illustrates that the simple identification of a single social proposition is a formidable task.³⁹

³³ *Id.* at 299-300 (Brennan, J., concurring); *id.* at 360-69 (Marshall, J., concurring); see also *Trop v. Dulles*, 356 U.S. 86 101 (1958) (plurality opinion) (stating that court evaluating validity of punishment under eighth amendment must consider "evolving standards of decency that mark the progress of a maturing society").

³⁴ See generally Poulos, *Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California*, 23 U.C. DAVIS L. REV. 157, 164 (1990) (describing states' reactions to *Furman*). By 1986, 41 of the 50 states had death penalty statutes on the books. See *Ford v. Wainwright*, 477 U.S. 399, 408 n.2 (1986); see also W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHRIFFRIN, *CONSTITUTIONAL LAW* 565 n.j (6th ed. 1986). "A decade after *Furman*, more than 70 percent of the general public and almost the same percentage of college freshmen and ABA member lawyers favored continuation of the death penalty." *Id.*

³⁵ 428 U.S. 153 (1976).

³⁶ *Id.* at 206-07.

³⁷ *Id.* at 179-80.

³⁸ *Id.* at 232 (Marshall, J., dissenting). This style of debate carries through to the Court's present day death penalty jurisprudence. In *Stanford v. Kentucky*, 109 S. Ct. 2969, 2977 (1989), the Court held that the death penalty as applied to minors did not constitute cruel and unusual punishment and was consistent with "evolving standards of decency" as shown by the "national consensus" reflected by a majority of state statutes that authorized the punishment. Besides claiming that the majority's review of state statutes "gives a distorted view of the evidence of contemporary standards that these legislative determinations provide," 109 S. Ct. at 2982 (Brennan, J., dissenting), the dissent contended that the views of "respected organizations," such as the American Bar Association and the American Law Institute (which opposed the imposition of the death penalty on minors), were "[f]urther indicators of contemporary standards of decency." See *id.* at 2984. Once again, we see both the majority and dissent relying on evidence that each claims to show that society as a whole supports their position.

³⁹ Professor Ely previously pointed to *Furman* and *Gregg* to illustrate the pitfalls of

Even assuming that judges could determine accurately the applicable social propositions, *The Nature of the Common Law* fails to squarely address a more fundamental question. Professor Eisenberg's theory suggests that social propositions limit the court's discretion and dictate the result in any given case. However, even when adhering to popular opinion, the discretion inherent in the process is great. As Professor Eisenberg describes, a judge in uncertain cases "may rely on his own judgment, as a participant-observer, concerning what norms appear as if they would have the requisite social support, provided he believes — or has no reason not to believe — that his judgment would be widely shared."⁴⁰ Similarly, the judge "may properly employ a norm that is still emerging in the society, if he believes that the norm will soon attract substantial social support, and he is ready to pull back if that belief proves incorrect."⁴¹

Professor Eisenberg implicitly acknowledges that the search for the applicable social proposition is an inexact science, which guarantees wide discretion for judges and, as we have seen, leaves considerable room for error:

[T]he court is not obliged to establish empirically that a moral norm has the requisite social support in fact, which it cannot do, but to use appropriate methodology to make a judgment on that issue. In substance the court makes a claim that *in its best judgment* . . . a norm has the requisite social support, and then opens the validity of that claim to discussion in the wider arena.⁴²

However, because *The Nature of the Common Law* does not squarely acknowledge the existence of the common law judge's reservoir of discretion, the book overlooks its vexing implications. True, judicial discretion is less problematic when a case causes minimal conflict between social propositions, as in many of the book's contract and corporations examples.⁴³ Unfortunately, conflicting social propositions are more likely to arise in a society, such as ours, with a great diversity of

looking to popular sentiment in constitutional adjudication. See J. ELY, *DEMOCRACY AND DISTRUST* 65 (1980).

⁴⁰ M. EISENBERG, *supra* note 3, at 17 (footnote omitted).

⁴¹ *Id.*

⁴² *Id.* at 18 (emphasis added).

⁴³ To illustrate morality's effect on the law, Professor Eisenberg offers the example of the development of unconscionability doctrine as a contract defense. *Id.* at 15. Similarly, to illustrate policy's effect on the law, he describes the rationale for the business judgment rule — that negligence liability will discourage the most qualified from serving as corporate directors. *Id.* at 30; see *id.* at 39. Although some might quarrel over whether these two examples accurately reflect popular belief, they would appear to generate significantly less conflict and controversy than many others.

opinion on a wide variety of issues.⁴⁴

Professor Eisenberg's solution to the problem is that judges must "give[] appropriate weight to all applicable social propositions and mak[e] the best choices where such propositions collide;" a praiseworthy result because, among other things, it ensures "adherence to society's prevailing standards."⁴⁵ Professor Eisenberg fails to explain how judges make the "best choices." For example, what weight should judges assign to colliding social propositions? Is one assigned a weight of "1" and another a weight of "10"? Does one social proposition trump all others?⁴⁶

Nor is it clear that, when two propositions collide, there is any single outcome that will satisfy a majority of the public. Consider a fairly typical case of environmentalists seeking to halt the construction of a dam or a nuclear power plant. The conflict between environmental and economic interests in such a case illustrates the difficulties inherent in determining the majority's view on a controversial issue. The book fails to explain how judges are to decide such cases.

One of Professor Eisenberg's examples indirectly illustrates the problems that arise when a case implicates conflicting social propositions. He states that "the court may conclude that since our economy is capitalistic, there is substantial social support for the policy that (all other things being equal) commerce should be facilitated."⁴⁷ It is, of course, the rare case in which "all other things [are] equal." Assume a more frequently arising case pitting an individual plaintiff against a large company. In that case, the capitalistic proposition of facilitating commerce (by not subjecting businesses to untoward liability) collides with the populist sentiment that large economic entities somehow are evil (and should be punished whenever possible).⁴⁸ To resolve the conflict, the court at least implicitly must weigh these two, along with any other, competing social propositions. Under these circumstances, it seems illusory to claim that social propositions dictate the result. Rather, the competing propositions at most suggest a range of options from which the judge can choose.⁴⁹ That range might include substan-

⁴⁴ See *infra* note 72 and accompanying text.

⁴⁵ M. EISENBERG, *supra* note 3, at 44.

⁴⁶ Similar problems are identified in a similar context in J. BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS 24-30 (1983).

⁴⁷ M. EISENBERG, *supra* note 3, at 30.

⁴⁸ See generally M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 211-52 (1977).

⁴⁹ See Fallon, *supra* note 16, at 1539. "In the effort to identify the 'true' morality of the society and its tradition, more than one account will frequently fit tolerably well

tial variation among the various alternatives.

Another example of the vast discretion available to a judge can be seen in the book's discussion of the application of the doctrine of *stare decisis* and the decision to overrule precedent. *The Nature of the Common Law* acknowledges judges' discretion to define, expand, limit, or apply precedent to the particular case at hand.⁵⁰ No two cases are identical, and every precedent can be distinguished.⁵¹ Once again, Professor Eisenberg turns to social propositions as a constraint: "Whether a precedent can consistently be distinguished turns chiefly on whether applicable social propositions justify different treatment of the two cases, given the social propositions that support the rule of the precedent."⁵² This analysis fails to account for a long observed phenomenon. On the one hand, lower courts that disagree with a higher court's decision seem more likely to hold that the precedent is distinguishable from the case before it. On the other hand, lower courts that agree with the precedent seem more likely to find it dispositive. This pattern suggests that courts consider something more than social propositions in applying the doctrine of *stare decisis*.⁵³

with the evidence." *Id.*

As Professor Chemerinsky recently observed in analyzing constitutional adjudication:

Too much of the discussion of constitutional law describes the world as having only two extremes, formalism, which denies all discretion, or radical indeterminacy, which accords total discretion. *The reality is someplace in between. Constraints usually exist in the sense of creating the outer limits on judicial action; they narrow the range of choices that could be regarded as reasonably permissible.* To be sure, Justices have the naked power to rule as they wish, subject only to impeachment or constitutional amendment, but discretion means the more limited "power to choose between two or more courses of action each of which is thought of as permissible."

Chemerinsky, *supra* note 28, at 101 n.236 (emphasis added); see also Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 396 (1950) (observing that courts applying precedent always may select from "more than one available correct answer").

⁵⁰ See M. EISENBERG, *supra* note 3, at 51.

⁵¹ *Id.* at 75.

⁵² *Id.*; see *id.* at 153.

⁵³ See Maltz, *The Nature of Precedent*, 66 N.C.L. REV. 367, 371-72 (1988); see also Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988). Cooper states that: "The truth, of course, is that stare decisis has always been a doctrine of convenience, to both conservatives and liberals. Its friends, for the most part, are determined by the needs of the moment." *Id.* at 402. See generally K. LLEWELLYN, *supra* note 5, 62-120 (discussing "leeways of precedent"). Recent comments of retired Justice Lewis Powell lend support to this observation. In a recent address to the Association of the Bar of the City of New York, Justice

In a similar vein, Professor Eisenberg relies on changes in social propositions to explain why courts overrule precedent. As social propositions change, judges deviate from precedent, "the law follows a jagged path of development,"⁵⁴ and the court ultimately overrules the precedent. Once again, this descriptive vision is in many ways appealing. It coincides with the empirical reality that, as society has evolved, common law doctrines generally have as well.⁵⁵

According to Professor Eisenberg, the overruling of the "jagged" doctrine should have been expected. He assumes that it *must* have been forecast in the professional literature. In any event, it is fair to punish conduct that the overruled precedent would have permitted because that precedent conflicted with generally accepted social propositions.⁵⁶ However, much has been said previously about the profession's estrangement from the law schools.⁵⁷ Not all lawyers stay abreast of the writing in law reviews.⁵⁸ Not every legal issue on which the academic writes is of particular interest to the practitioner, and vice versa. Thus, even assuming that the literature held a single view that a precedent should be overruled, a practitioner cannot be expected to know that when advising a client. Moreover, lawyers are as ill-equipped as judges to determine applicable social propositions.⁵⁹ Consequently, an attorney rendering legal advice may be unable to predict with certainty whether a particular course of conduct will run afoul of social propositions and thus of the law.

Powell lectured the Supreme Court on the need for adherence to the doctrine of *stare decisis*. See Powell, *Stare Decisis and Judicial Restraint*, 44 REC. B.A. CITY OF N.Y. 813 (1989).

⁵⁴ M. EISENBERG, *supra* note 3, at 79; see *id.* at 70-74.

⁵⁵ See generally Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247 (1967) (discussing changes in selected common law doctrines in response to social change).

⁵⁶ M. EISENBERG, *supra* note 3, at 113.

⁵⁷ See, e.g., Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285 (1988); Kay, *Lawyers and Law Teachers: Are We in the Same Profession?*, ASSOC. AM. L. SCH. NEWSL. 1 (Dec. 1989).

⁵⁸ See Larson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 928-31 (1990); see also Church, *A Plea for Readable Law Review Articles*, 1989 WIS. L. REV. 739 (stating that "[a]ll concerned have known for a long time that a large part of the legal community does not read the articles that fill America's law reviews"); Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936). In Professor Rodell's words, "[t]here are two things wrong with almost all legal writing. One is its style. The other is its content." *Id.* at 38. "[T]he only consumers of law reviews outside the academic circle are the law office, which never actually read them but stick them away on a shelf for future reference." *Id.* at 45.

⁵⁹ See text accompanying *supra* notes 28-29.

Moreover, changing social propositions do not always explain why courts overrule cases. Nor do the courts always overrule “jagged” doctrine. The short life of the Supreme Court’s decision in *National League of Cities v. Usery*⁶⁰ illustrates this fact. In that five-to-four decision, the Court overruled previous precedent, announced an abrupt change in doctrine, and held that Congress could not constitutionally regulate the states on matters essential to their separate and independent existence.⁶¹ In *Garcia v. San Antonio Metropolitan Transit Authority*, another five-to-four decision nine years later, the Supreme Court again announced a 180 degree change in doctrine and overruled *National League of Cities* on the grounds that it was “unsound in principle and unworkable in practice.”⁶² Contrary to Professor Eisenberg’s theory, there appears to be no evidence of any significant change in societal views about federalism in the nine years after *National League of Cities*. Thus, his theory fails to explain the Court’s decision to overrule *National League of Cities*.

There is an explanation, however. In dissent, Justice (now Chief Justice) Rehnquist expressed the view that *National League of Cities* “will, I am confident, in time again command the support of a majority of this Court.”⁶³ That comment suggests that the rule of law will change with the Court’s political composition. In any event, changing social propositions appear to have had little to do with the rise and fall of *National League of Cities*.

Professor Eisenberg might defend his theory’s ability to explain the

⁶⁰ 426 U.S. 833 (1976).

⁶¹ *Id.* at 853-55.

⁶² 469 U.S. 528, 546-47 (1985). Justice Blackmun, who sided with the majority in *National League of Cities*, had a change of heart and wrote the majority opinion in *Garcia*.

⁶³ *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); *see id.* at 589 (O’Connor, J., dissenting) (expressing similar view); *cf.* *South Carolina v. Gathers*, 109 S. Ct. 2207, 2217 (1989) (Scalia, J., dissenting) (advocating along with three other justices that Court overrule a two-year-old precedent and claiming that “I doubt that overruling [the decision] will so shake the citizenry’s faith in the Court. *Overrulings of precedent rarely occur without a change in the Court’s personnel*”) (emphasis added). As Professor Schwartz, who recently completed a thorough history of the Burger Court from oral and documentary sources, observed:

Garcia may tell us more about the operation of the Supreme Court than about federalism. The difference in result between the *National League of Cities* and *Garcia* cases may be explained less by legal logic than the changed vote of Justice Blackmun, who had concurred in *National League of Cities*.

B. SCHWARTZ, *THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION* 110 (1990).

Court's decision to overrule *National League of Cities* in two ways. First, he might claim that, in response to the professional literature's criticism of *National League of Cities*, the Court corrected an error in judgment.⁶⁴ While *National League of Cities* received abundant criticism, that criticism was not unanimous.⁶⁵ Moreover, some prominent scholars read a "silver lining" into *National League of Cities* and optimistically concluded that it created individual rights in governmental services.⁶⁶ Thus, it would seem difficult to attribute the demise of *National League of Cities* to academic criticism, particularly when the majority in *Garcia* failed to focus on any such criticism in its decision. Second, Professor Eisenberg might argue that any theory "is not necessarily invalidated by a few outlying cases."⁶⁷ The question, however, is whether occurrences exemplified by the travails of *National League of Cities* are more common than Professor Eisenberg would admit. I believe that they are.

In short, judges, similar to the experts in public opinion, are prone to error when grappling for the applicable social propositions that will decide a case. Moreover, one is left unconvinced by the suggestion that social propositions narrowly limit judicial discretion and require courts to reach a particular result. We instead must concede that the common law judge enjoys some, if not great, latitude in searching for the applicable social propositions. While social propositions may limit the options, the judge still enjoys much leeway in selecting any particular one. Once that concession is made, it becomes evident that there is room in the system for arbitrary, if not political, decisionmaking.

III

The theory of common law adjudication espoused in *The Nature of the Common Law* rests heavily on the close relationship between social propositions and the law. Professor Eisenberg squarely challenges Professor John Hart Ely's view, expressed in *Democracy and Distrust*,⁶⁸ that courts looking to social propositions may rely on nothing more

⁶⁴ See text accompanying *supra* notes 20-21.

⁶⁵ See Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 82 nn.5-6, 8 (collecting citations).

⁶⁶ Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

⁶⁷ M. EISENBERG, *supra* note 3, at 117.

⁶⁸ J. ELY, *supra* note 39.

than "the morality of a dominant group."⁶⁹ Professor Ely articulates the danger as follows: "one can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported."⁷⁰

To reject Professor Ely's concern, Professor Eisenberg makes an argument that seems to be a leap of faith:

[A] community may be stratified through groups defined by such elements as class, ethnicity, religion, or occupation. As to any given issue, some groups may hold moral norms that vary from those that have substantial support in the general community. The presence of such variations, however, should not be a barrier to using the norms of the general community in fashioning common law rules, *as long as the community is not exceptionally pluralistic and the norms claim to be rooted in aspirations for the community as a whole.*⁷¹

However, it is far from clear that American society is not "exceptionally pluralistic," regardless of how that term is defined.⁷² At a minimum, there are seriously different points of view on some very fundamental questions ranging from the death penalty⁷³ to federalism,⁷⁴ from affirmative action to abortion, and from insurance reform to environmental protection. In these controversies, both extremes claim to articulate norms "rooted in aspirations for the community as a whole." Perhaps most importantly, Professor Eisenberg fails to acknowledge the disparity of power between various groups in society and its effect on the law. Through the judicial system, the most powerful arguably may impose their social propositions on all others. Such a concern goes to the core of the debate about the distinction between law and politics. If the majority prevails at both the polls and in the courtrooms, the law seems little different from politics.

In a last attempt to calm the fear that the law is simply a reflection of the will of the dominant, Professor Eisenberg challenges a difficult

⁶⁹ M. EISENBERG, *supra* note 3, at 20.

⁷⁰ J. ELY, *supra* note 39, at 67; *see, e.g.*, Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1083 (1981). This view finds some support in the Supreme Court's death penalty jurisprudence in which both the majority and dissent claim to rely on contemporary community values about the death penalty. Chemerinsky, *supra* note 28, at 94 (stating that "[g]iven American history's diversity, a tradition can be found to support or condemn almost any practice").

⁷¹ M. EISENBERG, *supra* note 3, at 21 (emphasis added).

⁷² *See* Fallon, *supra* note 16, at 1539 (suggesting that American society is a "radically pluralistic society whose tradition frequently includes contradictory strands").

⁷³ *See* text accompanying *supra* notes 30-39.

⁷⁴ *See* text accompanying *supra* notes 60-62.

hypothetical posed by David Lyons in *Ethics and the Rule of Law*.⁷⁵ The hypothetical involves a racist legal system, endorsed by society at large, that allows a white citizen to recover damages from any black person who publicly challenges the white citizen's superiority. Lyons concludes that the judge hearing the case is ethically obligated to refuse to enforce the law. Although conceding that "[i]n such extreme cases" a judge "may be morally justified in following his own conscience," Professor Eisenberg insists that "highly charged and divisive" issues such as those raised in the hypothetical ordinarily should be addressed by the legislature or a constitution, not by judges engaged in common law adjudication.⁷⁶

There are several reasons why Professor Eisenberg's response to the hypothetical is unsatisfactory. If compelled to define a narrow, nonarbitrary category of "highly charged and divisive" issues not proper for common law adjudication, one obviously would encounter an abundance of problems. In the end, one might simply conclude that the inquiry is case-specific and that the judge must decide whether a case is too hot to handle. Moreover, the novel view that controversial questions fall outside the sphere of the common law does not coincide with experience. Wrongful termination,⁷⁷ landlord-tenant,⁷⁸ wrongful birth,⁷⁹ and toxic torts⁸⁰ are among the multitude of categories of cases in which courts have tackled controversial issues through common law adjudication. Indeed, recent commentators have argued persuasively that the common law has long played, and should continue to play, a significant role in addressing the "highly charged and divisive" issue of racial

⁷⁵ D. LYONS, *ETHICS AND THE RULE OF LAW* 100-01 (1984).

⁷⁶ M. EISENBERG; *supra* note 3, at 26. Professor Eisenberg also criticizes Lyons' judge because he would not *change* the law, but simply would not *enforce* it. *Id.* Given the options available to a judge deciding cases (as opposed to a legislator passing laws), that criticism seems unjustified.

⁷⁷ See generally Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1421-27 (1967) (arguing for judicial recognition of tort action for wrongful termination).

⁷⁸ See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1072-73 (D.C. Cir.) (Wright, J.) (implying warranty of habitability into all housing leases), *cert. denied*, 400 U.S. 925 (1970).

⁷⁹ See Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2018 n.5 (1987) (listing decisions of various state courts recognizing action for wrongful birth).

⁸⁰ See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 611-13, 607 P.2d 924, 936-37, 163 Cal. Rptr. 132, 144-45 (1980) (allowing recovery under theory of market share liability when plaintiffs could identify drug causing cancer but not precise manufacturer).

discrimination.⁸¹

Another troubling feature of Professor Eisenberg's response is that he apparently would place individual rights in the category of the "highly charged and divisive" issues only appropriate for resolution by statute or constitution. For example, Professor Eisenberg suggests that if there is no doctrinal or social support for the right of privacy, it is improper for the court to recognize such a right.⁸² Of course, even assuming that there was not sufficient social support for a right of privacy,⁸³ an argument could be made that certain individual rights are so fundamental to a society that courts should guarantee their protection.⁸⁴

Just as troubling, *The Nature of the Common Law* seems willing to sanction some disconcerting examples of common law adjudication. For example, Professor Eisenberg recounts the history of the now-defunct common law rule that a wife could not sue for alienation of affection, although her husband could.⁸⁵ As Professor Eisenberg describes, this rule changed along with changing social norms. Professor Eisenberg also traces, but does not criticize, a similar evolution in the law of criminal conversation.⁸⁶ He fails to state, however, that the original rules reflected a sexist view dominant in society.⁸⁷ These views were consistent with and reinforced a stereotypical view of the relationship between men and women that is widely (and correctly) discredited today.

The Nature of the Common Law fails to question or criticize the dubious rationale for the old common law rules. By failing to do so, the book suggests that, for better or worse, the common law must adhere to

⁸¹ See C. HAAR & D. FESSLER, *THE WRONG SIDE OF THE TRACKS* (1986); Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993 (1989); see also C. GREGORY & H. KALVEN, *CASES AND MATERIALS IN TORTS* 961 (2d ed. 1969) (posing question "whether under the logic of the common law development of insult and indignity, racial discrimination might be treated as a dignitary tort").

⁸² M. EISENBERG, *supra* note 3, at 22-23.

⁸³ For the reasons supporting recognition of a common law tort for violation of an individual's right to privacy, see Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁸⁴ See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

⁸⁵ M. EISENBERG, *supra* note 3, at 88.

⁸⁶ *Id.* at 89-90.

⁸⁷ See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1510-11 (1983); see also Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW*, *supra* note 6, at 117 (arguing that law has legitimized sex discrimination); Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW*, *supra* note 6, at 294 (discussing legitimization of sex discrimination).

generally held social propositions. Remedies for any wrongs caused by common law adjudication apparently must be found in legislative action or constitutions. However, such remedies as a practical matter fail to exist. Because legislators are elected and thus more likely will endorse rather than challenge the majority's views, legislative action seems unlikely. Constitutions ordinarily are difficult to amend.

A more devastating flaw in the logic is that Professor Eisenberg's attempt to pass the buck in the hard case fails to state an underlying assumption. It assumes that courts interpreting statutes and constitutions do *not* consider social propositions. However, there is every reason to believe that social propositions play a similar if not the same role in statutory and constitutional interpretation that they do in common law adjudication.⁸⁸ A strong argument can be made that courts deciding *any* type of case, including those requiring statutory or constitutional interpretation, are influenced by social propositions.⁸⁹ Thus, *any* lawmaking

⁸⁸ Perhaps for that reason, *The Nature of the Common Law* waives on the limits of its theory. The book initially disclaims that the theory applies to constitutional and statutory adjudication. See M. EISENBERG, *supra* note 3, at vii. But in the book's final footnote, Professor Eisenberg suggests that his theory "with suitable modifications" might apply to statutory and constitutional adjudication. *Id.* at 196 n.35. The reason, he concedes, is that "the application of a canonical text to a given case is frequently far from self-evident, and establishing the full meaning of such a text often requires the application of institutional principles of interpretation." *Id.* Such "institutional principles of interpretation" presumably would include adherence to generally held social propositions. For these types of reasons, others, including Professor Dworkin, have advanced one global theory of adjudication. See generally R. DWORKIN, *supra* note 16.

⁸⁹ The place of society's values in interpreting the Constitution is central to the dispute about whether courts are bound by the intent of the framers, compare Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1033 (1981) (arguing that framers' intent cannot constrain modern constitutional interpretation because meaning of Constitution "changes over time to accommodate altered circumstances and evolving values") with Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing that intent of framers is binding); and a related question whether courts should and must consider values in constitutional adjudication, see Chemerinsky, *supra* note 28; or rather should ensure that the political process be open to all and that the legislature should make the value judgments, see J. ELY, *supra* note 39. A similar dispute has been central to the debate about the proper role of the courts in interpreting statutes. Compare Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) (arguing that judges interpreting statutes should implement legislative intent as set forth in language of statute or legislative history) with R. DWORKIN, *supra* note 16, at 314 (arguing that judges should interpret statutes as "would make them best," not "according to what the legislators who actually adopted them intended") and Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407 (1989) (arguing that courts interpreting statutes inevitably rely on "background norms" not found in language of

in which courts weigh popular social propositions in the calculus might impose the dominant's will on subordinated groups. Indeed, Professor Ely expressed this fear in *Democracy and Distrust*, which focuses on constitutional interpretation. Once this point is realized, there is no safe-haven for value-free adjudication. In the end, Professor Ely's fear that the social propositions of the dominant will dominate the law seems all the more real.

IV

In many ways, *The Nature of the Common Law* offers a full and often attractive description of common law adjudication. Professor Eisenberg sketches the process by which social propositions play a significant role in the making of the common law. However, there are problems in this idealized world. Judges sometimes cannot determine with accuracy the most popular social proposition and must make difficult subjective judgments when social propositions conflict. Although popular opinion undoubtedly influences the outcome, it frequently does not strictly constrain the discretion of judges in selecting the applicable social proposition, resolving conflicts between propositions, and determining when society's views have changed. At most, social propositions limit the court's choice in any one case to a range of alternatives. Therefore, claiming that social propositions completely constrain judges overstates matters. In turn, the critics exaggerate by claiming that there are *no* limits whatsoever on a judge's discretion. The real world of judging and lawmaking seems to fall somewhere between these two extremes.

The next step beyond *The Nature of the Common Law* is to evaluate the process normatively. To begin that evaluation, we must consider the possibility that the law permits the dominant to impose its will on the rest of the society. Similarly, we must analyze the role of individual (or perhaps group) rights in the process. Once these questions are addressed, it will be possible to consider the propriety of relying on social propositions in common law adjudication. Only then will we begin to address the larger question of the true relationship between law and politics in modern day America.

statutes).