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## Wisdom and Reason in Law

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# WISDOM AND REASON IN LAW

STEVEN D. SMITH\*

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Some three decades ago, upon taking a job at the University of Colorado, I read some of the work of my new colleague Robert Nagel. One short but trenchant essay—one that I have pondered and cited repeatedly in the years since—was called "Rationalism in Constitutional Law."<sup>1</sup> In the course of a cogent critique of modern Supreme Court jurisprudence (a critique that the Justices didn't read, I'm afraid, or at least didn't demonstrably learn from), Bob observed that the "rationalism" that increasingly dominated constitutional decisions "does not exhaust the available methods of moral and intellectual inquiry. It is not the same as insight, creativity, wisdom, vision, instinct, or empathy."<sup>2</sup>

Bob's observation is surely correct, I think, although some might add that we do not necessarily want the Justices to attempt some of the arts or methods on Bob's list. "Creativity" is perhaps not something we want courts to attempt—arguably we have suffered from far too much of this in recent years—and interesting discussions have been held about the virtues but also the possible abuses of "empathy" in judicial decision making.

One quality we presumably *would* like to see in judges, though, is "wisdom." Bob suggested that wisdom is not the

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\* Warren Distinguished Professor of Law, University of San Diego. I thank Larry Alexander for helpful comments on an earlier draft. A slightly different version of this essay was originally written for presentation at a conference at Pepperdine on Wisdom in Law. I am grateful to the editors of the *Colorado Law Review* for permitting me to adapt the essay for inclusion in this symposium honoring my former colleague Bob Nagel, as wise and insightful a scholar as I have known in my three-plus decades in the academy.

1. ROBERT F. NAGEL, *Rationalism in Constitutional Law*, in CONSTITUTIONAL CULTURES 106, 106–20 (1989).

2. *Id.* at 110.

same thing as reason, or at least as instrumental reason; but how do these gifts or operations differ? Is wisdom something like a fortunate instinct that falls short of reason, or perhaps a gift that goes beyond and perfects reason, in the way grace is said to perfect nature? Or are the two at least sometimes in tension with each other?

And how do reason and wisdom relate to law? Is law reasonable, or "rational," or both? *Should* it be? Is law—or can it be—wise? Can we look to law as some sort of repository of wisdom? Or was Dickens's Mr. Bumble correct in declaring that "the law is an ass"?

I want to address these questions in three stages. First, I want to try to get a little more clear about what wisdom might be, in part by noting a possible opposition between wisdom and "reason." Then I want to suggest that at its best, the common law tradition (as Karl Llewellyn called it<sup>3</sup>) could be viewed as a sort of (admittedly imperfect) embodiment of (admittedly imperfect) wisdom. Finally, I will suggest that more modern thinking about law, under the pretense of "reason," often operates to suppress this element of wisdom in our law and in our culture: recent judicial decisions on the meaning of marriage are perhaps the most salient current example. I want to acknowledge at the outset that my thinking on all of these matters is thoroughly indebted to insights I have gained—though often, I'm afraid, failed to retain—from Bob Nagel.

## I. WISDOM AND "REASON"

Wisdom is a term that commonly appears in ordinary speech, in philosophical discourse, and also in scripture. It would be too much to expect that people would always use the term with a single, precise meaning; and they don't. But there are recurring themes. Thus, a person is typically described as "wise" when he or she seems to have some understanding of or discernment about *life*—about how it should be lived, about the significance of the events in a life, about which things in life are important and which are trivial. In this respect, wisdom is often contrasted with mere cleverness or shrewdness, and also with pure intellectual ability or a facility for "reasoning."<sup>4</sup>

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3. See KARL LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

4. Cf. PLATO, *LAWS* 689d (Trevor J. Saunders trans., Penguin

Shrewdness, or savvy, as we say, may help a person get what he wants, or what he thinks he wants; intellect or reason may allow a person to analyze and connect facts or ideas in impressively logical fashion. But neither of these attributes entails good judgment about what makes for a good or fulfilling life. So it is possible for a person to be clever, or vastly learned, or a formidable dialectician, and yet make a wreck of his or her life: academics should have no difficulty thinking of instances.

I don't mean to suggest that cleverness or intelligence are incompatible with wisdom. On the contrary, these other gifts *can* be of great value in living a good life. And yet it does sometimes seem that an overdeveloped intellect can come into tension with wisdom. How might this happen? The question will become relevant to our more specific concern about wisdom in law, I think, so we might pause to reflect for a moment on the possible (not necessary) tension between wisdom and mere intellect, or "reason."

Return to the basic idea that wisdom consists of a capacity for discernment about how to live a good and fulfilling life. The "life" we have in mind here, I assume, is *human* life: what would count as a good life for a toad, say, or a Martian, or an angel, might not be a good life for a human being. And there are essential features of human life that can prove to be frustrating to the exercise of "reason." Let us notice several of these features.

First, life for humans is always concrete and particular. We talk about "humanity," but this is an abstraction; in reality and "on the ground" (as they say) what exists are John Jones and Maria Vasquez and Solomon Grundy, and countless other individuals. Each of these individuals—each of *us*—is born at a particular point in time and space, and not in other times and places, to particular parents, within a particular community speaking a particular language, under particular and not other circumstances. Each of us is constituted in part by a consciousness that is mine or yours and not anybody else's, and

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Books 1970):

[N]o citizens who suffer from this kind of [internal discord] should be entrusted with any degree of power. They must be reprov'd for their ignorance, even if their ability to reason is outstanding and they have worked hard at every nice accomplishment that makes a man quick-witted. It is those whose characters are at the other extreme who must be called "wise," even if, as the saying is, "they cannot read, they cannot swim" . . . .

the content and richness of my life or your life will consist largely of particular experiences and memories registered in that consciousness: the special party your normally otherwise occupied parents put on to celebrate your eleventh birthday, the mournful cooing of the dove outside my bedroom window, the elusive scent of this lilac bush, that old Frank Sinatra song . . . an infinity of experiences, each concrete and particular.

But, second, each of these lives is given identity and shape by its relations with other people and things outside itself. Suppose a stranger asks you who you are. How can you answer the question? You could tell your name, but just by itself that answer would be profoundly uninformative. It probably wouldn't even distinguish you from hundreds or thousands of other people with the same name (this may be more true for me than for you). Your social security number would be more specific to you, but even less informative. Attempting to be more responsive, and to communicate something revealing of who you are, you are likely to explain your relations to other people ("I'm the son of Joe and Lupita"), to particular places ("I was born in Maine but grew up in Dallas"), perhaps to a religion or a profession or even a sports team ("I'm a Broncos fan").

Suppose your questioner were to say, "I don't care about *those* things. My question isn't about *other* people (like your parents, or the Broncos) or *places* (like Maine or Dallas). I'm not investigating *them*; I want to know who *you* are." It would be difficult to respond. We are individuals, each unique, but our identities are formed by, and understood by reference to, our relationships—by our place in the whole. The idea is amusingly conveyed by the letter mentioned in Thornton Wilder's popular play *Our Town*: the letter is addressed to "Jane Crofut; The Crofut Farm; Grovers Corners; Sutton County; New Hampshire; United States of America . . . ; Continent of North America; Western Hemisphere; the Earth; the Solar System; the Universe; the mind of God."<sup>5</sup> Through these relations, Jane Crofut is identified and located.

These features—of particularity and relationships—might provoke a worry. Are our identities constituted by facts that are wholly arbitrary? If so, does that mean that human life—

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5. THORNTON WILDER, *OUR TOWN* 46 (1938).

*every* human life—is a huge accident (or series of accidents)? You were born in Maine, perhaps, but it might just as easily have been Minnesota, or Montana, or Mozambique—and in the year 1870, or 1470, rather than in 1970. Under those alternative contingencies, your name, your language, your religion, your friends—everything about you—would likely be quite different. So it may seem that the circumstances of your life—and you yourself—are pretty much the product of a series of fortuities.

Is this observation troublesome? Suppose you think of yourself as, say, a devout Catholic; this seems to be essential to your sense of who you are. But then you reflect that you might have been born under wholly different circumstances, and then you might easily be a Hindu, or a Marxist, or a pagan. Is this realization unsettling?

Or maybe this whole line of thought is misconceived. *You* couldn't have been born under those radically different circumstances, maybe, because then you wouldn't be *you*, so to speak. But that view of the matter underscores how we are all of us defined and to a large extent constituted by our relation to fortuities of time, place, culture, and so forth.

This fact of apparent fortuity—of massive, constitutive fortuity—can point us to a third feature of life for humans: typically, humans attempt not just to survive and to satisfy our physical needs and wants, but also to find or establish some sort of *meaning* in our lives. “[W]e are meaning-seeking animals,” says Rabbi Jonathan Sacks. “It is what makes us unique. To be human is to ask the question ‘Why?’”<sup>6</sup> Thus, each of us seeks a meaning that will tie his life together—that will connect the toddler to the adolescent to the adult to the ailing octogenarian in some sort of overarching unity. As Wordsworth (and later the Beach Boys) observed, “The child is father of the man,” and so we seek a meaning such that our “days will be bound each to each.”<sup>7</sup> We seek as well a meaning that will

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6. JONATHAN SACKS, *THE GREAT PARTNERSHIP: SCIENCE, RELIGION, AND THE SEARCH FOR MEANING* 25 (2011). *See also id.* at 288–89 (“We are the meaning-seeking animal, the only known life form in the universe ever to have asked the question ‘Why?’ There is no single, demonstrable, irrefutable, self-evident, compelling and universal answer to this question. Yet the principled refusal to answer it, to insist that the universe simply happened and there is nothing more to say, is a failure of the very inquisitiveness, the restless search for that which lies beyond the visible horizon, that led to science in the first place.”)

7. WILLIAM WORDSWORTH, *ODE: INTIMATIONS OF IMMORTALITY FROM*

connect us to something larger than ourselves—to our families, our nation maybe, to history, even the cosmos or (like Jane Crofut) the Universe and the mind of God.

This larger meaning is sometimes described, or mocked, under the heading of “the meaning of life.” For better or worse, it seems characteristic of humans to seek such a meaning. In this vein, the philosopher E. D. Klemke approvingly quotes the psychologist Viktor Frankl’s statement that “[m]an’s concern about a meaning of life is the truest expression of the state of being human.”<sup>8</sup>

These features of the life of humans—its inherently concrete and particularistic quality, its constitutive relationship to seemingly contingent facts of time and place and parentage and language and culture, and its aspiration to meaning—seem inseparably connected. A person’s particularity entails that her identity can only be conceived and presented in relation to a larger field, much as a mathematical point can only be located and distinguished from other points by its coordinates on a larger plane or grid. And those relationships—to parents, siblings, friends, community, time, place, faith, and culture—will be essential to the account or story that gives a person’s life its meaning. Conversely, the supposition or ascertainment of meaning endows these otherwise contingent features with some sort of order and significance, and thereby deflects the concern that a person and her life are nothing more than some happy or unhappy accident, and that life is little more than “sound and fury, signifying nothing.”<sup>9</sup>

Although essential to what makes our lives human, however, each of these features is also resistant to the governance of what we call “reason.” I should quickly acknowledge that the term “reason” is used to denote very different and sometimes incompatible kinds of faculties or intellectual activities.<sup>10</sup> The word is often little more than a sort of tendentious, honorific label for “the way people like me and my friends think about things,” and I sometimes wonder

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RECOLLECTIONS OF EARLY CHILDHOOD (1807), *reprinted in* WORDSWORTH: POETICAL WORKS 460 (Thomas Hutchinson ed., 1936).

8. E. D. Klemke, *Preface to the Second Edition of MEANING OF LIFE*, at xi (E.D. Klemke & Steven M. Cahn eds., Oxford University Press 3rd ed. 2008).

9. WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5, ll. 27–28 (1623).

10. *See generally* ERNEST GELLNER, *REASON AND CULTURE* (R.I. Moore ed., 1992).

whether we would be better off if we could just banish the term altogether. For better or worse, though, it seems that we can't do that, so maybe it will suffice to say this much: the term "reason" usually connotes an effort to capture and understand the world in explicit verbal propositions—propositions that can be examined and tested using whatever the preferred epistemic methods of the time happen to be, and that can be arranged into some kind of logically coherent system or theory. At times (as with Plato, and Descartes) "reason" has been associated with a distrust for the senses' potentially deceitful observations of the shifting physical world.<sup>11</sup> Today, by contrast, under the sway and prestige of science, the term usually has the opposite sense: "reason" is closely connected with empirical observation and the methods and findings of science.

The features of human life that I have noted pose difficulties for this enterprise of understanding the world through explicit verbal propositions that can be ordered into a coherent system subject to empirical testing. In order to be incorporated into an explicit system, concrete particulars need to be reduced to more abstract and fungible entities: not John Jones and Maria Vasquez in all of their splendid unfathomable particularity, but rather "persons," "adult Caucasian males," or something of that sort. Nor do the particular experiences that make up a life, and that make a life fulfilling—last Friday's sunset, Rosa's incomparable tamales, the theme song of the dance where you and your spouse first met—fit easily within the discourse of reason. These too must be reduced to abstractions: "preferences," "interests," maybe even dollars.

Similarly, reason has difficulty with the inherently relational quality of persons. That is because reason works by isolating individual elements or hypotheses or claims, by analyzing—breaking the world up into ever smaller propositional components—rather than by understanding things holistically in terms of their relations to everything else. As Ernest Gellner approvingly explains, the "rational person" is one who "separates all separable issues, and deals with them one at a time. By doing so, he avoids muddling up issues and conflating distinct criteria."<sup>12</sup> Maybe so, but a different

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11. See 1 ANTHONY KENNY, *ANCIENT PHILOSOPHY* 121–29, (2004); see also 3 ANTHONY KENNY, *THE RISE OF MODERN PHILOSOPHY* 36 (2006).

12. GELLNER, *supra* note 10, at 136–37.



perspective suggests that in this cutting up and classifying human life so that it will be amenable to “reason,” “reason” denatures that life. Or, if “denatures” is too strong, at least much of the distinctively recognizable human quality of life is filtered out.

In addition, reason typically seems wary of *meanings*, which are not quantifiable or empirically verifiable. Thus, Susan Wolf observes that often in life, and in some of the most important matters, we do not act either from mere self-interest or because of purely “moral” imperatives of a deontological variety. Instead, we engage in “activities that make our lives worth living; . . . [that] engender, give *meaning* to our lives.”<sup>13</sup> This may seem an obvious point, but Wolf explains that the importance of “meaning” in life has been largely neglected by philosophers.<sup>14</sup>

One reason for this neglect, perhaps, is that while philosophy and science deal in propositions, formulas, discrete claims, or hypotheses, *meaning* is best conveyed, as Rabbi Sacks explains, in the form of stories, or *narratives*.<sup>15</sup> In this way, a cultural division can arise similar to that discussed by C. P. Snow in his well-known lecture on “the two cultures.”<sup>16</sup> Long before the advent of the “culture wars” in their current form, Snow perceived that “the intellectual life of the whole of western society is increasingly being split into two polar groups,”<sup>17</sup> which he identified as “literary intellectuals” on one side and scientists and their allies on the other. Snow thought these two groups were divided by a “gulf of mutual incomprehension,” with the consequence that they “had almost ceased to communicate at all.”<sup>18</sup> Although Snow’s depiction was controversial and arguably overdrawn, he was hardly alone in noticing a common mutual disdain between people drawn to science, mathematics, and analytical philosophy and those more oriented to humanities, cultural studies, and perhaps religion. Even if the first party appreciates the more “meaning”-oriented activities of the second, those activities are

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13. SUSAN WOLF, MEANING IN LIFE AND WHY IT MATTERS 2 (2010) (emphasis added).

14. *Id.* at 35.

15. See generally SACKS, *supra* note 6. See also JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE (2002).

16. C. P. SNOW, THE TWO CULTURES 3 (Canto ed., 1993).

17. *Id.*

18. *Id.* at 4, 2.

typically regarded somewhat condescendingly as “subjective,” not “rigorous”—not really governed by “reason” or capable of having the quality of actual “truth.”<sup>19</sup>

Although Snow’s own primary attachment seemed to be quite clearly to the “science” side of the divide—he described the literary group as “natural Luddites,” for example, and thought that argument within scientific culture was “usually much more rigorous, and almost always at a higher conceptual level”<sup>20</sup>—his overall objective was to promote greater mutual understanding. Or so he said. And indeed, there is no apparent reason why propositional and narrative modes of understanding—or wisdom and reason—need to be foes. It seems overwhelmingly plausible—doesn’t it?—to suppose that there are parts of reality that are best understood, and a myriad of tasks that are best performed, using the methods of science, or “reason,” and others that call more upon the kind of discernment that is attentive to the particularity, the relational qualities, and the meaning-seeking aspirations that are essential to human life. A poem should not be disparaged as merely a crude and sloppy piece of science; it is something quite different. In this spirit, Rabbi Sacks, who associates the question of “*how* things work” with science and the “*why*?” or meaning-seeking question with religion, advocates what he calls “the great partnership.”<sup>21</sup> We need both science and religion or, as I am putting it here, both reason and wisdom.

This partnership depends on a kind of humility, though, in which each partner understands its limitations and respects the legitimate function and domain of the other. That sort of respect often does not come easily, especially to the proponents of “reason,” who, as noted, are likely to be condescending even in their professed appreciation of the merely “subjective” quality of meaning-seeking human activities. This sense of superiority has surely been reinforced by the spectacular advances of science in recent decades and centuries, and also by the conclusion of at least some scientists that, as physicist Steven Weinberg asserts, “[t]he more the universe seems

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19. For a stark instance, see Steven Jay Gould, *Nonoverlapping Magisteria*, THE UNOFFICIAL STEPHEN JAY GOULD ARCHIVE, [http://www.stephenjaygould.org/library/gould\\_noma.html](http://www.stephenjaygould.org/library/gould_noma.html) (last visited Sept. 26, 2016) [<https://perma.cc/6PXB-RKPE>].

20. SNOW, *supra* note 16, at 22, 12.

21. See SACKS, *supra* note 6.

comprehensible, the more it also seems pointless."<sup>22</sup> From that perspective, the common human propensity to seek the "meaning of life" can come to seem an enterprise of self-deception in which weak or timid souls attempt to console themselves for their finitude.

Given this condescension, or this allocation of intellectual tasks into "objective" and "subjective," one common way of structuring the partnership is thus to allow that individuals are entitled to their subjective meanings in their private or personal lives; but questions of knowledge, and also of law or public policy, should be based on what is called "reason." This division of responsibilities is apparent in modern American law, as we will see. For now, though, let me quickly notice two issues where the potential divergence between wisdom and "reason" becomes visible.

The first concerns the value of "tradition," or custom. Anthony Kronman observes that from a rationalistic perspective tradition is equated with "unenlightened superstition" or "meaningless debris."<sup>23</sup> For Holmes, tradition amounted to "blind imitation of the past."<sup>24</sup> Perhaps these expressions are too severe, but the partisans of "reason" at least suppose that traditions should be respected just to the extent that they can be rationally justified, instrumentally or otherwise. In this vein, Gail Heriot explains that "the rationalist" is

kin to the skeptical man of science, the child of Enlightenment. He is loath to accept anything as truth that has not been subjected to what he regards as rigorous scientific testing. In general, he is no friend of tradition. The unexplainable custom holds no charm for him, and he is not inclined to assume that a custom should be followed in the absence of proof that it is producing beneficial effects.<sup>25</sup>

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22. STEVEN WEINBERG, *THE FIRST THREE MINUTES: A MODERN VIEW OF THE ORIGIN OF THE UNIVERSE* 154 (2d ed. 1993).

23. See Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1044, 1056 (1990).

24. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

25. Gail Heriot, *Songs of Experience*, 81 VA. L. REV. 1721, 1732-33 (1995) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)).

Proponents of tradition may respond in terms arguing that tradition is a repository of good answers to instrumentalist questions.<sup>26</sup> Maybe so, but I think this should not be the principal response to the rationalist demand for justification. The more important response, rather, is that tradition or received customary ways of living are constitutive of who we are—as individuals, as families, as societies. Whether or not a custom can be vindicated instrumentally, it is among the background contingencies that help to give shape, meaning, and identity to human life: without our traditions, we would not be the individuals, families, peoples we are.<sup>27</sup> True, we would perhaps be *other* individuals, families, peoples—but only because of and in relation to other, equally contingent circumstances and traditions.

Thus, demanding instrumentalist justification for the various elements or customs that make up a tradition is like requiring justification for an English teacher's assertions to a student about the meanings of particular words or the rules of grammar. "Why can't I use double negatives to express a negation?" the rationalist student might ask. "That's perfectly acceptable in some other languages. And why must I use these words according to their dictionary or conventional meanings? These sounds don't *have to* have these meanings; they have different meanings in other languages. All of this stuff is just socially constructed, contingent, arbitrary." The answer, I suppose, is *not* that English diction and grammar are objectively true in some sense, or rationally superior to other linguistic possibilities. There is no objective reason why "bird" must refer to a feathered animal and "fish" to an animal with scales that lives in the water: that just happens to be how English works. Nonetheless, the English language is immensely valuable, to English-speakers at least; and its word meanings and grammar are what make English the language it is. Yes, it could have different meanings and grammar. But

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26. [A] tradition of reasonably long standing may be regarded as a repository of experience and of the kind of wisdom that comes from experience. Traditional practices takes shape in light of an accumulation of historical experience, judgment, and perspective that outstrips what any single individual can reasonably aspire to achieve in the course of a lifetime, and someone who adheres to the tradition may gain the advantages of that accumulated experience and judgment.

SAMUEL SCHEFFLER, *EQUALITY AND TRADITION* 292 (2010).

27. *Id.* at 294, 300–03 (developing the theme with care and subtlety).

then it would no longer be English; it would be some other language (which would have its own contingent and conventional word meanings and grammar).<sup>28</sup>

An instinctive appreciation of this aspect of tradition is sometimes sadly evident in the lives of people who have been formed in a particular religious tradition—Catholicism, Judaism, Mormonism—that in the exercise of their “reason” (as they suppose) they no longer find credible, but that has given their own lives shape and content. In my observation, people in this predicament often struggle to maintain a connection to the tradition, doggedly carrying on many of the practices and observances whose theological basis they no longer accept, sensing that without these practices and observances their identity and the meaning of their lives would be at risk of dissolution. Although this is a precarious strategy (and without belief, is a person really within the tradition anyway, outward observances notwithstanding?), the familiarity of this strategy confirms the importance of tradition in many instances as constitutive, not merely instrumental.

A second site of divergence concerns attitudes toward the apparently overwhelming contingency in every human life. I have already noticed that one reaction to this contingency—a reaction I have associated with wisdom’s appreciation of the essential features that make human life what it is—is, first, to acknowledge, with gratitude, the contingencies of time and place and parentage and culture that give any of us an identity and, second, to seek a larger meaning for one’s life that informs, transforms, and transcends these fortuities.

But a different response—one more associated with “reason”—looks on all of these fortuities as arbitrary, and hence irrational . . . and hence, perhaps, intolerable. Reason is associated with the demand for justification. But there is no apparent rational justification for the fact that some people (through no choice or merit of their own) are born into opulence and opportunity, while others (again through no choice or fault of their own) are born into crushing poverty or oppression. And so these contingencies need to be corrected. Some such sense underlies, I suspect, the current insistent campaign for “equality” in various forms. It likely informs as well efforts to

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28. It should go without saying, I hope, that nothing I have said implies that a language or any other tradition or customary practice is static.

let people choose their sex, or their gender. After all, is it not an irrational accident that some people, without ever being consulted, are just born male and others female, with all of the biological and cultural consequences that accompany those categories? "Reason," it seems, rebels against this highly fraught arbitrariness, and suggests that people must be allowed to choose their gender.

Of course, if a person is not constituted by formative features including gender, it becomes a little unclear just who or what it is that is doing this choosing—hard to locate any "person" beyond all the contingencies that is capable of making choices. Peel away some of the contingent features and you will find . . . other contingent features. Peel all the contingencies away, and will there be anything left?

In sum, although wisdom and "reason" can and should be allies, their different modes of operation can also come into conflict; and then it is possible for "reason" to crowd out wisdom. In the determination to live by reason, life—human life—can be ignored, suppressed, distorted. In this vein, G. K. Chesterton quipped that "[t]he madman is not the man who has lost his reason. The madman is the man who has lost everything except his reason."<sup>29</sup>

Is this a danger for law, which after all has long aspired and claimed to be animated by "reason"?<sup>30</sup> But then again, as noted, "reason" is an honorific term used in different ways. In the next two sections, I will suggest that in the classic common law understanding, "reason" was entirely compatible with wisdom—and that in modern American law this compatibility has been turned to antagonism.

## II. WISDOM IN THE COMMON LAW TRADITION

American law today descends from, and in part still is, what we call "the common law." And what is the common law? Well, to begin with, it is essentially a "Case System," as Karl Llewellyn put it.<sup>31</sup> Law on this understanding is not a set of rules and policies, formulated in the abstract in sweeping

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29. Gilbert K. Chesterton, *Orthodoxy*, in HERESY AND ORTHODOXY 163, 180 (Thomas Nelson 2000) (1908).

30. Cf. MARY ANN GLENDON, A NATION UNDER LAWYERS 294 (1994) ("Reason, say the ancient voices. Reason, now and always, the life of the law.").

31. K.N. LLEWELLYN, THE BRAMBLE BUSH 77 (1930).

terms, and then enforced against a society. Instead, law consists primarily of an institutional system for resolving individual disputes in the particular contexts in which those disputes arise.<sup>32</sup>

Of course, unless the disagreement is purely factual in nature, then in order to resolve a dispute, the resolver—the judge—will need some “rule of decision.” So, where do those rules of decision come from? Today it is common to describe common law as “judge-made law,”<sup>33</sup> in contrast to the more familiar model of law made by legislators. But this is a serious misdescription, at least of common law as it was understood in what might be considered its classic period, the seventeenth century. As articulated by Coke and Hale and other major thinkers of that time, common law rules were not made by judges—or, for that matter, by legislators, or by other officials. Indeed, the rules were not “made” at all.<sup>34</sup> Rather, as Gerald Postema puts it, “[t]he law emerged from the course of argument exemplified in the cases . . . but it was not laid down.”<sup>35</sup>

But then how or from what *did* the rules of decision “emerge”? The standard recurring answer from common law thinkers was that the judges were resolving cases in accordance with custom. “For the common law of England is nothing else but the common custom of the realm,” Sir John Davies declared.<sup>36</sup> Indeed, in the common law’s early centuries, judges thought of the articulated rules as procedural, not substantive: the goal was simply to frame a dispute so that it could be presented to the community, often represented by a jury, for resolution under the customs of the community.<sup>37</sup> The jury, Postema explains, “[was] asked to judge the appropriateness of the disputed behaviour according to local

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32. See *id.* at 3 (“This doing of something about disputes, this doing of it reasonably, is the business of law.”).

33. See, e.g., Koen Lernaerts & Kathleen Gutman, “Federal Common Law” in *the European Union: A Comparative Perspective from the United States*, 54 AM J. COMP. L. 1, 3 (2006) (“In the United States today, common law means judge-made law . . .”).

34. Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L. J. 155, 166 (2002).

35. *Id.* at 161.

36. *Id.* at 168.

37. See S. F. C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 28, 32 (2d ed. 1981).

norms.”<sup>38</sup>

Since most of the formal law at the time was procedural, substantive norms of behaviour and liability were brought into litigation through the jury’s common sense judgments. Juries were not asked primarily to assess the weight of evidence, but rather ‘to speak the truth of their own knowledge,’ and to decide the substantive issues... according to common sense (customary) norms.<sup>39</sup>

As the legal system became more complex, it became apparent that legal rules were not merely procedural, and that they could not be accepted simply as factual descriptions of general customs. And so it came to be accepted that the controlling customs were those of the legal profession, not of the out-of-court community. Even so, judges insisted that professional customs were grounded in, and were implementations of, more general customs.<sup>40</sup> There needed to be, as Postema explains, “a substantial congruence of formal common law rules and doctrines with the ways of the people.”<sup>41</sup> Thus, “[a]ccording to the common lawyers, law lived in and evolved from the practical interactions of daily life as they surfaced in common law courts.”<sup>42</sup>

We might notice two features of the common law that might initially appear to be problematic for this account. First, although legislation was not as pervasive as it has since become, statutes enacted by Parliament also formed part of the content of the law. But as Postema, from whom I have mostly derived the description of the common law, explains,

for a large part of its history, Parliament produced legislation that was typically remedial or declaratory, correcting some anomaly in the common law or articulating in general terms doctrines already widely recognized by it. It functioned largely, but not exclusively, as an auxiliary to

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38. Postema, *supra* note 34, at 163.

39. *Id.*

40. *Id.* at 171–72, 174–75.

41. *Id.* at 175.

42. *Id.* at 167, 169.



the courts.<sup>43</sup>

Second, in addition to describing the common law as customary, the common lawyers also often said that the law was a product of "reason." These familiar descriptions—that common law was based on custom and that it was based on reason—can appear to the modern mind an indication of deep confusion.<sup>44</sup> In the common law mindset, though, these two sources—custom and reason—were not so much independent and potentially conflicting, but more nearly redundant.<sup>45</sup> That is because, as Coke explained in his famous exchange with King James I, by "reason" the common lawyers did not mean abstract or "natural" reason, but rather "artificial reason," which was something more like the workings of the common law process.<sup>46</sup> Thus, Postema explains that for the common lawyers, reason "was not 'natural' reason, as it was often called—the reason of broad, universal principles external to ordinary sources of law, accessible to individual rational minds, by which that law is measured—but reason *in* the law. Law, it was thought, contained within itself principles of reason."<sup>47</sup>

In short, in the common law, custom was not something that needed to be *justified by* reason, as in so much post-Enlightenment thought. On the contrary, custom was the very material through which reason worked. The fact that something had been done from "time immemorial" was not a source of suspicion, as in much modern thought, or at least something in need of critical examination.<sup>48</sup> On the contrary, a practice's perceived antiquity was the *prima facie* justification for acting in accordance with that established tradition.

I need to qualify and amend this description in one important way, though. Although common lawyers like Coke sometimes declared that the common law was composed of customs that had never changed at all throughout English

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43. *Id.* at 164–65.

44. See James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321 (1991).

45. Postema, *supra* note 34, at 167 (observing that for the common lawyers, "these two notions [of custom and reason] were complementary, mutually qualifying and mutually enhancing"). See also *id.* at 176.

46. See F. W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 268–69 (prt. 1965 ed.).

47. Postema, *supra* note 34, at 178.

48. *Id.* at 170.

history,<sup>49</sup> the more astute judges and scholars like Hale and Selden knew (as the historically learned Coke himself surely must have known) that this was not literally true. They knew that custom evolved over time.<sup>50</sup> They knew as well that custom was not unitary and harmonious, and that it often did not provide an unequivocal answer to a particular disagreement. In such situations, common law reason worked from within the tradition to resolve cases in the most fair and sensible way.<sup>51</sup> Judges selected what was best in the tradition to make the law "the best it could be," so to speak.

The phrase suggests a Dworkinian approach to adjudication. But there is a subtle but crucial difference, I think. In Dworkin's well-known approach, legal interpretation has two dimensions: "fit" and "justification."<sup>52</sup> An interpretation must sufficiently fit the received legal materials, but remaining uncertainties and indeterminacies (which an astute lawyer can find in abundance) are then resolved by looking outside those materials to something like abstract moral philosophy. In this way, abstract reason stands outside the law, like an unmoved mover, judging and shaping the law. In the common law approach, by contrast, it would be more accurate to say that there is only one dimension—"fit." "The overriding aim," Postema explains, "is not to find the result dictated by abstract principles of natural law, but to solve the practical problem and keep 'the law consonant to itself'"—here Postema is quoting Hale—"and for this the 'experience and observation' of common law judges provide a more reliable basis of judgment than"—Hale again—"the aery speculations and notions and consequences and deductions from certain preconceived systems of . . . philosophers."<sup>53</sup>

I suspect that this account is mostly cogent but perhaps somewhat overstated. Suppose we ask whether the pending case is closer—"fit"-wise—to precedent *A* or to precedent *B*, both of which have some similarities to but some differences from the pending case. Some similarities will be relevant and some will not—it will be supremely irrelevant, for example, that the plaintiffs in each case are named Charles and have the

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49. *Id.* at 169–70.

50. *Id.* at 172–74.

51. *Id.* at 178–80.

52. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 139, 228–38, 410–11 (1986).

53. Postema, *supra* note 34, at 180.

same birthday—but how do we know this? For Edward Coke, Michael McConnell suggests, the famous “artificial reason” that performed this sort of analysis was “based on a deep, intuitive, almost aesthetic sense of the way in which the new case ‘fits’ into the rich body of the law.”<sup>54</sup> Perhaps, but it seems almost inevitable that ethical or normative considerations would enter into this “deep, intuitive sense.” So there will probably be an implicit dimension of “justification” even in the single-minded quest to achieve “fit.” Even so, it is significant that the element of justification is mostly implicit, rather than proudly out in the open and even primary (as it can seem to be in Dworkin).

There are difficulties in this account of common law reasoning that I cannot explore here. For now let me say that, understood in this way, the common law approach invites and facilitates the exercise of wisdom, as I have tried to describe it earlier. There are of course no guarantees. The enterprise is of, by, and for human beings, after all. And in the nature of things there will be wise and foolish lawyers, prudent and imprudent judges. Still, the overall enterprise is compatible with, even conducive to, the cultivation of wisdom.

Thus, the law focuses on the particular and the concrete. It can only act in and upon concrete cases involving particular parties. In resolving those disputes the law treats the historical and societal context as authoritative: the goal is not to stand outside and in judgment on society, and to make or remake it, but rather to resolve concrete disputes. And the discursive medium of law is the meaning-laden medium of stories—the out-of-court stories that bring people before the judge, the stories that litigants present to judges and juries, the stories that the judge tells in resolving the dispute.

As an imperfect analogy, we might compare the law thus understood to a physician who treats a wounded or diseased patient. The physician does not conceive it to be his or her task to figure out what an ideal body would be, and then to treat the patient’s body as putty or plastic to be molded into that ideal shape. Instead, the physician supposes some sort of natural or normal condition of the particular patient—a condition that has been disrupted by violence, accident, or sickness—and then

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54. Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 179–81 (1998).

attempts to restore the body to that normal or natural condition.<sup>55</sup> For the common law, a community or society likewise has some natural or normal condition that makes it the community it is, but something has disrupted that condition, giving rise to a dispute. And the law's goal is to resolve the dispute, thereby restoring the community to its natural or normal condition, expressed in its customs and traditions. Which are the features, I have suggested, that, however contingent, are what give the community its existence, identity, and meaning.

### III. THE MODERN TURN TO "REASON"

If the picture I've been trying to sketch seems hazy or unattractive to you, you have plenty of company. That is because to what we might call the modern legal mind, the central features of the common law approach seem obscure, confused, and . . . not "rational."

Start with the idea of law as an institution for resolving disputes in accordance with custom—a practice in which the rules of decision are not "laid down" but rather emerge in the course of dispute resolution. In the first place, this is not how modern legal thinkers conceive of law. Something like the Austinian image of a ruler or "sovereign" who makes and enforces rule-like commands<sup>56</sup> resonates more closely with modern understandings. We now know, or think we know, as Holmes declared, and as the Supreme Court itself decreed in *Erie*, that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."<sup>57</sup> It is not just elite legal thinkers who adhere to this understanding; legally untutored citizens for the most part probably think of law primarily as a set of rules, enacted by Congress, maybe, or the state legislatures, or the FTC, or somebody. Somebody "up

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55. Cf. G. K. CHESTERTON, WHAT'S WRONG WITH THE WORLD? 12 (Feather Trail Press 2009) (1910):

No doctor proposes to produce a new kind of man, with a new arrangement of eyes or limbs. The hospital, by necessity, may send a man home with one leg less; but it will not (in a creative rapture) send him home with one leg extra. Medical science is content with the normal human body, and only seeks to restore it.

56. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 18–25 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

57. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

there.” Indeed, it is the power of this more positivist conception that leads us routinely to describe common law as “judge-made law”: if there’s a law, *somebody* had to make it, and if that somebody wasn’t a legislature or some agency exercising legislative powers, well, then who else could it have been except for a judge?

But even if we can accept the idea of law as emerging through the resolution of disputes, the notion that such disputes should be decided simply in accordance with custom may seem like the essence of irrationality. After all, customs can be good (like free speech) or bad (like racial discrimination). So if we follow a custom, don’t we need some reason, some justification, for doing so? Don’t we need reasoning to help us sort out the good customs from the bad ones? As Holmes’s famous mockery put the point,

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>58</sup>

So we need justification. And what sort of justification might we be looking for? Modern normative discourse is more frugal than normative discourse used to be; it has discarded older notions like those of a *telos* for humans and human affairs, or a final cause, or an order of things that is “natural” in a normative sense. So then what is left for reason to work with?<sup>59</sup>

The dominant answer in legal thinking from the early twentieth century has been instrumentalist in nature.<sup>60</sup> “Reason” in this context has meant, basically, means-end rationality or, more pretensively, “policy science.”<sup>61</sup> Human beings want and need particular things—that is simply a fact to be observed—and reason is a faculty or process by which we figure out how to get those things in the most efficient possible

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58. Holmes, *supra* note 24, at 469.

59. See STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (2010).

60. See BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END* (2006).

61. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 87–91, 99–101 (1977), for a classic deflationary description of the idea of law as policy science.

way. Law is an instrument for formulating and implementing social policy: particular cases are merely the medium through which this formulating and implementing occurs.<sup>62</sup>

This is a simplification, of course; and I will notice one major qualification in a moment. But conceding the simplification, it would be fair to say that Holmes at the beginning of the twentieth century and Richard Posner at the end represented the spirit of instrumental rationality that dominated twentieth-century legal thinking.<sup>63</sup>

This instrumentalism, or policy science, was and is conspicuous in legal scholarship—in law-and-economics, or public choice theory, to take two outstanding examples. Policy science is present but less prominent in the actual case law in private law fields like contracts, torts, and property: more on that in a moment. But instrumentalist thinking—or at least instrumentalist rhetoric<sup>64</sup>—has been and is powerful in constitutional law, especially in fields like substantive due process and equal protection. Upon reflection, this is perhaps not so surprising. In these areas, the Constitution itself provides very little hard law, so to speak; indeed, it is doubtful that the Constitution as written and enacted actually speaks at all to some of these areas. Lacking any meaningful guidance from the Constitution itself, judges who are nonetheless determined to forge ahead in these fields have had little choice but to make up the law as “reason” instructs them. And what could “reason” mean within the truncated philosophical horizons of the twentieth-century except instrumental reason? Or at least so it may seem to many judges and observers.

No one has written more insightfully on this phenomenon than Bob Nagel, including in the essay I mentioned at the outset: “Rationalism in Constitutional Law.” Bob began by observing that “modern constitutional law is largely the free-

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62. See STEVEN D. SMITH, *LAW'S QUANDARY* 77–82 (2004), for a critical discussion of this aspect of contemporary legal thought.

63. See Holmes, *supra* note 24; see also Richard A. Posner, *The Path Away from the Law*, 110 HARV. L. REV. 1039 (1997).

64. Given the failure of courts and scholars to develop any methodology by which instrumentalist calculations could actually be carried out in constitutional law, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987), it is entirely possible that constitutional decisions, while couched in instrumentalist terms, are not actually the product of serious instrumentalist deliberation.

floating application of one version of 'reason' to public issues."<sup>65</sup> More specifically, "across a surprisingly wide array of subject areas, the [Supreme] Court strikes the same chord again and again: the government must justify its rules by articulating a sufficiently important purpose and by demonstrating that the rule in some degree will actually achieve that purpose."<sup>66</sup> "[T]o anyone not inured to the Court's methods," Bob remarked, "it must be perplexing that constitutional provisions apparently so different substantively should all turn out to have such similar meanings operationally."<sup>67</sup> In adopting this instrumentalist approach, though, the Court is "deeply enmeshed in a general intellectual fashion."<sup>68</sup>

Bob proceeded to examine the unfortunate effects of this approach on law and culture. Here I will note only one of those effects—the misunderstanding and denigration of custom and tradition. Bob observed that "courts often operate under the assumption that beliefs that originate in tradition (and thus have the advantage of being time-tested) are impermissible bases for public policy, unless they can be justified by some rational standard extrinsic to the tradition."<sup>69</sup> But the attempt to provide such an extrinsic justification is likely to promote misunderstanding, and disdain. Bob quoted Michael Oakeshott, who asserted that "[l]ike a foreigner or a man out of his social class, [the rationalist] is bewildered by a tradition . . . of which he knows only the surface . . . . And he conceives a contempt for what he does not understand."<sup>70</sup>

As one illustration of this kind of dismissive distortion, Bob discussed a case in which a town had adopted an ordinance requiring drive-in movie theaters showing films containing nudity to install a visual barrier so that the films could not be seen from surrounding areas.<sup>71</sup> The ordinance, Bob remarked, surely reflected a community preference, "like a preference for quiet parks or for the grandeur of tall buildings, [that was] part of [the] locality's self-definition. It [was] a statement best understood on its own terms, not as a proxy for some ulterior

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65. NAGEL, *supra* note 1, at 108.

66. *Id.* at 106–07.

67. *Id.* at 107.

68. *Id.* at 110.

69. *Id.* at 116–17.

70. *Id.* at 117 (quoting M. OAKESHOTT, *RATIONALISM IN POLITICS* 31 (1962)).

71. See *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975).

purpose.”<sup>72</sup> Intuitively perceiving the inadmissibility of this sort of justification, though, the town attempted to defend the ordinance as an effort to prevent distracted drivers from running off the road. And the Court predictably found this justification inadequate. “In its relentless search for external justifications,” Bob observed, “the Court was too grave to pause for the comic aspects of its own discussion. The foolishness of the community’s asserted justification, however, did not demonstrate that the policy was ‘wrong,’ but only that its defenders had been driven to silliness by the Court’s demand for derivative justification.”<sup>73</sup>

It would not be difficult, I think, to identify numerous similar but more recent instances. A good place to look for such instances would be the chapters on equal protection and substantive due process in any respectable constitutional casebook.

One stark example, I believe, is the recent spate of joyously lauded decisions striking down traditional marriage laws. This obviously is not the place to debate the ultimate merits of traditional versus more expansive conceptions (or revisions of conceptions) of marriage; in this context, rather, I am interested in the legal process by which this change has occurred. That process, as we know, is typically one in which some political appointee whom hardly anyone had heard of yesterday and who will be forgotten tomorrow presumes to sit in judgment on an institution that has centrally shaped the lives and communities of millions of human beings for centuries. This robed anonymity listens to testimony from several selected experts, who report that a few social science studies have not to date shown any strong positive correlation between that institution and indicia such as student graduation or delinquency rates. He then confidently pronounces laws supporting the venerable institution to be demonstrably irrational; indeed, so supremely confident is he in the rightness and righteousness of this judgment that he may decline even to stay the judgment pending appellate review. Whatever the ultimate truth on the issue may be, I submit that this process is an almost breathtaking manifestation of recklessness and hubris, not of the prudence

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72. NAGEL, *supra* note 1, at 112.

73. *Id.*



and humility associated with wisdom.

(As is probably apparent, the previous paragraph was written after *United States v. Windsor*,<sup>74</sup> which I have addressed elsewhere,<sup>75</sup> but before *Obergefell v. Hodges*.<sup>76</sup> Applied to *Obergefell*, the paragraph would require amendment. The Justices who decided *Obergefell* were not “robed anonymities”; their names are known to most informed Americans. And the question of a stay pending appellate review was of course not presented: there was, unfortunately, no higher, wiser court to appeal to—or at least none whose jurisdiction the Justices would have recognized or submitted to. The Court did not invoke a “rational basis” test to conclude that traditional marriage laws were irrational; indeed, while purporting to exercise “reasoned judgment,” the Court did not trouble itself to articulate or invoke any particular doctrinal “test” at all. Nor did the Court rely on or purport to analyze social science studies. The points about prudence and humility and hubris, I think, require no amendment.)

#### IV. CONCLUSION

I want to reiterate, and to emphasize, that there is no necessary conflict between wisdom and reason, or even between wisdom and instrumental reason. But a legal mindset that views instrumentalism as the exclusive or at least the essential form of reason, relegating desiderata outside its cramped scope to the category of irrationality, can easily degenerate into a kind of institutionalized folly corrosive of the blessed contingencies that are the foundation of our personal and communal existence. Sadly, modern constitutional law in some of its most celebrated manifestations has become a case in point. And no one has investigated this situation more searchingly or illuminated it more steadily, I think, than Bob Nagel.

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74. 133 S. Ct. 2675 (2013).

75. Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675 (2014).

76. 135 S. Ct. 2584 (2015).