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A Revival of Some Ancient Learning: A Critique of Eisenberg’s The Nature of the Common Law

Carl A. Auerbach*

... a great commandment of our Lady of the Common Law: Thou shalt not make unto thyself any graven image — of maxims or formulas to wit.

— Sir Frederick Pollock**

We must be both conscious of what great thinkers have accomplished, and also eager to find elsewhere a more adequate and richer vision of reality. We must be familiar with them, bear them in mind, and salute them, before bidding them a respectful adieu. We must not forget them.

— Jean Wahl***

INTRODUCTION

The celebration of the bicentennial of the Constitutional Convention produced voluminous writings propounding theories to explain both the leeways and constraints involved in constitutional adjudication. Commentators also explored the same themes in common law adjudication. My Essay concerns this latter subject. It discusses Professor Melvin A. Eisenberg’s book, The Nature of the Common Law,1 an important contribution to the literature on the growth of the common law.

Nurtured on the writings of Karl Llewellyn2 and Julius Stone,3 I mistakenly believed that there is agreement on the

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** Pollock, A Plea for Historical Interpretation, 39 L.Q. Rev. 163, 169 (1923).
*** J. WAHL, TRAITÉ DE MÉTAPHYSIQUE 5, 7-8 (1953) (translated and quoted by J. STONE, LEGAL SYSTEM AND LAWYERS’ REASONINGS 7 (1964)).
3. J. STONE, THE PROVINCE AND FUNCTION OF LAW (1946); J. STONE, LEGAL SYSTEM AND LAWYERS’ REASONINGS (1964); J. STONE, HUMAN LAW AND HUMAN JUSTICE (1965); J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE
fundamentals of the judicial task in the development of the common law. Professor Eisenberg frames a theory of common law adjudication, purporting to be both descriptive and normative, which conflicts with these writings.

A principal task of any theory of common law adjudication is to explain how the common law in the United States and Great Britain adapted to social, economic, technological, and cultural changes while adhering to the principle of stare decisis. The strength of Eisenberg's work is his recognition that courts modify or abandon doctrinal propositions when they conflict with changing propositions of social morality, policy and experience. Wisely, Eisenberg rejects the distinction between "easy" and "hard" cases that depends on whether the case can be decided solely on the basis of doctrinal propositions or whether social propositions are also involved. He realizes that social propositions are always involved in the judicial establishment, extension, restriction, and application of rules. Rather, an "easy" case is one in which applicable social propositions support the relevant doctrinal rule.

The book's shortcomings lie in the criteria that Eisenberg maintains social propositions must satisfy before courts may employ them. Furthermore, Eisenberg fails to appreciate fully how changes in the common law occur within the confines of the doctrine of stare decisis itself.

I. EISENBERG'S THEORY OF COMMON LAW ADJUDICATION

Eisenberg maintains that, in deciding cases, American judges do and should apply four institutional principles that have roots in the social functions of the courts and are justified by fairness and social welfare considerations. The first of


4. "I have often wondered," wrote Lord Wright, "how this perpetual process of change can be reconciled with the principle of authority and the rule of stare decisis." J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS, supra note 3, at 230 (quoting L. WRIGHT, ESSAYS AND ADDRESSES XVI (1939)).

5. Doctrinal propositions are those "that purport to state legal rules and are found in or easily derived from textual sources that are generally taken to express legal doctrine." M. EISENBERG, supra note 1, at 1.

6. Id. at 1-2.
7. Id. at 2.
8. Id. at 3.
9. Id.
10. Id.
these institutional principles is objectivity, which requires courts to be impartial (in the sense of being “free of ties to the parties”) and to establish and apply rules, not merely in the immediate dispute, but in all disputes between similarly situated parties. Setting aside the question of the criteria for determining who are similarly situated, this principle is an acceptable descriptive and normative proposition.

The second, the principle of support, states that the general standards of the society or the special standards of the legal system should support rules established by the courts. By following this principle, courts perform their social function of serving as institutions where a person is entitled to go to resolve a dispute that derives from a claim of right based on the application, meaning, and implications of the existing standards of the society or its legal system. According to Eisenberg, only the legislature, not the court, may alter existing social standards in making rules to govern the future.

Eisenberg justifies the principle of support on two grounds. First, it helps to legitimate the establishment of legal rules by the court, an institution that is not intended to be representative, has a narrow base of experience, and is deliberately structured to limit its accountability and responsiveness to the citizenry. Second, it alleviates the difficulty that common law adjudication, by nature, is retroactive in effect. "How can it be fair," Eisenberg asks, "to resolve a dispute concerning a past transaction by applying a legal rule that is articulated after the transaction occurred?" The answer is to ensure that decisions reflect standards that the disputants either knew or had reason to know at the time of their transaction, even if the standards previously had not been officially recognized as legal rules.

The third institutional principle is replicability. It requires courts to employ a consistent methodology and a process of reasoning that is replicable by lawyers so that lawyers can determine the law and give reliable legal advice to their clients.

11. Id. at 8-9.
12. Id.
13. Id. at 9.
14. Id. at 4, 9.
15. Id.
16. Id. at 10.
17. Id.
18. Id.
19. Id.
20. Id.
for purposes of planning and dispute settlement.\textsuperscript{21} This principle also alleviates the retroactivity dilemma because use of a replicable process of reasoning enables the courts "to resolve a dispute on the basis of a proposition whose official recognition as a legal rule may have been predictable by the profession at the time of the transaction, even though the proposition had not yet received such recognition at that time."\textsuperscript{22} Knowledge of the types of proofs and arguments that courts entertain in their decisionmaking also enables the parties to participate actively and meaningfully in the adjudicative process.\textsuperscript{23}

The fourth institutional principle is \textit{responsiveness}.\textsuperscript{24} Courts must listen to legal discourse and be prepared to either modify their views when that discourse is convincing or show why it is not convincing.\textsuperscript{25} This discourse is found not only in the briefs and oral argument of a particular case but also in law reviews, treatises, monographs, opinions of sister courts, addresses by lawyers at judicial conferences, meetings of professional organizations that both judges and lawyers attend, and casual interchange among members of the bench and bar.\textsuperscript{26} Sometimes the discourse also includes articles, books, and editorials, written by non-lawyers, that evaluate common law opinions and are brought to the court's attention during the litigation of a particular case.\textsuperscript{27}

In one respect, Eisenberg states this principle too narrowly. If, for example, non-lawyers have ascertained or evaluated the legislative facts underpinning a specific legal rule, the court should take notice of these facts and evaluations, whether or not they are brought to its attention by the parties. Indeed, courts take judicial notice of legislative facts, whatever their source, that are not brought to their attention by the parties. Regrettably, they often do so without giving the parties an opportunity to confront the facts.\textsuperscript{28} In the latter case, the courts

\begin{itemize}
\item \textsuperscript{21} Id. at 11.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. at 12.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id. at 12-13.
\item \textsuperscript{27} Id. at 13.
\item \textsuperscript{28} Legislative facts are generalized facts used to justify "the formulation of a legal principle or ruling by a judge or court or ... the enactment by a legislative body." \textsc{Fed. R. Evid. 201(a)} (advisory committee's note). \textit{See also K. Davis, 2 Administrative Law Treatise} 136-42 (1979) (discussing judicial use of legislative facts).
\end{itemize}
deprive the parties of meaningful participation in the adjudicative process.

The principles of support and replicability are central to Eisenberg's conception of the nature of the common law. They explain his position that courts should consider only those moral standards that claim to reflect community aspirations and policies that claim to embody a state of affairs that is good for the community. Courts, however, must use an appropriate methodology to ensure that the moral standards and policies have substantial support in the community.

Eisenberg does not equate the social morality or policies the courts may employ with majority opinion. In response to the objection that social morality is not a meaningful concept, however, he contends that "we can often reach a pretty firm sense of what most people would regard as fair in a given case." At the same time, he recognizes that moral norms may vary by class, ethnicity, religion, or occupation.

What is the "appropriate methodology" whereby courts ascertain the community-supported moral norms and policies by which they are and should be guided? In 1955, Cohen, Robson and Bates argued for polling as the most appropriate methodology. At the very least, they insisted, this alternative was better than a determination made analogically from a judge's surmise or guess as to the community sentiment. They concluded that "modern social science can offer a better device than the primitive divining rod for fulfilling so important a task."

Eisenberg does not ask judges to rely on social science. A court is not obliged to establish empirically that the requisite social support exists for a moral norm or policy, but only to use

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29. M. Eisenberg, supra note 1, at 15.
30. Id. at 29. Moral norms "characterize conduct as right or wrong, policies characterize states of affairs as good or bad," i.e., as "conducive or adverse to the general welfare." Id. at 26.
31. Id. at 15, 29.
32. Id. at 21.
33. Id.
35. Moral Sense, supra note 34, at 141.
36. Id. at 149.
appropriate methodology to make a judgment on that issue.\textsuperscript{37} The judgment will be empirical although not normally testable.\textsuperscript{38} How will courts make empirical but not-testable judgments? Eisenberg requires the court to first look to official sources such as prior decisions.\textsuperscript{39} If the moral norms or policies articulated in those decisions “provoked no significant dissent in the professional discourse, or elsewhere in the wider arena, the court may usually assume that the norm [or policy] has requisite social support.”\textsuperscript{40} If prior decisions have not articulated the relevant moral norm or policy, it may be inferred because it is the best explanation of the doctrine found in these sources.\textsuperscript{41} Again, in the absence of significant dissent, the court generally may assume that the explanatory norm or policy has the requisite social support.\textsuperscript{42}

Official sources are not the exclusive, or necessarily the most reliable, sources for determining the requisite moral norms or policies because they may reflect past, rather than present, beliefs.\textsuperscript{43} Therefore, the court may employ those moral values or policies to which it determines citizens are committed, because they justify existing social structures and institutions.\textsuperscript{44} The court may also use moral norms discernable from popular sources, such as newspapers and everyday conversation,\textsuperscript{45} even if all members of the community do not practice them and even if those who practice them do not do so all of the time.\textsuperscript{46} What is important is that the community asserts, and does not widely disregard, a specific norm. If these two conditions are met, the norm may be accepted as embodying “a community view of right conduct.”\textsuperscript{47}

If applicable norms or policies are not apparent in any of these sources, judges may rely on their own judgment, as participant-observers, that particular norms or policies appear to have the requisite social support, provided they believe, or have

\textsuperscript{37} M. Eisenberg, \textit{supra} note 1, at 18.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.} at 16.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.} at 17.
\textsuperscript{44} \textit{Id.} at 17 n.8 (citing J. Bell, \textit{Policy Arguments in Judicial Decisions} 190 (1983)).
\textsuperscript{45} \textit{Id.} at 17.
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
no reason to disbelieve, that their judgment is widely shared.\(^48\) Indeed, judges may assume in such cases that their own moral judgments are widely shared,\(^49\) unless they know that their views are idiosyncratic or if discourse in the narrower or wider arena suggests they are idiosyncratic.\(^50\)

This is not all. In some cases judges may determine social morality "by extending other norms that have the requisite support,"\(^51\) or by employing an emerging norm if they believe the norm will soon attract substantial social support, and if they will retreat if that belief proves incorrect.\(^52\) The judgment that a moral norm has the requisite social support is empirical only in the sense that the judgment is subject to check by the lawyers in the case, the other judges in a multi-member court, and professional and other discourse in the wider arena.\(^53\)

If there is a collision between two norms of social morality, one that calls for the preservation of an established legal rule and another that calls for its abandonment, or if there is both substantial social support for and opposition to a moral norm underlying an established rule, judges should preserve the status quo,\(^54\) but not always. The courts may sometimes play a leadership role in these circumstances. If norms collide, the court may choose the one it believes the community regards as significantly more weighty,\(^55\) or the one it believes "is waxing while the other is waning,"\(^56\) even though the latter has more support. Furthermore, the court may choose the norm that "is more congruent with applicable policy and more consistent with the body of law,"\(^57\) or the norm that "is better connected to the community's fundamental concepts of justice."\(^58\)

II. TESTING EISENBERG'S THESIS: HOW DO COURTS ACTUALLY ADJUDICATE?

What may we conclude from Eisenberg's explanation of how courts do and should determine the content of existing so-

\(^{48}\) Id.
\(^{49}\) Id. at 17, 168 n.10.
\(^{50}\) Id.
\(^{51}\) Id. at 17.
\(^{52}\) Id.
\(^{53}\) Id. at 18.
\(^{54}\) Id.
\(^{55}\) Id. at 19.
\(^{56}\) Id.
\(^{57}\) Id.
\(^{58}\) Id.
cial standards? Whose standards do judges impose if they follow Eisenberg's methodology? Why should we assume that the absence of popular dissent from the norms articulated or implicit in judicial decisions necessarily indicates popular acceptance of them? Popular acquiescence may indicate only a "willingness to accept an authoritative decision merely because it is authoritative." It does not mean that the community would not support a contrary decision. Eisenberg initially rejects the notion that judges should impose their own moral norms and preferred policies; however, by the time he concludes his exposition of the appropriate methodology to determine existing social standards, he has left it to judges to determine the values that will bind ordinary citizens.

Justice Cardozo, whose writings (other than opinions) Eisenberg fails to mention, stated that it "is the customary morality of right-minded men and women which [the judge] is to enforce by his decree." Professor Ernest Nagel criticized Justice Cardozo for this view:

But does this mean that these are the values which the majority (or some other fraction) of the members of the community actually hold, whether or not they explicitly profess those values? Or does it mean that they are values which, in the opinion of the court, members of the community should hold, given the expectations that the institutional arrangements of the society generate? And in either case, how do courts ascertain what these values are, or establish who are the "right-minded" men and women? No clear answer to these questions can be found in Cardozo's writings. He seems to take for granted that a properly qualified judge will be familiar with the moral standards and ideals of the society of which he is an official. However, except for an unhelpful reference to "experience and study and reflection," he gives no instruction to his readers on how such familiarity is to be acquired. Nor does he suggest any mechanism for diminishing the subjective biases and idiosyncratic conceptions of what are the community values that are bound to accompany judicial decisions reached by the method of sociology so described. In short, although according to Cardozo's explicit account the method of sociology operates with "objective" values of a community, he does not show convincingly that the values entering into appellate decisions reached by that method are more than the personal preferences of the courts making them.61

59. Dickinson, Social Order and Political Authority, 10 AM. POL. SCI. REV. 593, 615 (1929).
Eisenberg, however, neither mentions Nagel’s criticism of Cardozo, nor recognizes that his position is vulnerable to the same attack. He maintains that the landmark common law cases are not judicial attempts to change existing social standards, but are attempts to bring legal rules into congruence with existing social standards.62

Eisenberg’s thesis may be tested by examining a sample of the decided cases and listening to what judges themselves say they do. Eisenberg applies neither test. To do so thoroughly is beyond the scope of this Essay. I present, however, a few cases and writings by judges that suggest that judges do not ascertain existing social standards before deciding cases, but decide on the basis of their own criteria of justice.

A. EXAMINING DECIDED CASES

In Coulter v. Superior Court,63 the California Supreme Court imposed dram shop liability on social hosts. Professor Edmund Ursin reports that within months of the decision, the California legislature enacted a statute exempting social hosts from this liability.64 Because the legislature is attuned to existing social standards and popular attitudes, which the judges made no effort to ascertain, it may be inferred that the California Supreme Court sought to impose its own views of morality and social policy, although ultimately without success.

In Repouille v. United States,65 the judges agreed that whether a petitioner for citizenship who committed euthanasia was of “good moral character” must, as a matter of statutory interpretation, be determined by whether “the moral feelings, now prevalent generally in this country” would be outraged by the petitioner’s act.66 Judge Learned Hand acknowledged that in “the absence of some national inquisition, like a Gallup poll, that is indeed a difficult test to apply.”67 Nevertheless, Judge Hand held that the petitioner was not of “good moral character” because the court was fairly certain that only a minority of virtuous persons would deem the practice morally justifiable so

65. 165 F.2d 152, 152-53 (2d Cir. 1947).
66. Id. at 153.
67. Id.
long as it remained in private hands. Thus, even when a statute required prevailing moral feelings to guide judicial decisions, the court, despite a strong dissent by Judge Jerome Frank, made no effort to ascertain those feelings, but imposed its own conception of them.

Justice White's 1986 opinion in Bowers v. Hardwick is a more recent illustration of the propensity of judges to act as Nagel describes. In support of the Court's decision not to grant consenting adults a constitutional right to engage in homosexual sodomy in the privacy of their bedroom, Justice White relied, *inter alia*, on the Georgia statute, enacted in 1816 and broadened in 1968, that made such activity criminal. From this alone, Justice White presumed that the majority of the Georgia electorate believed that homosexual sodomy was immoral and unacceptable. The majority did not attempt to determine the opinion of the Georgia electorate at the time of decision; nor did the dissenting Justices. Justice Powell, in his concurring opinion, did point out that the Georgia statute had not been enforced for decades, implying that the Georgia electorate did not believe the activity should be punished as a crime.

What did the public opinion polls show? A Gallup Poll special telephone survey, taken during March 1987, revealed that fifty-five percent of the respondents thought that homosexual relations between consenting adults should not be legal. Sixty-eight percent of the respondents in the South, but less than one-half of the respondents in the East and West, shared this view. Males and females did not significantly differ in their opinions on this issue, but non-white respondents opposed legalization of homosexual sodomy more strongly than white respondents. Age, education and religious affiliation also conditioned public opinion. Persons younger than fifty years of age, those with college educations, Catholics and non-

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68. *Id.* Judge Hand reached this conclusion after pointing out that neither the jury nor the trial judge felt any “moral repulsion” at the crime. *Id.*
69. *Id.* at 154-55.
71. *Id.* at 192-93.
72. *Id.* at 196. Whether social morality should have been used to determine the constitutionality of Georgia's statute is an issue outside the province of this paper.
73. *Id.* at 198 n.2.
75. *Id.* at 65 (56% of the respondents in the Midwest were of this opinion).
76. *Id.*
Evangelicals expressed more liberal views than other respondents. Only thirty-six percent of the college graduates opposed legalization; the less educated respondents were more likely to oppose legalization. Gallup concluded that the 3-1 ratio in the South opposing legalization may have reflected the views of the large Evangelical population there.

Opposition to legalization of homosexual relations increased significantly from 1977, when Gallup started assessing public opinion on this issue, to 1987. Indeed, 1986 marked the first time since 1977 that a majority opposed legalization. The Gallup Poll suggests that the post-1977 AIDS epidemic may have influenced public opinion on the issue. The widely publicized Supreme Court opinion in Bowers v. Hardwick may also have influenced public opinion.

More recent data indicate yet another change in public opinion on this matter. A National Law Journal/LEXIS poll in early 1990 showed that seventy-three percent of the respondents believed that the U.S. Constitution guarantees a right to privacy; indeed, fifty-one percent believed that this right is expressly written in the Constitution. Sixty-six percent of the respondents, including sixty-three percent of the respondents in the South, thought that the right of privacy should protect private, voluntary acts of homosexuals. Regional differences in the 1990 poll were not as great as those in the 1987 poll, and there were again no significant differences in the responses between males and females. Unlike the 1987 Gallup Poll, however, non-white respondents in the 1990 poll were more protective of homosexual acts than white respondents. Age, education, and religious affiliation again conditioned public opinion, but in only two categories — those with less than a high school education and the widowed — did less than one-half of

77. Id. at 65-66.
78. Id. at 65.
79. Id. at 67.
80. Id. at 66. In 1977, 43% of the respondents thought that homosexual sodomy between consenting adults should not be legal; 39% thought so in 1982; 47% in 1985; 54% in 1986 and 55% in 1987. Id. at 64-66.
81. Id.
82. Id. at 67.
83. The Poll was conducted by Penn & Schoen Associates on the 200th anniversary of the Supreme Court's first term. Coyle, How Americans View High Court, Nat'L J., Feb. 26, 1990, at 1, 36. Eight hundred five Americans over the age of 18 were interviewed on January 27 and 28, 1990. Id. at 36. The purpose was to test the public's knowledge and perceptions of the Supreme Court and its views on some controversial issues decided by or before it. Id.
84. Id.
the respondents believe that private, voluntary acts of homosexuals should be protected. As in 1987, persons younger than fifty years old, those with college educations, and Catholics expressed more liberal views than other respondents. Higher income respondents were more likely to think that private, voluntary homosexual acts should be protected. The views among Democrats, Republicans and Independents did not differ significantly; however, those identifying themselves as liberals or moderates were more protective of homosexual acts than those identifying themselves as conservatives.\textsuperscript{85}

The results of the polls illustrate the difficulties of ascertaining prevailing moral norms on issues before courts. Not only do different groups in society have different views, but they may share the same views with different degrees of intensity.\textsuperscript{86} If the moral norms and policies by which judges are and should be guided are those that have “substantial” popular support, in controversial cases any chosen moral norm or policy is likely to qualify. Notwithstanding, judges do not seem willing to discard their divining rods and rely on modern social science to determine the moral norms and policies that have substantial social support. In all probability, many judges would be outraged by the suggestion that they should be bound by public opinion polls.\textsuperscript{87}

B..listening to what judges say they do

What do judges themselves say about these matters? The


\textsuperscript{86} These difficulties are compounded when we appreciate that community behavior does not always reflect community attitudes. Should judges be guided by the community’s attitudes or by its observable practices?

\textsuperscript{87} See, for example, the comment of Justice Stanley Mosk of the California Supreme Court. Mosk, The Common Law and the Judicial Decision-Making Process, 11 HARV. J.L. & PUB. POL’Y 35, 41 (1988):

It will be a sad day... in this country if a judge feels he must take a poll of public opinion before rendering a judgment. If that day comes, let’s put George Gallup on the Supreme Court and we will get public opinion with reasonable accuracy. Judges must be fearless and independent, unafraid of applying the Constitution and laws to the least among us. That, I believe, is what was contemplated by those who fought British tyranny and then fashioned our Constitution two centuries ago.

I recognize that the passage is directed at constitutional adjudication. But a reading of Justice Mosk’s article indicates he would take the same position for common law adjudication. Id.
extensive literature on this subject, from which I take a few examples, warrants at least the modest conclusion that no consensus supports Eisenberg’s claim. I begin with an often-quoted passage written by Justice Holmes:

It is something to show that the consistency of a system requires a particular result, but it is not all. 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, . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.88

Holmes criticized judges for failing in their duty to adequately weigh social values: “[t]he duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious. . . .”89 For Holmes, this result was troublesome because, insofar as the actual justification for a rule of law is to achieve a desirable social end, it is necessary “that those who make and develop the law should have those ends articulately in their minds.”90 Holmes commended Chief Justice Lemuel Shaw of Massachusetts for his “accurate appreciation of the requirements of the community” and “understanding of the grounds of public policy to which all laws must ultimately be referred.”91 Nothing in Holmes’ writings on the common law indicates that he would require common law judges to ascertain whether moral norms and policies have substantial popular support before using them to reach their decisions.

Justice Cardozo’s writings on common law adjudication also illuminate the difficulties of Eisenberg’s thesis.92 While I agree with Professor Nagel’s criticism of Justice Cardozo,93 it must be appreciated that Cardozo anticipated the substance of his criticism. Cardozo was ambivalent on the issue of the subjective or objective nature of judicial decisionmaking and his ambivalence was heightened by his intense effort to present a

89. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 467 (1897).
90. Holmes, Law in Science and Science in Law, 12 Harv. L. Rev. 443, 460 (1899).
91. Holmes, The Common Law, supra note 88, at 85. There is only a brief citation of Holmes in Eisenberg’s work, supra note 1, at 19, and it does not deal with Holmes’ philosophy of adjudication.
92. See infra notes 95-107 and accompanying text.
93. See supra text accompanying note 61.
balanced assessment of the issue and avoid simplifying a complex process.\textsuperscript{94}

Many passages in Cardozo's writings support the objective view of judicial decisionmaking. A judge, he wrote, "would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or life."\textsuperscript{95} He provided the example of a judge who regards theatre-going as a sin, contrary to community sentiment. In his opinion, that judge would have a duty to abide by accepted community standards.\textsuperscript{96} In another passage Cardozo further supported the objective view of common law adjudication:

The recognition of this power and duty [of judges] to shape the law in conformity with the customary morality, is something far removed from the destruction of all rules and the substitution in every instance of the individual sense of justice, the arbitrium boni viri. That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law.\textsuperscript{97}

But there are countervailing passages. Cardozo examined philosophy, history, tradition or custom and sociology as distinct methods of molding the common law.\textsuperscript{98} Tradition required judges to accept customary morality and the prevailing standards of right conduct.\textsuperscript{99} Yet when social needs demand one settlement rather than another, judges must "sacrifice custom in the pursuit of other and larger ends."\textsuperscript{100} Pragmatism, in the end, was the juristic philosophy of the common law: \textsuperscript{101}

The standards or patterns of utility and morals will be found by the judge in the life of the community. They will be found in the same way by the legislator. [Cardozo's lecture on the method of sociology is subtitled The Judge as Legislator.] That does not mean, however, that the work of the one any more than that of the other is a replica of nature's forms. . . .\textsuperscript{102}

"[T]he final principle of selection for judges, as for legislators, is one of fitness to an end."\textsuperscript{103} Cardozo identified these ends as the welfare of society and social justice.\textsuperscript{104} Therefore, if

\begin{itemize}
  \item \textsuperscript{94} See infra notes 95-107 and accompanying text.
  \item \textsuperscript{95} B. Cardozo, The Nature of the Judicial Process, in Selected Writings, supra note 60, at 152.
  \item \textsuperscript{96} Id.
  \item \textsuperscript{97} Id. at 162-63.
  \item \textsuperscript{98} Id. at 132.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id. at 132-33.
  \item \textsuperscript{101} Id. at 149.
  \item \textsuperscript{102} See id. at 150.
  \item \textsuperscript{103} Id.
  \item \textsuperscript{104} Id. at 133, 163.
\end{itemize}
a judge finds that a rule, tested by experience, is inconsistent with social justice or societal welfare, the judge should be less hesitant to abandon the rule.\textsuperscript{105}

Cardozo was aware of his ambivalence about the objective and subjective views of decisionmaking:

The truth, indeed, is . . . that the distinction between the subjective or individual and the objective or general conscience, . . . is shadowy and evanescent, and tends to become one of words and little more. For the casuist and the philosopher, it has its speculative interest. In the practical administration of justice, it will seldom be decisive for the judge. . . . The perception of objective rights take the color of the subjective mind. The conclusions of the subjective mind take the color of customary practices and objectified beliefs. There is constant and subtle interaction between what is without and what is within. . . . The personal and the general mind and will are inseparably united. The difference, as one theory of judicial duty or the other prevails, involves at most a little change of emphasis, of the method of approach, of the point of view, the angle, from which problems are envisaged. Only dimly and by force of an influence subconscious, or nearly so, will the difference be reflected in the decisions of the courts.\textsuperscript{106}

He summarized his views as follows:

Each [judge and legislator] is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. . . . None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom.\textsuperscript{107}

Yet, another commentator, Justice Charles D. Breitel, observed that courts do not, in fact, confine their lawmaking activity to the interstitial.\textsuperscript{108} The frequency with which both state and federal courts override old rules and principles and substitute new ones illustrates that judges do not merely fill gaps in the law.\textsuperscript{109} Justice Breitel attributed this active judicial role to the legislature's failure to act in the face of a desperate need for creative lawmaking.\textsuperscript{110} Although he criticized an activist judiciary in a democratically organized society and urged judicial self-restraint,\textsuperscript{111} Breitel recognized that courts are engaged in broad lawmaking and that "[t]oday [1965] it is the

\textsuperscript{105} Id. at 171.
\textsuperscript{106} Id. at 152-53.
\textsuperscript{107} Id. at 154-55.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 769.
\textsuperscript{111} Id. at 770-71, 776.
courts which advance, compel and beckon the legislatures to follow their lead."

Two more judges attest to the creativity inherent in common law adjudication. Judge Charles E. Clark regarded the judge’s "code of personal values" as the decisive influence in a new case and urged recognition of a judge’s lonely responsibility as a legislator and the inevitable subjective nature of his perception. Similarly, Chief Justice Roger J. Traynor allotted primary responsibility for lawmaking in the basic common law subjects to the courts. In discharging this responsibility, Chief Justice Traynor expected a judge to be disinterested and to discount his own predilections. Nevertheless, he required a judge to arrive at a value judgment as to what the law should be and to explain why.

Traynor also wrote, however, that a court should generally lag slightly behind popular mores to ensure public acceptance of legal rules and delay legal formalization of community values until they are seasoned. Such an approach, according to Traynor, is sensible as long as the lag does not become a permanent lapse. Although Traynor here supports Eisenberg’s position, his whole body of writings does not support the conclusion that he advocated an institutional principle requiring judges involved in common law adjudication always to ascertain and accept moral norms and policies that have popular support:

Inevitably a creative decision, however impersonal its operation, bears a personal stamp. A judge who painstakingly explores the law tends to efface himself at the outset in tentative memoranda only to emerge from the shadows in the final opinion when his individuality, compressed by accommodation to the views of colleagues and by the very traditions and disciplines of his office, now impresses its life into the inert materials of the law. Time and again such judges must marshall their resources for the relentless and lonely task ahead as they review the record of the case and become aware that no magic words could

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112. Id. at 776.
116. Id.
117. Id. at 265.
118. Id.
III. EISENBERG'S NORMATIVE OBJECTIONS TO ALLOWING JUDGES TO APPLY THEIR CRITERIA OF JUSTICE

Using Eisenberg's "appropriate methodology," judges would likely adopt the moral norms and policies they believe are just and then persuade themselves that these moral norms and policies have substantial popular support. Nevertheless, it is useful to examine Eisenberg's normative objections against allowing judges to employ the moral norms they believe to be just even if they do not believe those norms are a part of social morality.\(^{120}\)

Eisenberg summarily dismisses Professor John Hart Ely's objection to social morality binding judges because it likely reflects the views of the dominant social group.\(^{121}\) Eisenberg contends there is "nothing necessarily wrong with that if it means only that in fashioning the common law rules that govern the general community, norms that have wide support will be favored over those that have little support."\(^{122}\) But this is not an adequate response to Professor Ely's objection. Eisenberg is aware that the moral norms of different societal groups vary,\(^{123}\) as the polls on homosexual sodomy demonstrate. Nonetheless, Eisenberg believes it is possible to use the norms of the "general community" to derive 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."\(^{124}\) These conditions are perplexing. The sharing of basic values is essential to the cohesiveness of any community; however, this does not mean that the articulation of these shared values always reveals the applicable moral norm for a specific issue. For example, the people of a state or nation may share the value of privacy. Yet this does not lead to the inference that the "general community" also shares a specific moral norm that re-

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120. M. EISENBERG, supra note 1, at 21.
122. M. EISENBERG, supra note 1, at 21.
123. Id.
124. Id.
quires the legalization or illegalization of homosexual sodomy or abortion. The norms of the “general community” on specific issues may still reflect the morality of the dominant groups that always claim to represent the community as a whole. As a president of General Motors once said, “What is good for General Motors is good for the United States.” On the other hand, if the community is exceptionally pluralistic, the norms of the “general community” may reflect the morality of a coalition of groups and, contrary to Eisenberg’s position, be more rooted in aspirations for the “community as a whole” and, therefore, more worthy of judicial consideration.

Eisenberg’s basic objections to allowing judges to employ the moral norms and policies they believe to be just flow from his institutional principles of support and replicability and his separation of powers concerns. Before considering them, however, it must be emphasized that the issue is not whether an individual judge should impose idiosyncratic notions of policy or morality on society. Multi-member appellate courts, not individual judges, make common law. An individual judge’s views of what is right or wrong become part of a group decisionmaking process that tends to curb idiosyncratic judgments. The question, therefore, is whether the highest appellate court in a jurisdiction does and should impose its collective view of a just resolution of a controversy.

Eisenberg’s basic contention is that judges have a moral obligation to follow community norms. Just as they have a moral obligation to employ constitutional or statutory texts when relevant, whether or not they agree with those texts, they have a similar obligation to employ the norms of social morality in common law cases, whether or not they agree with those norms. This moral obligation arises from the judicial commitment “to carry out the rules of the office.” Certainly, this proposition begs the question.

A judge has a moral obligation to employ constitutional and statutory texts because the highest lawmaking authorities

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125. Summing up the Eisenhower Administration’s attitude toward business in the 1950s, Charles Wilson, former head of GM and Eisenhower’s Secretary of Defense, uttered his immortal phrase. See Kotkin, The Making of the President 1988, INC., Nov. 1984, at 69.


127. I. Eisenberg, supra note 1, at 24.

128. Id.
in our society promulgate these texts and judges are therefore bound by them. No authoritative rule of the judicial office, however, prohibits judges from collectively employing their own criteria of justice in developing the common law. Nor should there be. People should not be required to have their disputes resolved in accordance with existing societal standards that the judges conclude are unjust.

Separation of powers principles also do not support Eisenberg's position. The legitimacy of lawmaking by common law courts lies in the legislature's power to undo the courts' work. In some areas such as tort, legislatures have left the general development of the law to the courts. The plaintiffs who are victims of injustice often lack the resources necessary to move the legislature, while opponents of judicial change possess these resources. Allowing the courts to act first has an additional value. Judicial decisions and opinions may educate the legislature and public and alter prevailing notions of morality and policy.129 A legislature's actions following a judicial decision may differ from its actions in the absence of a decision.

The replicability principle also cannot support Eisenberg's position. However desirable it may be for courts to act in accordance with this principle, they do not always succeed, as is attested by litigation involving disputes in which opposing lawyers have contrary views of the governing rules.130 This failure does not prevent lawyers from participating meaningfully in the adjudicative process. If the court adequately explains the grounds for a decision based on considerations of justice, lawyers will be as aware of the types of arguments and proofs guiding the court as they would if the decision were based on changing moral norms and policies that have popular support.

129. Throughout the book, Eisenberg assumes "that in the subject-matter areas covered by the common law the community's moral norms and policies are not themselves significantly determined by legal rules." Id. at 176, n.5. But whether this proposition is true is an empirical matter for testing, not assumption.

As early as 1909, Professor John Chipman Gray wrote that it is very probable that customs, or general practices, "owed their origin in many cases to judicial decisions." J. GRAY, THE NATURE AND SOURCES OF THE LAW 300 (Beacon ed. 1921) (first published in 1909).


130. See Priest & Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1 (1984) (addressing the relationship of tried disputes and disputes settled before or during litigation).
Judges also should not be restricted to adopting moral norms and policies that have popular support because the community may not be aware of, or may have a false conception of, the experiential propositions or legislative facts that underlie them. Eisenberg recognizes this only in connection with policies; yet a moral norm that has popular support may also derive from incorrect legislative fact assumptions. Unfortunately, courts have had great difficulty ascertaining the facts necessary for moral and policy judgment.

131. M. Eisenberg, supra note 1, at 32. Although Eisenberg recognizes a court may be justified in not employing a policy that is incorrectly perceived, he believes the court must be "willing to reverse its stand if, after publishing an opinion in which it explained the matter, its view was rejected in the wider arena." Id.

132. Eisenberg regards "experiential propositions" as a separate category of social propositions affecting the common law adjudicatory process. As he defines experiential propositions, "propositions about the way the world works," id. at 137, they are essentially legislative facts. Experiential propositions should not be regarded as a separate category of social propositions because they are essential to determining the validity of the moral norms and policies on which legal rules should be based. To be considered, Eisenberg requires that experiential propositions "should be supported by (or be propositions the court believes would be supported by) the weight of informed opinion — including informed opinion based on conclusions of the social sciences and the informed opinion of the courts themselves on matters in which they are expert, such as the capacity of fact finders." Id. at 40. I would add that the domain of experiential propositions is not fully occupied by the social and psychological sciences. Any field of human knowledge may contribute experiential propositions significant for lawmaking. For example, if the Supreme Court decides to limit a woman's access to an abortion to the time before the fetus becomes viable, then the medical sciences will have to be relied upon to determine viability. See Selected Amicus Briefs, Webster v. Reproductive Health Services, reprinted in 11 Women's Rts. L. Rptr. 163-536 (1989).

Eisenberg does not discuss the various alternatives that have been suggested for helping courts determine the facts necessary for moral and policy judgment. The dissatisfaction voiced by Dean Herbert Goodrich 60 years ago about the way courts determine legislative facts is echoed to this day. "Judges," Dean Goodrich wrote, "have laid down rules on the basis of public policy without the slightest support for the policy except preconceived opinion, and without either knowing or having means of knowing whether the policy declared was or was not aided by the particular decision rendered." Goodrich, The Improvement of the Law, 4 Temp. L. Q. 311, 324-25 (1930). Professor Morris R. Cohen complained in 1941 that "there is no provision [in common law procedure] for the court instituting any adequate inquiry to become fully acquainted with the social implications of the issues involved in the case." Cohen, Book Review, 36 Ill. L. Rev. 239 (1941) (reviewing L. Fuller, The Law in Quest of Itself (1940)), reprinted in M. Cohen, Reason and Law 159, 168 (1950). As early as 1923, Professor E. S. Corwin suggested that "some agency be created for enlightening the court as to such matters [the determination of legislative facts], upon whose results the [Supreme Court] could depend." Reports of the National Conference on the Science of Politics, 18 Am. Pol. Sci. Rev. 119, 153 (1924). Dean Roscoe Pound and Professor Frederick Beutel also
Finally, if, as Eisenberg writes, a particular case involves a conflict between competing policies, each with substantial support, or between a policy and a moral norm, or between one moral norm and another, the resulting judicial decision and legal rule must of necessity reflect an interplay among these standards and embody the court's own conception of justice.\textsuperscript{133}

Because the views of judges are shaped by their education and life-experiences in the communities affected by their decisions, they are influenced by the community values they have come to know. Community values and attitudes also inform judges about the effective limits of judicial lawmaking and the difficulties of effectuating social change through law. Furthermore, because legislatures are the supreme lawmaking authorities, except on constitutional issues, courts should make analogical use of the moral norms and policies embodied in statutes when exercising their common law powers.

Additional constraints on lawmaking make it unlikely that court decisions will reflect only the personal values of particular judges. A court decides only the issues framed by the record in the case or controversy before it. It does so in the context of a body of legal doctrine that must be handled "by way of a limited number of recognized correct techniques."\textsuperscript{134}

supported the idea of an independent research agency under the control of the courts. R. Pound, The Spirit of the Common Law 214 (1921); Beutel, Some Implications of Experimental Jurisprudence, 48 Harv. L. Rev. 169, 181 (1934). More recently, Professor K.C. Davis proposed that an agency similar to the Congressional Research Service be set up to assist the Supreme Court in determining legislative facts. Davis, Judicial, Legislative and Administrative Lawmaking: A Proposed Research Service for the Supreme Court, 71 Minn. L. Rev. 1, 17 (1986).

If these suggestions are to have any possibility of adoption by the courts, the proposed research institution should not be attached to any other branch of government, nor be a permanent agency, to which it might appear the courts were trying to delegate their undelegable powers. The National Academy of Science and its research arm, the National Research Council, would be ideal as research agencies for the federal courts, including the Supreme Court. They could create task forces to deal with particular legislative fact issues referred by the courts. Each task force would dissolve as soon as it completed its work. In this way, the country's experts most knowledgeable about a particular issue would be attracted to assist the courts.

\textsuperscript{133} M. Eisenberg, supra note 1, at 33-35.

\textsuperscript{134} K. Llewellyn, The Common Law Tradition: Deciding Appeals 21 (1950). Although he emphasized the "leeways of precedent" in his earliest writings, Llewellyn was eager in this last work to describe 14 clusters of "major steadying factors in our appellate courts." Id. at 19-61. In discussing each factor, he was careful to point out the countervailing "leeway," demonstrating, in his effort to formulate a "law of leeway," id. at 219-22, that the leeways and steadying factors were in constant tension.
The notion of impartiality attached to the judicial office impresses on judges the need to be informed, to respond to good reasoning,135 and to achieve a just result.136 This result must be explained and justified in a written opinion that will persuade their “colleagues, make sense to the bar, pass muster with the scholars, and if possible allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it.”137 Appreciation of the limits of judicial competence further constrains common law adjudication.138 Finally, a court may not enunciate a new rule applicable only to the litigants before it; the court must be satisfied that the rule will also be just as applied to all future litigants similarly situated.

IV. EISENBERG’S APPROACH TO STARE DECISIS

A. TWO MODELS OF THE COMMON LAW

The decisional choices open to creative judges and the constraints upon them come into particular tension when doctrinal propositions produce a rule that applicable moral norms and policies do not justify. Is a court then ever warranted in following the rule? To answer this question, Eisenberg invokes two ideals or standards that form the model of the common law he describes as “double coherence.”139 The first, “social congruence,” requires that “the body of rules that make up the law should correspond to the body of legal rules that one would arrive at by giving appropriate weight to all applicable social propositions and making the best choices where such propositions collide.”140 The second, “systemic consistency,” demands that “all the rules that make up the body of the law should be consistent with one another.”141 Eisenberg emphasizes that social propositions generally determine whether the body of law is systemically consistent.142

Eisenberg describes a second model of the common law

135. Id. at 47.
136. Id. at 23.
137. Traynor, supra note 114, at 621.
139. M. EISENBERG, supra note 1, at 44.
140. Id.
141. Id.
142. Id. Do we not, then, have a single, not a double, coherence model?
that he labels the "real-world model."\textsuperscript{143} This model requires courts to consider not only social congruence and systemic consistency, but also stability of doctrine over time,\textsuperscript{144} an ideal or standard that the institutional principle of stare decisis seeks to realize.\textsuperscript{145} Stare decisis may require the perpetuation of an incorrect decision because of the institutional principles of support, replicability and objectivity. The principles of support and replicability protect justifiable reliance on existing legal rules, provide reliability for legal planning, and facilitate private dispute settlement.\textsuperscript{146} The principle of objectivity entails two concepts. The first is universality, which requires the court to decide the case on the basis of a rule it is ready to apply to all similarly situated disputants in the future.\textsuperscript{147} The second is evenhandedness, which requires a court, once it has adopted a rule in a specific case, actually to apply that rule in the future to similarly situated disputants.\textsuperscript{148} I prefer, following Professor Larry Alexander,\textsuperscript{149} to describe these concepts as constituting a principle of equality rather than objectivity.\textsuperscript{150}

Professor Alexander has carefully examined the equality and reliance values justifying the doctrine of precedent.\textsuperscript{151} His conclusion, with which I agree, is that equality as a moral value does not compel a court to reach a decision that it believes is morally incorrect [or in Eisenberg's terms, not socially congruent];\textsuperscript{152} that the law has treated people unjustly in the past is no reason to continue to treat people unjustly. The reliance value provides a more plausible reason for following an incorrect precedent.\textsuperscript{153} The prospective application of new legal rules, however, safeguards the reliance value. More fundamentally, the doctrine of precedent itself, if properly understood, rarely requires a deciding court to promulgate rules that are not socially congruent.

\begin{itemize}
\item \textsuperscript{143} Id. at 47.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id. at 48.
\item \textsuperscript{147} Id. at 47-48.
\item \textsuperscript{148} Id. at 48.
\item \textsuperscript{149} See generally Alexander, Constrained by Precedent, 63 S. CAL. L. REV. 1 (1989) (discussing three models of precedent following: the natural model, the rule model, and the result model; and concluding that the rule model is the only reasonable alternative).
\item \textsuperscript{152} Id. at 12.
\item \textsuperscript{153} Id. at 16.
\end{itemize}
B. THE "MATERIAL FACTS" APPROACH TO ESTABLISHING THE RULE OF PRECEDENT

Eisenberg recognizes, at times, that it is not the precedent court, the court that decided the case that is looked to as precedent, but the deciding court, the court that must decide the instant case, that determines what rule a precedent stands for. His failure, however, to apply this insight consistently greatly weakens his undertaking. Eisenberg accepts Julius Stone's rejection of Arthur Goodhart's "result-centered" theory "that the rule of a precedent is the result reached on those facts of the precedent that the precedent court considered material." Stone demonstrated that Goodhart's theory is virtually impossible to apply because each material fact in a case can be stated at different levels of generality, each level of generality tends to yield a different rule, and no mechanical rules can be devised to determine the level of generality that the precedent court intended. Llewellyn earlier stated Stone's point, adding that "[e]very lawyer knows that a prior case may, at will of the [deciding] court, 'stand' either for the narrowest point to which its holding may be reduced [its minimum value], or for the widest formulation that its ratio decidendi will allow [its maximum value]."

The Llewellyn-Stone position illustrates why, in the area between the minimum and maximum values of the precedent case, it is always possible to distinguish the instant case from the precedent case. In this area, lawyers exercise their skills of advocacy, arguing for movement toward the minimum value (lowest level of generality) or maximum value (highest level of generality) of the precedent, depending on their clients' inter-

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154. M. Eisenberg, supra note 1, at 51-52.
155. Id. at 52-53. Eisenberg cites Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L.J. 161 (1930); Goodhart, The Ratio Decidendi of a Case, 22 Mod. L. Rev. 117 (1959); Stone, The Ratio of the Ratio Decidendi, 22 Mod. L. Rev. 597 (1959). This is Eisenberg's only reference to Stone's voluminous writings on the common law. See supra note 3 (listing Stone's writings).
156. M. Eisenberg, supra note 1, at 53.
158. K. Llewellyn, Preface to Cases and Materials on Sales X (1930); K. Llewellyn, supra note 157, at 69. To read a case for the narrowest point to which its holding may be reduced, its minimum value, is described by Eisenberg as the "minimalist approach." M. Eisenberg, supra note 1, at 52. Of course, a holding reflecting the minimum value of a precedent case must be stated in terms that make it applicable to at least one case other than the precedent case.
ests. In time, successive decisions diminish the distance between the minimum and maximum values of the precedent cases. The opportunity to distinguish cases, however, always remains because new circumstances continually arise that prior cases did not anticipate.

C. THE "ANNOUNCED RULE" APPROACH TO ESTABLISHING THE RULE OF A PRECEDENT

Although he acknowledges the force of Stone's objections to the Goodhart approach, Eisenberg espouses an "announcement approach" to establishing the rule of a precedent that, he believes, avoids the force of these objections. Under this approach, "the rule of a precedent consists of the rule it states, provided that the rule is relevant to the issues raised by the dispute before the court." Eisenberg claims that deciding courts start with the single rule the precedent court announced. He asserts that this approach is so common "that it needs no extensive illustration." I dispute this assertion, which ignores his insight that the deciding court, not the precedent court, determines the rule of the precedent. As Stone's writings conclusively demonstrate, the announcement approach does not avoid his objections to Goodhart's theory. Furthermore, Eisenberg's formulation of the announcement approach is essentially question-begging.

A rule of law is a statement of the specific factual conditions on which specific legal consequences depend. No court can meaningfully announce a rule of law, or state the issues in a case, without reference to these factual conditions, which are always susceptible of statement at different levels of generality. We cannot know, therefore, whether the rule "announced" by the precedent court is material to the issues raised by the dispute before the precedent court until we know at what level of generality to state the facts raising these issues. This is for the deciding court to determine and Eisenberg agrees that no "mechanical rules" can aid in this task.

Eisenberg may be assuming that the precedent court has announced a rule and, explicitly or implicitly, stated the material facts on which the rule is predicated at such a specific level.

159. Id. at 54-55.
160. Id. at 55.
161. Id.
of generality that the deciding court must accept this statement as the factual predicate of the announced rule. Even if so, there is no reason why the deciding court should feel constrained by the level of generality adventitiously chosen by the precedent court when the adjudicative facts of the precedent case enable the deciding court to read the rule of the precedent at various levels of generality. Julius Stone's comment is illuminating:

Is it reasonable to assume that courts using language appropriate to the case before them do, or could, address themselves in their choice of language to all the levels of generality at which each "material" fact . . . of the concrete case is capable of statement, not to speak of the possible combinations and variations of these facts, and the implications of all these for as yet unforeseen future cases? Yet unless it is reasonable it would reduce judgment in later cases to a kind of lottery (turning on the chance of words used) to say that the later holding is controlled by that level of generalized statement of the assumed "material fact" which is explicit in the precedent court's judgment. And to admit also that level which might be "implicit" in the former judgment would in most cases be merely to impute to the precedent court a choice of levels of generalized statement (and therefore of the reach of the ratio in the instant case) which must in reality be made by the instant later court.163

By 1985, Stone thought his conclusion that there is not a single ratio decidendi that explains a given decision and is discoverable from that decision was widely accepted.164 He believed that it was well-established that the meaning that the deciding judge attributes to the precedent judgment determines how the law progresses.165 This is the reality even when the deciding court attributes to the precedent court the meaning it discovers from the precedent. In sum, "[n]o workable meaning can be given to the cardinal precept of stare decisis which will eliminate this regular infusion into the supposed certainties of rules of law, of judicial policy choices between starting-points equally available under the existing law."166 The Stone-Llewellyn view of the "rule of a case" thus explains how the common

163. J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS, supra note 3, at 273.
In another context, Eisenberg accepted Stone's view when he wrote that "whether a previously adopted legal rule covers a given dispute may often depend on the degree of generality with which the rule was formulated in earlier cases, and that degree is often somewhat adventitious." M. EISENBERG, supra note 1, at 5-6. Yet, this insight is abandoned in the discussion of the doctrine of precedent.
164. J. STONE, PRECEDENT AND LAW, supra note 3, at 15.
165. Id. at 232.
166. Id. at 185.
law adapts to changing conditions while adhering to the principle of stare decisis.  

Eisenberg, however, presents a different view. He insists that a single, announced rule of the precedent case provides a starting point for the reasoning of a deciding court faced with an issue not before the precedent court. The deciding court then has three choices. It must determine whether the announced rule should be applied to a case that falls within the stated scope of the rule, extended to a case that falls outside the rule's scope, or reformulated or radically reconstructed so that the rule is inapplicable to a case that falls within its original scope. According to Eisenberg, if the rule announced in a precedent meets the standards of social congruence and systemic consistency, it should be consistently applied and extended, but not if it substantially fails to satisfy these standards. Even if the opinion applying the announced rule does not refer to social propositions, they are taken into account tacitly and in the typical such case, it may be assumed that the announced rule is socially congruent. The deciding court may also infer that the announced rule satisfies the standards of social congruence and systemic consistency unless treatises, law reviews, cases in other jurisdictions, or statutes that modify the rule, indicate the contrary.

This position relieves the deciding court of its independent responsibility to ensure the continuing validity of the moral norms and policies, particularly the underlying legislative fact assumptions, that it employs to justify the announced rule. For Eisenberg recognizes that the social propositions that determine social congruence are those that support or undermine the announced rule at the time it is considered by the deciding court and not at the time it was formulated by the precedent court. Therefore, if the social propositions applicable when the instant case is under consideration do not support the announced rule, it should be abandoned or modified. Eisenberg thereby allows for change and growth of the common law and

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167. The Stone-Llewellyn view thus solves Lord Wright's puzzle. See supra note 4 (describing the puzzle).
168. M. EISENBERG, supra note 1, at 64.
169. Id. at 64.
170. Id. at 71.
171. Id. at 76.
172. Id. at 64-65.
173. Id. at 65, 71.
174. Id. at 71.
makes it possible to link his approach to stare decisis with the Llewellyn-Stone approach. Under the latter view, in establishing the rule of the precedent, the deciding court will choose the level of generality that the applicable social propositions will support. Its decision, then, follows precedent and maintains doctrinal stability.

Eisenberg, however, does not take this way out. If the announced rule of the precedent, as he conceives it, is no longer socially congruent, courts must sacrifice doctrinal stability.\textsuperscript{175} He justifies the sacrifice as consonant with the principles of support and replicability because social congruence depends on objective support, and such support is observable.\textsuperscript{176} I reiterate my doubts that the moral norms and policies, and underlying legislative fact assumptions, that courts use to justify a decision are "objective" and "observable" by lawyers and judges in advance of the decision.

That there are "leeways of precedent" enabling deciding courts to adapt the common law to changing circumstances while adhering to the doctrine of stare decisis does not mean that they do or should ignore what the precedent courts have done and said:

For [precedents] continue to present for the instant case an efficient way of reviewing social contexts more or less comparable to the present and results thought to be apt in those contexts by other trained minds after careful deliberation. They may also assist by pointing to available and acceptable paths of reasoning by which one result or another can be or has been reached.\textsuperscript{177}

Nor does it mean that the "leeways of precedent" make overruling unnecessary. A deciding court will inevitably face situations in which it concludes that the precedent case was unjustly decided on its own facts and overruling even of its minimum holding is the only alternative.

D. MODES OF OVERRULING

1. Prospective Overruling

Eisenberg discusses five "modes of overturning:" overruling, prospective overruling, transformation, overriding and drawing inconsistent distinctions.\textsuperscript{178} His basic overruling principle is that courts should overrule a doctrine if:

\begin{itemize}
  \item \textsuperscript{175} Id.
  \item \textsuperscript{176} Id.
  \item \textsuperscript{177} J. Stone, Precedent and Law, supra note 3, at 167-68.
  \item \textsuperscript{178} M. Eisenberg, supra note 1, at 104-45.
\end{itemize}
it substantially fails to satisfy the standards of social congruence and systemic consistency, and... the values that underlie... doctrinal stability and the principle of stare decisis — the values of even-handedness, protecting justified reliance, preventing unfair surprise, replicability, and support — would be no better served by the preservation of a doctrine than by its overruling. 179 “Overruling” refers to retroactive overruling. Any basic overruling principle, however, must also incorporate prospective overruling because of its significant use by modern courts. 180 Julius Stone described prospective overruling as an American invention that “remains a momentous witness to the intellectual honesty and functional rationality of which American practice has shown the common law to be capable.” 181 Its use ensures realization of the goals underlying the principle of stare decisis without inhibiting the overturning of socially incongruent doctrine because of a concern for these values. As Justice Cardozo suggested in Great Northern Railway v. Sunburst Oil & Refining Co., 182 prospective overruling is not only a mode of overruling; it is part of the doctrine of precedent itself:

If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process. 183 Justice O’Connor’s plurality opinion in American Trucking Associations v. Smith, 184 reiterated Justice Cardozo’s view that prospective overruling is “part of the doctrine of stare decisis” 185 because it “allows courts to respect the principle of stare decisis even when they are impelled to change the law in light of new understanding.” 186 Eisenberg, however, fails to appreciate that prospective overruling is an element of the doctrine of precedent.

179. Id. at 104-05.
180. See generally W. Schaefer, The Control of “Sunbursts”: Techniques of Prospective Overruling (1967) (Justice Schaefer, of the Supreme Court of Illinois discusses the problems, techniques and results of prospective overruling).
182. 287 U.S. 358 (1932).
183. Id. at 366. What shall we make of Justice Scalia’s 1990 resurrection of the oft-ridiculed Blackstonian view “that prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.” American Trucking Ass’ns v. Smith, 110 S. Ct. 2323, 2343 (1990) (Scalia, J., concurring).
185. Id. at 2340.
186. Id. at 2341.
The requirements of the basic overruling principle, Eisenberg maintains, are satisfied when a doctrine is “jagged,” meaning that it is subject to relatively well-established, inconsistent, yet socially congruent exceptions. Once a doctrine has become “jagged,” reliance upon it is “unjustified, shaky, or legally unfounded” and it does not warrant perpetuation. Any “well-informed lawyer” would so counsel clients.

Eisenberg admits “it is easy to find jagged doctrines that still prevail.” Nonetheless, he believes that courts should and do overturn jagged doctrines. He views a principle “as descriptively accurate if it explains most judicial practice even though it does not explain every instance.” Eisenberg offers an interesting explanation for the survival of jagged doctrines: They may not, in fact, be jagged. A “doctrine may seem to be jagged only because its exceptions reflect a principle that has not yet been stated at the appropriate level of generality.”

For example, the announced rule that donative promises are unenforceable was inconsistent with some judicial exceptions for certain types of relied-upon promises. The courts that created these exceptions did not follow precedent. Eisenberg agrees, however, that if courts had read the rule announced in the non-exceptional cases at a higher level of generality, specifically that foreseeable reliance makes a donative promise enforceable, the “exceptions” would not have been exceptions and precedent would have been followed. This explanation, although accurate, is inconsistent with Eisenberg’s basic position that the rule of the precedent is a single rule announced by the precedent court.

The basic overruling principle suggests that a non-jagged doctrine should be overturned if the doctrine substantially lacks social congruence and systemic consistency and has been criticized for these reasons in the professional literature. The “literature” includes opinions from other jurisdictions, lower or parallel courts or secondary sources such as restatements, treatises and law review articles. Once a doctrine receives such

187. M. EISENBERG, supra note 1, at 105-18.
188. Id. at 110.
189. Id. at 111.
190. Id. at 117.
191. Id.
192. Id.
193. Id.
194. Id. at 118.
criticism, reliance on it is no longer justified. 195

Eisenberg's failure to recognize that prospective overruling is inherent in the doctrine of precedent leads him to conclude that even though a non-jagged doctrine is socially incongruent and systemically inconsistent, overruling is often inappropriate if it is not the subject of significant criticism in the professional literature.196 Under these circumstances, reliance on the doctrine is more likely to be justified and the values underlying protection of such reliance may be paramount.197 The "prudent course," then, is "to employ a technique of partial overturning, such as drawing an inconsistent distinction."198

According to Eisenberg, the absence of significant professional criticism does not prove that a deciding court would be wrong to overrule because the doctrine may be new or there may have been a new change in the social propositions on which the doctrine rests.199 Moreover, if the doctrine has been neglected in the professional literature or criticized in non-legal literature as lacking the support of applicable social propositions, a court may be correct to overrule. A lack of criticism in the professional literature should not prevent courts from doing justice when prospective overruling will protect the values Eisenberg considers important.

Eisenberg's failure to recognize the importance of prospective overruling leads him to assert other dubious principles. Overruling may be inappropriate, he maintains, even if a socially incongruent and systemically inconsistent doctrine has been criticized in the professional literature "if the doctrine concerns an area in which planning on the basis of law is common, certainty is particularly important, and justified reliance is very likely."200 This is precisely the situation, however, that is tailor-made for prospective overruling. Prospective overruling also makes unnecessary Eisenberg's second overruling principle: that a socially incongruent and systemically inconsistent doctrine that has been criticized in the professional literature "should be overruled if, but only if, the advantages of making the legal rule socially congruent and systemically consistent outweigh the costs of not serving the values that underlie doc-

195. Id. at 97, 118-19.
196. Id. at 119.
197. Id. at 121.
198. Id.
199. Id. at 189-90 n.31.
200. Id. at 121-22.
trinal stability and stare decisis.”

Eisenberg is not unaware of the value of prospective overruling. Even in situations in which his second overruling principle applies, the court, he suggests, may resort to “signaling, . . . a technique by which a court follows a precedent but puts the profession on notice that the precedent is no longer reliable,” thus paving the way for its eventual overruling. Eisenberg’s example of “signaling” is, as he recognizes, one of prospective overruling.

Eisenberg’s overruling principles enable him to justify retroactive overruling, application of the new rule to causes of action arising before, as well as on and after, the date of overruling, on the ground that it is not actually retroactive. Retroactivity “is both justified and made tolerable by the principle of support, under which newly announced rules are rooted in accessible doctrinal and social sources, and the principle of replicability, under which the process by which the court establishes a rule can be replicated by the profession even before the rule is announced.” Again, this hypothesis overestimates the ability of lawyers to replicate, ex ante, a deciding court’s decisionmaking process. Assuming this ability, why do lawyers resort to litigation and courts to prospective overruling?

Eisenberg recognizes that prospective overruling “can overcome the reliance barrier” to retroactive overruling and “thereby make the law more socially congruent and systemically consistent than it would otherwise be.” He claims, however, that prospective overruling has substantial costs, including inconsistent outcomes.

Chief Justice Traynor does not agree with Eisenberg that the new rule is “absolutely unnecessary to the decision.” He sees prospective overruling as a response to two “concomitant but distinct issues” in every case:

First, should there be a new rule? If so, . . . whether to apply the new rule retroactively. . . . The purpose [of prospective overruling] is to preclude injustice to those who reasonably relied on the old rule.

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201. Id. at 122.
202. Id.
203. Id. at 123-24, 128.
204. Id. at 127.
205. Id. at 129.
206. Id.
207. Id. Eisenberg also maintains that “no judicial technique brings out the announcement technique of interpreting precedent as sharply as does prospective overruling” because if “the new rule is not made applicable to the immediate transaction, the rule announced by the court is absolutely unnecessary to the decision, but it will be given the same regard by the profession as a rule that is crucial to a decision.” Id.
ruling produces greater inconsistency of outcomes than retroactive overruling depends upon the particular technique of prospective overruling that a court employs. No difference results if the new rule applies only to causes of action that arise after a designated date.\textsuperscript{208} The inconsistency in outcomes then is between the outcomes of causes of action arising before and after the designated date. The same intertemporal\textsuperscript{209} inconsistency in outcomes results if the legislature enacts a new rule or if a court applies a new rule retroactively. In the latter case, the inconsistency is between the outcomes of cases finally decided before the date of the retroactive overruling and the outcomes of cases decided on and after that date. Of course, if "the legal rights of parties have been finally determined, principles of public policy and of private peace" dictate that the matter not be open to litigation every time there is a change in the law."\textsuperscript{210} On the other hand, if intertemporal equality were more important than finality, courts would never overrule past decisions.

Intratemporal inconsistencies in outcomes raise greater concerns. Intratemporal consistency requires application of the same rules to all similar cases on direct review.\textsuperscript{211} Courts violate this principle when they overrule an old rule and apply the new rule only to the instant case and all causes of action arising after the date of decision, but not to any other causes of action.

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208. Id. at 270. The designated date may be the date of the decision, in which case the new rule would not be applied even to the instant case. This was the case in Great N. Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932), in which the Supreme Court upheld the power of a state court to overrule prospectively in this fashion. Or the designated date may be some date after the date of the decision. See Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 281, 118 N.W.2d 795, 796 (1962) (Minnesota Supreme Court delayed the new rule's effective date to the end of the succeeding session of the Minnesota Legislature in order to give it an opportunity to act before the new rule became effective).

209. The terms "intertemporal" and "intratemporal" are the linguistic creation of Alexander, Constrained by Precedent, 63 S. CAL. L. REV. 3 (1989).


211. See Smith, 110 S. Ct. at 2349 (Stevens, J., dissenting).
that arose before the decision. *Molitor v. Kaneland Community Unit District No. 302*,\(^{212}\) illustrates this type of prospective overruling. In *Molitor*, pupils of the defendant school district were riding on its bus that, because of the negligence of the bus driver, hit a culvert and exploded. The children suffered injuries. The court first applied its decision overruling the municipal-immunity doctrine only to the instant case brought by one child and all causes of action arising after the date of the decision. It later held it would also apply the new rule to the other children in the bus on the theory "that the parties had envisaged that the decision concerning [the plaintiff] would determine the rights of the other children, although there had been no formal agreement to that effect."\(^{213}\) Nevertheless, intratemporal inconsistencies in outcomes resulted between the instant cause of action and all similar causes of action arising before the date of the decision and not finally adjudicated.

Courts justify such intratemporal inconsistencies because they fear that if they did not give parties who are successful in securing legal changes the benefits of their successes, they would discourage the parties from bringing such lawsuits.\(^{214}\) Thus, these courts value law reform more highly than intratemporal equality, just as they value finality more highly than intertemporal equality.

In the end, Eisenberg tolerates prospective overruling only because he thinks it is seldom used.\(^{215}\) It is "normally appropriate, if at all, only if justifiable reliance is unusually likely notwithstanding that the rule is socially incongruent and sys-

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\(^{213}\) M. Eisenberg, *supra* note 1, at 128.

\(^{214}\) This fear is shared by Eisenberg, *Id.* at 131, but may be exaggerated. See Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 Harv. L. Rev. 437, 440 (1947) ("[i]n one jurisdiction which has consistently given overruling decisions only prospective effect, there have been at least twelve appeals in the last ten years which successfully obtained the overruling of prior decisions").

Chief Justice Traynor thought that the rationale of cases like *Molitor* was "specious." Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L.J. 533, 548-47 (1977). In his view, institutional litigants such as insurance companies in civil cases or prosecutors or public defenders in criminal cases, with recurring interest in overturning legal rules, would find incentive enough to bring lawsuits in the chance of achieving an overruling, even one that was entirely prospective. *Id.* at 547. The various interest groups, which proliferate in our society, would have the same incentive.

\(^{215}\) M. Eisenberg, *supra* note 1, at 132.
temically inconsistent, or there is a substantial likelihood that a judicial overruling will itself be legislatively overturned.\textsuperscript{216} According to Eisenberg, "courts should not assume . . . justified reliance without meticulous consideration of whether the area in question is one in which actors commonly plan on the basis of law, whether overruling had been foreshadowed, and whether reliance was morally justified."\textsuperscript{217} This theory is incongruous with Eisenberg's discussion of prospective overruling. He thinks reliance "is unlikely to be morally justified, because by hypothesis the doctrine [overruled] is socially incongruent."\textsuperscript{218} By this criterion, however, courts should never use prospective overruling.

2. Transformation

Eisenberg's basic position that the rule of a precedent is a single rule announced by the precedent court mars his discussion of all the other modes of overturning — transformation, overriding and drawing inconsistent distinctions. "Transformation occurs," writes Eisenberg, "when a court fully overthrows an established doctrine but does not announce that it has done so."\textsuperscript{219} One of his examples of a "transformation" is \textit{MacPherson v. Buick Motor Co.},\textsuperscript{220} in which he claims that Justice Cardozo "radically reconstructed the precedents through a result-based technique and then purported to follow them."\textsuperscript{221} Radical reconstruction of precedents, however, is typical of the way the common law grows within the bounds of the doctrine of precedent.

In analyzing \textit{MacPherson}, Eisenberg assumes that the old rule, announced in a number of precedents, was that the principle of negligence was not fully applicable to manufacturers.\textsuperscript{222} He begins his analysis with \textit{Thomas v. Winchester} which, according to Cardozo, laid the "foundations of this branch of the law" in New York.\textsuperscript{223} In that case, the defendant negligently

\begin{itemize}
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Id. at 119.
\item \textsuperscript{219} Id. at 132.
\item \textsuperscript{220} 217 N.Y. 382, 111 N.E. 1050 (1916).
\item \textsuperscript{221} M. \textsc{Eisenberg}, \textit{supra} note 1, at 132. Eisenberg defines a "result-centered approach" as one which takes the rule of a precedent to consist "of the proposition that on the facts of the precedent (or some of them) the result of the precedent should be reached." Id. at 52.
\item \textsuperscript{222} Id. at 132.
\item \textsuperscript{223} 6 N.Y. 397 (1852).
\item \textsuperscript{224} \textit{MacPherson v. Buick Motor Co.}, 217 N.Y. at 385, 111 N.E. at 1051.
\end{itemize}
labeled a jar containing a poison as a medicine and sold it to a
druggist. The druggist then sold the jar, to the plaintiff-cus-
tomer, who took the poison and became seriously ill. Eisenberg
reads the case as announcing the rule that “a manufacturer can
normally be sued in negligence only by its immediate buyer,” but
that this general rule was inapplicable to the instant case
because “‘the defendant’s negligence put human life in immi-
nent danger.’” Cardozo, however, read Thomas as establish-
ing the “principle” that a seller owes a duty of care and
vigilance to others than the immediate purchaser if the seller’s
negligence places human life in imminent danger, and the dan-
ger was foreseeable. Unlike Eisenberg, Cardozo did not read
the hypotheticals the court set forth in Thomas, in which the
seller would not be liable to others than the immediate buyer,
as holdings, and the decision as an exception. Indeed, the pre-
cedent court’s answers to these hypotheticals were dicta be-
cause the hypothetical cases stated circumstances in which
defendants would not be liable, while the court decided that the
defendant in the case before it was liable. Nevertheless, Car-
dozo cast doubt on the soundness of the court’s answers to
these hypotheticals because they assumed the negligent con-
duct of the seller “was not likely to result in injury to anyone
except the purchaser.”

Cardozo then examined all of the cases subsequent to
Thomas and concluded that there “has never in this state been
doubt or disavowal of the principle [in Thomas] itself.” In
Loop v. Litchfield, the manufacturer negligently made a
small balance wheel used on a circular saw. The manufacturer
pointed out the defect in the wheel to the buyer, who wished to
purchase a cheap article and was willing to assume the risk of
the defect. The buyer then loaned the saw to a neighbor who
used it and was killed when the wheel flew apart. The court
held the manufacturer not liable to the neighbor’s representa-
tives. Cardozo read this case narrowly and consistently with
the principle he gleaned from Thomas. He emphasized that the
risk assumed by the buyer “can hardly have been an imminent

225. M. EISENBERG, supra note 1, at 59.
226. Id. The quotation is from Thomas, 6 N.Y. at 409.
228. Id.
229. Id.
230. 42 N.Y. 351 (1870).
one, for the wheel lasted five years before it broke."\textsuperscript{231}

In \textit{ Losee v. Clute},\textsuperscript{232} the defendant negligently constructed a steam boiler that exploded and damaged the plaintiff's property. The plaintiff was not the original buyer and the court held the manufacturer not liable. Cardozo did not believe this case was inconsistent with the principle in \textit{Thomas} or his decision in \textit{MacPherson}. Because the original buyer tested the boiler and the manufacturer knew that his own test would not be the final one, the risk of injury to the plaintiff from the manufacturer's negligence was too remote for liability to exist.\textsuperscript{233}

According to Cardozo, \textit{Loop v. Litchfield} and \textit{ Losee v. Clute} suggested a narrow construction of the liability principle set forth in \textit{Thomas}, while later cases evinced "a more liberal spirit."\textsuperscript{234} In \textit{Devlin v. Smith},\textsuperscript{235} the defendant contractor negligently built a scaffold for a painter. The scaffolding collapsed and caused the death of an employee of the painter. The court held the contractor liable to the employee. Cardozo drew on the factual similarities between this case and \textit{MacPherson}. The contractor in \textit{Devlin} knew that workmen would use the scaffold and that, if improperly constructed, the scaffold was a dangerous trap.\textsuperscript{236} Therefore, the manufacturer owed the employees a duty to build it with care.\textsuperscript{237}

Finally, Cardozo considered \textit{Statler v. Ray},\textsuperscript{238} in which the defendant manufactured a large coffee urn that was installed in a restaurant. When heated, the urn exploded and injured the plaintiff, who had purchased the urn from a jobber. The court held the defendant liable. Cardozo then reformulated his principle of \textit{Thomas}:

We hold, then, that the principle of \textit{Thomas v. Winchester} is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the el-

\begin{itemize}
\item \textsuperscript{231} \textit{MacPherson v. Buick Motor Co.}, 217 N.Y. 382, 386, 111 N.E. 1050, 1052 (1916).
\item \textsuperscript{232} 51 N.Y. 494 (1873).
\item \textsuperscript{233} \textit{MacPherson}, 217 N.Y. at 386, 111 N.E. at 1052.
\item \textsuperscript{234} \textit{Id.}
\item \textsuperscript{235} 89 N.Y. 470 (1882).
\item \textsuperscript{236} \textit{MacPherson v. Buick Motor Co.}, 217 N.Y. 382, 386, 111 N.E. 1050, 1052 (1916).
\item \textsuperscript{237} \textit{Id.}
\item \textsuperscript{238} 195 N.Y. 478, 88 N.E. 1063 (1909).
\end{itemize}
ement of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case.  

Eisenberg describes this holding, which is not stated at the highest level of generality that MacPherson could support, as a “transformation” because it “completely changed the substance of the old rule” without overruling it. Eisenberg arrives at this conclusion only because he chooses to read Thomas at a much lower level of generality than Cardozo read the “principle” in that case. Eisenberg agrees that in some cases transformation and overruling are distinguishable on the ground that “in transformation the newly announced rule is consistent with the results reached in the precedents, while in overruling it is not.” This is so because, in transformation, the deciding court reaches consistent results only by “singling out features of the precedent that the precedent courts did not themselves consider material.” Therefore, Eisenberg criticizes Cardozo’s reading of the precedents holding manufacturers not liable because “it was not how the precedent courts conceived the cases before them.” This reversion to Goodhart’s theory of the ratio decidendi, which Eisenberg earlier rejected in the face of Julius Stone’s objections to it, again overlooks the Llewellyn-

239. MacPherson, 217 N.Y. at 389, 111 N.E. at 1053.
240. M. Eisenberg, supra note 1, at 60.
241. Id. at 133.
242. Id.
243. Id.
244. See supra notes 155-66 and accompanying text. Overriding is a mode of overturning defined by Eisenberg as narrowing “the ambit of an established doctrine in favor of a rule that has arisen after the earlier doctrine was established.” M. Eisenberg, supra note 1, at 135. Unlike transformation, the “new rule cannot be reconciled with the old results.” Id. at 136. It is, therefore, an overruling but one that “is frequently only partial.” Id. An example that Eisenberg gives is the principle that a donative promise was unenforceable, which had been applied to cases in which the promisee had clearly relied on the promise. But from the time the Restatement (First) of Contracts, § 90 (1932), adopted the principle that donative promises were enforceable if relied upon, the courts followed this Restatement and adopted the new principle that donative promises were unenforceable unless relied upon. M. Eisenberg, supra note 1, at 135.

The final mode of overturning discussed by Eisenberg is the drawing of inconsistent distinctions; that is, “distinctions that are inconsistent with the underlying rule, given the social propositions that support the rule.” Id. at 136. This mode of overturning differs from overruling because it is only partial, in the sense that there will be “two inconsistent legal standards on the books at the same time — the underlying rule and the inconsistent exception.” Id. at
Stone, and his own occasional, insight that the deciding courts, not the precedent courts, determine what the rule of the precedents is.

CONCLUSION

Eisenberg concludes his work by presenting his general theory of the common law. He first considers Professor Dworkin’s principal claims about the nature of law and adjudication. He agrees with Dworkin’s claim that “courts determine cases on the basis of legal rights and duties, rather than making law in a legislative capacity.”245 According to Eisenberg, “[a] court does not say, ‘We establish this legal duty for the first time today, and we impose liability on you for not performing the duty yesterday.’ Rather, a court says, ‘You were under a legal duty to do this, and we impose liability on you because you didn’t.’”246 This is a myth and it is surprising that Eisenberg propagates it. In every case of first impression and other cases in which courts make new law by taking advantage of the leeways of precedent or overruling existing doctrine, they act in a legislative capacity and, when not making their decisions prospective only, impose liability for acts previously done. Some courts may be more candid than others in acknowledging this.

Eisenberg rejects Dworkin’s claim that “adjudication is essentially an interpretive enterprise and that the task of the judge is to give the best possible interpretation of prior institutional decisions.”247 According to Eisenberg, Dworkin maintains that:

138 (overriding is not a partial overruling in this sense). Eisenberg justifies the drawing of inconsistent distinctions rather than total overruling on the ground that it is useful when a court is not sure of itself and wishes to take only “a provisional step toward full overturning” or is not sufficiently confident to formulate an exception at the level of generality necessary for the exception to be fully principled. Time is thereby gained for further reflection and experience. Eisenberg also justifies this mode of overturning on the ground that it allows the courts “to protect at least those who relied on the core of a doctrine, that is, that part of a doctrine that cannot be even plausibly distinguished,” and at the same time, “diminish the likelihood of future justified reliance, and prepare the way for an overruling that might not have otherwise been proper.” Id. at 140. This is a weak justification because prospective overruling will safeguard the values Eisenberg here seeks to protect by the drawing of inconsistent distinctions.

245. Id.
246. Id.
[A] judge properly decides common law cases by first determining what rules would satisfy a threshold degree of fit with prior institutional decisions and then selecting, from among these rules, the one he thinks best on the basis of his own convictions of political morality, excluding his convictions on policy.\textsuperscript{248}

Eisenberg thinks this claim is incorrect because "courts should and do employ policies, and should not and do not employ their personal convictions."\textsuperscript{249} As I have demonstrated, my position is that courts involved in common law adjudication should and do employ policies and their personal convictions.

The strength of Eisenberg's work lies in its conception of common law decisionmaking as a dynamic process seeking to adapt to changing conditions. For this reason, Eisenberg characterizes the common law as consisting of rules that courts generate at the present moment by applying institutional principles of adjudication, not as the body of rules in existence at a particular time.\textsuperscript{250} He draws two dubious implications from this theory. One is that a common law rule may exist on a matter without a doctrinal proposition adopted in a binding precedent case.\textsuperscript{251} The other is that "the common law is comprehensive, in that there is a legal answer to every question that takes the form, 'What is the law concerning the matter?'"\textsuperscript{252}

According to the first implication, a case of first impression never arises in a jurisdiction. This, indeed, is Eisenberg's claim. He gives the example of State A, where the issue has never arisen whether a physician, who has been negligent in a manner that foreseeably led to the birth of an unwanted, but healthy, child, is liable to the parents for the expense of the child's birth.\textsuperscript{253} Nevertheless,

\begin{quote}
[a]pplication of the institutional principles of adjudication generates the rule that the physician is liable. Applicable social propositions would not justify exempting physicians from the force of the negligence principle in this kind of case; many other jurisdictions have so held (and no recent case holds to the contrary); and the rule is firmly established in the professional literature. It is then part of the law of State A that a physician is liable for wrongful birth, although that rule has not been adopted in an official text.\textsuperscript{254}
\end{quote}

I doubt that the lawyers and judges in State A would agree

\begin{footnotes}
\item[248] M. Eisenberg, supra note 1, at 140-41.
\item[249] Id. at 141.
\item[250] Id. at 154.
\item[251] Id.
\item[252] Id. at 159.
\item[253] Id. at 154.
\item[254] Id.
\end{footnotes}
with Eisenberg's conclusion. Lawyers might predict that the state's highest court is likely to decide the case as Eisenberg indicates and counsel their clients accordingly. They would not, however, argue before a court that it is the law of the state that a physician is liable for wrongful birth, but that it should be the law of the state for the reasons advanced by Eisenberg. Nor would the state's judges believe that the matter is settled for them so that they need only follow the existing law of the state. If the judges decided that a physician ought to be liable for wrongful birth, they would then and only then establish what the law of the state is.

Similarly, in response to the question "What is the law concerning a particular matter," judges and lawyers might state that no answer yet exists, but that the courts will generate an answer because of their ability to "determine the law on every matter, [and] should pass upon the justice under law of any claim that might arise." Only after the courts determine matters, however, should the resulting product be described as law. Because courts do not turn away claimants solely because there is no existing law on the issues they raise, does not mean that there was applicable law before their claims were adjudicated.

Eisenberg's position is understandable in light of his view that what the law is and what the law should be are inseparable questions. The validity of his position, however, depends upon how courts determine what the law should be. He agrees that the two questions are separable if notions of critical morality and right policy determine what the law should be. But he maintains that the institutional principles of adjudication "turn on factual criteria, such as social congruence, rather than on critical morality and right policy." This is because Eisenberg believes that only moral norms and policies that have social support, not norms and policies that judges collectively determine are just or correct, should be considered by the judges. Therefore, the moral norms, policies, and experiential propositions that satisfy standards of social congruence and systemic consistency determine both what the common law should be and what it is. Thus, "[b]ecause of the dual role those

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255. Id. at 159.
256. Id. at 160-61.
257. Id.
258. Id. at 160.
259. Id. at 161.
standards play, what the common law is cannot be determined without consideration of what the common law should be."

This conclusion follows only because of two doubtful assumptions Eisenberg makes about the judicial process, as I have tried to explain and will now summarize. The first is that common law courts always employ only moral norms and policies they know have substantial social support. If this is so, the common law is the product of Eisenberg's institutional principles of adjudication. The second assumption is that the courts should always employ only such norms and policies. If this assumption is true, the product of these institutional principles is also what the law should be. I doubt, however, both the empirical validity and normative soundness of these two assumptions, which reflect a Panglossian outlook that all is for the best in this best of all possible common law worlds. What the law should be is subject to evaluation in light of criteria of justice, because what the law is may not be what it should be. Even if we agree that judges should be guided by their criteria of justice, it would still be true that when courts decide what the law should be, they are also deciding what the law is. Judges would not, however, say that this is what the law was before their decisions. As Julius Stone wrote:

[The task of the court . . . is to determine what the applicable law ought to be for this court . . . on this point. The court has to determine what the law ought to be, and this simultaneously fixes what the law now is.]

260. Id.
261. J. Stone, Precedent and Law, supra note 3, at 176 (emphasis in original).