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The Use of Knowledge and Moral Imagination in the Common Law

ALLEN MENDENHALL[♦]

I thought I knew a lot until I had kids. One hot Sunday summer afternoon in Alabama, when I was driving my family home from church, my son, Noah, then five, asked about the origin of roads. From a father's perspective, this curiosity was a sweet, welcome alternative to questions about where babies come from. I explained with resolute immodesty how road construction operated, under what timelines and conditions, and using which tools and implements. I smiled, thinking the matter settled, and turned up the radio.

Then my son, in his little-boy manner and vocabulary, objected that his inquiry was, in effect, less about the technicalities of engineering or labor and more taxonomical or definitional in concern. Why was the trail near our home, trodden beneath innumerable feet, not a road? Why were the sidewalks in downtown Auburn not roads? What made a road a road? How did construction workers know where to build roads? From whom did they take orders and derive their authority? Could he, Noah, build a road if he wanted to? How could anyone build a road from here to there if the property along the way belonged to someone else, even multiple owners?

I turned down the radio. This perplexing interrogation led Noah—who, again, possessed merely the lexicon and sophistication of a child—to more grating appeals for clarity and qualification. What, he wondered, empowered governments to authorize the creation and maintenance of roads? Were there roads beyond government control? What was the difference between public and private? What was government? Where did it come from? Why did we have it?

The moment I caught myself trying to explain social contract theory to a five-year-old, I realized I had been not only humbled and humiliated but overmatched, not by Noah necessarily but by the impressive sum of human ignorance about everyday experience and activity.

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Though not impulsively so, I am reflectively Hayekian and thus managed to articulate to Noah my abiding belief in the limitations of human knowledge, the selectivity of human memory, and the fallibility of human intuition, and to emphasize the importance of subjecting our most cherished principles to continued testing so they may be corrected or refined as we mature in our understanding.¹ Roads cannot be the inevitable product of one man's awesome imagination working in isolation; rather they are the concrete product of aggregated, uncountable ideas applied variously depending on local circumstances.² This fancy way of saying "I do not know" seemed to satisfy Noah, who grew quiet about his objections and marvels and turned his attention elsewhere.

I, however, could not quiet *my* restless urge for the kind of comforting certitude that ultimately cannot be achieved. It was not roads but knowledge itself and its embodiment or expression in the law—in particular in our Anglo-American common-law tradition—that suddenly bothered and intrigued me. Noah's inquisitiveness reminded me of the opening lines to a learned book on the common law:

Legal history is a story which cannot be begun at the beginning. However remote the date at which we start, it will always be necessary to admit that much of the still remoter past that lies behind it will have to be considered as directly bearing upon the later history [T]he further back we push our investigations, the scantier become our sources, and the more controversial and doubtful their interpretation.³

The common law is not just a historical and governmental system for resolving disputes through courts and case precedents, traceable to eleventh-century England and adopted by the United States and nearly half of the countries on earth. It is also a mode of preserving and transmitting knowledge about the human condition that develops out of ascertainable facts rather than abstract speculation. It is bottom-up, reflecting the embedded norms and values of the community as against executive command or legislative fiat.

My temptation is to define the common law and map its features and continuities across time and space, but that is impossible to do here. I will attempt, instead, to explain what I mean by suggesting that the common-law system represents the disembodied, accumulated knowledge of society over

1. See FRIEDRICH A. HAYEK, 1 *LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER* 12, 13 (1973).

2. See *id.* at 16.

3. THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 3 (5th ed. 1956). For further history and discussion of the features of common law see *A Concise History of the Common Law. Id.*

generations. To do so, however, I must discuss matters exponentially more difficult, namely what I consider to be the salient features of human belief and intelligence, the optimal conditions for knowledge acquisition, and the role of judges in depositing innumerable facts and principles into a vast fund of wisdom that no one mind could comprehend on its own. An inquiry of this grand scale might as well account for the moral imagination, as understood by Russell Kirk, if for no other reason than to question its effects on the field of judging.⁴ Therefore, I conclude with this theme, which I hope to approach circumspectly to avoid wandering into preposterousness or absurdity.

This talk, therefore, is not about roads, despite what I may have led you to believe. But roads serve as a constructive metaphor because all thoughts, like roads, lead somewhere—some intersect; some are dead ends; but all are means of arrival and departure. Roads do not tell you where to go; they enable you to get there. Such are beliefs, formed as they are from sustained thought.

Any contemplation of complex systems like the common law should proceed from basic premises. For my purposes, these are human belief, action, and knowledge, to which I now turn with no small degree of unease about the enormity of the undertaking.

Human thought is teleological in the sense that our deliberate actions are traceable to drives, goals, and ambitions. Teleology thus understood has nothing to do with abstract philosophy such as Marxism, which proclaims a quasi-religious metanarrative of human history as the struggle between monolithic classes culminating in a proletariat revolution. The teleology I am talking about involves, rather, commonsense decisions about quotidian experience: Should I do this or that, and what consequences will follow if I choose one course of action over another?

C.S. Peirce referred to the “irritation of doubt” as a stimulus for knowledge.⁵ Doubt disrupts habits, those regular actions or repeated behaviors that reveal something customary or patterned in one’s character.⁶ Doubt is a state of unsettled thought resulting in *hesitance* to act.⁷ Put differently, hesitance to act is evidence of doubt.

4. RUSSELL KIRK, THE MORAL IMAGINATION, *reprinted in* THE ESSENTIAL RUSSELL KIRK: SELECTED ESSAYS 206, 207 (George A. Panichas ed., 2007).

5. C. S. Peirce, *Illustrations of the Logic of Science: The Fixation of Belief*, 12 POPULAR SCI. MONTHLY, Nov. 1877, at 6. For a discussion of the relevance of Peirce to the common law as understood by Justice Oliver Wendell Holmes Jr., see Seth Vannatta’s *Conservatism and Pragmatism in Law, Politics, and Ethics*. See SETH VANNATTA, CONSERVATISM AND PRAGMATISM IN LAW, POLITICS, AND ETHICS 129-30, 132, 135, 137-38, 139-40 (2014).

6. See Peirce, *supra* note 5, at 5, 6.

7. See *id.*

A state of non-doubt is belief, or the state of mind upon which one is prepared to act.⁸ If you believe something, you will act based upon your perception of its truth. Truth and belief are wedded concepts: our decisions are predicated on conditions we believe to be true or not.⁹ I turn the doorknob believing the door will open; experience verifies the truth of my belief.

Actions are outward manifestations of beliefs about the truth of circumstances: doubt causes hesitance to act because of a lack of clear belief in predictable outcomes, whereas habits are signs of fixed or settled belief in predictable outcomes.¹⁰ We act, in short, when we are sure in our knowledge of the probable results of our prospective action.

Belief, once attained, calls into question other premises and assumptions. Every new belief occasions new doubts. Knowledge develops when one accumulates beliefs that have been rigorously tested and verified. Imagine a staircase leading upwards, with no end, each step representing the attainment of belief. Suppose everyone had his or her own “belief staircase.” At the moment of their death, people whose staircases stretched the highest will have attained more knowledge than those with shorter staircases, knowledge being the sum of verifiable beliefs. The goal of the curious person, it seems to me, is to attain as much knowledge as possible during his or her life to facilitate healthy habits of mind and behavior. The conscientious, wise person builds tall staircases.

Thus, our goal as conscientious people should be to acquire right beliefs to which we conform our behavior, developing proper habits that multiply good acts as known by their detectable effects. A society with the greatest number of good-faith actors whose habits reflect the attainment of hard-earned beliefs will tend to be more productive, virtuous, and upright.

Now it may be that some society is populated by complacent people who do not seek out belief, who are content in the limited information they have attained; these societies are less likely to contribute substantially to the sum of knowledge or to add useful data to the stock of historical, moral, and scientific understanding.

Sometimes we are wrong about the truth. No individual mind possesses sufficient data with which to predict the likely and good outcomes in all situations.¹¹ Thus, ascertaining truth requires a laborious study of history combined with present testing and verification that are subject to communal scrutiny or affirmation. Truth exists independently of anyone’s perception of

8. *See id.* at 6.

9. *See* William James, *THE WILL TO BELIEVE*, reprinted in *THE WORKS OF WILLIAM JAMES: THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 19 (Frederick H. Burkhardt, et al. eds., 1979).

10. *See* Peirce, *supra* note 5, at 5, 6.

11. *See* HAYEK, *supra* note 1, at 16.

it.¹² It is what a disinterested group of informed inquirers, searching and deliberating in good faith, would uniformly agree to after sustained investigation using the best resources available to them.

We form concepts to justify and explain our actions. The success of concepts, whether they are true, may be determined by their ability to succeed insofar as they have achieved that which they were intended to achieve. No single success in isolation is sufficient to demonstrate the truth of a concept; patterns and tendencies of verified success, however, tend to reveal the truth of a concept in stages. Only by seeking to falsify or discredit our most valued concepts can we measure their correspondence with truth. If we seek only to affirm, however, we will find only affirmance.

The appearances of the things and events we perceive are indicia of their ultimate properties. We rely on the testimony of the senses to define and describe phenomena.¹³ We have no understanding of things absent some sense of their conceivable effects;¹⁴ a thing cannot be defined without reference to its physical properties and function. We know what a thing *is* in part by what it *does*. A key is a key because it unlocks doors. Pens and pencils both write, but they are distinguishable by the *practical* differences between them: one contains ink, which cannot be erased; the other contains lead or graphite, which may be erased. One is easily breakable, the other not; and so on. Things are knowable by their physicality; beliefs about them are based on observation. The demonstrable effects of a concept tend to cause belief or disbelief in it; the capacity of a concept to provide bases for action demonstrates one's belief in the reality or trueness of that concept.¹⁵

Satisfaction with belief in a perceived truth, or with the felt consequences of the belief, is a valid (or at least not easily discountable) form of evidence that the belief is true.¹⁶ A process of verification aids an individual's arrival at truth; a truth claim is verifiable if it cannot be discounted or disconfirmed.¹⁷ Whether a truth claim obtains beyond the individual depends on its proven survival of rigorous tests and wider experiments over time. The more frequently the truth claim is accepted, and the more people who believe in it, the greater the probability is that the truth claim is not just a claim, but a truth. Faced with multiple, viable candidates for belief, all of which lack adequate evidentiary proof, one may justifiably choose one action over another if faith itself is causally necessary to demonstrate the truth of the belief (i.e., if

12. See Peirce, *supra* note 5, at 11-12.

13. See *id.*

14. See C. S. Peirce, *Illustrations of the Logic of Science: How to Make Our Ideas Clear*, POPULAR SCI. MONTHLY, Jan. 1878, at 293.

15. See *id.* at 293, 297.

16. See *id.* at 298.

17. See Peirce, *supra* note 5, at 5.

evidentiary proof of the truth of the belief cannot be acquired until faith is adopted).

An abiding awareness of our ignorance and fallibility inspires us to learn and pursue the truth. Humility, then, is the foundation of inquiry. The point of inquiry is to develop belief, which is the basis for action. Stasis and inaction characterize an absence of belief. Action facilitates the process of verification that either confirms or disconfirms belief in whole or in part.¹⁸ Conjunctive, collective evaluation of individual action validates or invalidates, in whole or in part, the rightness or wrongness of an individual's acted-on belief. Therefore, beliefs about ideas or concepts must be submitted to knowledgeable peers for their assessment. When an inquiring group of informed minds acting in good faith comes to the uniform conclusion that an idea or concept cannot be disproven, the chances are high that absolute truth has been pragmatically ascertained. Knowledge is both acquired and advanced through this deliberative process.

Therefore, knowledge is situated, situational, temporal, contingent, inherited, customary, cultural, embedded, fallible, fluid, contextual, appreciable, factual, and social. Those who possess knowledge are "perpetual students," always open to learning more, never satisfied with their state of understanding. "Perpetual students" tend to shy away from claims to unqualified certainty or universalism; they resist abstractions, closed schools of thought, and fixed dogma that purport to know all answers; they are searchers and seekers. "Perpetual students" hope to generate inquiry by systematically and intentionally testing ideas in the concrete world through practical application and sustained observation, by modifying or adapting ideas when errors are found, by subjecting ideas to a community of minds (rather than leaving them to individuals in isolation), and by examining the habits and tendencies of nature and human behavior for recurring, lasting themes or traits. Although "perpetual students" tend to be tolerant of views that have not been discounted, or open to ideas that have not been disproven, they are also prudently skeptical of ideas that have not won out in the course of history—for example, those that are unrepresented in custom or tradition.

What does any of this have to do with the moral imagination? Definitional preliminaries are needed to approach an answer to this question. I defer to Russell Kirk, who, in an essay titled "The Moral Imagination," extrapolated from Edmund Burke's discussion of "the wardrobe of a moral imagination" a more comprehensive understanding, furnished with revealing literary examples, fond memories, and touching tributes.¹⁹ Although Kirk's

18. *See id.*

19. *See* KIRK, *supra* note 4, at 207. Parts of this essay have not held up well, in particular Kirk's praise of *Little Black Sambo*, which was the second book ever read to him, and his prediction that José

interest in the moral imagination may have been influenced by Lionel Trilling's *The Liberal Imagination*, which Kirk's *The Conservative Mind* refuted, the decisive and early influence on Kirk was Irving Babbitt, about whom Kirk wrote: "He has influenced me more strongly than has any other writer of the twentieth century. It was through Babbitt that I came to know Edmund Burke, and Babbitt, as much as Burke, animates my book *The Conservative Mind*."²⁰ W. Wesley McDonald claims in his study of Kirk that "[n]o previous student of Burke had grasped as well as Irving Babbitt the critical importance of moral imagination for [Burke's] political thought."²¹ Without Babbitt, Kirk may not have fully appreciated the way in which imagination produces "right judgment and community."²²

Kirk calls the moral imagination "that power of ethical perception which strides beyond the barriers of private experience and momentary events."²³ It is sustained by religion and manners,²⁴ "informs us concerning the dignity of human nature,"²⁵ "teach[es] us what it means to be genuinely human,"²⁶ cultivates the "norms of human nature,"²⁷ "form[s] the normative consciousness,"²⁸ and "teach[es] human beings their true nature, their dignity, and their place in the scheme of things."²⁹ Kirk believed that lasting literature meets "enduring standards of private and public conduct" involving morality.³⁰ "The moral imagination," he claimed, "aspires to the apprehending of right order in the soul and right order in the

María Gironella's *The Cypresses Believe in God* "will live a great span in the realm of letters." See *id.* at 211, 216. Catholics who love literature continue to read the latter. See JOSÉ MARÍA GIRONELLA, *THE CYPRESSES BELIEVE IN GOD* viii (Harriet de Onis trans., 1955). Few students today, however, know much if anything about the Spanish Civil War; thus, most are unequipped to appreciate Gironella. See *id.* at vii. Nevertheless, Kirk cannot be faulted for the faults of our time. His chief insights about the staying power of imaginative literature that imparts normative knowledge remain compelling and evocative. See KIRK, *supra* note 4, at 209, 210.

20. See Russell Kirk, *The Enduring Influence of Irving Babbitt*, in IRVING BABBITT IN OUR TIME 20 (George A. Panichas & Claes G. Ryn eds., 1986).

21. W. WESLEY McDONALD, *RUSSELL KIRK AND THE AGE OF IDEOLOGY* 64 (2004).

22. Glenn A. Davis, *Irving Babbitt, the Moral Imagination, and Progressive Education*, 19 HUMANITAS 50, 51 (2006). For the relationship between imagination and rationality, see *Imaginative Origins of Modernity: Life as Daydream and Nightmare*. See Claes G. Ryn, *Imaginative Origins of Modernity: Life as Daydream and Nightmare*, 10 HUMANITAS 41 (1997), available at <http://www.nhinet.org/humsub/ryn10-2.htm>. For an in-depth philosophical exploration of the meaning of the moral imagination and how it relates to the historical consciousness and knowledge, see *Will, Imagination & Reason: Babbitt, Croce, and the Problem of Reality*. See CLAES G. RYN, *WILL, IMAGINATION & REASON: BABBITT, CROCE AND THE PROBLEM OF REALITY* 222 (2d ed. 1986).

23. KIRK, *supra* note 4, at 207.

24. *Id.* at 208.

25. *Id.*

26. *Id.* at 209.

27. *Id.*

28. KIRK, *supra* note 4, at 209.

29. *Id.*

30. *Id.* at 210.

commonwealth.”³¹ It is “expressed afresh from age to age.”³² Examples of writers from the 20th century who transmitted the moral imagination to future generations include T.S. Eliot, Robert Frost, William Faulkner, Evelyn Waugh, and William Butler Yeats.³³ Earlier examples include Sophocles, Aristophanes, Thucydides, Tacitus, Plato, Cicero, Hesiod, Virgil, Dante, Shakespeare, Dryden, and Pope.³⁴ The normativity rendered and advanced by these authors enabled their timelessness or the timelessness of their work.³⁵ “For as the normative consciousness breathes life into the soul and the social order,” Kirk intoned, “so the normative understanding gives an author lasting fame.”³⁶

What Kirk described is, in effect, a literary canon made up of imaginative literature, i.e., “bodies of normative knowledge,”³⁷ or “that body of literature which helps to form the normative consciousness of the rising generation.”³⁸ He named the qualities necessary for creative texts to become canonized: principally their “normative function,”³⁹ “enduring standards,”⁴⁰ or “normative knowledge.”⁴¹ On their face, these qualities are not necessarily literary; they can describe texts, for example, that do not aspire to artistic merit or aesthetic excellence.⁴²

The common law represents, or contains, a canon.⁴³ Its constituent parts are facts, data, rules, principles, and holdings; it is not imaginative literature or creative forms representing poetry and the like. But the common law does transmit morality and normativity through texts. A judge may exercise creativity in resolving disputes about facts or rules, but the principles and holdings that characterize the common law are not strictly speaking literary, however literary their articulation in written opinions may seem.⁴⁴ Judges may, of course, be imaginative. Their opinions, however, are not imaginative literature. They cannot be. The chief difference, it seems to me, between literature and judicial opinions involves human creativity and the appropriate

31. *Id.* at 207.

32. *Id.*

33. KIRK, *supra* note 4, at 207-08.

34. *Id.* at 209.

35. *See id.*

36. *Id.* at 211.

37. *Id.* at 216.

38. KIRK, *supra* note 4, at 218.

39. *Id.* at 212.

40. *Id.* at 213.

41. *Id.* at 212.

42. *See id.* at 212-13 (describing renowned works that are not particularly literary).

43. For further discussion of the common law and Oliver Wendell Holmes Jr.’s aesthetic writing (in particular in his dissenting opinions), see ALLEN MENDENHALL, OLIVER WENDELL HOLMES JR., PRAGMATISM, AND THE JURISPRUDENCE OF AGON: AESTHETIC DISSENT AND THE COMMON LAW 109 (2017).

44. *Id.* at 102.

genre or forum for its operation: the judge writes not just to generate some emotional, intellectual effect on readers, but to settle a current problem or dispute that is submitted for official resolution.⁴⁵

The common law and a literary canon consist of innumerable precedents and the imitative utterances of numberless authors. The common law may absorb the prevailing view of some temporary majority or transitory fixes to ephemeral problems. These expedients, having been integrated into the system, become merely data in a vast and multitudinous network of historical forces, political compromises, and judicial patterns. Over time cases tend to conform to the habits, customs, mores, and traditions of a mature, educated, and virtuous populace.⁴⁶ The common law, as manifested in cases, is elastic, but only within prescribed, observable parameters that are inadvertently fixed by the deliberate actions of countless individuals seeking right results and clear answers in the face of complicated controversies and alarming innovations. In any given case, a judge considers general maxims and distills them down to applicable particulars to resolve concrete disputes. A judge's rationale furnishes the common law with normative and practical reasoning; over time the normative and the practical become durably interlocked.⁴⁷ A judge cannot dispose of a case without engaging, wittingly or otherwise, with normativity.

The common law system always contains within it much that has fallen out of current use, or that the living generation has forgotten. Because the common law is disembodied knowledge, a cultural transmission whose fractions, divisions, branches, and components are too vast to be wholly comprehended by a single human mind, it makes available in perpetuity seminal principles for future discovery and reanimation. It embeds values and morals in the textual record so they will not perish during modish ages, so they may live through dark times, and so they are able to *be* seen even when they are *unseen*. Over centuries in the common-law system, the combined intents and motivations of judges, as expressed in opinions, approximate enduring truths, notwithstanding any passing feelings that dominate a present mood or ethos. An incalculable number of distinct cases, each with their own array of facts and with affinities only superficially apparent to judges, ultimately add up to a unified system, to wit: the common law.⁴⁸ The common law is thus a name for a medium that preserves and communicates facts and discourse for the gathering of operative principles—

45. *Id.* at 121.

46. *Id.* at 123.

47. *Id.* at 121.

48. MENDENHALL, *supra* note 43, at 122.

imperfectly embodied and understood—which are transmuted through actual disputes with felt consequences in differing contexts.⁴⁹

To avoid confusion, I should clarify what is meant by “disembodied knowledge.” This term is not meant to present law as abstract or unhistorical. On the contrary, it means to suggest that law is historical and concrete, an assemblage of the quotidian practices, moral norms, and dispute resolutions of real people interacting within describable jurisdictions.⁵⁰ The history of the common law involves so many fact-specific situations regarding the unique application of inherited principles that no person is capable of fully understanding that history in its entirety. Because the common law is the medium used to preserve that history and that knowledge, judges in a common-law system always have available to them a record containing what they do not, and cannot, know. That is the sense in which “knowledge” in and of the common law is “disembodied.” *Much* of the knowledge embedded in the common law, but not *all* of it, remains separated from a person’s mind because it is too immense and variegated for single minds to comprehend. Such knowledge consists of the collection of decisions that numerous minds have reached over generations.⁵¹ Consider a literary canon: one may not have read every great text it contains, yet each text within it contributes to the total knowledge it retains.

A judge may know the facts and principles that are operative in a particular case before him, and thus may enjoy embodied knowledge of those, but he cannot know or understand the many implications of his decision in that case on the sum of legal experience. The common-law system is a mechanism for recording and transmitting resolutions to disputes in several individual cases in which a particular judge’s decision is “embodied,” but the decision is then plugged into a vast network of cases, most of which the average judge may never read and thus may never *know*, even if he senses their effects. That network of cases is what I am calling “disembodied knowledge,” because it exists independently of one mind and consists of innumerable decisions that are waiting to be recalled if certain facts or principles revive their importance and necessitate their application. Disembodied knowledge is the incomprehensible sum of legal experience; it is the entire historical record of judicial decisions within the jurisdiction. The common-law system preserves that sum of legal experience so that future judges may mine it for the particular knowledge (i.e., the pieces and parts of the incomprehensible and unknowable whole) that they do not possess in their

49. *Id.*

50. *Id.* at 85.

51. *Id.* at 117.

own minds in the present moment.⁵² It is not that the combined knowledge is abstract; rather, it is concrete and bottom-up and the product of felt experience, but manifests as an interconnected case network made up of a wide array of information that develops into ascertainable patterns from which general principles can be employed and differentiated.

The common law is not entirely coherent or cohesive, and the knowledge it preserves is never finished or total. Nor is it an indiscriminate lump of easy information. Its meaning is never clear or unified because it is an amalgamation of meanings. Its principles may be ambiguous and their application confounding because the common law is not a formula.⁵³ It is a collection of lessons learned from a multiplicity of competing interests, enterprises, and activities. It is the sum of judicial decision-making that bears upon everyday experience. It is our complicated inheritance, a multifaceted guide for human action, a manifold of distinctive solutions to real conflicts that develop into discernable trends and tendencies. It is not predetermined, at least not by human beings, and its important cases in any era are probably only attenuated manifestations of profound truths, but they are manifestations all the same.

The rules that develop out of the common law are not abstract, but historical; they represent practical solutions to concrete problems. They arise from lived experience. The common-law judge takes possession of knowledge, comes into it, inherits it, and makes it his for the immediate purpose at hand. The judge is not the passive recipient of outside instruction, but an active participant who transmits learning to future readers; he plants the seeds that cultivate a system, that sprout principles afresh in changing intellectual climates.⁵⁴ Each judicial holding deposits information and reasoning into a trust of cases for later withdrawal. The information and reasoning in a past case about trespass may be irrelevant to the disposition of some present case, say a divorce proceeding or a criminal appeal regarding the death penalty, but they are not inherently useless. Some other case involving different fact patterns or implicating different rules may prove the usefulness of the information and reasoning that did not obtain in the context of divorce or capital punishment.

The common law is the living whole of human experience within the jurisdiction it touches, its cases entering into new combinations in new eras and adding variety to its already vast content.⁵⁵ The common-law judge must surrender to the flow of historical forces that govern the present, even without

52. *Id.* at 121.

53. MENDENHALL, *supra* note 43, at 119.

54. *Id.*

55. *Id.* at 120-21.

full knowledge that he is doing so, because the past is always alive to him. The judge who wishes to purge opinions of metaphysical or moral terminology inadvertently contributes to the normative order by submitting additional data and perspective to the textual tradition, thereby expanding the frontiers of knowledge if only by presenting examples of error and fallacy. We learn from bad precedents as well from good precedents.

Tracing the genealogy of particular laws demonstrates that they often originate as practical solutions to concrete problems. Only after generations of repetition, modification, and refinement do they reveal themselves as unintended reflections of general, normative principles. Every so often a brilliant jurist with a long view of society, like Sir William Blackstone, synthesizes what seemed to be disparate and unassimilated principles, giving needed coherence to the system whose on-the-ground particulars can seem disordered and disorienting.⁵⁶ Within the common-law system theories are finite, be they interpretive or otherwise, but data is infinite. The common law supplies finite theory, in other words, for a phenomenal world with infinite data. Each decision expands the range of the known and the knowable, multiplying future options for judges who can select from alternative rulings and rationale in past cases. The common law thus represents tacit knowledge, or the idea that underlying human action are principles and standards that are known but cannot be articulated. People in a common community possess a silent understanding of the foundational, coherent norms that characterize their community. That understanding is felt but cannot readily be defined or explained.

Judges are not usually competent as philosophers, but are suited to oversee the discovery of evidence and facts, implement prescribed procedural rules, manage cases, and harmonize precedents; however, in the aggregate, the several decisions of innumerable judges tend to reveal the prevailing norms and controlling rules of society.⁵⁷ Data about the moral order are always inadvertent byproducts of judicial opinions. The common law is residual normativity cultivating good habits out of the beliefs it reveals. The common law embeds information about lived experience (and about the truths and beliefs that arise from lived experience) within an inexhaustible network of texts. The residual knowledge transmitted through cases, being too varied and complex for one mind to comprehend, supplies direction and purpose for those judges who seek it—for the “perpetual students.”⁵⁸ Such knowledge never settles into easily applicable axioms that pacify all conceivable predicaments. Yet the demonstrated success of certain principles

56. *Id.* at xxiv.

57. *Id.* at 85.

58. MENDENHALL, *supra* note 43, at 98.

in cases can cultivate, through replication, imitation, and mutation, good habits predicated on normative judgments. Humbled by the difficulty of a problem presented by litigation, the conscientious judge as a “perpetual student” will undertake the laborious process of sustained inquiry, consulting the wisdom of the ages as embodied in cases decided with practical reasoning.

Perhaps I should disclaim the grand goals I envisioned at the outset of this talk. I likely have idealized the common law beyond my own liking. If so, my overstatement is meant to clarify or make plain what in practice is messy business, and to discuss the common law in a way that approaches but never reaches a definition.

Which brings me back to roads.

Roads are made for travel. They represent the taming of wild nature and the deliberate alteration of land, terrain, and space for human mobility. They ease burdens by facilitating the passage of people and goods from place to place, by vehicle, animal, or foot. Travel for the ancients was arduous and dangerous. Roads were rough and rare. Where they stretched into the desolate distances, away from safe cities and the protections of civilization, they could be treacherous, the site of bandits and the banished.

Even today roads can send you in circles, vanish into forests and woodlands, or twist along the jagged edges of cliffs. They can climb high into snow-capped mountains or split the soft sands of beaches. They can be large or small, long or short, straight or narrow.

In these properties and characteristics, however historically contingent, I see something of the common law, with travel signifying inquiry along endless surfaces pathed and smoothed by the thinking of our ancestors. Roads reflect norms and customs; for example, in some cultures and circumstances we might drive in the left or the right lanes. In others we may ignore red lights or stop signs, and in others still we may navigate roundabouts or tunnels, boulevards or bypasses. I have ridden on a moped in a Brazilian favela, in a tuk-tuk in Thailand, in the shinkansen in Japan, and in a gondola in Venice. Such modes of transportation, although not all of them strictly speaking for roads, speak to and about the cultures in which they operate. They are contextual, situational, and expressive—the product of regularized interactions among ordinary people with tacit knowledge of everyday social situations.

Who among us can say definitively what the common law is, as though it were some indivisible monolith with fixed, permanent properties and definite applications in all conceivable situations? The common law defies our ability to understand it fully because it is vast and multitudinous, its innumerable component parts too complex for quick and simple definition.⁵⁹

59. MENDENHALL, *supra* note 43, at 130.

The common law is aggregated, disembodied knowledge and the name for the underlying unity of complex institutional arrangements formed out of cultural specificities.⁶⁰ The common law contains an immense understanding that no one person could possess or control. We consult it for the wisdom we lack and fill it with the wisdom we do not know we have.

As for Noah's question, "where do roads come from?" The truth is that no one knows. We can trace their history back only so far, knowing we do not entirely know what came before. Yet we do not need to know where they came from to know how to use them, to appreciate the order and stability they provide, or to follow the rules that govern their passage. We just know they are there—most of us with only a faint awareness of how they are made or maintained. We ride or walk where others have for centuries, the past always at our heels, and the future always and everywhere before us.

60. *Id.* at 102-03.