Beware Judge & Co.

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ABSTRACT. Richard Hyland's *Common Law Judging and the Great Tradition* offers an admirably erudite reconstruction of the common law's central commitments. Hyland is right that the common law is not a system of rules mechanically applied and that good adjudication ultimately requires good judges. But accepting that judges have broad, ineliminable discretion is different from concluding—as Hyland tends to—that there is no vantage point from which judicial decisions can be evaluated and criticized. This essay argues that Hyland's account of the common law is in tension with the rule of law; that the common law cannot rely as easily as he suggests on the claim that it tracks social norms and values; and that we should be concerned about an excessive and uncritical admiration of individual judges in the American common law. Still, Hyland is right that the openness and adaptability of the common law are both central to it and valuable. But this should not lead us to a quietism that avoids rational scrutiny of how judges exercise their power.

INTRODUCTION

Richard Hyland's *Common Law Judging and the Great Tradition* is an admirable achievement. The book is full of both erudition and humanity. It masterfully combines attention to historical and biographical detail with a sustained articulation and exploration of one big theme across centuries of thinking and writing about the common law.[1] Students of the American common law and its theory will be rewarded by careful and sustained reading of this book.

The book's central theme is that the common law is inherently flexible and open-ended. "With few exceptions," Hyland writes, "any result a court truly desires can be convincingly anchored in the [common] law."[2] What drives judicial decision-

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[1] Among other achievements, the book also offers—to my knowledge—the deepest and most thorough reconstruction to date of the facts surrounding *Webb v. McGowin*, 27 Ala. App. 82 (1935).

[2] RICHARD HYLAND, COMMON LAW JUDGING AND THE GREAT TRADITION 18 (2026).

making is the pull that the facts of the particular case exert on the judge.[3] Common law decision-making does not begin with the application of a rule but with an intuitive sense of the correct outcome for the case.[4] If the "rules" don't allow for that outcome, so much worse for the rules—the common law judge will "get creative and look for an alternate construction."[5]

This seems at odds with a common sense, somewhat naïve view of the law that sees it as a rulebook or master code from which the judge is supposed to extract rules that decide particular cases.[6] And it is a central task of a common law legal education, at least to many teachers and scholars in the United States, to slowly teach students that this lay conception of the law is wrong. As Hyland himself writes:

> "Students come to law school with a surprisingly clear idea of legal method. They believe that cases are decided by locating the applicable rule and applying it to the facts …. [T]his view has nothing to do with how cases are decided."[7]

I agree that our job as law professors in an American law school in part requires shaking off the rulebook conception and showing our students that there is a lot more to legal reasoning than what that conception suggests. And yet I couldn't shake off, while reading Hyland's book, the suspicion that we should be a bit more uncomfortable than he seems to be with the fact that the (American) common law is sometimes so at odds with that conception. More precisely, I worry that we are giving judges—that great and central figure of the common law tradition—too much of a pass by not sticking to our naïve expectations a little bit more. Perhaps, as I will argue, we should be less at ease than *Common Law Judging and the Great Tradition* is with the fact that our common law judges have so much power.

I. Thrasymachus's Justice and the Common Law

To motivate this idea a bit more, let me start with the definition of justice offered by Thrasymachus in Plato's *Republic*, which Hyland himself discusses. According to that

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[3] *Id.* at 42.
[4] *Id.* at 44.
[5] *Id.* at 43.
[6] *See* Frederick Schauer, Thinking Like a Lawyer 103–104 (2009).
[7] Hyland, *supra* note 2 at 4–5.

definition, justice is whatever is in the interest of the powerful.[8] Hyland writes:

> "As Socrates and his friends began their discussion, Thrasymachus offered a definition of justice: 'justice is nothing other than what is advantageous for the stronger.' Why should we accept such a strange suggestion? Well, Thrasymachus explained, we consider it just to obey the laws, and the laws are usually made by the most powerful, so doing what they find advantageous is justice. This definition is of course absurd. And yet oddly, that view, which Plato thereby reduced to its rude essentials, is consistent with the view my students have on the first day of law school. Judges decide properly, they believe, when they follow the law. But where do the laws come from? In contemporary society, laws are enacted by a government chosen through the electoral process. And yet it is easily demonstrated that the law is shaped by the most powerful members of society. We have the laws that our rulers give us.... In other words, those who argue that judges should simply apply the law have a lot in common with Thrasymachus."[9]

My suggestion here is that we should not forget that judges also wield power, that their decisions and their opinions are the written prelude for the exercise of state violence or its threat, and that—as Robert Cover famously put it—their decision-making "takes place in a field of pain and death."[10] In other words, my worry is that being too comfortable with the fact that the common law is not a system of rules, but a system where the judge decides on their own and on the basis of what the facts suggest to them, is also accepting a version of Thrasymachus's definition of justice. By accepting a picture of the common law as simply a method for free decision-making by judges, we are also accepting the view that those who are in power get to determine what counts as just.

This is an old worry in the common law tradition. Jeremy Bentham used to criticize "Judge & Co."[11] as a shorthand for the lawyers and judges he famously disliked and for the myths they attempted to build around their activities.[12] As Postema

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[8] Plato, *The Republic*, Book I.

[9] HYLAND, *supra* note 2 at 20.

[10] Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

[11] Jeremy Bentham, *An Introductory View of the Rationale of Evidence*, 6 *in* THE WORKS OF JEREMY BENTHAM , 22, 24 (John Bowring ed., 1843).

[12] Frederick Schauer, *Jeremy Bentham, Tom Campbell, and the Normative Positivist Tradition*, 42 AUSTL.

helpfully explains Bentham's concern, the customs the common law relied on weren't the customs of the people but rather the customs *in foro*.[13] In other words, beneath the classical common law's poetic references to custom from time immemorial and the law's artificial reason, was the imposition of the legal elite's values on the rest of the population. Bentham wanted to demystify the common law to show how much of it was really an exercise of power by an unaccountable elite.[14]

I have certain doubts about the Benthamite critique. It has the same appeal and motivation, but also the same risks, of all the forms of distrust of technical experts and unelected elites (of which we've seen a lot in the past few years in the United States and the West). Thus, I don't want to endorse a completely cynical view of the common law system, and much less to endorse a Benthamite cynicism about judges.

But I do think we should be careful about glorifying the common law and its judges too much. And while Hyland's aim is to understand the common law and how it approaches the decision of a case, there is also a lot in his book that reads (to me at least) as a celebration of the common law as a method of decision-making. For instance, Hyland writes:

> "An appreciation of the common law approach to decision making may also improve the many choices we make throughout the day, particularly when they involve important life decisions. Though the law has a specialized vocabulary, specific concerns, and its own traditions, the 'methods used by judges are those of ordinary, everyday reasoning.' Common law judges.... take everything into account.... [G]etting to know some of the factors that judges use and understanding something about how they combine them can improve our own choices and enrich many aspects of daily life.'"[15]

I am less sure than Hyland is that we actually do or should make decisions in everyday life by taking everything into account. I certainly don't, and I think that's a good thing. I also doubt that's how a good common law judge should think of their job, and how good common law judges (even a Cardozo, a Holmes, or a Lord Mansfield) actually decide. But perhaps more importantly, I worry about the idea that,

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J. LEG. PHIL. 204, 205 (2017).

[13] GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 268–269 (2019).

[14] *Id.* at 262.

[15] HYLAND, *supra* note 2 at 4.

in a liberal democracy, we should be comfortable with such a way for individuals who exercise political power (in many cases, with life tenure) to make their decisions.

Again, these are old concerns. They are the worries that animated Bentham and his passion for codification. They are, similarly, the worries at the root of the French codification process,[16] as well as the worries that led to the German repudiation of judicial creativity after World War II.[17] And they are some of the worries that underlie Montesquieu's characterization of judges as the mouth of the law as a precondition of political liberty.[18] While not new, though, these concerns are present in American legal and political debates, today, about the Supreme Court.[19]

Hyland is of course right in his diagnosis of the central idea of what he calls the great tradition as the Holmesian notion that "general propositions do not decide concrete cases."[20] He is also right about more detailed aspects of the common law. For instance, he is right about the fact that the holding of a particular opinion is not set by the opinion itself but is, instead, an upshot of later interpretation.[21] Hyland is also right in concurring with Kessler and Llewellyn's view that most of the cases that make it to our casebooks and that are the centerpiece of American legal education are hard cases

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[16] *See* JOHN MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 29–30 (2018).

[17] As Hyland writes: "In the year following Llewellyn's second stay in Leipzig, German law underwent a tragic transformation. The view that rules alone do not decide cases triumphed in the perverted form of Nazi justice. Hans Frank, one of the Third Reich's leading jurists, asked judges to ignore formal law: 'As you decide each case, ask yourselves: How would the Führer decide in my place?' After the war, scholars argued that Free Law, by loosening the constraints on judges, made it easier for Nazi jurists to manipulate German law. In any case, the searing memory of that catastrophe ensures that German judges will never again be accorded broad discretion to create law. And yet because of German émigrés like Kessler, and because Llewellyn taught for a couple of years in interwar Leipzig, Free Law not only did not perish but was reborn on this side of the Atlantic." HYLAND, *supra* note 2 at 166. On judicial philosophy in Nazi Germany, *see generally* HERLINDE PAUER-STUDER, JUSTIFYING INJUSTICE: LEGAL THEORY IN NAZI GERMANY (2020).

[18] CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS XI (1989). For discussion, *see* Fernando Atria, *Jurisdicción e Independencia Judicial: El Poder Judicial Como Poder Nulo*, 5 REVISTA DE ESTUDIOS DE LA JUSTICIA, 124 (2004).

[19] *See*, *e.g.*, Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022); LEAH LITMAN, LAWLESS: HOW THE SUPREME COURT RUNS ON CONSERVATIVE GRIEVANCE, FRINGE THEORIES, AND BAD VIBES (2025).

[20] HYLAND, *supra* note 2 at 6. The reference is to *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[21] *Id.* at 9.

in which good arguments can be made for each side.[22]

My concern is that he goes astray when, from this recognition, he derives a certain acritical quietism towards judges. For instance, Hyland writes:

> "[T]he great many of us who are not making the decision have little to contribute to those judges who are. A judge's work only makes sense if we assume that some decisions are better than others and that one is best of all. And yet figuring out which is which is a task that each judge must face as we face most important predicaments in life—and that is, sadly, alone. It is unfortunate that we cannot be of more assistance, but the great books tell us that we can do little to help our judges. The best we can do…. is to remind judges to keep an open mind. We can enumerate some of the many factors that may be relevant, but there is nothing we can do to tell a judge how to balance those factors or which decision is the right one. But look, as devastating as this may seem for a legal system, it is also a permanent feature of the human condition. No one can instruct any of us how to lead our lives. We want to find the right path, we ask everyone we know for advice, but in the end we are working with our own criteria, and the decision is always only our own."[23]

This, I think, is something we can't accept. It is certainly true that it is silly to think that, if we only came up with the right theory of precedent, of interpretation, or of decision-making, that will be enough to have good adjudication. I would even argue that many recent debates in American law about textualism (in statutory interpretation) and originalism (in constitutional interpretation) assume this distorted picture, and Hyland's book is an excellent reminder of the fact that the best means for good adjudication is good, responsible judges. But this does not mean that there is nothing to say, normatively, about how cases should be decided. Perhaps more importantly, while there might be good arguments on both sides of hard cases, this does not entail that there aren't better or worse ways of going about weighing those arguments, and that we cannot articulate criteria, theories, and methods that answer those questions and *do* tell judges how they should decide. We are entitled to do this because when judges are deciding disputes they are not, *pace* Hyland, making decisions

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[22] *Id.* at 17.
[23] *Id.* at 19.

like the ones we make about how we lead our lives. They are, instead, determining how the coercive apparatus of the state will be used.

From this perspective, the law should not be seen as an obstacle that judges have to maneuver around and overcome.[24] It is, on the contrary, a set of impersonal and impartial standards that limit and temper the unfettered discretion of the judge, and therefore the possibility of litigants being dominated by the judge's own conception of right and wrong.

II. Rationality and the Rule of Law

Hyland is aware of the criticisms of the common law. Most of his discussion in this regard, however, revolves around Weber's judgment that the common law was a system of irrational law.[25] The focus on rationality here makes sense descriptively, because it highlights what distinguishes the common law as a method for creating legal rules and decided cases. But from the perspective of a normative evaluation of the risks of the common law, this focus is not particularly helpful. Hyland notes, correctly, that Weber made a fundamental distinction between making and finding (we could also say, applying) the law.[26] But the moral and political significance of this distinction is not really captured by the (notably obscure) Weberian idea of rationality.

In fact, something like this distinction is crucial for some of our central political values, including the rule of law and democracy.[27] Allow me to focus here on the rule of law. There are many conceptions of the rule of law and articulations of its value.[28] But, to my mind, the best encapsulation of the idea is relatively simple: it is about the subjection of political power to the discipline of law, so that ordinary people can plan their affairs and decide how to act under the guidance of legal norms.[29] Because of this,

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[24] *See Id.* at 42.

[25] *Id.* at 64. Weber's discussion can be found in Max Weber, Economy and Society: An Outline of Interpretive Sociology (1978). For a helpful discussion of Weber's view of the common law, *see* Emmanuel Melissaris, *Is Common Law Irrational? The Weberian "England Problem" Revisited*, 55 N. Ir. Legal Q. 378 (2004).

[26] Hyland, *supra* note 2 at 66.

[27] Here, I am echoing a larger theme explored at length in Paolo Sandro, The Making of Constitutional Democracy: From Creation to Application of Law (2021).

[28] *See*, *e.g.*, Lon Fuller, The Morality of Law (1964); Joseph Raz, *The Rule of Law and Its Virtue*, *in* The Authority of Law: Essays on Law and Morality (1979); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 Law & Phil. 137 (2002).

[29] *See generally* Felipe Jiménez, *The Rule of Law (Forthcoming, Michigan State Law Review)*, (2026).

there is a certain *impersonality* to the rule of law—typically captured by the slogan *the rule of law, not men*. It turns out that the common law, at least when conceived of in the way that Hyland conceives of it, is in tension with this idea. If we care about the rule of law, this should lead us to try to think about the common law differently (under the plausible assumption that how we think of law has an impact on how law operates[30]), or—if we think there is no alternative to Hyland's reconstruction—then to criticize it and to argue for the modification of its most problematic aspects, from the perspective of the rule of law.

Indeed, the idea that law does not govern the decision of cases, but rather that—as Cardozo *via* Hyland suggests—legal rules can be set aside and reconsidered on the basis of the judge's personal views, seems clearly at odds with the rule of law.[31] Of course, it would be myopic to deny that facts about particular judges—about their values, their commitments, their psychology, their dispositions—play a huge role in adjudication. Importantly, this is true even for judges who are trying to decide in good faith, the best they can. There is, thus, an ineliminable element of luck in which type of judge(s) you get to decide your dispute.[32]

Hyland's book is a good reminder of this fact, and of the equally important fact that the common law does not shy away from it but rather makes it central to its view about legal ordering and reasoning. But sometimes Hyland slides from this to a troubling quietism about judges that really spells, I would respectfully suggest, trouble for the rule of law. For example, he writes:

> "The great tradition's central insight is that there is no vantage point from which the judicial result can be judged. We can suggest factors for the judge to consider, and we can share our view about how a case should come out, but once the decision is announced, we can do little but try to understand the judge's thinking. The decision is highly

[30] While plausible, this is not an indisputable idea. For discussion, *see* Felipe Jiménez, *Legal Positivism for Legal Officials*, 36 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 359 (2023).

[31] HYLAND, *supra* note 2 at 149–150. I say "Cardozo *via* Hyland" because others would have a different reconstruction of Cardozo's views about jurisprudence and judicial method. On this discussion, *see generally* Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149 (2005); John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419 (1999); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1993). Hyland is aware of the fact that this conception, that emphasizes the significance of the judge and their psychology and judgments, is a disturbing view. HYLAND, *supra* note 2 at 152.

[32] *See generally* Jeremy Waldron, *Lucky in Your Judge*, 9 THEORETICAL INQUIRIES IN LAW 185 (2007).

> personal and not at all the team sport we might expect. As long as the judge is not acting improperly and is proceeding as judges do, we have no criteria by which to decide whether a judge has decided a case correctly."[33]

My view is that we do indeed have criteria, and that it is our job—as law professors and legal scholars—to develop those criteria and use them to relentlessly scrutinize and criticize judges. Now of course here Hyland could answer that he is open to criticizing judges who act "improperly" or who fail to proceed "as judges do." But these phrases are just placeholders for, precisely, the criteria that we need to develop for what counts as a proper judicial method. It can't be that, as long as judges are not taking bribes or flipping coins, there is nothing left to say. We need, *precisely*, something that will count as a vantage point from which to discern good and bad decisions.

We can acknowledge that the task will be hard; that there will be disagreement; that there will be cases where the law is genuinely indeterminate; that every case is factually rich and complex; and that it is easier said than done. But after these acknowledgments, we must insist—if we really believe in the idea of the rule of law—that judicial decision cannot be *that* personal.

Thus, I think Llewellyn was right to be embarrassed about having said that the law is nothing but what judges do about disputes.[34] True, precedent is flexible.[35] True, the distinction between holding and *dicta* and the idea of *ratio decidendi* are endlessly malleable.[36] But these are features of the common law we should worry about and figure out how to discipline, rather than celebrate or passively accept.

The response to the worry does not need to be the abolition of the common law method. It could be something like Hart and Sacks's ideas about institutional competence.[37] It could be a moderate conceptualism like the one at the core of Goldberg and Zipursky's theory of tort law or the one developed by Balganesh and

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[33] HYLAND, *supra* note 2 at 152–153.
[34] Against what Hyland argues in *Id.* at 168.
[35] *Id.* at 170–171.
[36] *Id.* at 172.
[37] *See Id.* at 186. *See also* HENRY M. HART (JR.) ET AL., THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994).

Parchomovsky.[38] Or it could be something like Ronald Dworkin's interpretivism.[39]

I don't mention these alternatives because I think they are correct. In fact, I have doubts about each of them. But they all recognize that the freedom that the common law generates is something to be disciplined, rationalized, cabined, and channeled. Perhaps, following Gilmore, we can't be sure that we have got it right.[40] And, following the critical legal studies movement, we should recognize that there are genuine and sometimes incommensurable conflicts of value underlying our legal institutions.[41] Still, the response cannot be surrendering to judicial freedom.

So, I think we need to recover something very much like the starting intuition of Hyland's students: judges should apply legal rules and doctrines impersonally and impartially, as they find them.[42] This will not be as easy as finding rules in a code, using them as the major premise of an argument, and spitting out a conclusion. A good judge will adopt certain values and commitments, will exercise judgment, and will recognize the space for interpretive freedom that legal rules and doctrines leave for them.[43] Thus, the students' somewhat simplistic picture has to be replaced with something more complex. But in the process of replacing the simplistic picture, we should avoid quietism and underestimating the risks of judicial power and domination. We should also attempt to preserve the idea that judges should be subject to the impersonal authority of law.[44]

III. On Law and Society

At this point, though, a common law enthusiast might want to argue that the common

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[38] *See* Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 University of Pennsylvania Law Review 1241 (2015); John C. P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs (2020); Benjamin Zipursky, *Pragmatic Conceptualism*, 6 Legal Theory 457 (2000).

[39] *See generally* Ronald Dworkin, Law's Empire (1986).

[40] Hyland, *supra* note 2 at 223.

[41] *Id.* at 244. *See also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harvard Law Review 1685 (1976).

[42] Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 Hous. L. Rev. 103, 114–116 (2021).

[43] I develop a view along these lines in Felipe Jiménez, *On Legal Expertise*, 69 The American Journal of Jurisprudence 141 (2024); Felipe Jiménez, *Tradition in Constitutional Adjudication*, 36 Yale Journal of Law & the Humanities 1 (2025).

[44] As opposed to the *personal* authority of the judge. Hyland, *supra* note 2 at 385.

law rejects the subjection of the judge to law because it is suspicious of top-down legal authority and relies, instead, of the judge's feel for the actual norms accepted by their fellow citizens. The common law, Hyland argues, has as one of its central commitments the idea that the law follows the lead of society—most of the time, the common law is an elaboration of ideas, norms, and values that are already thriving in social life.[45] Since at least Blackstone, an important part of the justification of the common law has been that the common law does not impose legislative edicts from above, but instead reflects emergent customs and norms that arise out of the people's customs.[46]

On this view, the common law is a combination of reason and social custom.[47] It is not the free, abstract reasoning of a philosopher king that rules from above, but the elaboration of norms and expectations that are already found in the customs of the people.[48] As Hyland explains, sometimes this customary basis for the common law is even—as in James Coolidge Carter's formulation—raised as the *sole* basis of the common law.[49] If that is the case, a defender of the common law could argue, then the fact that the judge has so much freedom and such a central role does not generate a risk of domination—after all, the judge is merely declaring what the norms of social life already are.

One potential problem with this line of argument, as Hyland himself suggests, is that the common law sometimes refuses to follow social norms and social expectation.[50] But here I want to suggest something more damaging: the common law is by design unable to take into account certain norms that are (and ought to be) particularly relevant in a large liberal democratic society. As Hyland writes when discussing Unger:

> "It is tragic that human beings, including so many children, live in degrading conditions. When revising the Rental Housing Act, the

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[45] *Id.* at 85–86.

[46] *Id.* at 86.

[47] *See* Gerald J. Postema, *Philosophy of the Common Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman & Scott J. Shapiro eds., 2002); J.W. Tubbs, *Custom, Time and Reason: Early Seventeenth-Century Conceptions of the Common Law*, 19 HISTORY OF POLITICAL THOUGHT 363 (1998); Matthew Steilen, *Reason, the Common Law, and the Living Constitution*, 17 LEGAL THEORY 279 (2011).

[48] Nathan B. Oman, *Private Law and Local Custom*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW , 167 (Andrew S Gold et al. eds., 2020).

[49] HYLAND, *supra* note 2 at 87.

[50] *Id.* at 88–89.

> D.C. Council recognized that there was a severe shortage of rental housing and that the problem was felt most acutely by those without means. But I cannot see how litigating one case at a time can change that. It can protect the rights of a few tenants, but our social structure limits what the law can accomplish. 'No law can provide adequate wages and working conditions and decent and affordable housing to those without means.'"[51]

What Hyland is articulating here is the fact that, due to its focus on the bilateral relationship between plaintiff and defendant, the common law is ill-suited to implement norms about the general distribution of goods, opportunities, resources, and burdens across society. To use the old Aristotelian distinction, the common law seems much better at achieving corrective justice than distributive justice.[52] But norms of distributive justice are centrally important in our positive political morality, which suggests that at least one subset of relevant socially accepted moral norms cannot be recruited as part of the custom- or social-norm-based justification of the authority of common law judges.

This is not just a problem of norms of distributive justice, though. There is a whole array of social customs and norms that common law judges have very little access to due to the features of litigation. Only some disputes make it to court. Of these, only some make it to appellate litigation. We all know the story.[53] Those disputes typically reflect who, in our society, has access to lawyers and the time and money to litigate disputes.[54] Today, they are also a reflection of who can avoid the domain of mandatory arbitration.[55] On top of this, common law judges are not a representative sample of our society. Thinking that these highly unrepresentative individuals deciding a highly unrepresentative sample of disputes can claim as justification for their power their deep

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[51] *Id.* at 242.

[52] *See* ARISTOTLE, NICOMACHEAN ETHICS V (Robert C. Bartlett & Susan D. Collins eds., 2011).

[53] For articulations of this idea, *see* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 THE JOURNAL OF LEGAL STUDIES 1 (1984).

[54] *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOCIETY REVIEW 95 (1974).

[55] On this, *see* Danielle D'Onfro, *Private Law Without Precedent*, 78 VANDERBILT LAW REVIEW 1385 (2025); Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735 (2006); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052 (2015); Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed out Common Law*, 67 UCLA L. REV. 600 (2020).

connection to the customs and norms of the people requires a degree of optimism and faith that seems unjustified.

IV. Notorious Judge & Co.

The problem is not recognizing that judges play an important role, and that they are not merely the conduit for the automatic application of legal norms. Surely, Hyland is right about that. The problem is deriving, from this, an acritical attitude towards judges. My worry here is that Hyland is channeling a broader problem in our legal culture.

Consider how we talk about judges. Justice Ruth Bader Ginsburg was described as "a titan among us"[56] and "the great equalizer."[57] She was also labeled by her admirers as the "notorious RBG."[58] Similarly, the late Justice Antonin Scalia has been described as a "judicial icon,"[59] a "Platonic leader"[60] and a "philosopher king."[61] Benjamin Cardozo has been described as a "master of expression"[62] and "beautiful" (as Hyland himself tells us).[63] Similar expressions can be found regarding Holmes, Harlan, Warren, Hand, and many other judges.

This reflects something important about American law. We are part of a juristocratic (perhaps almost *juristophilic*) legal culture, where the admiration of the personal identity of the judge, their personal style, and even the hagiographic reconstruction of their lives play an important role.[64] These juristocratic tendencies, and the associated centering of individual judges, have even led some scholars to argue that the foundations of the American legal system are to be found in the *personal* views

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[56] Arun Subramanian, *A Titan Among Us—On Dissents, Waymaking, and Strong Coffee*, 121 Columbia Law Review 1 (2021).
[57] Jill Lepore, *Ruth Bader Ginsburg: The Great Equalizer*, The New Yorker, Sept. 2020.
[58] Irin Carmon & Shana Knizhnik, Notorious RBG: The Life and Times of Ruth Bader Ginsburg (2015).
[59] Edward A. Purcell, Antonin Scalia and American Constitutionalism: The Historical Significance of a Judicial Icon (2020).
[60] Steven G. Calabresi, *In Memory of Justice Antonin Scalia*, 50 Loy. L. A. L. Rev. 165, 165 (2017).
[61] *Id.* at 173.
[62] Arthur L. Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 52 Harvard Law Review 408, 409 (1939).
[63] Hyland, *supra* note 2 at 143.
[64] This is reflected, too, in the received wisdom about judicial writing style. Varsava, *supra* note 42 at 112.

of judges about the law.[65]

Here it is almost impossible not to recall Ronald Dworkin's mythical creature, Judge Hercules.[66] Hercules is, of course, a fictional figure supposed to provide a model for the perfect judge. At the same time would-be novelist, justice personified (in robes), applied moral philosopher, and sophisticated interpreter of our collective history, Hercules epitomizes Dworkin's ideal for judging. It seems to me many American legal scholars and commentators have tended to treat their preferred judges as real-life incarnations of Hercules, and that Hyland's quietism about judging is aligned with this worrying tendency in American legal culture.

The fact that we focus so much on judges is not surprising. American judges are extremely politically significant figures.[67] As Merryman and Pérez-Perdomo explain, common law judges are "culture heroes, even parental figures,"[68] while civil law judges are "functionaries."[69] In most civil law systems, by contrast, judges are typically thought of as public servants or bureaucrats. Judicial careers are highly regulated, bureaucratized, and have a pre-established hierarchical structure that starts with specialized judicial education.[70] Civil law judges are *career judges*.[71]

Thus, the focus on judges makes sense in our legal culture, and it makes a lot less sense in others. But note that our focus on judges is not just a focus on the analysis of their decisions, the explanation of their methods, and the role they play in the legal system. It is also about admiration, praise, and—dare I say—idealization.

Against this trend, it seems to me, what we need is a good dose of skepticism about the stories judges tell about themselves and about the power that they exercise. Note that this applies both to judges who embrace their power and affirm it—like Cardozo and Holmes, in Hyland's account—and to those who try to hide it beneath

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[65] *See* Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARVARD LAW REVIEW 824 (2023); Richard M. Re, *A Law unto Oneself: Personal Positivism and Our Fragmented Judiciary*, 110 VA. L. REV. 1169 (2024).

[66] *See generally* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); DWORKIN, *supra* note 39.

[67] MERRYMAN AND PÉREZ-PERDOMO, *supra* note 16 at 34.

[68] *Id.*

[69] *Id.* at 35.

[70] *Id.*

[71] Mauro Cappelletti, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis*, 8 MONASH U. L. REV. 15, 62 (1981).

supposedly highly constraining methods of interpretation. Thus, I am not arguing in favor of any particular view about how judges should decide cases or how much they should use their judicial freedom. But I do think we should worry about the tendency to acritically admire and praise the individual human beings that occupy the position of the judge. The answer should not be to deny the centrality of this position, but rather to channel it into a more critical direction—one that thinks more carefully about the virtues of a good judge and the institutional mechanisms and arrangements that foster such virtues.

From this perspective, it is not enough to say that legal rules do not apply themselves and that each instance of judicial reasoning can reimagine old rules.[72] That is certainly true. But the question is what we should want judges to do with this power. Merely noting that they can sweep aside doctrines is not enough.[73] On the contrary, we need methods for disciplining this freedom, methods that we will not develop if we remain enthralled by our admirable judges, like much of our legal culture, or if we reject the project of constraining judicial discretion, as Hyland does.

Hyland is of course right that the illusion that we could replace judicial decision with a rule-bound, mechanical decision procedure is just that—an illusion. But our task is not, as Hyland suggests, merely "to understand what judges do, not to tell them how to do it."[74] In Hyland's view, we should not tell judges what to do because

> "there is no reason to think that we could do a better job than the judges.... [W]e certainly will not get very far in our quest [to understand judicial decision making] if we spend our time erecting guardrails to prevent the chaos that we fear might result if a crackpot were one day appointed to the judiciary.... The much maligned 'rogue judge'.... doesn't roam at large after all. In any case, since judges do not care greatly what law professors think of them, our criticism is not likely to have much effect."[75]

I hope judges actually care, at least a little bit, about how their decisions are evaluated by other legal experts. To the extent that they don't, I would take this is a concerning sign of hubris. I also worry, unlike Hyland, that the judiciary is actually far

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[72] HYLAND, *supra* note 2 at 106.
[73] Regarding Holmes and consideration, *see Id.* at 114.
[74] *Id.* at 154.
[75] *Id.* Internal citations and quotation marks omitted.

from lacking "crackpots." Judges, again, are public officials who control the levers of state coercion. Their decisions and the ways in which they make them must be subject to rational scrutiny, and the work of the legal academy is one of the few mechanisms that we have to engage in that scrutiny.

Of course, contrary to what many in the legal academy seem to believe now, the development of new methods of interpretation and theories of adjudication has limited marginal value. Hyland is right that what we need the most are judges who are self-aware and reflective.[76] But quietism is not the appropriate response to this fact. Nor is, as I have suggested, an acritical attitude towards judges and their personae. What we need instead is constant rational scrutiny and a persistent insistence on the ethics of the judicial role.

Conclusion (In Defense of the Common Law)

Does any of this suggest that we should just abolish the common law and move in the direction of Bentham's dreams of codification? I don't think so. And the first reason for this is that judicial creativity is also part of code-based and civil law systems, as Hyland correctly argues.[77] But there are deeper, normative reasons, that explain why we should not want to abandon the common law. In fact, and despite some of my worries, Hyland's book gives us multiple reasons to think that, even if we could sweep tradition and radically transform our legal system into a civil law system without any cost (which, of course, we can't), we shouldn't. So let me, in closing, note some of these reasons, and some of the ways in which Hyland is right to celebrate the common law method.

First, Hyland is surely right that the American common law reflects an openness to other fields, other forms of knowledge, and other sources of information, that we should cherish. As he writes, the common law's openness has made American law schools the most open-minded departments in American universities.[78] My colleagues are lawyers, but also economists, historians, sociologists, psychologists, political scientists, and philosophers. That would be almost unthinkable in a civil law context, and it is a reflection of the openness of the American common law to multiple ways of thinking and forms of knowledge.

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[76] *Id.*
[77] *Id.* at 173.
[78] *Id.* at 200.

Second, Hyland is right that the common law is not just open to other forms of knowledge, but also to evolving over time by recognizing forms of injustice, mistreatment, and wronging that it didn't originally recognize.[79] This is a valuable aspect of the common law that can be seen, for instance, in its recognition of promissory estoppel claims, its adoption of unconscionability, or its limitation of the effects of privity of contract in product liability cases. This does not mean, as Hyland notes, that all of these expansions are correct—but it does show that the common law is flexible and open to evaluate multiple factors.[80] This is valuable particularly in conditions of legislative inaction and democratic gridlock.

Finally, as I have already noted, Hyland is right to note—with Cardozo, and before him, with Ehrlich—that rules alone do not determine outcomes, and that the best guaranty of a good decision is a good judge.[81] But as I have also noted, this is not a reason to think that, once a judge has made their decision, there is nothing left to scrutinize, evaluate, and criticize. Judges exercise power, and the great insight of the liberal tradition (which is also part of our legal tradition) is that power, in all of its forms, is a threat to freedom that needs to be constrained, disciplined, and questioned.

[79] *Id.* at 282.
[80] *Id.* at 374.
[81] *Id.* at 151.