

Michael Oakeshott's Declaratory Theory of Adjudication

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In this essay I consider a portion of Chapter Two of Michael Oakeshott's book, *On Human Conduct*, in which Oakeshott pursues an understanding of civil association in terms of its conditions or assumptions.¹ These postulates include free agents, civil law, adjudication, authority and obligation, legislation, and politics. The portion I consider treats one of these postulates, adjudication. Oakeshott's legal theory in general has received little attention – his theory of adjudication in particular has received next to none. In fairness, the adjudication section fills only seven of the more than 300 pages in *On Human Conduct*, but this small section contains much more than either its length or the size of the existing literature on it suggests. For in this section Oakeshott elaborates a novel theory of adjudication that reveals him to be a significant part of a tradition not typically associated with him: the common law tradition. This puts him in company with such jurists as Coke and Hale, Blackstone and Bentham.²

Oakeshott presents his theory as a conceptual description “in new terms” of adjudication, though at least two of its features can be understood in familiar terms. These are: the role of prior judicial decisions in adjudication and the act of reaching a judicial decision in adjudication. These features' analogues in the common law tradition are the doctrine of *stare decisis*, and the declaratory theory of law, according to which adjudication is not the process of making law, but of declaring what the law already is, respectively. By pointing out these connections I mean to suggest that Oakeshott should be understood as a common law theorist. But by exploring the nuances of his versions of *stare decisis* and the declaratory theory I present Oakeshott's reflections upon common law as a contribution

1 Following Oakeshott, I use the term “civil association” interchangeably with “civil condition.”

2 The questions which these thinkers address in different places—and which, in joining them, Oakeshott addresses also—concern the relation of common law to legislation and the power of Parliament, and the nature of the unwritten common law, Coke arguing for the limitation of monarchical power by common law and the courts, Blackstone arguing for Parliament's supreme law making supremacy over common law and the courts, and Bentham's eventual rejection of the possibility of an unwritten common law. Oakeshott contributes to the debate over the relation of the decisions of courts and legislation, and to the nature of the unwritten common law.

to and development of this tradition. Specifically, he delineates a moderate declaratory theory. He concedes, on the one hand, legal realism's critique of declaratory theory—that it misconstrues law as a “science” in which adjudication is a process of logical deduction from fixed rules. However, he denies the realist thesis that adjudication is an arbitrary process of creating law, instead arguing that adjudication requires an exercise of discretion only upon a given and authoritative law. Whether in the end we may call this law “natural” is, I suggest, dubious.

Identifying Oakeshott's theory of adjudication is not as simple as it may sound, mainly because Oakeshott does not explicitly expound his theory in terms of any current discourse, either in the section on adjudication or, for that matter, in any other part of *On Human Conduct*. Yet attentive readers familiar with the discourse cannot miss that this is what he is doing—that the debate over declaratory theory in adjudication is the context in which he understands his concept of law to have any meaning and importance. Accordingly, in order to identify Oakeshott's declaratory theory and situate it in the context of debates in legal theory, I draw heavily from recent work on declaratory theory by Alan Beever. Beever elaborates the theory and some of its common critiques, suggesting that the critics tend to target a caricature and not the real theory. His situation of declaratory theory somewhere between the caricature and the critics' alternative is helpfully similar to Oakeshott's moderate formulation.

I. Oakeshott on the Common Law in *On Human Conduct*, The Role of *Stare Decisis* and Declaratory Law

Oakeshott's description of the role of prior judicial decisions in adjudication can be understood in terms of *stare decisis*. Midway through his discussion of adjudication Oakeshott writes, “civil association is necessarily relationship in terms of the accumulated meanings of *lex* which emerge in the adjudication of disputes” (137). Earlier, Oakeshott stated that the conclusions of courts must “enjoy a high degree of immunity from subsequent disturbance” (131). The “accumulated meanings” that “emerge” over time can only refer to a body of case law, or precedents. And it is the authority of these accumulated meanings to inform adjudication in subsequent cases that essentially amounts to *stare decisis*, which literally means “to stand by that which has been decided.” Furthermore, this “immunity” Oakeshott insists upon serves to contribute to one of the essential purposes he attributes to courts: to make known to citizens the rules of their associations with each other, without which knowledge they could not be expected to abide by the terms as closely. Without immunity from

disturbance the accumulated meanings of the law can change rapidly. Such immunity allows this knowledge to solidify in the minds of the citizens. So far as the English common law system of adjudication is distinguished by a high degree of “immunity” from disturbance for past decisions, therefore, it is that system for which Oakeshott here provides a conceptual account, and that account can be understood in terms of *stare decisis*.

Oakeshott does not simply restate the conventional common law understanding of *stare decisis*. Rather, he revises it so as to account for common criticisms. For instance, Oakeshott distances himself from the conventional notion of *stare decisis* according to which past decisions form authoritative precedents, “case-law,” which judges simply reapply in subsequent cases. On this view, a judge simply determines which precedent best corresponds to the case he is to decide. Oakeshott writes that the need to consider earlier judicial decisions is “a condition not merely imposed upon *lex* (in, for example, rules relating to the recognition and authority of ‘precedents’), it is a condition upon which the systematic character of *lex* depends” (136). Consulting past decisions, in other words, is not merely a policy a judge may or may not subscribe to when adjudicating disputes but is an inherent part of his task to clarify what the law, as an independent entity, means in relation to the given circumstances.

Elaborating the distinction between his *stare decisis* and conventional *stare decisis*, Oakeshott continues,

An adjudicative procedure cannot properly be said to be ‘arguing from case to case’ in terms of the likeness or unlikeness of the contingent situations concerned: no ‘case’ can be a condition or a precedent for reaching an adjudicative conclusion in another ‘case.’ The reasoning is analogical; it is not concerned ultimately with the similarities of ‘cases’ but with what can be abstracted from a judicial conclusion, namely, the amplification of the meaning of *lex* (136).

In contrast to conventional *stare decisis*, legal questions are not answered by the correct specification of precedent. If they were, judging would be mainly concerned with cases as opposed to law. On this view, finding the correct case provides one with the correct decision, the decisive act in determining what the law is. Rather, Oakeshott means to suggest that adjudication is mainly concerned with law. On his view, specifying the correct case is just the beginning, for cases do not answer the question “what is the law?” but give past answers in the context of different circumstances. These past answers can be used by the judge as analogies for deciding what meaning the law will “tolerate” in his case. Consideration of precedent thus acquaints a judge’s mind with the sort of meanings law can tolerate and enables him

to decide what amplification of the law's meaning to make in his case. Oakeshott's implication seems to be that no two cases are alike and thus a judge exercises some degree of arbitrary discretion in each case no matter how closely he tries to adhere to precedent. So, for example, while Judge Smith may have "the shoulders of giants" to stand on in precedent, those giants are dead; they do not know this case at all, let alone as well as Judge Smith does (or should).

The two important points from the foregoing discussion should be evident. First, this is in fact a very old common law theme: although Oakeshott does not use the term *stare decisis* and distances himself from the conventional understanding, this attention to past "amplifications of meaning" held to be "tolerated" by law is in fact *stare decisis*. And second, Oakeshott's is a novel conception of the role of precedent in the process of adjudication that emphasizes its importance while at the same time emphasizing that precedent is not conclusive and can thus never be the only thing that informs judicial decision-making. Judges must align their decisions not only with precedent but also with something else. To what? This question brings us to the second common law feature of Oakeshott's theory of adjudication.

The declaratory theory of law attempts to describe the activity of adjudication and the nature of law as a part of that process. Despite its name it should be understood more specifically not as a theory of law but as a theory of adjudication. It holds that in the act of adjudication judges do not create or change the law but declare what it is and always has been. Eighteenth-century jurist William Blackstone, author of the *Commentaries on the Laws of England* and early exponent of the declaratory theory, expressed it thus: The judge "is not delegated to pronounce a new law, but to maintain and expound the old one."³ And another century later Lord Esher MR wrote, "There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."⁴

Criticism of the declaratory theory centers on the observation that judges do in fact make law and thus law changes. Because law changes it is naïve to say judges "declare" what the law is. Possibly the earliest critic, Jeremy Bentham, wrote, "It is the judges that make the common law, just as a man makes laws for his dog. When your dog does anything you want to break him off, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way judges make laws for you and

³ William Blackstone, *Commentaries on the Laws of England*, vol 1 (Cavendish 1766), 69.

⁴ *Willis v. Baddeley* [1892] 2 Q.B. 324, at 326. At the time of this decision Lord Esher was Master of the Rolls, the presiding judge of the Civil Division of England's Court of Appeal.

me.”⁵ John Austin later called the theory a “childish fiction.”⁶ Criticism has come from across the Atlantic as well. In a 1917 opinion Oliver Wendell Holmes quipped that it cast law as “a brooding omnipresence in the sky.”⁷

Despite these criticisms, the declaratory theory has not fallen out of favor entirely. There are still a few who suggest that critics of the theory fundamentally misunderstand it, and I suggest their clarification of the theory helps us understand Oakeshott’s discussion of adjudication. In a recent essay, Allan Beever advanced the argument that “the declaratory theory of law does not deserve the invective heaped upon it. This is not because modern lawyers are wrong to reject the theory they criticize. It is because the theory criticized by modern lawyers is not the declaratory theory. The theory ridiculed today is no more than a caricature of the real one.”⁸ In what follows I present Beever’s clarification of the declaratory theory, and then use it as a framework for interpreting Oakeshott’s discussion of adjudication in *On Human Conduct*.

II. The Declaratory Theory Reconsidered

The critics’ main mistake, Beever writes, is to say the declaratory theory holds that common law does not change. Because common law so evidently does change, they observe, the theory must be false. But, as Beever points out, this disagreement flows from differing uses of the word “law” by the theory’s critics and adherents; once these differences are sorted out it becomes clear that while the critics deride their caricature of the declaratory theory, they actually (and unknowingly) adhere to the real one.

First, the differing uses of the word “law.” In brief, critics of the theory assume a positivistic view of “law.” Criticism of declaratory theory thus flows from critics’ prior assumption that positive law (i.e. statutes, court decisions, constitutions, regulations, and the like) exhausts “law.” On the other hand, adherents of the theory going all the way back to medieval courts assume a different, twofold conception of law—a conception represented by, for example, natural law theory. On their view, law comprises both positive law and some sort of higher or general law. One practical example of this twofold conception, Beever points out, is equity in medieval common law. The law of equity was enforced by the Court of Chancery, which in some sense contravened common law and in another sense fulfilled it, depending on which “law” in the twofold conception is the point of reference. The

⁵ Jeremy Bentham, *The Works of Jeremy Bentham, now first collected; under the supervision of his executor, John Bowring*. Part V (Edinburgh: Tait, 1838), pg. 235.

⁶ John Austin, *Lectures on Jurisprudence, or, the Philosophy of Law* (J Murray 1895), 321.

⁷ *Southern Pacific Co. v. Jensen* 244 U.S. 205, 222 (1917).

⁸ Beever, 422-3.

Court of Chancery issued decisions the common law courts could not have issued. For instance, in the case of a debtor who gave his creditor a sealed bond, later repaid the money, but did not ensure the bond was canceled, the common law would rule the debt unpaid. Yet if the debtor were to take his case to the Court of Chancery, his debt would be canceled. Here, in one sense, law conflicts. But, as J.H. Baker points out,

In making such decrees, medieval councilors or chancellors did not regard themselves as administering a system of law different from the law of England. They were reinforcing the law by making sure that justice was done in cases where shortcomings in the regular procedure, or human failings, were hindering its attainment by due process. They came not to destroy the law, but to fulfill it.⁹

Thus court A can reach different legal conclusions, and thus create different positive law, from court B while at the same time serving the same law as court B. As Beever explains, “equity fulfilled the common law by producing the result that the common law would have produced were its rules of evidence less pedantic.”¹⁰

The same seeming contradiction does not occur only between equity and common law courts but also within common law courts, and its resolution likewise involves the twofold conception of law. As the substance of common law slowly changes over time as circumstances and technology change, it can still be understood to declare the same law and to serve the ends of the same law. Beever provides two examples. The first is seventeenth-century jurist Matthew Hale’s expression of declaratory theory by way of a metaphor from classical myth:

Use and Custom, and Judicial Decisions and Resolutions, and Acts of Parliament, tho’ not now extant, might introduce some New Laws, and alter some Old, which we now take to be the very Common Law itself, tho’ the Times and precise Periods of such Alterations are not explicately or clearly known: But tho’ those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho’ in that Long Voyage it had successive Amendments, and scarce came back with any of its former Materials; and as Titius is the same Man he was 40 Years since, tho’ Physicians

⁹ Baker, 102, as quoted by Beever at 425n21.

¹⁰ Beever, 427.

tell us, That in a Tract of seven Years, the Body has scarce any of the same Material Substance it had before.¹¹

Although “particular variations” change the laws, “in the general” law remains the same. For Hale, “particular variations” do not comprise the whole law. Second is the reasoning of Lord Atkin’s decision in *Donoghue v. Stevenson* (1932), which involves the duty of care in negligence. Finding in the common law a collection of different and conflicting rules, he insists that “the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist,” and therefore “in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.”¹² Here Lord Atkin posits a “general conception of relations giving rise to a duty,” understands it to be “in English law,” and distinguishes it from “the particular cases found in the books.” By attributing his decision to this general conception he presents himself as “declaring” the general law as applied to the contingent circumstances. In both examples the point is this: declaratory theory postulates a twofold conception of law.

Although declaratory theory requires a twofold conception of law, there are different ways to refine such a conception. In any of them, positive law remains the same—statutes, regulations, case-law, executive orders, and the like. The tricky question is rather how to conceptualize the second, more general sense of law. For instance, in the two examples cited in the previous paragraph, though they are both consistent with declaratory theory, each implies a different notion of what the general law is. Hale seems to understand general law as a very basic sense of “form” as opposed to substance: though the substance of law may change, what does not change is that it remains law—it retains the form of law in how we treat it. A ship is still a ship with different planks just as Law is still Law if the laws change. Now, this metaphor implies several things Hale likely would not have endorsed. For one, it would accommodate any laws. If form is all that matters, for instance, there is no reason a particular law banning the sale of wood could not be Law. So this may have been a sloppy metaphor used to make a point. Nevertheless, it still coheres with declaratory theory. A judge can plausibly be said to declare with each particular law what the Law is. On the other hand, in the second example, Lord Atkin understands the general sense of law as a general legal principle common to all the otherwise divergent precedents; he called it “the neighbour principle.”

Another alternative way to conceptualize the more general sense of

¹¹ *Ibid.*, 427.

¹² [1932] AC 562 (HL Sc), 580, as cited by Beever at 423n12.

law is found in the tradition of most medieval jurists: in the terms of natural law. And even today there is no shortage of thinkers making the same argument, both from the academy and from the bench itself.¹³ The common law has an historical association with natural law theory, by virtue of its roots in medieval Christian England in an academic environment dominated by scholastic theology.¹⁴ But the common law does not, as a philosophical matter, require natural law. Something else besides natural law can play the part of general or higher law required by declaratory theory, and therefore declaratory theory does not rely on natural law. Though Beever does not assert this conclusion, he implies it where he does mention natural law:

The connection between the declaratory theory of law and natural law theory is very important and exploring it is sure to be illuminating. But I will not do that here. A defence of the declaratory theory based on that strategy would need to take on the rejection of that theory and legal positivism at once; but one heresy is enough for now. Instead, I focus on a closely related though separable aspect of the declaratory theory: the connection between that theory and the recognition of legal principles.

Here, Beever does not expressly say that declaratory theory does not require natural law theory. However, that he feels he can make a defense of declaratory theory without defending natural law theory shows he assumes declaratory theory can get by just fine without it. Moreover, throughout the article he argues for the premise: namely, that something else, specifically “general legal principles,” can, and in fact do play the part of general law.

This notion that declaratory theory’s higher sense of law is best conceptualized as general legal principles needs brief elaboration, for it clarifies how declaratory theory does not assume natural law as the latter is conventionally understood.¹⁵ In brief, these general legal principles are

13 Cf. the work of Professor James Stoner, especially his *Common-Law Liberty: Rethinking American Constitutionalism* (University Press of Kansas, 2003), and the 2004 commencement speech at Notre Dame Law School, delivered by Judge Diarmuid O’Scannlain of the U.S. Court of Appeals for the Ninth Circuit and published in *Notre Dame Law Review* as “Rediscovering the Common Law” in Volume 79, Issue 2. Judge John Noonan, also of the Ninth Circuit, endorses this view as well.

14 The precise nature of this association is not important. It could be that the institutions of the common law were the product of a natural law theorist aiming to embody his natural law theory, but that is unlikely. What is more likely is that natural law theorists used the concept of natural law to help them make sense of an institution that already existed and which had more practical origins. Even if it is the former, it still is not necessarily the case that common law theoretically requires natural law.

15 It must be acknowledged that this conception of general legal principles may well conform to a more refined understanding of natural law as some have attempted. I am not familiar

not outside and independent of us, as some heteronomous “brooding omnipresence in the sky” to which we must submit. Rather, they are found within existing law and must therefore be understood as inherent parts of the legal reasoning process. Consider two examples from Beever’s discussion, the first of which we have considered already. When Lord Atkin searched for an authority to guide his decision in *Donoghue v. Stevenson*, he found it in the “general conception of relations giving rise to a duty of care” which he called “the neighbour principle.” This principle appeared as the common foundation of numerous otherwise divergent precedents. Likewise, in *Willis v. Baddeley* the presiding judge, Lord Esher, ruled that “if a claimant qua agent of a principal sues a defendant then the defendant is entitled to discovery against the principal, even though the principal is not a party to the action.”¹⁶ There was no precedent that promulgated this rule. Rather, the relevant precedent, *Republic of Costa Rica v. Erlanger*, said that a defendant is entitled to discovery from a claimant. On what basis, then, did Lord Esher expand the rule as he did? He claimed to have taken his cue from the general principle expressed in *Costa Rica v. Erlanger*: “We are acting, in making this order, on an appreciation of the rule laid down in the case of *Republic of Costa Rica v. Erlanger*... The principle which was there enunciated should govern the present case.”¹⁷ Thus, although Lord Esher could find in precedent no direct analogy to apply to his case, he was not therefore without guidance in law. He did not have to consult natural law (whether by examining his conscience or St. Thomas’s *Summa*), nor was he left with only his subjective preference or public opinion. He took his cue from the principle that seemed to be embedded in the common law.¹⁸

The distinction from natural law is in some sense epistemological: it lies in how these general principles are discerned. Whereas natural law is found in our conscience, in moral philosophy, in revealed religion, or some combination thereof, general principles of common law emerge as we gather together each particular judgment as to proper conduct in contingent circumstances and examine them at a distance, so to speak. This examination reveals the general principles at work in each case, which we may call general or abstract principles of human practical reasoning in law, distinct from the written, positive law on its face but also embedded in it. General law is thus no “brooding omnipresence in the sky.” It is in fact quite immanent. It is not “up there” somewhere waiting to be consulted, but only

enough with these attempts to say anything more than the relationship between the two would make an interesting subject of future inquiry.

16 Beever, 427.

17 *Willis v. Baddeley*, 326n4, as cited by Beever at 427n27.

18 For a concrete example of this method applied in a comprehensive analysis of common law in a particular area, see Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007).

emerges in the unfolding of judicial decisions over time. Recall Lord Atkin's method in *Donoghue v. Stevenson*, considered above. He identified the neighbor principle only by considering from a distance several cases side by side. His opinion is worth quoting at length:

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist.¹⁹

It is out of this mess of “English authorities” that Lord Atkin abstracted the “neighbour principle.” He did so by identifying the element common to the many cases involving various sorts of relationships. This is a prime example of a general principle of common law being found in the aggregation of common law itself and declared by a judge in subsequent cases.

The theory is still susceptible to the following objection from its critics: the general principles underlying the common law change just like positive law changes. That may be true, but what is important is not that the principles do not change but that judges search for these principles and decide in accordance with them as best they can. Declaratory theory is foremost a theory not of law but of the activity of judging. In the version of it I have suggested here, it says that judging must consult not just positive law but the general principles underlying common law. Otherwise, in the absence of clear guidance from a statute or precedent, judges assume they have nothing to guide them but their subjective preference, or popular opinion. The declaratory theory tells them there is more guidance to be found in the general principles of common law. That these may change over time does not mean they are not present in common law and therefore

19 [1932] AC 562 (HL Sc), 579-80.

of possible assistance to judges. Furthermore, that judges may disagree about what these principles are does not invalidate the theory. The theory suggests that judicial development of law should happen in just this manner: by focusing the debate on the general principles themselves. That these principles are not perspicuous suggests that they are something like what Oakeshott calls practical or traditional knowledge, an affinity I consider below.

So much for Beever's theory of general law and declaratory theory. It is distinct from positive law and more fundamental and enduring, yet it is to be found in the reasoning process employed in existing judicial decisions. As I discuss below, this view is helpful in understanding Oakeshott's discussion of adjudication in *On Human Conduct*. Regardless of how one fleshes out general law, the declaratory theory's critics and adherents both agree that positive law changes. The critics cannot charge the adherents with ignoring this fact if the declaratory theory is properly understood. The disagreement rather surrounds the conception of law. Because the critics deny the theory's premise—namely, that general law exists—they therefore deny its conclusion: that judges declare what the law is. But, as Beever demonstrates, this denial of general law is often duplicitous. The critics in fact at times make use of the concept of general law and thus adhere to the theory themselves, though they do not realize it. In addition, the specific form of the concept of general law that they use is the same form Beever suggests: general legal principles.

One clear example of this is found in Lord Reid's speech, "The Judge as Law Maker" (1972). In the same speech Lord Reid both ridiculed the declaratory theory and suggested we need it. First he said,

There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.²⁰

Yet later he says,

We must get rid of the idea which still seems to animate some of our pedestrian confreres, that law is a congerie [sic] of unrelated rules. That results in the dreary argument that the case is similar to A. v.

²⁰ Lord Reid, "The Judge as Lawmaker" (1972) 12 J Soc Public Teachers L 22, 22, as cited by Beever at 422n8.

B. and C. v. D. but is distinguishable from X. v. Y. and In re Z. That way lies confusion and uncertainty. We must try to see what was the principle or reason why A. v. B. should go one way and X. v. Y. the other.²¹

Not knowing that what he ridiculed was only a caricature, Lord Reid “unconsciously reinvented” declaratory theory and acknowledged the judiciary’s need of it. Beaver goes on to argue that in two more ways Lord Reid relies upon declaratory theory: by denouncing politics in adjudication and by affirming retrospectivity in adjudication. ‘Thus despite the critics’ disavowal of the theory, they often end up recognizing its necessity, revealing the object of their disavowal to be a caricature of the real declaratory theory.

Our discussion of Oakeshott’s version of *stare decisis* ended with Oakeshott’s recognition that precedent only goes so far. When it is not conclusive, judges must consider something else. We now know that that blank space can be filled with general legal principles which emerge over time. Indeed, the same is true in Oakeshott’s theory of adjudication: general legal principles may be understood as Oakeshott’s concept of law, as I will now explore. I will begin by giving the basics of Oakeshott’s theory in his own words, then I will illustrate how Oakeshott’s theory conforms to the terms of declaratory theory as expounded by Beaver.

III. The Declaratory Theory in *On Human Conduct*

Let us begin by observing the basic building blocks of Oakeshott’s theory of civil association under the rule of law—the following fundamental concepts: *cives*, *civitas*, *lex*, and *respublica*. *Cives* are the individual persons in a given civil association. *Civitas* is their “entire civil condition.” *Lex* comprises the terms of their condition. And *respublica* comprises the “comprehensive conditions” of their association.²² Oakeshott gives each of these a modern phrasing: “citizen,” “state,” “law,” and “public concern,” respectively (109). Using terms from Chapter One of *On Human Conduct*, Oakeshott specifies the civil condition (*civitas*) as an “ideal character:” namely, the identity that the theorist seeks to understand in terms of its conditions, and *lex* is one such condition:

What have to be identified and understood are the theoretical conditions of a durable and diurnal association *inter homines* ... The first of these conditions is, then, rules of a certain kind ... Such rules I shall call ‘law’; and, so that they may not be confused ... I shall call

²¹ *Ibid.*, 26n8, as cited by Beaver at 430n38.

²² For each of these see the beginning of Chapter II at 108.

them *lex*: rules which prescribe the common responsibilities (and the counterpart 'rights' to have these responsibilities fulfilled) of agents (128).

Thus *lex* is a condition or postulate of civil association. It is one of the conditions in terms of which the theorist must understand the civil condition.

In addition to *lex*, a process of adjudication is also a postulate of the civil condition. Given that "All modes of human relationship are conditional upon their terms being recognized and understood by the associates," and that "general abstract considerations [*lex*] cannot themselves be the terms of any association," civil association therefore postulates "a procedure in which general considerations are related to contingent circumstances" (130). Adjudication, in other words, must exist to clarify what is and is not permissible in civil society under the rule of law.

Now, what makes Oakeshott's theory declaratory? It is clear that Oakeshott adopts a twofold conception of law, and he makes a point of criticizing legal realism. We see his twofold conception of law, for example, where he distinguishes his idea of adjudication from arbitration. The outcome of arbitration "is a resolution of the conflict whose virtue is that the disputants have been persuaded to accept it" (132).²³ Here, judges are guided not by some general, abstract sense of law but by what the disputants will suffer. By contrast, in a court of law the judge is "the custodian of the norms of *lex*. And the conclusion reached does not represent the relative bargaining strengths of the disputants but the relative strengths of their claims measured on the independent scale of these norms of conduct" (133). This should settle our question as to whether Oakeshott's is a declaratory theory, but Oakeshott's elaboration of this position, which covers the rest of page 133, is worth reviewing. He writes, "the notion that there is no *lex* in advance of adjudication and that adjudicating creates it, is absurd." "Therefore," he continues a few lines below, "adjudication cannot be understood as the arbitrary exercise of the so-called 'subjective will' of the judge." This is because judicial decisions "must refer to *lex* and they must stand seized of the authority of *lex*." By this Oakeshott means that a judge must "connect [his decision] with the known system of *lex* and purport to exhibit the manner in which it shelters under the authority of the system." Such a decision is thus an "amplification of the meaning of *lex*." The meanings of law, distinct from law itself, comprise positive law. In this way judges neither create law nor

²³ This may sound confusing to us, since arbitration in the current American legal system is something different than what Oakeshott describes here, which is more like our procedure of mediation. I am not sure if arbitration was of this sort in Oakeshott's England, but even if it was, his point is not thereby invalidated.

declare what their subjective preference or the public's opinion is. Rather, they declare what law is—in Oakeshott's more precise formulation, what the meaning of law is in the circumstances of their case.

So Oakeshott employs declaratory theory's twofold conception of law, but in what terms does he understand the law being declared? What is its shape? Would it be wrong to characterize it as the general law of declaratory theory? It could simply be precedent. But we know from our earlier consideration of *stare decisis* that precedent is not conclusive and can thus never be the only thing that informs judicial decision-making. Someone of a more democratic stripe could plausibly think law refers to legislation. The courts thus simply apply and enforce the laws the people enact. Oakeshott mentions legislation in his section on adjudication, but he distinguishes it from *lex* as he has been using *lex* throughout the preceding pages. "Further, where *lex* is recognized to have been expressly enacted and there is an authentic text," judges must limit their consideration to the text of the legislation, excluding the intention of the legislator (134). Oakeshott here adopts statutory textualism for his theory of adjudication. But this by no means entails that legislatively enacted law comprises the entirety of *lex*. Furthermore, in the next section of this part of *On Human Conduct*, where Oakeshott discusses legislation, he makes clear that in his theory legislation does not exhaust law in civil association.²⁴ There he writes,

How much use may be made of [legislation] is a matter of circumstance. But in the civil condition a too ready resort to it may be recognized as a somewhat clumsy and hazardous invasion of adjudicative procedure which may imperil the system of *lex* by abrupt alteration, or as a fruitless attempt to spell out what cannot be spelled out in advance of the event (138).

This shows that Oakeshott by no means sees legislation as filling the "legal gap" significantly let alone completely. What is left is *lex* itself: general law.

But the question remains. How does Oakeshott mean for us to understand this general law? Is it the form of Law in the manner of Matthew Hale's metaphor of the Argonauts? Is it a set of clear principles from which to deduce judicial decisions? Is it natural law? First, it is not Hale's form because, as is clear throughout the section, *lex* gives substantive guidance as to what rules to apply. It is not simply the form of Law that may house any law. Then what about clear principles, in keeping with the theory of

²⁴ Somehow Steven Gerencser reads these two sections of *On Human Conduct* to avow just this sort of legislative supremacy. See Gerencser, "Oakeshott on Law," in Paul Franco and Leslie Marsh, eds., *A Companion to Michael Oakeshott* (University Park, PA: The Pennsylvania State University Press, 2012), pp. 312-336.

strict formalism?²⁵ He rejects strict formalism, writing, “in no case can [the meaning of *lex*] be concluded without reflection. There is no ‘plain case’ in the sense of a dispute which settles itself or one which can be settled in a merely ‘administrative’ act. This uncertainty is intrinsic to *lex* as the terms of human association” (133). Because of this uncertainty judges exercise substantial discretion with each decision: specifically, they “declare a conclusion which is not, and could never be given in *lex*” (133). This is to “amplify the meaning of *lex*.”

The preceding evidence comes from page 133, but the bulk of Oakeshott’s rejection of strict formalism is found after page 134. At the bottom of that page, he begins a paragraph, “On the other hand, adjudication cannot be a deductive procedure.” *Lex*, Oakeshott writes, “is a system of descriptively identified general conditions to be subscribed to in choosing actions from which no conclusions about adequate subscription in contingent situations can possibly be deduced” (134). He goes on to dismiss the “unfortunate metaphor” involved when adjudication is characterized as “finding” law, and one might conclude from this that Oakeshott hereby dismisses the declaratory theory as such. For does it not posit that judges do not make law but indeed find it and declare it? Yet that would be to fall prey to the same error as the critics of declaratory theory in Beever’s essay: it is to misunderstand declaratory theory as though it posited that judges find their answers in precedent. They do not find their answers but rather the principles that can guide their answers. As Oakeshott writes,

And to speak of the procedure of adjudication as that of ‘finding’ what is latent in *lex* is to resort to unfortunate metaphor. Even if it is codified, *lex* is neither a catalogue of possible contingent circumstances, each with its prescribed conditions of response, in which an adjudicator might hope to identify the situation with which he has to deal and from which he may ‘read off’ the required conditional response, nor is it a storehouse of minutely distinguished conditions to be subscribed to in choosing actions in which a ‘judge’ may hope to discover that which exactly fits the contingencies of his problem situation. Such notions are, perhaps, genuine attempts to convey the closeness of the relationship between adjudicative conclusion and *lex*, but they go astray in failing to recognize that adjudication is concerned with the meaning of *lex* in a contingent

²⁵ Clear principles such as these are to be distinguished from Beever’s general legal principles. Though Beever’s declaratory theory is a species of formalism, it should not be confused with the strict formalism that Oakeshott here rejects and that Beever himself rejected: strict formalism corresponds with the caricature of declaratory theory denounced by the critics we considered above. I return to the question of formalism in the conclusion.

situation, that meanings are never deduced or found but are always attributed or given, and that what has to be understood here are the conditions to which this attribution must subscribe (135).

Adjudication is thus not a science. If this dismissal of strict formalism is “the other hand,” what was the first hand? The first hand began three paragraphs above “the other hand” at the beginning of Oakeshott’s last point, where he dismissed positivism as “absurd.” With legal realism on the one hand and strict formalism “on the other,” Oakeshott seems to be situating his theory of adjudication right between legal realism and strict (conventional) formalism, which is precisely where Beaver situated his, as we saw (strict formalism being equivalent to the caricature of declaratory theory). Again, though, the question still stands. What for Oakeshott is general law?

Let us examine how Oakeshott presents *lex*. First, the content of *lex* is the rules of civil conduct. *Lex* is comprised of the rules the “common appreciation” of which forms the only basis of civil association (128). It is comprised of “the terms of the relationship” between *cives* in civil association: that is, the “rules of a practice which may concern any and every transaction between agents and is indifferent to the outcome of any such transaction: the practice of being ‘just’ to one another” (128). In other words, to repeat what was quoted above, *lex* is comprised of “rules which prescribe the common responsibilities (and the counterpart ‘rights’ to have these responsibilities fulfilled)” (128). Oakeshott characterizes these as “general, abstract considerations” (130), as general “legal norms” (133), and as “descriptively identified general conditions” (134). Second, *lex* as a whole is more than just the sum of these rules. *Lex* is “not a mere collection of rules but a system of rules and self-sufficient” (129).

The systematic character of *lex* is a relationship between the prescribed conditions of conduct themselves, in virtue of which they continuously interpret, confirm, and accommodate themselves to one another, and thus compose a self-sufficient (although not self-explanatory) system (129).²⁶

For Oakeshott, then, the law underlying common law has some sort of internal logic and consistency. *Lex* is a body of rules that guide civil conduct

²⁶ Immediately prior to this sentence Oakeshott wrote something irrelevant to our consideration of *lex* as such but intriguing enough that I decided to include it. “These laws are the sole terms in which *cives* are related. And in constituting this relationship they create and delineate a *persona civica* which wholly depends for its identity and coherence upon their symmetry.” This seems like it could open up a whole discussion on political psychology and political identity, but Oakeshott nowhere seems to enter that discussion.

and that fit together somehow in some sort of self-reinforcing relationship.

With this clarified, Oakeshott's distinctive way of characterizing the act of judging should make sense. Judges attribute meaning to the law. A judicial decision, for Oakeshott, is not a mere "application" of precedent but rather an "amplification of the meaning" of *lex*. Judges are concerned with the question, "What meaning may this rule of law justifiably and appropriately be made to tolerate here?" (136). Regarding this concept of meaning, Oakeshott is careful to specify that "meanings are never deduced or found but are always attributed or given" (135). This is a tricky sentence. Is Oakeshott saying that the source of positive law (for the meanings of *lex* are what comprise precedent) is purely in the judge and not in the law? That would conflict with his clear denunciation of legal realism, which we explored. But it seems to be the distinction in this sentence. Deduction or discovery of meaning imagines meaning sourced in something external, while attributing or giving meaning imagines it coming from within the adjudicator. It might be unfair to scrutinize the metaphor this closely. And at any rate, one ambiguous metaphor notwithstanding, the whole of this section makes clear that positive common law is comprised of the accumulated meanings of *lex* which emerge in the adjudication of disputes but which are necessarily related to the external "independent scale" of general norms that Oakeshott calls *lex*.

Finally, we may now consider whether Oakeshott fits the mold of declaratory theory cast by Beaver. First, do they imagine the act of adjudication in similar ways? As we have observed, Oakeshott positions his theory of adjudication somewhere between legal realism and strict formalism, just like Beaver. In this intermediate zone for both theorists the act of adjudicating is neither the mere application of precedent nor the creation of law. As we just explored, for Oakeshott it is the attribution of meaning to law made under the guidance of past meanings given to the particular rule in *lex*. In this process what the judge must consider is "this rule amplified by the meanings it has already been made to tolerate in earlier judicial decisions" (136). This consideration involves "analogical" reasoning. Oakeshott's description of adjudication as analogical reasoning in consideration of past meanings of a given rule sounds much like Beaver's description of Lord Esher's method in *Willis v. Baddeley*: "Accordingly, the decision in *Willis v. Baddeley* was no mere application of *Republic of Costa Rica v Erlanger*... He tells us that he is, not applying, but 'acting ... on an appreciation of the rule.'²⁷ Thus both theorists imagine that judges take real but not mechanical guidance from precedent.

But what about the nature of general law? We have seen that Beaver

27 Beaver, 428.

characterizes general law as general legal principles embedded in common law, and that Oakeshott characterizes *lex* as rules of civil conduct that comprise a logical system of some sort. Would Oakeshott allow *lex* to be characterized as general legal principles identifiable within common law? In fact, there appears to be in Oakeshott's theory an analogue to Beever's general principles. The systematic character of *lex* is manifested in what Oakeshott calls "propensities."

Every system of law has propensities lodged in the meanings attributed to its more general and least fluctuating concepts which, although they are no more than propensities and are not immune from change, cannot be violated in an adjudicative conclusion without serious damage to the equilibrium of the system (136).

These propensities define "the limits of tolerance imposed by the system of *lex* itself" upon what can be an acceptable meaning of *lex* in a particular case. And they do not fall short of Beever's conception for being "not immune from change," for Beever acknowledges both that the principles can change over time and that "there will be cases about which reasonable people disagree" (442). Thus Oakeshott's "propensities" correspond to Beever's principles. However, the propensities are not themselves *lex*. They are found rather in positive law—"lodged in the meanings attributed to its more general and least fluctuating concepts." *Lex* has concepts which have attributed meanings which have propensities. It seems clear that Oakeshott's propensities or his "least fluctuating concepts" correspond with Beever's general legal principles. But whether *lex* so corresponds depends on how much you decide to emphasize the distinctions between all these. Oakeshott unfortunately leaves us with little guidance for making that decision.

This raises the question of natural law in Oakeshott's theory. For if you emphasize the distinction between, on the one hand, *lex* and, on the other hand, the concepts, meanings, and propensities, then *lex* seems something much higher than Beever's general principles, something that could plausibly be conceptualized in terms of natural law. In considering the possibility of natural law in Oakeshott, one must not forget his treatment of it in the essay, "On Being Conservative." There he writes, "[W]hat makes a conservative disposition in politics intelligible is nothing to do with a natural law or a providential order, nothing to do with morals or religion" (RP, 423f). Now, that Oakeshott does not think conservatism entails a natural law does not *prima facie* mean that he would not adopt a natural law concept in *On Human Conduct*. He could mean to say that one need not accept natural law in order to be conservative. But what he means by conservatism imbues his concept of civil association to such an extent that the conditions

of conservatism can find direct counterparts in the conditions of civil association. Conservatism includes

the belief... that governing is a specific and limited activity, namely the provision and custody of general rules of conduct, which are understood, not as plans for imposing substantive activities, but as instruments enabling people to pursue the activities of their own choice with the minimum frustration (RP, 424).

This echoes Oakeshott's distinction between civil and enterprise association in *On Human Conduct*. Civil association involves instrumental rules (*lex*) as opposed to the "managerial decisions" that guide conduct in enterprise association toward a common purpose.²⁸ Civil association is defined by these rules and the recognition of them. Therefore, to the extent his conception of civil association is intrinsically conservative, his system of *lex* does not necessarily involve a natural law. That much we may glean from "On Being Conservative." But this does not logically foreclose that *lex* may involve a natural law. Of course, the usefulness of "On Being Conservative" to our effort to understand *On Human Conduct* is not indisputable. Oakeshott was not always consistent with his use of words, and his epistemology changed significantly during his career. But if nothing else it serves to show explicitly that Oakeshott was not generally well-inclined toward natural law theory. Nevertheless, such an inclination would not have prevented Oakeshott from unintentionally aligning himself with natural law. Indeed, we are left where we began—facing the possibility that *lex* is something higher and more permanent than general legal principles of common law. On this premise, *lex* could well be some sort of natural law understood in a very basic sense, and not in the way history has delivered natural law to us—i.e. in terms of Thomist theology.

This possibility of natural law hangs on a strong distinction between *lex* and its "concepts" and "propensities." Some clarification may be found in his section on legislation, for his discussion of *lex* there implies that subjecting *lex* to legislative activity removes it from natural law. There is no way to determine if an enactment of *lex* is right or wrong. First, Oakeshott says that *lex* itself, not just the meanings of *lex*, is "alterable," for legislation actually alters the content of *lex* (139). For *cives* and adjudicators, *lex* is authoritative. But for legislators, "*lex* is an invitation to consider whether it should not be in some respect changed, extended, or contracted, and if so, then, precisely what change should be made" (139). "Legislative opinion cannot be demonstrably correct or incorrect; *lex* cannot be deduced from the

²⁸ For the development of this distinction see *OHC*, 112-122.

so-called dictates of Reason” (139). Moreover, there is a “necessary absence of a ready and indisputable criterion for determining the desirability of a legislative proposal” (140). If *lex* holds no sway over a legislator’s enactment of it, it must not have the transcendent quality typically accorded the natural law. We may infer from this that *lex* is closer to *lex*’s “concepts” and “propensities” and thus to Beever’s general legal principles.²⁹

Although I have suggested that general law in Oakeshott’s theory of adjudication can plausibly be understood in terms of Beever’s general legal principles, I wish to suggest in addition that Oakeshott provides a way of elaborating this conception of general law further, but not in *On Human Conduct*. This suggestion, which may not have occurred to Oakeshott, would enhance our understanding not only of his theory but also of declaratory theory more generally. It thus departs from the primarily historical aim of this paper and offers a contribution to current theory. My suggestion is that *lex*, as he describes it, seems to fit the bill of what Oakeshott in his essay “Rationalism in Politics” calls practical or traditional knowledge. One of the “two sorts” of knowledge that exist “in every practical activity,” practical knowledge “exists only in use and (unlike technique) cannot be formulated in rules” (RP, 12). Thus it is unable to be communicated through verbal instruction but must be learned by imitation. It contrasts with the other sort, technical knowledge, whose “chief characteristic is that it is susceptible of precise formulation” (12). Let us remember that *lex* involves a degree of uncertainty. Although *cives* “are aware of their responsibilities” in a general sense, they are uncertain about what specific conduct these responsibilities prescribe and proscribe in particular situations—i.e., about “how the norms of *lex* relate to contingent situations” (OHC, 131). Oakeshott writes, “In no case can [the meaning of *lex* in relation to the contingent situation] be concluded without reflection. There is no ‘plain case’ in the sense of a dispute which settles itself... This uncertainty is intrinsic to *lex* as the terms of human association” (133). *Lex* involves uncertainty, I suggest, because it cannot be set down in language in its entirety. Beever acknowledges that “there will be cases about which reasonable people disagree” even when reasoning in terms of general legal principles as he suggests.³⁰ Indeed, my suggestion that the general legal principles of common law are not susceptible to verbalization

²⁹ Oakeshott does not in this section much discuss *lex* in terms of morality, with at least one exception: “And if the procedure invokes a general moral consideration it must be in respect of its antecedent recognition in *lex* and in terms of that recognition” (134). This connects *lex* with moral considerations, suggesting *lex* might be some sort of moral law. But Oakeshott has his own understanding of morality which he elaborates in Chapter One and which we would have to consider before making full sense of this sentence and how it bears on the natural law question. But that is not necessary, since our consideration of the legislation section showed that *lex* is not natural law.

³⁰ See Beever, 442.

finds resonance in other writings on the declaratory theory. Darryn Jensen writes,

The understanding of legal authority which is at the core of this view sees legal authority as something which exists independently of particular verbal propositions. The particular verbal propositions that exist are, rather, explications (however partial and approximate) of a larger body of principle which governs relations between participants in a legal community but which is open to further discovery and explication.³¹

Verbalization can “get at” *lex*, but it cannot capture it in its entirety. *Lex* is a form of practical, traditional knowledge.³²

Not only is this twofold theory of knowledge helpful for understanding *lex*, but the correspondence extends to the second sort of law in Oakeshott’s twofold theory of law: particular adjudicatory conclusions are in fact formulated in propositions and communicable via language. In other words, as *lex* corresponds with practical knowledge, particular judicial conclusions correspond with technical knowledge. I advance this claim of correspondence hesitantly, for Oakeshott certainly does not make it explicit. And the fact that *lex* can be enacted through legislation may obviate a view of *lex* as practical knowledge. Other descriptions of *lex*, however, lend support to my claim. In the discussion of legislative process which follows that of adjudication, Oakeshott characterizes *lex* as a “vernacular language” (141). Earlier he had referred to it as “the language of civil association” (137). Language, of course, is associated with technical knowledge, but these characterizations do not mean that *lex* is a language; rather, like a language it must be learned by imitation. It is marked by such “complexity” that legislation and adjudicative conclusions can never capture the entirety of *lex* because *lex* eludes our delimitations of it in language. The constant flux and flow of circumstance, sentiment, and belief mean that *cives* will always be confronted with questions as to the meaning of *lex*. *Lex* only has meaning in positive law, but throughout the constant changes in positive law *lex* persists as independent. If nothing else, then, conceiving *lex* as practical knowledge is a useful heuristic tool for understanding *lex* and its place in the adjudicatory system.

31 Darryn Jensen, “Theories, Principles, Policies, and Common Law Adjudication,” 36 *Austl. J. Leg. Phil.* 34 (2011), pg. 44.

32 This theory of knowledge is not unique to Oakeshott. For a similar theory but much more developed see the writings of Michael Polanyi, especially *The Tacit Dimension* (Garden City, NY: Doubleday & Company, 1966).

IV. CONCLUSION

It should now be clear that Oakeshott was no general theorist of law but a common law theorist with a substantial contribution to make to the common law tradition: namely, a refined declaratory theory of adjudication. In summation, Oakeshott's description of the role of prior judicial decisions in adjudication can be understood in terms of *stare decisis*. Oakeshott does not simply restate the conventional common law understanding of *stare decisis*. On his view precedent is not conclusive and can thus never be the only thing that informs judicial decision-making. His theory of adjudication can be understood in terms of declaratory theory. Despite criticisms, the declaratory theory has not fallen out of favor entirely. There are still a few who suggest that critics of the theory fundamentally misunderstand it. The critics' main mistake is to say the declaratory theory holds that common law does not change. This disagreement flows from differing uses of the word "law" by the theory's critics and adherents. In brief, critics of the theory assume a realist view of "law." On the other hand, adherents of the theory going all the way back to medieval courts assume a different, twofold conception of law. There are different ways of conceptualizing general law in this twofold view. One way is Beever's legal principles. Though the critics disavow their caricature of the declaratory theory they actually (and unknowingly) adhere to the real one. Oakeshott's theory of adjudication can be understood in terms of declaratory theory. He adopts a twofold conception of law and positions it midway between legal realism and strict formalism. The propensities of law that guide adjudication can be understood in terms of Beever's general legal principles, but it is not entirely clear whether these propensities exhaust *lex* for Oakeshott. This leaves open the question whether *lex* approximates natural law. At any rate, *lex* can be understood in other Oakeshottian terms: namely, in terms of practical, traditional knowledge as laid out in "Rationalism in Politics."

What Oakeshott accomplishes with this theory is to show that the common law is not simply a historic artifact we have inherited and must use as we can but is actually possessed of a great deal of internal logic and coherence. In other words, he shows how someone could with good rational basis devise the common law if, say, charged with creating a new government among a people with no prior experience of organized government—how you might decide to govern, with a good deal of practical prudence, by starting at square one, so to speak. With this demonstration of internal coherence he brings his philosophical idealism to bear upon his common law analysis and thereby makes a novel contribution to common law theory. There are two ways of looking at Oakeshott's accomplishment. One way is to say Oakeshott's can be marshalled in support of declaratory theory. The

other way is to say the more empirically based reflections of Beever's defense of declaratory theory can be understood to support Oakeshott's more theoretical account of civil association under the rule of law.

In closing I must acknowledge that declaratory theory, as should now be clear, though it does not necessarily entail natural law, looks more like another legal theory that has fallen out of favor: formalism. We have already observed that declaratory theory is prone to be caricatured in terms of strict formalism. But the real declaratory theory is also a species of formalism. Formalism is considered to have been decisively refuted by legal realism. Oakeshott's declaratory theory, along with all declaratory theories, must be defended against legal realism. To the extent modern legal theory is hamstrung by varieties of legal realism, perhaps some sort of reinterpretation of formalism should be developed.³³ My task in this essay has been historical. I purport not to have made this defense or development. But I hope to have established that any attack on formalism must deal with Oakeshott's declaratory theory, any defense of formalism may draw on it, and any potential rapprochement must account for it.

³³ Although Beever does not mention formalism in his essay, he defends it in law and music in "Formalism in Music and Law," *University of Toronto Law Journal*, Volume 61, Number 2, Spring 2011, pp. 213-239. One prominent attempt at reinvigorating some sort of legal formalism is found in Frederick Schauer, "Formalism," *Yale Law Journal*, Vol. 97, No. 4 (Mar., 1988), pp. 509-548.

