Articles

Administrative law within the common law tradition

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I set out to uncover and describe some of the values which influence the judicial review of administrative action within the common law tradition. Articulation of these values by academics has contributed to our present day understanding of them, from Albert Venn Dicey in the 19th century through to Joanna Bell and Paul Daly in this decade. With the benefit of their contributions, I identify four values which I see as fundamental to judicial review of administrative action in Australia. I explain how they might be conceived of as a single composite value, not necessarily peculiar to administrative law, existing within the institutional structures and normative practices of the common law tradition which shape them.

The eminent historian of English law, Sir John Baker, commenced his recently published Hamlyn Lectures, *English Law under Two Elizabeths,* raising the question whether the common law of 21st century England is the 'same' as the common law of 16th century England. His answer was that it is. His explanation was that:

> The law actually is the same law, if we understand the word 'same' in the way that the present writer is the same John Baker as the boy of that name who was at primary school when the Queen was crowned, even though there is little discernible similarity between the two entities and not one molecule remains of the earlier being. It is quite possible to be the same organically and yet to evolve and to grow, and also (eventually) to decline.[1]

The explanation drew on that branch of philosophical inquiry known as ontology which is concerned with 'identity' or 'sameness' and, in particular, with the age-old question of how something might be said to remain the same even though some or all of its component parts might be replaced. The question is sometimes illustrated by the ancient example of the 'Ship of Theseus' which, according to Plutarch, had all of its timber planks replaced as they rotted one by one. Sometimes it is illustrated by the example of the 'Philosopher's Axe' which, it is said, has had a number of new handles and a number of new heads.

One contemporary answer to the age-old question is that a thing which can be seen to have changed can yet be seen to have remained the same if time is seen to be a dimension of its existence. A three-dimensional form (be it a ship, an axe or a person) can in that way be seen as a four-dimensional worm stretching through time as well as occupying space at each moment in time.

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1 Sir John Baker, *English Law under Two Elizabeths* (Cambridge University Press, 2021) 2.

The four-dimensional worm can then be seen to be the one thing in time and space even though it might look like two quite different things were its time dimension to be sliced through and were its three-dimensional form at one moment in its life-cycle compared with its three-dimensional form at another moment in its life-cycle.

Taking my cue from John Baker the elder, my starting point is to treat the common law which we inherited from England and the common law which we now understand to be the common law of Australia as the same common law. When I refer to the 'common law' I mean to refer, like Baker, to the entire body of judge-made law, including judge-made principles of equity and statutory interpretation.

The nature of judicial law-making means that the common law, considered as a body of judge-made law, lends itself to being understood to maintain an identity through time even more strongly than does a three-dimensional form (such as a ship, an axe or a person). That is because the centrality of the doctrine of precedent to the identity of the common law means that the content of the common law at any moment in time can never be examined by slicing through the time dimension and attempting to take a snapshot of the common law at that moment.

Frederick Schauer elucidated how judicial adherence to the common law method of following precedent means that the judicial declaration of the law at a moment in time affects the future as much as it is affected by the past. As he put it:

> An argument from precedent seems at first to look backward. The traditional perspective on precedent, both inside and outside of law, has therefore focused on the use of yesterday's precedents in today's decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decisionmakers. Today is not only yesterday's tomorrow; it is also tomorrow's yesterday. A system of precedent therefore involves the special responsibility accompanying the power to commit the future before we get there.[2]

Judicial adherence to the common law method therefore means that it is impossible to say what the common law is at any moment in time by looking just to that moment. What is necessary in that moment is to look to how the law has been declared by judges in the past and to look to how the law might be declared by judges in the future. Oliver Wendell Holmes captured the essentiality of that time dimension to the identity of the common law when he famously said that '[i]n order to know what it is, we must know what it has been and what it tends to become'[3] and when he went on provocatively to proclaim that 'by the law' he meant 'nothing more pretentious' than '[t]he prophecies of what the courts will do in fact'.[4]

From that starting point of treating the common law as a body of judge-made law having a single continuing identity through time, I narrow my focus to look to those interconnected parts of the common law which pertain

2 Frederick Schauer, 'Precedent' (1987) 39(3) *Stanford Law Review* 571, 572–3.

3 Oliver Wendell Holmes Jr, *The Common Law* (Little Brown, 1881) 5.

4 Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 457, 461.

to the judicial review of administrative action and which we now group under the rubric of 'administrative law'. In looking to administrative law, I look beyond the frequently adjusted collection of principles of law which we think of as legal doctrine.

My concentration instead is on 'values'. When I refer to a 'value', I mean an enduring idea or belief about a desirable end or about acceptable means which operates to inform the content and application of legal doctrine. A 'value' in the sense I am using that term is an idea or belief that is of sufficient significance or importance to influence the judicial attitude to the performance of the function of the judicial review of administrative action. A value is not a principle of law but rather an idea or belief that, alone or in combination with other ideas or beliefs, informs the declaration or enforcement of a principle of law.

My ambition in this lecture is to uncover and describe some of the values which influence the judicial attitude to the performance of the function of the judicial review of administrative action and to locate those values within what I will refer to as 'the common law tradition'. In referring to 'the common law tradition', I mean to refer to those institutional structures of, and normative practices within, courts which adhere to the common law method and that have served to foster those values and to transmit them through time.

By attempting to locate administrative law values within the common law tradition, I am consciously drawing on the more general relationship between values and tradition explored in the writings of the philosopher Samuel Scheffler.[5] Scheffler has explained:

> Traditions are ... human practices whose organizing purpose is to preserve what is valued beyond the life span of any single individual or generation. They are collaborative, multigenerational enterprises devised by human beings precisely to satisfy the deep human impulse to preserve what is valued. ... [B]y participating in traditions that embody the values to which they are committed, individuals can leverage their own personal efforts to ensure the survival of those values. In addition, they can think of themselves as being, along with their fellow traditionalists, the custodians of values that will eventually be transmitted to future generations. In this sense, participation in a tradition is not only an expression of our natural conservatism about values but also a way of achieving a *value-based* relation to those who come after us. We can think of our successors as people who will share our values, and ourselves as having custodial responsibility for the values that will someday be theirs.[6]

Scheffler's explanation provides an account of how I and other judges I know see our temporal relationship to the common law. We do not see ourselves, in the language of Benjamin Cardozo, as 'knight[s]-errant, roaming at will in pursuit of [our] own ideal of beauty or of goodness'; rather, as Cardozo put it, we 'draw inspiration from consecrated principles' and 'exercise discretion informed by tradition [and] disciplined by system'.[7] We do not see ourselves as having dominion over the common law or any part of it, nor as declaring

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5 Samuel Scheffler, *Equality and Tradition: Questions of Value in Moral and Political Theory* (Oxford University Press, 2010); Samuel Scheffler, *Death & the Afterlife* (Oxford University Press, 2016) ('*Death & the Afterlife*').

6 Scheffler, *Death & the Afterlife* (n 5) 33 (emphasis in original).

7 Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 141.

it merely in and for the present. We see ourselves as present-day custodians of values that have been transmitted to us from earlier generations and that will be transmitted from us to future generations. What we do in the present, we do with a sense of responsibility to the past and for the future.

What are the values of which I speak? And what are institutional structures and normative practices by means of which those values have been transmitted through time to their present custodians?

Administrative law values

The historically transmitted values which influence our contemporary judicial attitude to the judicial review of executive action are not incompatible with those of a modern system of public administration. Yet it would be a mistake to think that they are the same.

The values influencing judicial review of executive action can be contrasted with the 'primary goal' of the administrative law system as identified by the Administrative Review Council in that they are not about 'improving the quality, efficiency and effectiveness of government decision-making generally'.[8] They can be contrasted as well with the 'overall objective' of the merits review system as also identified by the Administrative Review Council in that they are not about 'ensur[ing] that all administrative decisions of government are correct or preferable'.[9]

However, because they are embedded in institutional structures and normative practices, and because their transmission has been largely unspoken, identifying what those values are is more difficult than identifying what they are not. With notable recent exceptions,[10] judges have rarely attempted to articulate them. That has been left to academics, one of whose strengths has lain in their ability to stand aside from the day-to-day cycle of dispute and adjudication and to point out patterns not always apparent to those whose focus is more immediate.

The earliest and most enduring academic articulation was that of Albert Venn Dicey writing in the late 19th century. His explanation of common law constitutionalism was famously in terms of 'parliamentary supremacy' and the 'rule of law'. Components of the 'rule of law', as he explained it, were that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary [courts]'[11] and that 'the general principles of the constitution ... are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts'.[12] Those components combined inexorably to result

8 Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, September 2012) 41 [2.63].

9 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, November 1995) 16 [2.9].

10 Justice Robert French, 'Administrative Law in Australia: Themes and Values' in Matthew Groves and HP Lee (eds), *Australian Administrative: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15, 15–33; James Allsop, 'Values in Public Law' (2017) 91(2) *Australian Law Journal* 118.

11 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan, 10th ed, 1959) 193.

12 Ibid 195.

in his denial of any room within common law constitutionalism for a distinct 'administrative law'.[13] That is a perception to which I will return.

A further articulation of enduring significance was that of Louis Jaffe and Edith Henderson writing in the middle of the 20th century.[14] Expressed in Dicey's terminology, the effect of Jaffe and Henderson's analysis of the development of English administrative law since the 17th century was to combine the conceptions of parliamentary supremacy and the rule of law to explain the judicial review of administrative action in terms of the judiciary declaring and enforcing the limits of administrative power conferred on the executive by the legislature. That basic account of judicial review of administrative action has been especially influential in Australia.[15]

Following on from Jaffe and Henderson, by far the most influential account of judicial review of administrative action to emerge in the second half of the 20th century was that of William Wade and Christopher Forsyth. They explained the concern of a court engaged in the judicial review of administrative action as being about ensuring the 'legality' of the exercise of power. The judicial review of administrative action, on the Wade and Forsyth account, was all about keeping administrators within the legal limits of legally conferred power. The 'very marrow of administrative law', on their account, was to be found in the doctrines by which those limits were ascertained and enforced by the judiciary.[16]

There were some, within the academy but also within the judiciary, who challenged the Wade and Forsyth account by asserting that 'legality' was nothing more than a 'fig-leaf' covering up the embarrassing anatomical reality that the doctrines by which the judiciary ascertained and enforced the legal limits of power were in truth the products of naked value judgments.[17] Without disqualifying the aptness of the metaphor, Forsyth gave the following delicate response.

> Those who consider that the fig-leaf should be stripped away to reveal the awful truth to all the world do not, with respect, appreciate the subtlety of the constitutional order in which myth but not deceit plays an important role and where form and function are often different.

The requirement for courts to conceive of their role as restricted to being arbiters of legality was 'inherent' in the 'constitutional order'. Maintenance of the fig-leaf was a matter of institutional decorum — 'a gentle but necessary discipline'.[18]

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13 Ibid ch XII.

14 Louis Leventhal Jaffe and Edith Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72(3) *Law Quarterly Review* 345.

15 Stephen Gageler, 'Whitmore and The Americans: Some American Influences on the Development of Australian Administrative Law' (2015) 38(4) *University of New South Wales Law Journal* 1316.

16 William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 26.

17 See Dawn Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' [1987] (Winter) *Public Law* 543; Lord Woolf, 'Droit Public — English Style' [1995] *Public Law* 57, 66.

18 Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review' (1996) 55(1) *Cambridge Law Journal* 122, 136–7.

Two recent academic works have sought to expose the value judgments hidden by the fig-leaf in respectful and nuanced terms. One of those works, by Joanna Bell, focuses on administrative law in England and Wales.[19] The other, by Paul Daly, takes account as well of administrative law in Australia, Canada, Ireland and New Zealand.[20]

Bell labels Wade and Forsyth's account of judicial review of administrative action as 'monist', given that it sought to account for administrative law as the embodiment of a unitary principle, and notes the more recent emergence within the academy of other competing monist accounts which have sought to account for administrative law as the embodiment of one or other different unitary principles.[21] Critiquing without rejecting those monist accounts, Bell charmingly invokes the metaphor of a rose. Just as it is possible to admire the beauty of a rose and yet scientifically to examine its 'inner structure', she argues, it is possible to admire the elegance of a monist account and yet to appreciate that the account fails 'to supply the whole set of intellectual tools needed to understand administrative law adjudication'.[22] Without detracting from Wade and Forsyth's account, it is therefore possible to recognise the complexity of administrative law and seek to explain the detail of its anatomy. One source of the complexity of administrative law which she identifies is its pursuit of multiple normative goals.

In the culmination of a project on which he has been working for more than a decade,[23] Daly takes up where Bell leaves off. His argument is that the 'core features of the contemporary common law of judicial review of administrative action' can be explained in terms of four values which he derives from decided cases across the multiple jurisdictions he has examined.[24] He argues that those four values are sometimes in harmony and sometimes in tension. He argues that their interplay 'can be understood as having structured the principles that judges apply and the decisions that judges reach' and that their elucidation has 'the potential to be a source of "reasoned justification" for judicial review principles and decisions, guiding the development of administrative law in the future and justifying the contemporary law of judicial review of administrative action'.[25]

The four values in the terms identified by Daly are: 'individual self-realisation' (involving the protection of 'individual interests which are important because they contribute to ... individuals' ability to plan their affairs whilst being treated with respect by administrative decision-makers');[26] 'good administration' (involving the avoidance of compromising effective and

19 Joanna Bell, *The Anatomy of Administrative Law* (Bloomsbury, 2020).

20 Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford University Press, 2021) ('*Understanding Administrative Law in the Common Law World*').

21 Bell (n 19) 220ff.

22 Ibid 246.

23 See earlier Paul Daly, 'Administrative Law: A Values-based Approach' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Bloomsbury, 2016) 23.

24 Daly, *Understanding Administrative Law in the Common Law World* (n 20) 14.

25 Ibid 19 (citations omitted).

26 Ibid 14.

efficient public administration);[27] 'electoral legitimacy' (involving respect for the roles of elected representatives);[28] and 'decisional autonomy' (involving courts and administrative decision-makers each staying in their own spheres of decisional competence and doing what they do best: courts assessing lawfulness of executive action and administrative decision-makers assessing the merits).[29]

Much in Daly's account resonates with my experience. My perception of the values which inform our contemporary judicial attitude to the judicial review of executive action nonetheless differs from his in several respects. The differences may be attributable partly to my narrower focus on administrative law only in Australia and partly to my experience of judicial review of administrative action as but one limb of an interconnected body of judge-made law. Extending Bell's metaphor to illustrate the same comparison, it may be that the difference between Daly's perception and mine is explicable on the basis that he is attempting to describe the genetic structure of a number of roses grown from a common stock whereas I am attempting to explain the genetic structure of a single rose grown with other flowers in a single garden which it is my current responsibility to tend in my own backyard.

One respect in which I differ from Daly is that I think that we tend within the judiciary in Australia to treat procedural fairness — or as it has traditionally been known 'natural justice' — as intrinsic to the value Daly describes as 'individual self-realisation'. Another is that I think that we tend to treat what he refers to as 'good administration' not as a distinct value so much as the by-product of what he refers to as 'decisional autonomy'. Yet another is that I think we tend to see what he refers to as 'decisional autonomy' not so much in terms of courts doing legality and administrators doing merits but more in terms of courts being mindful of sticking to just doing legality. In that respect, I think we have adhered to the 'gentle but necessary discipline' inherent in Wade and Forsyth's account more consistently than the English and much more than the Canadians.[30]

More than 2 decades ago, I described the 'merits' of an administrative decision as nothing other than 'the residue of administrative decision-making that in any given case lies beyond any question of legality'.[31] Borrowing language from Ronald Dworkin,[32] I more recently described the area of 'discretion' committed to an administrative decision-maker as the 'hole in the legal doughnut'.[33] Thomas Bingham, one of the wisest common law judges of my lifetime, explained in the interim that 'judicial review' is 'an excellent description' of the process by which courts enforce compliance by

27 Ibid 16.
28 Ibid 17.
29 Ibid 18.
30 Stephen Gageler, 'Deference' (2015) 22(3) *Australian Journal of Administrative Law* 151.
31 Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21(3) *Australian Bar Review* 279, 280.
32 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 31.
33 Stephen Gageler, 'Judging the New by the Old in the Judicial Review of Executive Action' (2020) 42(4) *Sydney Law Review* 469, 472.

administrators with the law 'because it emphasizes that the judges are reviewing the lawfulness of administrative action taken by others'. He continued:

> This is an appropriate judicial function, since the law is the judges' stock-in-trade, the field in which they are professionally expert. But they are not independent decision-makers, and have no business to act as such. They have, in all probability, no expertise in the subject matter of the decision they are reviewing. They are auditors of legality: no more, but no less.[34]

Substituting the expression 'adjudicators of legality' for 'auditors of legality', that explanation well captures the mainstream judicial attitude in Australia. A judge engaged in judicial review of administrative action who imagines that the judicial function is to determine whether the administrative action is 'in accordance with precepts of good administration'[35] is a judge who is perilously unaware of the limits of his or her professional expertise and institutional competence.

Acknowledging the influence of Daly, my own attempt to explain the genetic structure of the judicial review of administrative action in Australia would similarly isolate four values. The first is the autonomy of the individual. The essential idea is that everyone has freedom to do anything not prohibited by law, has rights and interests that are protected by law, and has an entitlement to be heard before power is exercised to diminish that freedom or alter those rights or interests. The second is the subordination of power to law. The essential idea is that nobody has power to diminish the freedom or to alter the rights or interests of anybody else except as is positively conferred by law. That is so for an officer or authority of the State as it is for everybody else. The third is the subordination of law to democracy. The essential idea is that competing versions of the common good are resolved through the political process. The political resolution is manifested in legislation which, subject to constitutional limitations, has the force of law such that it is binding on everybody including every officer and institution of the State. The fourth is the hegemony of the courts over the declaration of the law. Everybody must abide by the law. Everybody is entitled to form an opinion about the law. But only a court has authority to declare the law.

Those are the four values that I see as fundamental to the judicial review of administrative action in Australia in the sense that they are imperative and omnipresent. To afford them that core status does not rule out other values having borne on the judicial development of administrative law doctrine in the past and continuing to bear on the judicial development of administrative law doctrine in the future. Good faith, impartiality, consistency, rationality, transparency, participation and accountability, as Mark Aronson has noted, can be seen in varying measures to have had some role in shaping modern administrative law doctrine in Australia.[36] More recently imported ideas, like

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34 Tom Bingham, *The Rule of Law* (Penguin, 2010) 61.

35 Jason NE Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Bloomsbury, 2016) 45, 52.

36 Mark Aronson, 'Public Law Values in the Common Law' in Mark Elliott and David

justification and proportionality, are no longer entirely foreign to our law and are not without some influence in contemporary judicial thinking.

The four core values, as I have couched them, are related to each other in a way that minimises tension between them and contributes to their overall coherence to such an extent that it does no violence to conceive of them as a single composite value. Indeed, what has come home to me in attempting to isolate and explain them is that they are not peculiar to administrative law. They are, I think, at the core of the common law as a whole.

Sir Maurice Byers, a profound legal thinker and the most subtly persuasive advocate I had the privilege to work with, once referred to the law as 'an expression of the whole personality'.[37] As those characteristically beautiful and tantalisingly obscure words have been translated by James Allsop, 'subtlety and complexity' are not 'matters of choice' but 'how life is' and personality as a human attribute 'is neither understood nor described by breaking it down into separate component parts (if they be separate at all), though the parts may help one understand the whole'.[38]

It will be recalled that in Archilochus' fable, as appropriated by Isaiah Berlin and in turn by Dworkin, 'the fox knows many things, but the hedgehog knows one big thing'.[39] To the hedgehog, as Dworkin put it, 'value is one big thing'.[40] Where I end up is finding myself in sympathy with Dicey in questioning the existence of a distinct administrative law and more fundamentally in sympathy with Dworkin in thinking unashamedly not as a fox.

Institutional structures and normative practices of the common law tradition

The institutional structures and normative practices through which those core values have been fostered and transmitted do much, I think, to explain their existence and essential coherence.

The standard institutional structures involve the separation of judicial power, the commitment to the judicial power of the unique function of finally resolving disputes about legal rights and duties, and the conferral of that judicial power on an independent judiciary comprised of judges who for the most part have joined the judiciary only after having had long experience as legal practitioners within an independent legal profession. The performance of that function of resolving disputes about legal rights and duties is according to a well-trodden judicial process, intrinsic to which is that the parties in

Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 134, 145.

37 Maurice Byers, 'From the Other Side of the Bar Table: An Advocate's View of the Judiciary' (1987) 10(1) *University of New South Wales Law Journal* 179, 182.

38 James Allsop, 'The Law as an Expression of the Whole Personality' [2017] *Bar News* 25, 25.

39 Isaiah Berlin, *The Hedgehog And The Fox: An Essay on Tolstoy's View of History* (Weidenfeld & Nicolson, 1953); Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011) ('Justice for Hedgehogs').

40 Dworkin, *Justice for Hedgehogs* (n 39) 1.

dispute are given an opportunity to be heard and the culmination of which is an adjudication by which the law as ascertained is applied to the facts as found.

Judicial review of administrative action occurs within those standard institutional structures. It occurs only in the context of the judicial resolution of a dispute about the legal rights of an individual or about the legal duties of an administrator which is brought before the independent judiciary for adjudication at the suit of the individual against the administrator. It occurs always in accordance with the judicial process.

The normative practices which develop within those institutional structures involve the judiciary attempting always to arrive at the just resolution of the dispute in the individual case through the declaration and enforcement of principles of law that are both seen at the time of adjudication to have been just in the past and appear at the time of adjudication to be just in the present and for the future. For those whose professional lives have involved a repetition of those practices, as Karl Llewellyn put it, '[t]radition grips them, shapes them, limits them, guides them': they develop 'ingrained ways of work or thought' or 'habits of mind'.[41]

The camel

In my metaphorical ramblings, I have moved from a worm to a rose to a fig-leaf to a hedgehog. I will finish with a camel.

When I have spoken about tradition and values in the common law in the past, I have used the metaphor of the camel. I have spoken about a 1,200-year-old Tang Dynasty terracotta camel which I bought 2 decades ago and that sits on a Perspex pedestal in my living room. I have explained how the camel is half as old again as the common law. I have explained that I do not see myself as really owning it but rather as having the privilege of looking after it for perhaps another 2 decades. The camel has been kept safe and handed on through many generations. With goodwill and good management, it will be kept safe and handed on through many generations to come. My job is to keep it safe for the time that I have custody of it.

You can't meaningfully define a terracotta camel any more than you can meaningfully define Joanna Bell's rose. The most you can do is describe the features that make it meaningful to you, in the belief that others have found those features to have been sufficiently meaningful to have been worth preserving in the past and in the hope that others will find those features to be sufficiently meaningful to be worth preserving into the future.

What I have attempted here is to describe the camel.

41 Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown, 1960) 53.