Contents

Acknowledgments xiii

1. INTRODUCTION: “THE JUSTICE OF THE COMMON LAW” 1
   A. Unjust Laws 1
   B. The “Moral-Formal Dilemma” 2
   C. Unsatisfying Answers 4
   D. An Alternative 5
   E. Types of Injustice 12

2. THE COMMON LAW 22
   A. Sources 23
   B. Process 26
   C. Content 28
   D. Structure 32

3. THE SOURCE-BASED ARGUMENT FOR THE JUDICIAL OBLIGATION TO APPLY THE LAW 33
   A. Stare Decisis 33
   B. Legislative Supremacy 41

4. THE CONCEPTUAL ARGUMENT FOR THE JUDICIAL OBLIGATION TO APPLY THE LAW 47
5. THE SOURCE-BASED ARGUMENT FOR THE JUDICIAL OBLIGATION TO DEVELOP THE LAW: PART I
(ENGLAND) 53
A. Dr. Bonham's Case and the Common Law That Controls Acts of Parliament 53
B. Omychund v. Barker and the Common Law That Works Itself Pure 74

6. THE SOURCE-BASED ARGUMENT FOR THE JUDICIAL OBLIGATION TO DEVELOP THE LAW: PART II
(UNITED STATES) 79
A. The Origins of Common Law Review in the State Courts 79
B. The Origins of Common Law Review in the Supreme Court 91
C. Common Law and Natural Law, Again 102
D. The Source-Based Judicial Obligation to Develop the Law 107

7. THE CONCEPTUAL ARGUMENT FOR THE JUDICIAL OBLIGATION TO DEVELOP THE LAW 112
A. Role Obligations 113
B. Disagreements about the Law: Dissenting Opinions and the Design of the Common Law 114
C. Judges and Justice 119
D. Disagreements about the Judge's Role: Interpreting the Judicial Function 124
E. Consequences of Judicial Failure to Develop the Law 130

8. COMMON LAW REVIEW 138
A. Analytic Features 139
B. Adjudging a Statute Void: The Form and Exercise of Common Law Review 149
C. Applying and Developing the Law: Common Law Review, Stare Decisis, and Legislative Supremacy 150
D. Common Law Principles and Rule-of-Law Values: The Example of Ouster Clauses 159
E. Responding to Radbruch 163
F. Summing Up 167
9. COMMON LAW REVIEW IN TWO COMMON LAW SYSTEMS 169
   A. England 169
   B. United States 187

10. CONCLUSION 192
    A. Types of Injustice 192
    B. An Alternative 193
    C. Unsatisfying Answers 196
    D. The “Moral-Formal Dilemma” 196
    E. Unjust Laws 197

Table of Authorities 199
Notes 207
References 283
Index 301