Common Law Judging

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3 Subjectivity and Intersubjectivity

Not till Kant’s *Critique of Judgment* did this faculty [of judgment] become a major topic of a major thinker.¹
—Hannah Arendt

This chapter considers some connections between Kant’s theory of aesthetic judgment and the common law tradition of legal judgment. Specifically, I examine Kant’s theory of synthetic a priori judgments in the realm of aesthetics and indicate their significance when applied to common law adjudication.² This chapter is not meant to demonstrate, or even to suggest, that Kant’s work translates fully as a framework for or a commentary on the common law. This is why, among other reasons, I do not in this chapter discuss Kant’s writings on law, government, or justice. Where common law judicial decision making is concerned, these aspects of Kant’s work are less germane for my purposes than his discussion of aesthetic judgment. In addition, for similar reasons, I limit myself solely to Kant’s analysis of aesthetic judgment, without considering his comments on the sublime or on teleological judgment.³ I argue that there are enlightening parallels between Kant’s and the common law’s approaches to the formulation and communication of reflective judgments. I hope to explain the fundamentals of Kant’s aesthetic theory in a way that is faithful to its subtlety and salience while ensuring that this discussion will be both accessible to readers who may not have any formal background in analytic philosophy and engaging for readers who do.

It might seem unlikely that a book published toward the end of the eighteenth century by a Prussian philosopher who never traveled more than one hundred miles from the city of his birth would have much to offer in explaining a legal tradition that began in England centuries before he was
Nonetheless, I am not the first person to think that revealing correlations exist between Kant’s theory of the process of aesthetic judgment and the common law process of judicial decision making:

If Kant had been an Englishman he might have noticed that the same sort of reflective judgment [operative in aesthetics] seems to work in the common-law tradition . . . a sense of justice develops through case precedents much as a taste for beauty develops through the appreciation of exemplary models of artistic excellence.5

This observation aside, however, very little has been written relating Kantian aesthetic judgment directly to common law legal judgment.6 The value of pursuing the connections between Kant and the common law is in thinking more carefully about the parallels in the faculty of taste and the sense of justice. As I will argue here, the faculty of taste7 combines feeling and imagination with reason and reflection to arrive at an aesthetic judgment that is communicated to and evaluated by a larger community. Similarly, a sense of justice combines an immediate and individual response with doctrinal sources and processes of reasoning to produce a legal judgment that is communicated to and validated by a larger community. Moreover, both types of judgment cannot depend entirely on nor be divorced entirely from a subjective response, and neither type of judgment is directed toward objective truth. Both the individual and interpersonal aspects of aesthetic and legal judgment must be recognized as vital to the validity of both types of judgment. It is a mistake to deny or denigrate the subjective aspects of this process. It is also a mistake to assume that the interpersonal validity of a judgment depends on an impersonal stance or distance of the judge.8 Considering the correspondence between aesthetic and legal judgments helps us to understand more sensitively and more accurately the dynamics of the decision-making process and the nature of the judgments reached.9

This chapter is an extended study of Kantian aesthetic theory as it applies to the dynamics of judicial reasoning and legal judgment in the common law tradition. I will describe these aspects of Kant’s theory and then explain how they might be employed in relation to the common law and judicial decision making. The chapter is divided into subsections—judgment, communication, community, and disinterestedness—that correspond to elements of Kantian aesthetic theory applied to specific aspects of the common law.10 Like Kantian aesthetic judgments, common law judgments cannot be reduced to moral intuitions or abstract deductions.11 Instead, as the compar-
ISON TO KANTIAN AESTHETIC THEORY HELPS US TO SEE, COMMON LAW JUDGMENTS COMBINE A PERSONAL RESPONSE WITH PREEXISTING PARAMETERS OF LEGAL SOURCES AND PROCESSES THAT ESTABLISH THE FRAMEWORK OF POSSIBLE SUBSTANTIVE OUTCOMES AND THEIR FORMAL EXPRESSION.

**JUDGMENT**

To look for connections between Kant’s writings and the common law, the third *Critique* seems a sensible place to start. After all, it was in this work that Kant sought to explain “the power or faculty of judging,” an apt description of this book’s motivating concern, as well.

For purposes of Kant’s theory and this book’s overarching theme, the most important single facet of synthetic a priori aesthetic judgment is the idea “that the aesthetic quality ascribed to the object is purely and inescapably subjective; yet, despite all this, he [Kant] teaches that the aesthetic judgment of taste ‘lays claim . . . to be valid for everyone.’” The central idea here is that according to Kant, one’s reaction to a work of art combines pleasure and judgment in a process that is creative and reflective. Crucially, though, one should not assume that the feeling of pleasure at the apprehension of the object occurs first, and then, if the object truly deserves to be adjudged beautiful, one formulates a considered opinion that the object is in fact beautiful. In Kant’s view, the pleasure at the apprehension of a beautiful object follows the formulation of the judgment. This serves to ensure that the considered judgment of beauty is not merely a statement of personal preference. I will return to this point later in the discussion of disinterestedness.

So while the pleasure at apprehending a beautiful object cannot be purely personal, the formulation of a judgment that the object is beautiful is, in part, necessarily subjective. One has that feeling for oneself and by oneself. The reflective, considered judgment is also intersubjective. One does not simply say that the object is beautiful “to me” as an individual; instead, one makes a judgment that all other individuals who evaluate the object aesthetically would reach the same conclusion. This conjoined personal and interpersonal evaluation of the object is the crux of Kant’s theory of synthetic a priori judgment. A Kantian aesthetic judgment begins with a purely subjective response, but it cannot end there. The subjective response must be coupled with a considered judgment that the claim of beauty may reasonably be imputed to all other judges of the object.
Subjectivity

To understand Kant’s aesthetic theory more completely, we need to define subjectivity, intersubjectivity, and synthetic a priori judgment, for purposes of Kant’s theory and its application to the common law. In Kantian aesthetics, the subjective element in aesthetic judgment requires singularity and autonomy. Singularity means that aesthetic judgment begins with an individual’s felt response to an artistic object. At the same time, though, individual responses are not judgments and the ability to feel is not identical to the capacity to judge. If our aesthetic judgments were nothing more than our internal feelings (which might or might not be articulable), then they could not accurately be described as judgments. Rather, our individual responses must also be reflected upon in the articulation of a judgment that may be communicated to others and with which we may claim that others should agree.

The function of singularity in Kantian aesthetic theory is found in two features central to the common law judicial process. First, common law judges are ultimately expected to arrive at their decisions by themselves, as individuals. Probably the most evident demonstration of this expectation in the common law tradition is the production of signed opinions. The judge may author the opinion himself or he may join an opinion written by another member of the panel, but in the common law tradition judges sign their names to the opinion they endorse. This individualized expression of each judge’s opinion serves to reinforce systemic commitments to transparency and accountability and to the notion that attempting to do “justice in the individual case” demands that judges make that effort as individuals. In addition, the tradition of producing and publishing dissenting opinions is perhaps the most telling indication of the common law’s expectation that judges reach and render their judgments for themselves, even when they speak for themselves alone.

Second, and related to the previous point, the autonomy of subjective judgment in Kantian aesthetics means that each individual reacts and decides for herself, as a self-legislating agent, in adjudging an artistic object. No one else decides for her and no one else can tell her how she should feel about or react to a work of art. Analogized to the common law, each judge’s subjective autonomy is expressed in the structural and constitutional mandate of judicial independence. I return to this point at length in chapter 5, but for now the point is that, individually and institutionally, the common
law preserves for judges the freedom to reach legal determinations by their own lights and in the absence of external pressures or precommitments. In this regard, judicial independence is described as decisional and institutional. In accordance with decisional independence, judges are empowered and expected to reach their own decisions, and the capacity to decide freely for themselves what the law means is the distinguishing and definitive characteristic of their institution and the signature value of that institution for the larger governmental system in which it operates. Like Kantian aesthetic theory, the common law does not attempt to deny that an integral part of judging involves a personal response. And like Kantian aesthetic theory, individuated responses are recognized as an essential and desirable component of the process of formulating and expressing a considered judgment about the law.

Most discussions of judicial independence in the Anglo-American legal tradition tend to focus principally on institutional independence. Institutional independence protects judges from being penalized by others for the legal judgments they reach, and it protects the judicial process of reasoning and decision making from being interfered with by other branches. As I will explain later, an interesting and troubling element of certain legislative attempts to constrain judicial reasoning and to cabin decisional resources is that they seek to limit the courts’ institutional independence by limiting the judges’ decisional independence.

The importance of judicial independence not just externally (i.e., in relation to other branches of government) but internally (i.e., in relation to the judges who constitute the judicial institution) is less widely considered. Employing Kant’s aesthetic theory in this regard helps us see that the independence of the judiciary depends upon the independence of individual judges and the preservation of their individuality within their institutional role.

The importance of the individual judge’s perspective within his institutional role as a judge helps to differentiate the judiciary from the legislature. Jeremy Waldron argues that “Kant does not have a robust, participatory image of politics; the supersession of individual judgments of right by the centralized deliverances of a civil legislator, in his scheme of things, might involve a decline in genuine ‘omnilateralism.’ He does not claim for positive law that it actually takes account of everyone’s circumstances or everyone’s point of view. The virtue of positive law resides in its univocality, its power, its being put forward in the name of the whole community.” There are several problems with Waldron’s reading of Kant here, but I will focus on only one. A central value of looking to the Critique of Judgment for Kant’s account
of judging, and for relating his account to the common law, is that it helps us see more fully the differences between judges and legislators in individual responsibility and institutional function. Leaving aside Waldron’s assertion about Kant’s not having a participatory image of politics (which Arendt’s reading of the third *Critique* leaves seriously in doubt), his claim that a centralized legislature’s legal pronouncements demonstrate (in Kant’s view) the “virtue of positive law” due to its univocal pronouncement on behalf of the community can be, at best, only partially accurate. Judicial decisions and legislative provisions differ in any number of ways, including the observation that judges must justify their judgments with respect to legal sources and processes, while legislators need not do so. Moreover, and more directly responsive to Waldron’s point, the virtue of legislated positive law may be its univocality and practical resolution of contentious political and moral questions, but the virtue of positive law made via an adjudicative process is precisely that it requires judges to consider arguments from multiple points of view, including their own, before communicating their understanding of the law’s meaning to the community. Individual judgments are not superseded by generalized deliverances to realize their value as legal pronouncements; individual judgments are the individual judge’s and the judicial institution’s contribution to the community’s positive law.\(^{33}\)

The ability to decide as an individual is, in fact, a central component of the authentic meaning of judicial independence in the common law tradition.\(^{34}\) Kant helps us to see that judges cannot make decisions independently unless they make their decisions individually. But making decisions individually does not thereby afford judges of art or law license to make their decisions idiosyncratically.\(^{35}\) A judge’s subjective response is a necessary component of his judgment, but a judge can produce a judgment qua judgment only insofar as it is communicated to a larger community in which that judge functions. That communication requires the judge to articulate his judgment in accordance with the forms, sources, arguments, and processes of the relevant community.\(^{36}\)

**Intersubjectivity**

Turning from subjectivity to intersubjectivity, Kant’s interest is to demonstrate that an aesthetic judgment differs from an aesthetic response to the extent that the judgment expresses “the transition from a statement of private liking to one claiming universal validity.”\(^{37}\) The transition from a purely subjective aesthetic response to an intersubjective aesthetic judgment is captured by the linguistic and conceptual transition from saying that an artistic
object “seems beautiful to me” to the claim that the object “is beautiful.” The shift from response to judgment, then, is captured by the shift in language and meaning from statements by and for me to statements by me and for everyone who has the capacity to judge. It is the shift from a statement about me (“this object is beautiful to me”) to a statement about the object (“this is a beautiful object”). However, and this is where the confusion sometimes arises, such a statement about the object itself is presumed valid for “the whole sphere of judging subjects.”

Kant does not claim that the transition from subjective response to intersubjective judgment somehow transmogrifies the object itself. Aesthetic judgments do not alter the object or recognize a latent quality of the object. Rather, the judgment is a claim made by an individual and imputed to all other individuals with the capacity to judge. Kant describes this distinction as the difference between judgments of “objective universal validity” (objectivity) and judgments of “subjective universal validity” (intersubjectivity). The former type of judgment “is valid for everything which is contained under a given concept” while the latter type of judgment “does not rest on any concept . . . because judgements of that kind have no bearing upon the Object.” In other words, aesthetic judgments help us to appreciate further the distinction between objectivity and intersubjectivity, which was discussed in the previous chapter. On this account, and oversimplifying for the sake of clarity and emphasis, an objective judgment makes a claim about an object (which need not be a physical object) while an intersubjective judgment makes a claim about other subjects (as potential judges of an object).

The distinction between objectivity and intersubjectivity is helpful in thinking about the province of aesthetic and legal judgment because, like aesthetic judgments, legal judgments are not evaluated for truth in relation to an externally existing natural reality. Laws are not natural kind objects. But legal judgments, like aesthetic judgments, are evaluated as valid and persuasive according to a shared human capacity to make considered assessments in accordance with recognized forms of articulation and standards of reason. Judgments about law or art are not best evaluated in terms of their objectivity. As Stephen Perry and others have explained, thinking about law in terms of objectivity amounts to a characterization of law that is inaccurate and seriously misleading:

The claim would be that law is equivalent to a natural kind, such as water or gold, and all instantiations of that kind exhibit certain characteristics; that is, they necessarily have those characteristics. . . . [B]ut that is not an
easy view to defend. It requires us to assume that law has an essence, presumably determined by some natural function that must be served by all true legal systems. Yet the idea of a natural essence, which is problematic at the best of times, seems especially ill-suited as a characterization of a humanly-created institution—more accurately, a highly diverse set of independently-created institutions—such as law.\textsuperscript{45}

In terms of strong objectivity,\textsuperscript{46} the opposite of truth is falsity. In terms of intersubjectivity, however, the opposite of validity is arbitrariness.\textsuperscript{47} In terms of “intersubjective validity,”\textsuperscript{48} a legal or aesthetic judgment may be “valid but erroneous”\textsuperscript{49} but a judgment cannot be both valid and arbitrary, even if the result is perceived to be otherwise “correct.”\textsuperscript{50}

In distinguishing between objectivity and intersubjectivity, Kantian aesthetic theory again offers a useful means of approaching the theory and practice of common law judging. For Kant’s theory and for my argument, intersubjectivity and intersubjective validity must be differentiated from objectivity and objective truth.\textsuperscript{51} The important point here is that the contrast between intersubjectivity and objectivity ultimately relates to the distinction between the objects themselves and the individuals who evaluate them:

A logically universal judgment connects a predicate-concept to a subject-concept in such a way that the former is valid of any object falling in the extension of the latter; the extension of a subjectively universal judgment, by contrast, is not a class of objects, but the class of possible human judges. ‘Aesthetic universality’ thus does not connect a predicate with the concept of an object, ‘considered in its whole logical sphere,’ but rather ‘extends [the predicate of beauty] over the whole sphere of the judging [subjects].’\textsuperscript{52}

In other words, Kant’s theory of aesthetic judgment is not meant to demonstrate that beauty is a quality that inheres in objects themselves, independently of our judgments of them.\textsuperscript{53} According to Kant, the quality of beauty as it relates to an artistic object is the product of an individual assessment of that object that is then extrapolated and attributed to all future appraisers of that object. Of course, Kant did not mean to deny that people may disagree about aesthetic judgments, but the judgment that an object is beautiful is made by me and claimed for you. If it turns out that you disagree with my judgment, it means one of us is mistaken in our judgment, but not about any quality intrinsic to the object itself about which one of us is right and
the other is wrong. Put differently, beauty is no more a quality of a painting than pain is a quality of a knife; beauty is the feeling that the painting engenders in us and the judgment that we make about that work of art. We communicate our judgment to other subjects with the demand that they share our response and our judgment about the painting.

There is a further point here with respect to the connection between artistic and legal judgment. Kant frequently writes as though judgments of taste assess the quality of beauty. Similarly, we often assume judgments of law concern the quality of justice. But it is important to remember that not all artists attempt to convey beauty through their art. A work of art may succeed as a work of art precisely insofar as it forces us to confront something we do not wish to see: something aversive or unpleasant or, in a word, ugly. So a judgment that an artistic object succeeds as a work of art may not always be an assessment of beauty. Likewise, common law judges may for many reasons be unable to achieve the most just result in their judgments, and that outcome will not necessarily be a legitimate basis for criticizing those judgments. Indeed, in certain circumstances, a judicial decision may succeed as a legal judgment because it forces us to confront the law’s injustice. So the evaluation of a legal judgment may not always be an assessment of its substantive justice. Nevertheless, it is fair to say, as Kant does, that in general the goal of art is the expression of beauty. And it is fair to say, as the common law does, that in general the goal of law is the pursuit of justice. More simply put, judgments of taste are directed toward beauty, and judgments of law are directed toward justice. This directive and interactive quality of aesthetic and legal judgments is an added felicity of thinking of judgments of art and law in terms of their intersubjective validity as judgments (whose meaning and force are not fixed by the individual judge), rather than in terms of their objective truth or correctness as conclusions.

For Kant, intersubjective validity is “the rational expectation of agreement among different subjects.” For the common law, a judge does not search in his decisions for an abstract notion of justice or truth that exists naturally or objectively, but he does make his best effort to express his best judgment of what the law requires in the context of a given case. Moreover, as I discuss more fully in the next two sections, the judge offers his judgment for the consideration of future judges and claims that future judges should and will agree with his determination of what the law requires in cases of this kind. In doing so, a judge is obliged to communicate his reasons for arriving at his judgment to other subjects as potential judges of that case or
similar cases in the future. The process of judging in Kantian aesthetics and in the common law tradition requires judges to provide the reasons for their decisions to aid others in their consideration of that judgment and in justifying the outcome through a claim to the assent of other future judges. We demand the assent of others to a judgment we proffer as correct, not because our judgment must necessarily be true; we demand the assent of others because they share our capacity to feel, think, and judge. If our judgment is correct, we believe that others will and should arrive at the same judgment we did. Like legal judgments, however, the defense of an aesthetic judgment “cannot be the presentation of a fact to verify a truth claim, nor like a correct logical argument whose denial is merely self-contradictory. . . . [B]y their very nature, judgements of taste are bound to be persuasive.”

The discursive and heuristic process of common law judging is similar to the Kantian process of aesthetic judging in that they share an integration of individual response contained within a reasoned and communicated judgment, together with an expectation that others will agree with the judgment when they consider the matter for themselves. In addition, the goal for the common law and for Kantian aesthetics is not judgments that are true but rather judgments that are shared. In distinguishing intersubjectivity from objectivity, Kant stressed the role of the self and the community in the formulation and instantiation of a judgment. Correspondingly, the common law process of adjudication does not seek something like objective truth but rather a public justification achieved over time through sustained efforts by judges to communicate their best understanding of what the law means.

Similar mistakes are made about both Kantian aesthetic theory and the common law in this regard. People sometimes mistake the goal of Kantian aesthetic theory as “possible true judgements.” Making truth the goal of aesthetic judgment undermines the Kantian analytic project. Truth demands a means of assessment to which aesthetic judgment is not suited. And if truth is conceived as the goal of aesthetics, the realized result of actual aesthetic judgments will seem partial and inadequate. Likewise, as I discussed in the previous chapter, people often view the goal of law as objectivity. If a purely neutral, objective rule or a singular legal result is perceived as the goal of law, the realization of its unattainability may lead to cynicism about the law and its judges. Kant’s view of aesthetic judgment helps us to see something important about the common law tradition of legal judgment: both types of judgment seek a kind of validity that depends not on empirical correlation with external reality but instead on the intersubjective
nature of considered judgments, which depend in turn on communication and evaluation. The legitimate claim to the agreement of the community determines the validity of the individual judgment.

By seeking intersubjective validity rather than objective truth, aesthetic and legal judgments combine individual subjective responses with reasoned deliberative assessments that are ultimately tested by their persuasiveness in capturing a shared communal response. Once the goal of truth or objectivity is set aside, the value of validity and intersubjectivity becomes more apparent. Errors and disagreements no longer appear to challenge the usefulness of the enterprise; instead, they are recognized as a necessary, inevitable, and worthwhile part of the process. Indeed, the communication of the judgment to the community and the reception or rejection of the judgment by the community are necessary for Kant and for the common law in determining its ongoing validity.

**Synthetic A Priori Judgment**

Now that we have considered the interplay between subjectivity and intersubjectivity in Kantian aesthetics, we are ready to approach his theory of synthetic a priori judgment. Here is a presentation of the point in full:

On Kant’s view, the justification of a judgment of taste . . . requires a deduction of a synthetic a priori judgment because in calling an object beautiful, we each express our own pleasure in it, yet go beyond the evidence furnished by that feeling to impute it to the rest of mankind, as the potential audience for that object. We presume that our feelings . . . can be the subject of publicly valid discourse, and that . . . [we are] entitled to respond to a beautiful object with a ‘universal voice . . . and lay claim to the agreement of everyone.’ But the universal validity of our response to a beautiful object can neither be deduced from any concept of the object nor grounded on any information about the actual feelings of others, Kant believes, and so it can be based only on an a priori assumption of similarity between our own responses and those of others.

Guyer describes several details of Kant’s aesthetic theory that can usefully be applied to the common law. In addition to those I have already discussed, I want now to highlight the expectation that there is a “similarity between our own responses and those of others.” I will return to the importance of “publicly valid discourse” in the discussion of “community” a bit later.

Where similarity of our response with those of others is concerned, there
is a notable congruence between Kant’s notion of an a priori assumption and the framework of legal reasoning that structures and informs any common law judge’s judgment about the law.\textsuperscript{72} When a judge reaches a decision, and particularly when she writes that decision into a legal judgment, the form and nature of the judgment are, in an important sense, established prior to her writing of it in a specific case.\textsuperscript{73} The common law makes an assumption that the judge’s response in the form of a judgment will be recognizably similar to the responses of other judges. More specifically, when a judge articulates the reasons for her decision in a written judgment, she also proffers that judgment as her best evaluation of what the law means and how it applies to the case she has decided.\textsuperscript{74} Moreover, the common law doctrine of precedent means that other judges are always obligated to consider her prior judgment and are frequently obligated to follow it.\textsuperscript{75}

Just as in Kantian aesthetic theory, the common law judge’s decision possesses a subjective and an intersubjective quality. The judge decides for herself and yet she also decides for future judges, in the sense that she claims her judgment is correct and expects other judges will follow it in the future without depriving them of their own capacity and opportunity for independent assessment. In addition, in the same way that Kantian aesthetic judgments are not claimed to be objectively true but instead are claimed to be intersubjectively valid, common law legal judgments are not claimed to describe a natural reality or a logical necessity. They are claimed as a judge’s authoritative statement of the law’s meaning and normative force.\textsuperscript{76} It is more accurate here to characterize the judgment as the judge’s best effort to articulate the content of the law, particularly because in the common law tradition the judgment is itself a source of law that ultimately depends for its continuing validity on its ability to persuade future judges to incorporate it into their judgments.\textsuperscript{77} Here we see the importance of communication in aesthetic judgment for Kant and in legal judgment for the common law.

**Communication**

For Kant and the common law, a judgment is not a judgment until it is communicated. The act of reaching a decision is importantly subjective, and the act of rendering a judgment is inherently communicative. An entirely subjective feeling cannot be a judgment.\textsuperscript{78} To begin with a practical point, a judgment cannot be claimed as universal or intersubjective until it has been communicated to other judging subjects or unless it is at least communicable in this fashion.\textsuperscript{79} In fact, the judgment’s communicability is necessary
for its normativity, because the claim to intersubjective validity turns on the assertion that other subjects should agree with one’s judgment, but not necessarily that they will. The claim being communicated is that the subject’s judgment should be shared by others.

The transformative step from subjective responses to intersubjective judgments of taste lies in the social process of communicating the subjective aesthetic experience to others. The societal components of aesthetic judgment possess an analogous provenance in the common law tradition, where judicial decisions are announced and often published in written opinions for the parties, the profession, and the public.

It is usually insufficient for common law judges simply to make a decision. They must justify their decisions. Justification is itself an important correlative between Kantian aesthetic judgment and common law legal judgment. The requirement of public articulation as a judicial obligation serves to justify results in particular cases and to provide a basis for later decision making. Purely internal and individual experiences of aesthetic pleasure are distinguished normatively from reflective judgments of taste because of the imputation of universal agreement or acceptance through a communicative process. Similarly, idiosyncratic and unregulated judicial responses are distinguished normatively from considered decisions rooted in legal doctrine and argumentation—from judgments—by the provision of a judge’s written decision as a statement of the deciding judge’s understanding of the law and expectation that others will choose to follow that judgment in the future.

The normative force of this expectation is easy to misconstrue. A deciding judge may not necessarily believe—for instance, if she is writing a dissenting opinion—that other judges will in fact decide as she does. She must, however, believe that they ought to decide as she has, because she believes in good faith that her judgment is correct. In fact, the ought in the previous sentence can be understood in two ways. First, a judge may say that other judges ought to decide as she has because hers is the best conception of what the law requires. Other judges ought to decide similarly because her judgment is legally correct. Second, assuming the correctness of her judgment, a judge might also say that other judges ought to decide as she has because they are judges. As judges, they have a moral and legal obligation to decide in a certain way and in accordance with a particular tradition. Other judges ought to decide similarly because they have a duty to say what the law is, to the best of their ability and according to their best understanding.

Both of these connotations of the normativity of judgment—the cor-
rectness of the judgment and the nature of the judicial role—apply to and connect the aesthetic and the common law conceptions of judging. Both connotations turn on the dynamics of communication:

Kant’s association of universal validity, publicity, and a reciprocity by which a person’s contribution to the whole is the basis for defining his role and position in it, may be understood as a matter of having a certain viewpoint. Publicity, universal validity, and the proposed reciprocity require subjects to make judgements from a viewpoint which encompasses those of other subjects. . . . In this context ‘publicity’ may be seen as the exemplification of the a priori moral demand in our actual political, legal, cultural, and aesthetic lives. The ‘public’ then denotes a relation between imperfectly rational subjects, who are capable of entering into discussion, of making decisions, and of having feelings. . . . In legal, civil, and international relations, ‘all actions affecting the rights of other human beings are wrong if their maxim is not consistent with being made public’. The ‘form of publicity’ is what remains if we ‘abstract from all the material of public law. . . .’ Similarly, by comparing judgements of taste with a public sense Kant brings our subjective lives into the domain of duty and right. . . . By showing the universal validity of aesthetic judgements and their comparison with a public sense Kant shows them capable of value.87

Several aspects of this quotation relate to my argument. The first sentence refers to universal validity, publicity, and reciprocity. I discussed universal validity previously and I will discuss publicity in the next section. For now, I want to concentrate on the reciprocity between a judge’s own viewpoint as a contribution to the whole and as a basis for defining his role. In relation to the subjective and the intersubjective, the judge’s own viewpoint is essential. And that viewpoint informs both the judge’s subjective response to the artistic object or the legal dispute as well as the judge’s considered judgment about that object or that dispute. In other words, the judge is always aware that she is engaged in the process of judging.88 This means, first, that the subjective response is that of a member of a community of judges (as I discuss further in the next section). Her membership in this community helps to establish the viewpoint from which she initially approaches the object or dispute and through which her subjective response takes shape. Second, she is expected (as she is also aware) to articulate her judgment in a form that will be recognized as a judgment by other subjects.
Kant helps us to see that judges cannot and should not attempt to suspend their humanity when judging. To judge as a human being, the judgment must incorporate a subjective response within a considered judgment that is communicated to others. Whatever may generally be the case with man, no judge is an island. A judgment depends, in its subjective and intersubjective aspects, on the mutuality of these components in the process of judging. As Kant explains in the third Critique, judging combines imagination and understanding, feeling and reason, creativity and reflection, within a process that both defines a community of judging subjects and depends upon that community’s evaluation for the validation of the judgments reached by its members. The process of constituting a community through the shared experience of communication requires us as judging subjects to recognize our role in a reciprocal process of creating and evaluating judgments, sometimes speaking and sometimes listening, and this is the process that ultimately results in the apprehended meaning of a judgment. Both dynamics of the communication—the articulation and the evaluation, the speaking and the hearing—are always operative, all the time.

Community

For Kant and the common law, communication requires a community. In this critical aspect, a judgment is intersubjective, and its intersubjectivity is necessary to its expression as a judgment rather than just as a subjective response, because the response must be communicated in and to a community in a form that allows for and is intended to engender agreement and assent. The judgment is not completely realized until it is communicated, because the judgment depends, in an important sense, upon its evaluation and reception as a valid judgment by the community.

The community’s evaluation of a judgment involves more than simple consensus, however, no matter how strong the consensus may be or how long it has lasted. The fact that a legal judgment has long been regarded as correct is, of course, an important element of its authority as a source of law. But the common law processes of articulation and evaluation of legal judgments also require their constant re-evaluation in light of evolving social and institutional factors to which the law must adapt. Established precedents are sometimes overruled and dissenting judgments sometimes become accepted as settled doctrine. No matter how broadly or narrowly we construe the community to which a judgment is communicated, the intrinsic merit of a judgment must be continually be considered and reconsidered.
by the community through the intersubjective dynamic of articulation, evaluation, and validation. Judgments continue to speak, and communities continue to evaluate them, long after they are written.

The role of the community in the formulation and reception of legal and artistic judgments touches on requirements of form, reason giving, justification, persuasion, and the inherently public nature of communication and intersubjectivity. In this section, I focus principally on the theme of public discourse, with the understanding that the closely related concepts of form, reason giving, justification, and persuasion, which I have already addressed, are implicitly operative throughout this discussion.

Kant and the common law require that a judge communicate her considered decision as a member of a larger community, and each of these aspects of the judgment is important: the communicator, the communication, and the community. The subjective and the intersubjective, the process and the product, contribute to the validity and authority of the judgment. In moving from subjective experience to intersubjective judgment, the judgment is communicated not merely as an individual belief but as the correct decision, not just in this case but in all similar cases, not just for this judge but for all judges who reflect on the matter. In its expansive reach, we see the normative force of the intersubjective judgment and can appreciate the necessity of intersubjectivity for the judgment to be a synthetic a priori judgment.

If a judgment of taste is correct, any judge who reviews that work of art should come to the same decision. In this way, a judgment is public in the sense that it is offered as a justification for a conclusion and as a basis for the judgments of others in the future. Like the common law, Kant uses the word “judgment” at times to refer to both the process and the product of judging, but this in no way diminishes the salience of the distinction. Differentiating the process of judgment from the production of a judgment helps us to appreciate the distinction between the process of judging at common law and the law that is made as its product. In law and art, the judge communicates his judgment “as a member of a community” and as a contribution to that community:

If Kant can characterize . . . aesthetic activity as engagement in a dialogue with other subjects, . . . [this] represents a shift in emphasis from a concern with consciousness to one with community. . . . The judgement that an object is beautiful, in which a subject seeks to appreciate an object, involves an individual’s relation to others in a community and a dialogue aimed at interpreting and understanding the work.
With respect to the common law, the community that is the principal audience of a judicial decision as a legal judgment is the legal community. Narrowly speaking, this might mean attorneys only and broadly speaking this might include all those professionally engaged in researching, analyzing, and/or practicing law. Judicial decisions are, however, also directed toward a larger political community, which might mean the citizens of a polity, and broadly speaking this might include all those subject to the law of a jurisdiction.108

Earlier, in considering Kantian aesthetic judgment as a form of synthetic a priori judgment, I touched on Kant’s understanding of aesthetic judgment as a form of publicly valid discourse.109 Here we return to the concept of publicity to discuss it more completely, particularly as it relates to the function of community in Kantian aesthetics and common law judging.110 In Kant’s conception, the public nature of judgment is immanent in its intersubjectivity. A judgment of taste is a form of participation in a public dialogue with and within the community of judging subjects.111

In an important sense, Kant’s view of the intersubjective validity of aesthetic judgment is a form of public participation in a process of persuasion through shared experience:

At most we may change other subjects to our point of view by . . . what may be called ‘aesthetic argument by comparison and example’. It is successful when another subject is enabled to gain the experience of beauty for himself. . . . Persuasion respects the autonomy of an individual and treats his capacity for reason and appreciation as an end. Thus, our experience of fine art is not only public and persuasive but is also intersubjective and promotes our humanity through unity with other subjects.112

The reflexive process of aesthetic judgment means that these judgments depend for their existence on their audience. In an immediate and direct way, the intersubjectivity of the judgment depends on the imputed assent of the whole sphere of judging subjects. In a less apparent way, the sphere of judging subjects can begin to see itself as a community of judging subjects, in which all potential judges’ future opinions are valued because they are necessary to sustain the community and to establish the validity of each prior judge’s determinations. Individual judges depend upon and constitute their community.113

Aesthetic judgment as a form of publicly valid discourse tracks the process of common law judicial decision making. Ultimately, the validity of a judicial decision depends on its persuasiveness to other judges.114 The decisions of each judge are valued as that individual’s most central contribution to the in-
stitutional community, and each judge’s decisions ultimately depend upon the community’s assessment for their continuing validity. In both of these senses of community construction of valid judgments, the communication of the judgment and the community to which it is communicated are indispensable to the role of the judge and to the product of his deliberations.

Intersubjectivity and community relate to the judging of art and law in another way, too. The community ultimately determines whether a particular judgment satisfies the “criteria for the evaluation of aesthetic response.” The criteria imposed by the requirement of intersubjective validity include “a justified demand of assent from others . . . [which requires] an argument sufficient to justify the imputation of specific feelings to others on specific occasions, and this is a very strong constraint.” As Paul Guyer points out, judges may not simply demand assent to their judgments. Judges must make a “justified demand of assent,” which requires the judge to proffer “an argument sufficient to justify” the claim of assent. On this account, an aesthetic judgment demands of judges the “inclusion of justificatory criteria” even when that judgment incorporates, to some degree, a subjective response.

The criteria that allow the community to evaluate whether an argument is sufficient to justify a judge’s claim to the assent of other judges connect aesthetic judgment to legal judgment in the context of a process of public discourse. I have in mind here the role that legal sources and argumentation play in judicial reasoning. Recognized sources of law and processes of legal argument presuppose and impose criteria on a common law judge’s evaluation of existing law and on the formulation and articulation of her judgment. In turn, these justificatory criteria provide the basis for the community’s assessment of the proffered judgment in relation to the judge’s implicit demand that the community endorse the judgment as correct. The formulation and reception of a judgment reflect the reciprocal dynamic of an individual judge’s contribution to a community’s evolving understanding of the law and the community’s contribution to or construction of the meaning of the judgment. Even though the common law expects its judges to respond as individuals to the cases they decide, and even though those responses are a necessary and integral part of the judicial decision-making process, they can be translated into legal judgments only to the extent that the audience can reasonably regard them as valid. That audience includes, at a bare minimum, the parties to the case. For most common law cases, and all cases in which a written opinion is produced, that audience also includes the professional and academic legal community. For certain cases that touch on important social, policy, or constitutional questions, that audience might include the entire polity.
Thinking of the polity as the audience for judgments about constitutional questions also helps us to consider the common law process of constitutional adjudication. Here, again, the judgment seeks a valid and legally defensible interpretation or construction of constitutional meaning. Fundamental as the text and the history are here, this form of judgment cannot be limited solely to the text and the history. A text alone cannot constitute a community; the community must also constitute the text. In other words, the text cannot be understood apart from the various processes the community uses to interpret it. Each judgment helps to define the meaning of the community, and the community helps to define the meaning of the judgment. In this sense, a constitution is itself a form of legal judgment: it is a statement by and to the community and an expression of the community’s image of itself. Each judgment is a further expression of each judge’s understanding of the community’s relationship to its members and the standards according to which they have agreed to live. Moreover, these communities are not just imagined. Should the judgment require citizens and government to act in certain ways on the basis of the community’s constitution, which the judgment helps to construct, then these communities are actualized through the process and result of the judgment.

The notion of a judgment that helps to construct a community’s constitution and the judgment as a statement by an individual judge as a member of that community are often mischaracterized. Paul Campos offers an evocatively stated and commonly made mistake about this claim:

The meaning of a text can change because people disagree about its meaning if and only if we assume that the different beliefs about the text’s meaning which constitute this disagreement also constitute that meaning. Indeed, several contemporary constitutional theorists have advocated this account of interpretation. From this ‘reader response’ perspective, the meaning of the constitutional text is equivalent to some interpretive community’s beliefs about the text’s meaning. But whether or not a theorist holds this position explicitly is less important than the fact that anyone who subscribes to the view that the meaning of the constitutional text changes must either accept some version of it or be placed in the untenable position of the theorist who holds that the actual height of Mount Everest alters in response to the plurality of beliefs that exist on that particular question. There are two problems with Campos’s criticism here. First, he equates legal validity with objective truth. Laws are not like mountains. The meaning of
a constitutional text and the height of Mount Everest cannot be compared in the way Campos suggests for the reasons I explained earlier in this chapter and in the previous one. Second, Campos seems to assume that the contemporary constitutional theorists he criticizes must believe that all proposed interpretations are equally valid or that these theorists cannot engage in normative evaluation of competing interpretations. But again, for reasons I have explained, this familiar criticism is entirely unfounded. Finally, in relation to the last point, the reality of competing interpretive judgments does not and need not devolve into an “anything goes” free-for-all in legal interpretation. The criteria of legal validity place genuine constraints on the legitimate judgments that are available to a judge.

The relationship between the judge as the expositor of a judgment and the community as the collective evaluator of that judgment also helps us to appreciate a correspondence between Kantian aesthetic theory, on the one hand, and the common law and common law constitutionalism, on the other. On Kant’s account of aesthetics, there are two instances when we should not place particular importance on judgments: (1) if there is no one to whom the judgment can be communicated, or (2) if there is no especial ability or capacity afforded to the communicator. In the absence of a community to whom a judgment can be communicated, experiences of isolated aesthetic pleasure are possible, but instances of intersubjective aesthetic judgment are not. And if a community lacks judges who possess the capacity to formulate and communicate judgments of taste, then the process of aesthetic judgment as a form of public discourse is impossible. Similarly, the common law tradition places judges in a position of central importance precisely because the common law system emphasizes both the audience to whom judicial decisions are communicated and the authority and unique position of judges as interpreters and expounders of the law. The communication of legal judgments to the parties, the profession, and the public is probably the most enduring contribution judges make as members of the judicial institution and of the legal community and is also the judicial institution’s most enduring contribution to government and the polity.

A final point in relation to community also serves as a segue to the discussion of disinterestedness in the next section. Each judge knows that his judgment’s validity depends upon its evaluation by the community, and so the judge knows that his judgment’s intersubjective validity depends in part upon his ability to claim that his judgment is valid for others and not just for himself alone. In this way, the community frames the context for the judgment’s validity and force:
Kant holds that it is because your aesthetic judgment is not conditioned upon any private interest that you are entitled to claim that others ought to share your judgment. Impure judgments of taste void their claim to universality because they are based on private conditions. . . . I propose that we should reconsider . . . the sort of universality that we should expect from aesthetic judgment. . . . Advocates of aesthetic and cognitive claims appeal to a background of aesthetic and cognitive commitments already shared with those to whom the claims are made. . . . Only having already agreed on many things (implicitly or explicitly) can we demand that others agree with something more. . . . But this means, as we have seen, that the claims of interpretive understanding are only conditionally valid (when valid at all): If we share this sense of how things are, then you may insist that I agree with your judgment of an artist, because that should be my judgment also. . . . [N]ormativity is restricted by the bounds of the community of inquirers to which the claim is addressed. I suggest that we call this limited normativity a ‘localized universality’.132

This quotation helps us appreciate the connection between community and disinterestedness in Kant’s theory of aesthetic judgment. Our aesthetic reactions cannot accurately be claimed as intersubjective judgments if they are based exclusively or excessively on personal interests or biases. Instead, we must understand that we make our judgments, and claim them as intersubjectively valid, only because we make those judgments within a community that has, in a meaningful sense, already precommitted itself to a process and form of judgment. The reach of our aesthetic judgment depends on the range of our defined interpretive community. And to claim that other members of that community should endorse our judgments as valid, we must ensure that our judgments are faithful to its background commitments.

Disinterestedness

Kant tells us that aesthetic judgments must be distinterested.133 He sometimes seems to indicate that this disinterest should be conceived as “indifference,”134 which might suggest that we should be disengaged sensorily and intellectually when making judgments of taste. This is not the case. By indifference, Kant means that we should formulate our aesthetic judgments without being motivated by any concern for the “real existence of the object.”135 In other words, we should attempt to make our aesthetic judgments based on our response to the object, rather than any possible interest in the
object itself. So, in fact, Kantian “indifference” in this connection is better understood as disinterest.\textsuperscript{136} If indifference in Kantian aesthetics were understood as entire and holistic, then aesthetic judgment would be autonomic rather than autonomous. That is to say, we must possess some sort of interest in the object to judge it—our judgments are not supposed to be entirely disengaged—but our reactions and judgments must be free of any external or internal interest in reaching a specific result in the case of a specific object.\textsuperscript{137} At the same time, however, this account of disinterest should not lead us to believe that we should attempt to make our aesthetic judgments in some rarified sphere of recondite taste, entirely detached from our human selves. Judging requires volition, and volition requires identity. As with the rest of Kant’s aesthetic theory, where disinterest is concerned, the key is the conjunction between the subjective and the intersubjective. We must bring our individual humanity to the task of judging, and we must also view our humanity in connection with others as prospective judges of the artistic object, and of our judgment of that object:

The normativity of interpretive understanding cannot depend on a purely disinterested evaluation of its products, and so this reading of Kant’s theory of aesthetic judgment cannot accommodate the proposed disinterestedness of his pure judgment of taste. One might hold that the aesthetic dimension of human understanding can only be impure, motivated indeed by specific interests, but attempt to preserve Kant’s judgment of taste in some noncognitive realm of pure aestheticism. But there is little reason to imagine that such a land of untrammeled aesthetic value actually exists and little reason to wish for it. Few philosophers working in the field of aesthetics today . . . take strict disinterestedness seriously as a requirement of cultivated aesthetic judgment. They would allow that taste is stunted when made merely the lapdog of unreflective prejudice, and they would encourage us to approach new work with an open mind. But they would reject the quite implausible notion that we are somehow to set aside the interests that make us who we are when we enter the hallowed sphere of art.\textsuperscript{138}

Put differently, our judgments should be informed by our perspectives without being influenced by our prejudices. But to reach a judgment that can be claimed as valid for others, we must be able to claim that others can and will reach the same judgment. This claim cannot fairly be made for a judgment that reflects a personal bias. Our judgments are, again, subjective and
intersubjective. They reflect who we are as judges and help to contribute our individual perspectives through our judgments as members of a community. In fostering a claim of intersubjective validity, disinterestedness allows other members of our community to evaluate a judgment’s validity on its own merits, and ultimately to share that judgment.139

Applying Kant’s account of disinterest in aesthetic judgment to the broader themes of this book, it is helpful to consider the linguistic distinction between disinterestedness and uninterestedness.140 Simply put, someone is uninterested if she does not care at all about something.141 Someone is disinterested if she has no personal stake in the outcome, which is the definition of impartiality that I discussed earlier.142 For Kant, judgments of taste should be disinterested but judges need not be uninterested in art or aesthetics or judging.143 Indeed, conflating uninterested and disinterested judgments in this manner might seem to render the entire project of aesthetic judgment futile or pointless. After all, why would an uninterested judge bother to undertake the careful and personal response, reflection, and expression necessary to render a meaningful artistic judgment?

The distinction between disinterested judgments and uninterested judgments corresponds to the distinction in this book between impartiality and objectivity and parallels Kant’s own use of the term impartiality to describe the absence of interest that gives rise to judgments of taste.144 Kant’s use of impartiality in aesthetic judgment translates directly to impartiality as the core value of common law judging. Judicial decisions should be impartial and disinterested in the sense that judges must not have a personal desire to see one party win or lose. But judges need not be objective in the sense that is captured by the term “uninterested.”145 It is not necessary, in other words, that judges have no feelings whatsoever about the cases they decide. They need not and should not be uninterested, so long as they are disinterested.146

Disinterestedness and its contrast with uninterestedness help us to see another connection between Kant’s aesthetic theory and the theory and practice of common law judging. I mentioned earlier that an individual’s assessment of an object’s beauty consists of a subjective response together with the reflective and expressive process that results in a full and final judgment.147 To this point, I have focused principally on the second part of this equation, the communication of the judgment to the community as establishing its intersubjective validity through its claim to agreement. Now I want to highlight some aspects of the subjective response in relation to disinterestedness.148

According to Kant, aesthetic judgment begins with a subjective response
to an artistic object. But the judge must feel assured that his subjective response can legitimately be claimed on behalf of other judges. Kant believed that disinterest contributed to aesthetic judgment: as long as a judge can honestly claim that his subjective response is not tainted by any improper bias toward the object, the judge may reasonably claim the judgment as intersubjectively valid. Kant did not seek to deny the importance of our subjective response or its relationship to the feelings generated by our response to the artistic object. At the same time, however, if a judge were concerned that his reaction and judgment might be motivated by an improper interest in the object, the judgment could not reasonably be claimed on behalf of others.\footnote{149}

In this regard, Kant’s aesthetic theory mirrors the role of disinterest in common law judging. In the same way that Kantian aesthetic judgment leaves room for subjective, felt responses, so long as those responses are not biased or unduly invested in the object,\footnote{150} the common law allows and expects that the responses of its judges will play a role in the formulation of legal judgments, so long as those responses are not tainted by undue bias or interest in the case. In both Kantian aesthetic judgment and common law legal judgment, the ultimate defect of a judgment tainted by bias is its inability to claim the assent of future judges. The fact that a judge is biased does not necessarily ensure that his judgment was incorrect,\footnote{151} but it does ensure the appearance of impropriety. For Kantian aesthetics and common law judging, such an appearance is enough to undermine the validity of the judgment.\footnote{152}

**Judging Art and Law**

For those who see the ideal of judging as objectivity and disengagement, acknowledging the subjective element in judging may be discomfiting. But as I have already explained, the value of a judge’s individual responses in the process of adjudication and deliberation is central to the common law tradition. The values and viewpoints of judges are absolutely necessary in the process of judicial reasoning, in the production of judicial decisions, and in the development of the law. From this perspective, the role of taste in Kantian aesthetic judgment parallels the sense of justice in legal judgment. The cultivation of a faculty of taste refines one’s capacity to judge works of art. The development of one’s sense of justice hones one’s capacity to judge the content and application of law. In both aesthetic and legal judgments, a felt response is combined with reflective evaluation that is informed by reason and experience and expressed through a form of interpersonal communication to produce an authentic judgment about art or law.\footnote{153} This judgment
makes a claim to the assent of other subjects through an appreciation and expression of our shared human faculties. For Kant and the common law, judgments are expressed and defended not in reference to an abstract conception of beauty or justice but in relation to other cases that have already been judged, and on the expectation of others’ agreement with the judge’s own determination.

The combination of a decision reached individually and independently, which is communicated and thereby claimed as intersubjectively valid for all members of the judge’s community, animates both Kantian aesthetic judgment and legal judgment in the common law tradition. Each element of the process of aesthetic and legal judging is illuminated by considering the relationships between the processes of judgment. Subjectivity and intersubjectivity are integral to the process of judging and the value of each must be fully appreciated for the process to be fully understood.

Considering Kantian aesthetic judgment and common law legal judgment together, we find that Kant and the common law do not seek judgments that are objective either in the sense that the judge must disengage or suppress his subjective responses or that the judgment must state or seek the truth. Instead, the Kantian and common law processes of judging require that judges combine their subjective response with a reflective judgment that is claimed as valid by virtue of the form of its reasoning and expression according to the methods and sources of the community in which and to which the judgment is rendered. Provided that the judge can perform the adjudicatory function impartially and independently, without any improper interest or influence tainting the decision-making process, the judge remains free to decide for herself. That is the sort of judgment that is recognized by the community as intersubjectively valid and which best contributes to the perpetual process of understanding art and law.

In this chapter and the previous one, I argued for the conception of judicial decision making that is most authentic to the common law. This conception distinguishes objectivity from impartiality and from intersubjectivity. It recognizes that impartiality and intersubjective validity are necessary to the legitimacy of the process and the product of judicial reasoning and decision making. And it rejects strong objectivity as the means or the goal of common law judging. In the next chapter, I explore this conception in more detail by analyzing legal judgments that help clarify the relationship between subjectivity and intersubjectivity in common law decision making.