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The Changing Common Law

I am very pleased and honoured to have been asked to participate in this centennial celebration. For me, it underlines the common bonds between the people of Canada and of the United States, who, in spite of various stresses and strains, manage to live side by side in peace and mutual respect. May we continue to set an example for the rest of the world.

Until I read John Willis' very interesting history of Dalhousie Law School, I had not fully realized that I am here simply as another link in a long-standing relationship between Dalhousie and Harvard Law Schools. At the very beginning, in 1883, as Professor Willis tells us, three emissaries from Dalhousie visited the Harvard Law School, and, as a result, "there is a persistent local tradition to the effect that the School's founders drew their inspiration from the Harvard Law School." Indeed, in his inaugural address, Weldon "pa[id] a glowing tribute" to the law school in Cambridge, Massachusetts.

Dean Horace Read, Professor Willis also noted, was responsible for the view that Dalhousie Law School was "modelled explicitly on the Harvard Law School." But, says Willis, "there is no historical evidence behind the assertion." Dean Read was simply "addicted to viewing Dalhousie Law School through a rainbow, and preferably a Harvard rainbow." The evidence, he concludes, "runs in an entirely opposite direction." While the curriculum at Harvard was organized around private law subjects, the really distinctive characteristic of the new Dalhousie Law School "was its original emphasis on public law subjects — Constitutional History, International Law and Conflict of Laws."[1]

I begin this way because it underlines the fact that, as Professor Risk suggested yesterday, Canadian legal culture appears from the beginning to have been dramatically different from that of both England and America. When Dalhousie Law School was founded, the common law, like England, was at the zenith of its prestige and power. And yet, for reasons that Canadian legal historians are just beginning to explore, its private law emphasis seems to have been

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1. J. Willis, *A History of Dalhousie Law School* 31 (1979).

rejected, consciously or unconsciously. While I surely do not know enough to explain Canadian developments, I hope you will listen to my description of the common law as it existed in the late nineteenth century, keeping in mind that it has been suggested that perhaps this was the path not taken in Canada.

What have been the changes in the common law of the United States during this first century of Dalhousie's existence? The most basic change is that it is less important, both practically and symbolically. Today, it seems hard to imagine that the great state common law judges of the nineteenth century, like Shaw and Cooley, were almost as well known among their contemporaries as the constitutional giants, such as Marshall and Story. By contrast, from the time that Benjamin Cardozo of the New York Court of Appeals ascended the United States Supreme Court bench just over fifty years ago, only one common law judge, Roger Traynor of California, has miraculously transcended the obscurity to which destiny has consigned these oracles of the common law in the twentieth century. Law students in the United States can recite the names and opinions of many lower federal judges; rarely can they do the same for state common law judges.

In 1881, Oliver Wendell Holmes, Jr., could become famous by writing a very difficult book on the common law. The success of the book in fact reflected a striking revival of the cultural authority of the common law, which had laboured defensively under the shadow of anti-British nationalism from the time of the American Revolution. This powerful resurgence of the prestige of the common law was accompanied by intense nativism and anglophilism, which became one of the dominant American responses to the waves of immigration from southern and eastern Europe during the late nineteenth century.

Holmes' book was drawn from a series of lectures that traced the most complex and obscure twists and turns in the history of the common law. Yet, it appears that an educated lay audience was familiar enough with its material to be able to follow at least its basic outline. Indeed, if one looks at volumes of general periodicals published earlier in the century, such as the North American Review, one finds fairly technical arguments, directed to a nonlegally trained audience, on such topics as the merits of a common law system versus a system of legislative codification.

Today, the common law is no longer a part of general elite culture, as it was in both England and America in the nineteenth

century. Indeed, the idea that, in some sense, the common law represented an integrated system of law — that it hung together at some deep level — is no longer shared either by lawyers or lay persons, by practitioners or scholars. And the forms of legal literature reflect this.

For a hundred years — roughly those between the publication of the first volume of Kent's *Commentaries on American Law* in 1826 and Williston's text on contracts in 1920 — American legal literature was dominated by the treatise tradition. Kent's *Commentaries* was an effort to demonstrate that, in the quaint language of the day, law was a "science", or, in other words, that it was capable of generalization, systemization, and rational classification. The treatise tradition emerged in direct opposition to the codification movement of the 1820s and 1830s, which insisted that, since law was political, it should be promulgated in a democratic society by legislatures, not by courts.[2]

For roughly one hundred years, the dominance of the treatise tradition expressed the increase in the authority of the common law and its autonomy from democratic politics. This vision of the separation of law and politics reached its highpoint under Langdell's influence at Harvard Law School during the 1870s and 1880s, for Langdell based both the case method and the common law curriculum on the dogma that "law is a science."[3] The apparent refusal of Weldon to take this path at Dalhousie suggests that he rejected the sharp distinctions between law and politics and between public and private law that were becoming central to the legal consciousness in both England and America during the late nineteenth century. Perhaps the supreme manifestation of the triumph of this view of the common law in England was the extremely formalistic declaration of the House of Lords that it did not have the authority to overrule earlier precedents, a view that persisted for almost a century until it was disavowed some fifteen years ago by the law lords themselves.[4]

By 1900, the view of the common law as being self-contained, neutral, and apolitical — which is what the word "scientific" was

2. C.M. Cook, *The American Codification Movement* (1981).
3. Chase, *The Birth of the Modern Law School* (1979), 23 Am. J. Legal Hist. 329.
4. *London Street Tramways Co.* v. *London County Council*, (1894) A.C. 489 (infallibility established); "practice statement" by Chancellor, Lord Gardener (1966), 1 Weekly Law Reports 1234 (infallibility overruled); see J.P. Dawson, *The Oracles of the Law* (1968), pp. 90-95.

meant to communicate — had prevailed completely in the United States. Then things began to change. Beginning early in this century, the Progressive Movement attacked the claims that the common law enjoyed political neutrality, and associated it with the majority of the most terrible ills of industrial capitalism. Then, during the 1920s, the legal realist movement began to undermine the intellectual foundations of the claims of the common law to be "scientific".

In the crisis between labour and capital, which broke out in the 1870s and which, by the 1890s, resembled European class conflict for the first time in American history, the common law was increasingly perceived as unfair. The notorious labour injunction provided one example of the partisanship of common law courts.[5] Another example was the area of workmen's injuries, where the prevailing negligence standard was reinforced both by the fellow servant rule and the doctrine of assumption of risk. At the turn of the century, the law of torts was frequently denounced as a mere instrument of industrial capitalism, and the triumph of workmen's compensation systems in most states was, by the 1920s, a direct rejection both of common law negligence doctrine and of courts as institutions capable of the fair administration of schemes for the alleviation of industrial accidents.[6] The Progressive Movement's critique of the earlier twentieth century was thus shaped by struggles over picketing, strikes, and workmen's injuries. It culminated in the legal realist movement of the 1920s and 1930s, which denied that law and politics could be separated or that the common law could be neutral and apolitical.

Legal realism was itself an expression of important structural changes that had taken place in the position of the common law. From the time of the Civil War, there were periodic shifts in power from the states to the federal government. If judge-made common law was distinctively state law, expanded federal authority was largely a product of statutory law. Indeed, the doctrine that there was no federal common law was an important expression of the post-revolutionary Jeffersonian hostility to governmental centralization.

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5. A.M. Paul, *Conservative Crisis and the Rule of Law* (1960), pp. 104-158; F. Frankfurter and N. Greene, *The Labor Injunction* (1930).
6. L.M. Friedman and J. Ladinsky, *Social Change and the Law of Industrial Accidents* (1967), 67 Colum. L. Rev. 50.

But the shifts from state to federal authority and from common law to statute law were themselves symptomatic of still more basic change that resulted from the rise of economic regulation. Indeed, as I hope to argue, the decline of the cultural and political authority of the common law during the last century has marched hand in hand with the rise of the bureaucratic, regulatory, corporate, welfare state.

More than anything else, the common law, both ideologically and practically, reflected a preregulatory world and was thus incapable, without drastic modification, of doing more than serve as a mere appendage to any system of extensive regulation. The common law in the nineteenth century was the legal accompaniment to the vision in political economy of a natural, self-executing market system, in which, as if by an invisible hand, private greed and public welfare were brought into harmony. The common law of property, contract, and tort was thought to be simply facilitative of that system. It was private or voluntary law. It was conceived of as fundamentally different from public or regulatory law, which was not only coercive, but which in most instances was regarded as expressing the illegitimate desires of popular legislatures to interfere with a natural and neutral economic system. If public law thus represented illicit state intervention and the dangers of the unnatural redistribution of wealth, private law — the common law — was treated as a neutral expression of the natural order of things. The common law was regarded as being voluntary and noncoercive. Legal thinkers sought to argue that the twin principles of will and fault were the only legitimate basis for the state to intervene in relations between *meum* and *teum*. In short, the common law was regarded as the perfect accompaniment to the triumph of laissez-faire principles in political economy.[7]

The late nineteenth century thus represented the pinnacle of the glorification of the common law as the legal expression of political and economic individualism. Never before had legal thinkers had more grandiose aspirations for integrating wider and wider spheres of legal transactions under one heading. The law of contract, for example, was redesigned to reflect an intellectual grandiosity unheard of before. If you asked a legal practitioner in the early nineteenth century to tell you about the law of contract, he would have described the various functional classifications of the law:

7. J.C. Carter, *The Ideal and the Actual in the Law* (1890).

insurance law, the law of master-servant, the law of common carriers, and the law of sales. By contrast, in the late nineteenth century most of these areas were almost entirely subordinated to one general abstract system of contract law which centered on the new categories of offer and acceptance and consideration. In actuality, all of the other areas had yielded to the insatiable claims of the law of sales, which had become generalized to represent all of contract law. The premier example of a competitive market transaction — the sale of commodities — was projected as the paradigm for, among others, labour law, consumer law, and landlord-tenant law. This is only the most dramatic example of the surge of generalizing, integrating, and abstracting designs that the late nineteenth century legal thinkers deployed in order to render the common law a virtually exclusive system.[8]

Tort law was also redesigned and reconceptualized so as to submerge existing functional categories, such as carriers, and injuries to persons and to property.[9] Under the influence of Holmes in the United States and Pollock in England, the modern tripartite distinction between intentional, negligent, and strict liability torts was created. Both Holmes and Pollock sought further to confine strict liability to a small corner of the law of torts. They wrote articles trying to explain that the strict liability of common carriers or of the master for the tort of his servant or, indeed, of the rule in *Rylands* v. *Fletcher* were either anomolies or anachronisms in the law.[10] In principle, they wished to subordinate the entire law of torts to the negligence principle. They feared strict liability as permitting the dangerous public law principle of redistribution of wealth to enter the sacred precincts of the private law.

Whether this architectural revolution in the law was the effect of the collapse of the forms of action is a more difficult question than has been generally realized. Suffice it to say that the writ system, which for hundreds of years had presented the common law as being fragmented, compartmentalized, and extremely particularistic, suddenly yielded to a passion for systematic integration that sought to bring the common law into touch with the deepest currents in

8. G. Gilmore, *Death of Contract* (1974), pp. 97-98; G.E. White, *Tort Law in America* (1980), pp. 20-62.
9. Holmes, *Agency* (1891), 5 Harv. L. Rev. 14; *Common Carriers and the Common Law* (1879), 13 Am. L. Rev. 609; *The Theory of Torts* (1873), 7 Am. L. Rev. 660.
10. Dalton, *Rylands* v. *Fletcher: The Case in Context* (unpublished manuscript).

social Darwinism, natural rights, political theory, and the extreme individualism of the laissez-faire political economy.

Built deeply into the ideological structure of the common law was, thus, a hostility to statutory change, as being artificial interference with a natural order, and to legislative and administrative regulation, as representing the dangerous "political" effort to redistribute property or otherwise distort a neutral economic order. The central distinction between public and private law was reinforced by doctrines of civil procedure that expressed the idea that the civil lawsuit was a matter between private individuals and had nothing to do with more general social goals. Rules of joinder and standing, for example, emphasized the bipolar or private character of the lawsuit.[11] The declaratory judgment was attacked as judicial legislation.[12] Use of the common law to vindicate any so-called public interest was thought to unwisely invite judges to engage in legislative regulation. And, by the end of the nineteenth century, the "decadence of equity", as Roscoe Pound put it,[13] reflected a flight not only from the common law's more paternalist, organicist, or communitarian substantive history, but also from the more free-wheeling regulatory pattern of its own procedural history. Only in the case of the notorious labour injunction did otherwise committed laissez-faire judges embrace the regulatory traditions of equity.

It is not surprising, therefore, that the primacy of the common law should have come under attack in an age of regulation. The rise of administrative regulation in the United States, for example, was accompanied by criticism of the common law as being incapable, because of its extreme particularism and individualism, of performing sustained regulatory functions.

The legal realist movement of the 1920s and 1930s represented the effort of progressive legal intellectuals to discredit the anti-regulatory premises of the common law. Their attack on common law orthodoxy remains, fifty years later, the most powerful criticism of the contemporary ideological biases of the common law,[14] and every current attempt at reconstruction and

11. Chayes, *The Role of the Judge in Public Law Litigation* (1976), 89 Harv. L. Rev. 1281.
12. *Anway* v. *Grand Rapids R.R.* (1920), 211 Mich. 592.
13. Pound, *The Decadence of Equity* (1905), 5 Colum. L. Rev. 20.
14. E.A. Purcell, *The Crisis of Democratic Theory* 74 (1973).

reconstitution of common law argument must squarely face the legal realist attack on its foundations.

First and foremost was the legal realist challenge to the scientific, neutral, and apolitical claims of orthodox legal reasoning. Beginning with Holmes' famous attack on conceptualism — "general propositions", he proclaimed, "do not decide concrete cause" — legal intellectuals from John Dewey to Felix Cohen demonstrated the discretionary and political character of common law reasoning.[15] Whether it was the theory of precedent or the nature of legal deduction and analogy, the legal realists attacked the pretentions of orthodoxy to scientific or apolitical modes of reasoning. In the legal realist critique of legal reasoning, we see the most sustained and brilliant challenge in three hundred years to the insistence of common lawyers that law and politics could be separated. There had been nothing like it since Thomas Hobbes heaped scorn on Sir Edward Coke's efforts at distinguishing the "artificial reason" of the common lawyer from the "natural reason" of the layman.[16]

After their challenge of the autonomous character of common law reasoning, the legal realists offered a sustained attack on the values that were implicit within the common law method. First, they maintained that, in its hostility to regulation, the common law was out of touch with the needs of industrial society. By purporting to provide justice in the individual case, common law judges had rendered themselves incapable of creating general rules to regulate large numbers of cases. The structural problems of industrial society, they insisted, required a public law, regulatory mentality that was fundamentally inconsistent with subtle efforts at finding individual distinctions between cases or with seeking to identify individual fault or will in a particular transaction. Justice in the individual case was just too slow and costly.[17]

Perhaps more important, the common law had gradually been shaped to correspond to the assumption that all individuals had

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15. J. Dewey, *Logical Method and Law* (1924), 10 Cornell L.Q. 17; F.S. Cohen, *Transcendental Nonsense and the Functional Approach* (1936), 35 Colum. L. Rev. 809.

16. T. Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, J. Cropsey, ed., (1971), pp. 54-57.

17. M. Cohen, *The Basis of Contract* (1933), 46 Harv. L. Rev. 553; *Property and Sovereignty* (1927), 13 Cornell L.Q. 8; J.M. Landis, *The Administrative Process* (1938).

equal bargaining power in the market.[18] Many ancient protective and paternalistic doctrines of equity had been eliminated or deprived of vitality by the assumption of equal bargaining power. The regulatory state emerged to challenge the view of late nineteenth century freedom of contract doctrine, which held that labourers or consumers or urban tenants could in fact protect themselves in the marketplace.

The rise of the corporation to dominant economic power in the late nineteenth century undermined the individualistic premises of the common law method. Indeed, it is very striking to watch common law judges attempt to apply the individually oriented categories of will and fault to the corporation. If one wishes to locate the actual historical moment that traditional common law categories began to unravel, it is in the period during the decades after the Civil War, when the corporation became the central economic actor and the traditional common law became inpreasingly incapable of dealing with its presence.[19]

It must be understood that conceptualism and formalism collapsed in the twentieth century not because they were "wrong" in some scientifically demonstrable sense, but because they were no longer able to draw on views in science and philosophy that legitimated the theory that judges passively discovered the law. The disintegration of a religiously based theory of law, the collapse of an objective theory of causation in science, and the attacks of pragamatism on philosophical essentialism, mathematical deduction, and the integrity of categories contributed to the erosion of legal formalism.[20] I am afraid to say that I believe that not even philosophers of the stature of Rawls, Nozick, or Dworkin can succeed in putting Humpty-Dumpty together again. And so the legal realist challenge to the autonomous character of law remains with us always.

The most basic symptoms of the success of the legal realist challenge is the appearance of "balancing tests" in dozens of areas of the law during the early decades of the twentieth century. In constitutional law, in anti-trust law, in nuisance law, and in the law of negligence, balancing tests replaced formal rules purporting to

18. Hale, *Coercion and Distribution in a Supposedly Non-coercive State* (1923), 38 Pol. Sci. Q. 470; Pound, *Liberty of Contract* (1909), 18 Yale 454.
19. E. Freund, *The Legal Nature of Corporations* (1897). This is a theme that I will document and elaborate on in a book on which I am currently at work.
20. Purcell, *supra*, note 14 at pp. 47-73.

establish bright line boundaries.[21] It was Holmes who redrew the map of legal thought from a picture of class-bounded categories to a vision that all legal phenomena are arranged along a continuum.

Holmes argued, for example, that there was a fundamental conflict between property and competition in anti-trust cases that could not be solved through deductive legal reasoning.[22] Only a balancing could work. Similarly, he challenged the notion that the rights of labour could be deduced from the rights of property owners to limit picketing. Only a balance between the two prima facie legitimate interests could work.[23] Holmes is also famous for introducing a balancing test — the famous "clear and present danger" standard — into free speech doctrine.[24] In the earlier, pre-Holmes vision, each legal event could in principle be assigned to its correct category. In the post-Holmesian universe, legal reasoning must resort to balancing tests and line-drawing. Questions of kind have become transformed into questions of degree. For example, the collapse of a qualitative direct/indirect distinction and its replacement by a quantitative flow of commerce standard in commerce clause adjudication ran parallel to developments in a large number of different fields of law.[25]

The rise of balancing tests made common law courts ever more vulnerable to the charge that they were simply "doing politics", that in fact the choice of appropriate weights and measures necessary for any process of balancing is no different from what legislatures do. No longer able to fall back on a traditional system of legal thought that sought to create an immaculate distance between law and politics, common law courts became increasingly vulnerable to criticism of their underlying political values.

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21. *Schenck* v. *United States* (1919), 249 U.S. 47; *Standard Oil* v. *United States* (1911), 221 U.S. 1; *Rose* v. *Socony-Vacuum Corp.* (1934) 54 R.I. 411, 173 A. 627; *United States* v. *Carroll Towing* (1947) (2d. Cir.) 159 F. (2d) 169; Terry, *Negligence* (1915), 29 Harv. L. Rev. 40.

22. *Northern Securities* v. *United States* (1904), 193 U.S. 197 (Holmes J., dissenting).

23. O.W. Holmes, "Privilege, Malice, and Intent", in *Collected Legal Papers* (1920), pp. 127-128; *Vegelahn* v. *Guntner* (1896), 167 Mass. 92 (Holmes J., dissenting).

24. Holmes quite self-consciously modeled *Schenck* on his balancing views in negligence law and the criminal law of attempts.

25. *United States* v. *E.C. Knight* (1895), 156 U.S. 1 (qualitative distinction); *Stafford* v. *Wallace* (1922), 258 U.S. 495; *Swift & Co.* v. *United States* (1905), 196 U.S. 375 (quantitative distinction).

All of this has resulted in a more modest role for the common law in the regulatory state. As the common law has moved from its nineteenth century position as the grand legitimator of market capitalism to a more subordinate and residual role in the corporate, welfare, regulatory state, it has gradually allowed us to see that, nevertheless, there is still no escaping from its function of providing background law against which to understand and interpret statutory and administrative regulation. In much the same way as common law judges, after the abolition of the forms of action or after the merger of law and equity, could not escape the distinctions between trespass and case, general and special assumpsit, or law and equity, so too in the age of the statute and of administrative regulation it is impossible to engage in the task of "interpretation" independently of common law categories. There are now entire areas of the federal law which Judge Henry Friendly has identified as "general common law".[26] They are judicially developed rules and standards that purport to derive from interpretation of a very generally worded statute. In fact, statutory interpretation under these circumstances is strikingly difficult to distinguish from common law modes of reasoning. The process of judicial interpretation of the meaning of statutory prohibitions of, for example, "unfair competition" or "contracts in restraint of trade" may fundamentally be no different from pristine common law adjudication in the good old days. Indeed, the judiciary may now be less restrained, because it purports merely to interpret the legislature's views, than it was when it needed to take direct responsibility for "declaring" the common law. In any event, statutory interpretation creates a new opportunity for those who wish to see judging as neutral and apolitical to maintain that all that the judge is doing is simply "discovering" or "declaring" the will of the legislature. In reality, the words of a statute often constitute a Rorschach onto which the judges simply project their own fantasies of desirable policy. There are, of course, other institutional constraints. But to maintain that a coherent law/politics distinction can be made to correspond to traditional separation-of-power ideas about the distinction between legislation and adjudication strikes me as silly. The distinction between law-making and law-applying in traditional discourse describes the process of statutory interpretation in the regulatory

26. Friendly, *In Praise of Erie — And of the New Federal Common Law* (1964), 39 N.Y.U.L. Rev. 383.

state no more accurately than traditional common law judging could be represented as mere "discovery" of the law. Both involve choice among values, which is not entirely different from what legislators do.

So, like the country from which it came, the common law entered the second half of the twentieth century shorn of its former imperial glory and deprived of its aristocratic pretentions by the humdrum reality imposed by its new historical situation. While it can no longer command awe and reverence as in days of yore, there are still some who continue to speak in grandiose tones, as if the empire remains intact, and who refuse to acquiesce in a humbler and more modest role. Fortunately, these nostalgic few usually enact their delusions of imperial grandeur only on celebratory occasions, surely a more harmless means of remembering the past than going to war over distant islands, but equally as detached from reality.

Nevertheless, the common law, bowed and humbled, does continue to exact a different, more subtle kind of loyalty. As I need not remind a Canadian audience, cultural influence often continues long after the empire has been dismantled. The Privy Council commands respect long after its power to overrule is regarded as inconsistent with the dignity of a sovereign nation. And the authority of modes of thinking lingers on long after the Constitution is brought home.

So, in an age of regulation, common law method continues to structure the ways of understanding of lawyers, of judges, and of legislators. Like the effects of a common language on the structure of thought, the common law tradition affects our sensibilities at almost pre-rational levels. Here is the continuing power of the common law.