John Willis - A Tribute

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John Willis has been respected and loved in the Canadian legal community as a teacher, colleague, and scholar for decades, and one of his articles — *Statute Interpretation in a Nutshell* — is probably the best-known single piece of Canadian legal writing. The law about government was his abiding interest and the subject of most of his writing. This article is a study of this writing, especially the writing done during the 1930s. It is primarily part of an undertaking to understand the minds of Canadian lawyers, but it is also a tribute. My conclusion is that this writing was outstanding scholarship. Canadians do not easily believe that one of us has been outstanding, not only within our community but beyond, but this is my claim and my tribute.

Both his preferences, and my tastes and limitations make it a study of his writing and not a biography, but a few dates and places in his life are a useful introduction. He was born in England in 1907, and educated at Winchester and at Oxford, graduating in 1929 with a ‘double first’ in classics and jurisprudence. After teaching at a public school for a year he went to Harvard Law School for two years, from 1930 to 1932. He then returned to England, taught school for another year, and in 1933 came to Canada and Dalhousie Law School. He spent the next forty-seven years teaching at Dalhousie, Osgoode Hall, the University of Toronto, and the University of British Columbia, except for a year working for the International Monetary Fund, and five years in practice in Halifax. He retired in 1980, and now lives in Annapolis Royal.

Much of his writing was a challenge to the ideals about law that were dominant during the second half of the nineteenth century, and which can conveniently here be called the...

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John Willis — A Tribute

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1. (1938), Can BR 1.
traditional ideals. In these ideals — at least so far as Willis and his generation understood them — the law was pre-eminently common law, and its primary purpose was to establish rights and boundaries for individual autonomy. To achieve this purpose, a fundamental division was made between the public and private worlds; obligation was conceived as a product of will; and the proper form of the law was general and comprehensive rules that contained little or no discretion and that governed all individuals and the state equally. The courts and the legal profession were crucial institutions in this vision, because they were the custodians who declared and interpreted these rules. The ideals made this function apolitical, and the law, especially the common law, was perceived as a distinctive and autonomous enterprise. These ideals were fundamentally the same in England and the United States, although in England the faith in precedent, especially the authority of single cases, was more powerful, and in the United States there was a greater emphasis on conceptual thinking about systems of rules.

These ideals included ideals about law and government, which were expressed in their best-known form in Dicey's statement of the rule of law, which he first proclaimed in 1885. The rule was expressed in three propositions: first, no person should be subject to the power of the state except for a breach of the law — the common law and statutes — determined by the "ordinary courts." "In this sense the rule of law is contrasted with . . . wide, arbitrary, or discretionary powers." Second, all

2. Our understanding of these ideals is still incomplete, and — whatever the state of our understanding may be — a short summary cannot avoid distortion and oversimplification. For a couple of generations our understanding has been shaped by the accounts of the progressives, especially Roscoe Pound. Recent scholarship is illuminating, although much remains to be done to explore the complexities of the thought and the differences among England, the United States, and Canada. For the United States, see Gordon "Legal thought and legal practice in the age of American enterprise" in Geison (ed) Professions and Professional Ideologies in America, Gordon "Book review" [White Tort Law in America: An Intellectual History] (1981), 94 Harvard LR 903, and Kennedy (1980), Research in Law and Sociology 3; for England, the best description is a book review, Sugarman "Book review" ["The legal boundaries of liberty: Dicey, liberalism and legal science" a review of Cosgrove The Rule of Law: Albert Venn Dicey, Victorian Jurist] (1983), 46 Modern LR 102. Even less has been done in Canada.

3. Dicey An Introduction to the Study of the Constitution (1885), especially ch. 4.
persons, including all government officials, should be subject to the ordinary law, and their liability should be enforceable in the courts. Third, the rules of the constitution were established in lawsuits brought by private persons. In a famous article about the *droit administratif* written in 1903 Dicey proclaimed the crucial role of the courts and the common law, and in 1915 he claimed that the continuing grant of powers to government departments, especially powers to make judicial decisions, "saps the foundations" of the rule of law, although he found its salvation in the judicial supervision of government, through review for *ultra vires* and unfair procedures, and through civil actions.\(^4\)

So far as this rule of law was a description of the current state of English law, much of it was misleading or wrong. It underestimated the extent of governmental functions and discretion, and the significance of other forms of law, and it exaggerated the liability of government — an action in tort against a governmental official was less likely to succeed than an action against a private individual. Yet Dicey's statement of the rule of law was far more important as a statement of ideals than as a description. These ideals became the established creed about law and government. In England they shaped the minds of generations of lawyers — and the legal education Willis received at Oxford.

During the 1920s they were the basis of protests by lawyers against the continuous expansion of the powers of government, which culminated in Lord Hewart's *New Despotism*, published in 1929.\(^5\) Hewart claimed that there was "a persistent and well-contrived system, intending to produce, and in practice producing, a despotic power which . . . places Government departments above the Sovereignty of Parliament and beyond the jurisdiction of the Courts."\(^6\) Extensive judicial and legislative powers were being given to government departments; Parliament was failing to supervise the use of these legislative powers; statutes often seemed to forbid supervision by the courts; and, more generally, the rule of law was being fundamentally

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4. Dicey "*Droit administratif* in modern French law" (1901) 17 LQR 302, and Dicey (1915), 31 LQR 148.
5. Hewart *The New Depotism* (1929)
subverted. Throughout, Hewart proclaimed the traditional ideals and Dicey's rule of law.

The book was superficial and shrill, but it was much better journalism than it was sustained thought. In response to the prospect of its publication, the Lord Chancellor appointed a powerful committee, the Donoughmore Committee, to consider the "legislative, and judicial and quasi-judicial powers of ministers and departments," and the safeguards needed to "secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law." The committee reported in 1932 and firmly denied any threat of injustice or despotism.\(^7\) It assumed and affirmed the traditional ideals; for example, it affirmed the antithesis between law (general rules), and discretion and arbitrariness, and it expressed a fundamental faith in courts, including their apolitical functions and the traditional approaches to interpretation.\(^8\) It declared a need for delegation of powers by Parliament, and made modest proposals to accommodate these powers with the rule of law.

For delegated legislative powers, it proposed limits to the kinds of powers that could be granted, supervision by Parliament through committees, and unrestricted review by the courts for *ultra vires*. For judicial and quasi-judicial powers, it made definitions based on the distinction between law and discretion: both were powers to determine disputes and required presentations by the parties and determination of facts. Judicial decisions were characterized by application of law, and quasi-judicial decisions required the exercise of discretion. Decisions that did not require presentations by parties or findings of facts

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\(^7\) Report of the Committee on Ministers' Powers (Cmd. 4060, London 1932). The original chairman was the Earl of Donoughmore, who resigned and was replaced by Sir Leslie Scott. The terms of reference are on page 1.

\(^8\) The committee's comments on interpretation were probably provoked by one of its members, Harold Laski, who wrote a short personal "note" as an appendix to the report (at 135), in which he challenged the traditional approaches and stressed the element of choice, and recommended permitting use of a wider range of background materials in interpretation, especially explanatory memoranda. Discussions during the 1920s and 1930s attacked the restrictive rules on the use of background materials frequently, and far more often than the likelihood of opportunities to use them might have suggested. The issue might have seemed important because the use of these materials may have seemed to threaten the ideal of autonomy in a simple and dramatic way.
were administrative. The principle of separation of powers dictated that judicial decisions should usually be made by courts, and quasi-judicial and administrative decisions should be made by ministers or departments.9

The traditional ideals, including the ideals about law and government as they were expressed by the Donoughmore committee, continued to be the dominant faith in England throughout the 1930s, and the faith was not often examined, or even remembered and displayed. The lawyers, especially the academics, did remarkably little thinking and writing about law and government, and the only significant thinking that was done, and the only challenge to the ideals, was from a few scholars, especially Robson, Laski and Jennings.

While the Donoughmore Committee was deliberating, Willis was at Harvard, on a Commonwealth scholarship, and it was an exciting time to be there. Two strands of thought are especially significant for understanding him and his context. The first was thought about the nature and purpose of law generally. Early in the twentieth century, Pound proclaimed a need for a "sociological jurisprudence;" he denounced the "mechanical jurisprudence" of the nineteenth century and declared that law must openly serve social purposes. Late in the 1920's Pound himself was challenged by the realist movement, led by Frank, Llewellyn, and Cohen, which made an even more radical attack on the traditional ideals. In 1930, the appearance of Frank's *Law and The Modern Mind*, and a debate between Pound and Llewellyn10 must have made a dramatic contrast for Willis from the world he had left in Oxford.

The second strand was thought about law and government. In the late nineteenth century lawyers and political scientists had begun to study the agencies and judicial review as discrete and important topics, and by 1930 the thought was much more

9. The principle was not rigid; for example, assigning judicial decisions to departments (although not to ministers themselves) could be justified by a large volume of cases, or a need for specialization or saving of cost. But, the rule of law demanded that if judicial powers were assigned to departments, the courts should enforce a right to natural justice, and supervise decisions for errors of jurisdiction and law. The committee firmly rejected a proposal made by Robson for supervision by a specialized administrative court rather than the regular courts.

extensive and rich than it was in England, even apart from the distinctive constitutional issues.\textsuperscript{11} At Harvard, Felix Frankfurter was inspiring a generation of colleagues and students in courses in administrative law and public utilities.

Willis' BA did not entitle him to do a graduate degree and a three year undergraduate programme seemed likely to be an unattractive grind, and therefore he simply took courses he liked. He came under the wing of Frankfurter, and his first book, \textit{The Parliamentary Powers of English Government Departments}, published in 1933, was written as a seminar paper for Frankfurter.\textsuperscript{12} It was a response to the dire warnings from England about despotism, the irresponsible executive, and the passing of the traditional constitutional ideals, and its Introduction took express aim at \textit{The New Despotism}. The topic was the discretionary powers of government departments that seemed to be insulated by statute from supervision by the courts.\textsuperscript{13} These were the powers where "the constitutional shoe pinches,"\textsuperscript{14} and they had been the most common examples of the alleged despotism. Like \textit{The New Despotism}, it was passionate and eloquent, but in contrast it was based on careful

\begin{itemize}
\item \textsuperscript{11} Chase \textit{The American Law School and the Rise of Administrative Government} (Madison 1982) gives a description of the events and participants.
\item \textsuperscript{12} Willis \textit{The Parliamentary Powers of English Government Departments} (Cambridge 1933).
\item \textsuperscript{13} More particularly, three kinds of powers were examined. The first was powers to make delegated legislation that included provisions making the rules as effective as if they were part of the statute or that made confirmation by the minister "conclusive evidence" that the rules were properly made and authorized; the second was powers given to ministers to confirm "schemes," especially schemes for housing re-development, that included similar provisions to ensure validity; and the third was powers to modify statutes by order or delegated legislation.
\item \textsuperscript{14} \textit{Parliamentary Powers}, supra note 12, at 4.
\end{itemize}
research and analysis. It was praised in reviews, but it is little known today, perhaps because it seems so much limited to the particular controversies of its times.

Throughout the book, Willis observed with unusual clarity how government was changing. In the early twentieth century, the State had changed its character, had ceased to be soldier and policeman, and was rapidly becoming protector and nurse. . . . Again the rights of the community bulk larger than the rights of the individual.

But his observation went far beyond the general changes in function and sheer growth, which were obvious by 1930. He saw subtle changes in the structure and functions of legal institutions, and saw how many of the changes had been made through the accumulation of changes in procedure and administrative powers. The implications of these changes were not realized,

until there comes a day when trivial changes of procedure, cumulative in their effect, each precedent going a little further than the one before it, have gnawed their way into the fabric of substance, and the elaborate, supposedly perpetual edifice of a constitutional theory is seen to be tottering to its fall. Then and only then is a cry raised, and as if to compensate

15. Some of the reviews were, Laski (1934), 47 Harvard LR 1453 ("This is the best book that has been published on delegated legislation in England. It has learning, it is well written, and it possesses what is still rare in books of law — a graceful power of wit."), E.C.S.W. (1934), Cambridge LJ 428, MacDonald (1934), 20 Cornell LQ 536, Dobie (1933), 82 U Pennsylvania LR 198, Fuchs (1934), 20 St. Louis LR 189, Fairlie (1934), 27 American Political Science Rev. 994, Finkelman (1935), 1 U Toronto LJ (". . Mr. Willis's study remains the most outstanding contribution yet made to the subject of administrative legislation."), Sayre (1934), 19 Iowa LR 652 (". . . the best treatment of delegated legislation in England that has so far appeared . . . well written, even brilliantly written."), Corry (1934), 12 Can BR 60, Vaile (1934), 20 ABAJ 776, Robson (1934), 50 LQR 282 ("This is a book of the first importance, by virtue not only of the subject with which it deals but also because of the brilliant and profound treatment which it receives."), and Robson (again!) (1934), 34 Columbia LR 189 ("Mr. Willis's book must undoubtedly rank as the most important treatise on delegated legislation which has so far been published in the English language.").

for their blind apathy, party leaders open the flood gates of oratory and swamp the issues in swirling rhetoric.\textsuperscript{17}

Willis demonstrated through careful and extensive research in the statutes that most of the powers he was considering were narrower and more circumscribed than the attacks on them had suggested. They had an extensive and respectable history, and had not appeared suddenly in the 1920s as a result of some nefarious plot of officials. He argued powerfully and passionately that these powers were necessary for the modern state. Of course, what was necessary and reasonable was debatable, and in making this argument he demonstrated an attitude that would continue throughout his writing — a willingness to accept the modern state, a willingness to give extensive powers to government, and a great faith in expertise.

The widening of the field of government brought to the departments new legislative powers, for who else could deal effectively with matters that required special knowledge of conditions and special skill? . . . But it does not follow, as some writers have thought, that power leads to arbitrary methods; at no other time has such an effort been made to take action on the basis of fact rather than conjecture . . . . The civil service [is] the best informed and most forward-looking body of persons in England to-day. . . . The rational of . . . delegation . . . is . . . to give full play to the determinations of the expert.\textsuperscript{18}

He was determined to study "what really happens," rather than the formal legal doctrine, and he believed that the important reality of government was the daily routine of government business, and not the more dramatic conflicts in courts and Parliament.\textsuperscript{19} The major argument of the book was his belief that the test of the existence of the new despotism should be the ways in which powers had actually been used, and not the

\textsuperscript{17} Id. 9. Willis understood that changes in legislation were often incremental and cumulative, like changes in the common law, and he stated this perception long before Horace's famous article (1937), 23 Iowa LR 41. For example, "the process of generalisation, the very life of the Common Law imperceptibly goes on in the field of legislation, . . . " (at 118).

\textsuperscript{18} Id., 33, 35, 113 and 157. See also 104, 132, 153 and 159-163.

\textsuperscript{19} Id., 58. Closely associated with this understanding was a belief, which he did not develop extensively, that effective legal arrangements must be designed for particular contexts, for example, at 1557. This emphasis on facts and "what really happens" was probably stimulated by Frankfurter, see Frankfurter (1927), 75 U Pennsylvania LR 614, at 620.
ways in which they might have been used or the fate of abstract constitutional principles. He asserted that the use of the powers had not impinged unreasonably upon individual rights.

The generality of the words used is not in itself important; the proper question is what has in fact been done under those words. . . . Questions of government cannot be settled by drawing analogies from the behaviour of a pickpocket when the policeman is off his beat.\textsuperscript{20}

This emphasis on facts was one of the distinctive elements of legal thought in the United States in the twentieth century, especially the thought of the realists. Of course, lawyers cannot ignore facts, but the emphasis on generalization and abstraction in the traditional ideals seemed to diminish the significance of particular facts. Willis' concern was intense even by the standards of the realists, and his argument that the test of the existence of a new despotism and infringements of individual rights should depend solely upon what actually happened was distinctive.

Parts of this argument led into statutory interpretation, because the decisions of the courts about the terms that sought to insulate administrative action from review began to change just as he was writing. An early willingness to give the terms a substantial effect gave way to a very narrow reading that made them virtually ineffective. In discussing the recent cases, Willis squarely challenged the traditional ideals about interpretation. He declared that words did not have plain meanings, and that interpretation was not autonomous and apolitical.

The courts . . . purport to deal only with questions of power and not questions of policy; but since their decisions rest mainly on statutory interpretation, and ambiguous words derive their force not from any innate virtue of their own but from what the interpreter puts into them, these decisions are in effect judgments of a court upon what in their opinion should be the scope of executive discretion.\textsuperscript{21}

And he left no doubt that he believed the courts had been hostile towards executive powers, especially in the recent past. He did not undertake to analyze in any comprehensive way why this antipathy existed, although he did suggest that common

\textsuperscript{20} Id., 104 and 152. See also 57, 101, 104, 108, 152-56, and 166.
\textsuperscript{21} Id., 112. See also 81. His attitudes about statutory interpretation contrasted sharply with the traditional faith of the Donoughmore Committee.
law values were one of the major causes. The courts saw the legislation "through the fog of the common law."

So comes about the doctrine that statutes are to be interpreted strictly, that there is a presumption in favour of the liberty of the subject and the result of the doctrine, that it is not thought mal propos to measure modern development by the yardstick of the Case of Proclamations.\textsuperscript{22}

This understanding, coupled with a strong dislike of privilege, led him to comment harshly on some of the recent cases, which had involved attacks by property owners on orders confirming urban housing redevelopment schemes. Willis claimed that the courts delayed "great improvements" by performing their "legal acrobatics" for the benefit of "worthless slum owners."\textsuperscript{23} More generally, he argued that these attitudes made the courts inappropriate to supervise government, and he proposed a system of specialized courts. "... [W]hy should our system of government be conceived of as a pyramid with the courts at the apex...? Who shall be the final interpreters of social legislation and in what spirit shall they approach the task?" The courts had frustrated the objectives of the Parliament, and therefore "... a new system of government must be administered by those who do not draw their inspiration from Common Law analogies."\textsuperscript{24}

His perceptions of the changes in government led to the realization that these changes and the values that inspired them were inconsistent with the traditional ideals and assumptions about the constitution and law and government. He was especially eloquent and biting about the way in which lawyers managed to carry both the reality and these ideals in their heads at the same time.

... [T]he English lawyer, with his strange but quite intelligible aptitude for divorcing life from law..., failed to realize the significant changes going on beneath the trappings of legal theory. ... [T]o a lawyer a statute does not speak the living language of the day. Lawyer's ears are attuned to the accents of the forgotten past, new commands are faintly apprehended through the fog of the Common Law.\textsuperscript{25}

\textsuperscript{22} Id., 51. See also 113 and 148.
\textsuperscript{23} Id., 42, 78, and 104.
\textsuperscript{24} Id., 113, 148 and 171-72.
\textsuperscript{25} Id., 5 and 51. See also 29 and 112.
Willis returned to England in 1932 with a promise of a university position, which perished in the depression, and a year later he was offered a job at Dalhousie Law School for a year, as a replacement for a faculty member who was going on leave. He came for want of any other opportunities, and stayed. During the next two years he published two articles — one about the report of the Donoughmore committee and the other about local government in England — two book reviews, and a case comment. His next important piece of writing, *Three Approaches to Administrative Law*, appeared in 1935, and it is the piece of his writing I admire most, because it has the most impressive combination of insight, wit and passion, and an orderly framework for analysis. He began by describing the expansion of government and its institutions. The most common framework in the legal literature for description and analysis of government had been the distinction between judicial and legislative powers, but Willis saw that this framework was inadequate to accommodate the diversity of powers and functions, and especially inappropriate for the independent regulatory agency, which was becoming common in Canada and which he called a "government in miniature." He then stated his theme: "The practical problem is how to get into our constitutional structure these new institutions whose growth seems inevitable." The answer depended, "as will the


27. (1935), 1 U Toronto LJ 53. In 1942 he sent a paper to his friend "Caesar" Wright, the editor of the Canadian Bar Review, and said, "the only thing I beg of you is to not tone it down. In 1935 I wrote an article for Kennedy [the editor of the UTLJ] and he toned it down, and now . . . I find myself faced with a mass of milk and water Willis which is much more disgusting than the real article." (Wright Papers, University of Toronto Archives, Willis to Wright, December 29, 1942) I would be glad indeed to be able to read the original version.

28. Willis borrowed this effective phrase from a mid-nineteenth century article; for its origins, see Arthurs "Without the Law" *Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto 1985).
solution of most problems of administrative law, upon the approach,” and he described three possible approaches — the judicial, the conceptual, and the functional.29

The judicial approach had been frankly hostile “to the new institutions,” and here Willis expanded the analysis he had begun in Parliamentary Powers. He demonstrated the hostility by tracing its development in English decisions during the preceding half century, and he condemned the approach, more by implication than expressly, because it was inconsistent with the preferences clearly expressed by the legislatures. He suggested three reasons. First, the agencies were created by statute, but the courts were hostile to statutes as a form of law. “A statute is strictly construed. It is placed against the background of a common law whose assumptions are directly opposed to those of modern legislation.” Second the courts were faithful to the common law and the “uncompromisingly individualistic” values it expressed. The application of these values, especially as expressed in presumptions, “goes far to nullify the effect of statutes which emphasize not the rights of the subject but the claims of the state upon him.” The third reason was that the courts were “uncompromisingly hostile to the executive.”30 These reasons may have permitted the inference that if only the judges would improve their processes and ways of reasoning, the results they reached would be better. He did not expressly suggest that the results were also determined by the general social or political values of the courts or by class power, although the general mood of his discussion suggested these influences. Allegations that the courts had been unsympathetic to the modern administrative state were familiar in the United States, but in England only a few scholars, again primarily Robson, Laski, and Jennings were making similar claims. In Canada, the issue had barely been raised.

Willis also condemned the conceptual approach. His discussion was provocative and insightful, even though it was vague at some crucial turns and ultimately incomplete. His understanding of conceptual reasoning can be illuminated by a brief reference to an otherwise unrelated article he wrote about conflicts of laws, in which he described conceptual reasoning

30. Id., 60 and 61
as "the deduction of specific rules from a consistent legal theory of the nature of conflict of laws," and contrasted it to a "practical" approach that stressed "justice and convenience." In *Three Approaches*, he began by asserting that concepts were necessary elements of legal reasoning, and he gave as examples of concepts, trust, bailment, and the distinction between judicial and administrative powers. The concepts were to be applied by courts to facts to resolve disputes, but sometimes two or more concepts seemed to apply. The choice among them was an expression of values and not a product of reasoning from the "legal" premises, and the decision could only be made by resort to a theory — "really not a question of law but of political science." The forms of legal thinking often obscured the nature of this choice, and concepts became ends in themselves and fixed in particular forms of words that obscured the original purposes and the theories behind them. His major example of the limitations of conceptual thinking was the efforts of the Donoughmore committee to allocate functions of government by using the concepts judicial and administrative as though they had some firm and useful meaning.

In this discussion of conceptual reasoning, Willis had tackled deep and much-debated issues about legal reasoning. Much of the twentieth-century challenge to the traditional ideals was a denial of its vision of reasoning from general principles. From Holmes to the realists, legal thinkers asserted that the choices of principles were arbitrary, and that more than one result could be derived from any given principle. Willis shared these attitudes, although he did not elaborate them rigorously or express them in any original way. He did, however, understand how profoundly ideas could shape perceptions and conduct, and the dangers of responding to questions of values by reciting familiar and comfortable dogma.

Willis clearly preferred the functional approach, and distinguished it from the conceptual approach.

The problem put is, how shall the powers of government be divided up? The problem is neither one of law nor of formal logic, but of expediency. The functional approach

31. (1936), 14 Can BR 1, at 2 and 1.
examines, first, the existing functions of existing governmental bodies in order to discover what kind of work each has in the past done best, and assigns the new work to the body which experience has shown best fitted to perform work of that type. If there is no such body, a new one is created *ad hoc*. A proposal to empower a department to make regulations under a statute should not then, be met with the question, “Is the legislature delegating legislative power?” but rather “Is the department or the legislature itself better fitted to make a decision of this kind?”33

Lawyers cannot ignore function any more than they can ignore facts, and concern for the appropriate function of institutions without the word “functional,” existed long before the twentieth century, for example, in the doctrine of separation of powers, and the allocation of functions between judge and jury. In the United States, it appeared in thinking about administrative agencies in the late nineteenth century, and it emerged as a major and express approach in the 1930s. Willis was among the first scholars to apply it expressly and specifically to the design of the agencies. He used it to explain and justify the creation of particular kinds of agencies, for example, licensing agencies, and as the basis for proposals for supervising them. He had no doubt that some supervision was necessary, and that the courts were inappropriate, “for they have no experience of administrative policy . . .” The appropriate institution was “an independent body, composed of persons trained in the practice of the whole law pertaining to administration.”34

From 1936 to 1938 he published two articles, one case comment, and four book reviews, including enthusiastic and provocative reviews of Thurman Arnold’s *The Symbols of Government* and *The Folklore of Capitalism*.35 Willis shared Arnold’s perceptions and way with words, although he tended to be caustic where Arnold was ironic. At Dalhousie, he taught only the traditional common law subjects until 1937, when he

33. Id., 75.
34. Id., 80.
began a course in statutes and administrative law. During that
summer, he wrote a short introduction to the course for his
students, which appeared in 1938 as *Statute Interpretation in
a Nutshell*. It was both a realistic guide to understanding the
process of interpretation and a powerful attack on the traditional
faith. Its iconoclastic attitude was expressed in the first few
words, "If you are trying to guess what meaning a court will
attach to a section in a statute..." Guessing must have seemed
inconsistent with the rule of law, if not impertinent. Willis
asserted that the traditional sources and techniques did not and
could not determine outcomes in difficult cases: "No technique
has much effect on final result...". The texts on statutory
interpretation were unreliable, because they asserted "one great
sun of a principle — the "plain meaning rule... around which
revolve in planetary order a series of minor rules of
construction, and the crucial element was not any one principle
or technique, but the choice of approach. The texts took no
account of the context of place and time, and they displayed
what courts said, and not what courts did. "What will they
do, and not what they will say, is your concern." Dictionaries
and rules of grammar, such as the *ejusdem generis* rule, were
equally unreliable, because they permitted wide ranges of
choices. The plain meaning rule was rarely useful, because the
growth of social legislation made "wide and general terms"
dominant, and it usually was no more than "a device whereby
to achieve some desired result." The "golden rule" was much
the same, because the perception of an absurdity depended "on
the social and political views of the men who happen to be
sitting on the case."

In difficult cases, the courts usually chose between the
"mischief rule" and presumptions. The mischief rule was
"sensible and... thoroughly in accord with the constitutional
principle of supremacy of parliament," but it was unworkable,
because the rules that excluded evidence of parliamentary
material made it impossible for judges to determine the policy
and purpose. Again, it served merely "to achieve a desired
result." Presumptions were a "common law 'Bill of Rights'",
although many of them, for example the presumptions against

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36. *Supra* note 1
37. *Id.* 4, 2, 11, 11, and 13.
taking away property or common law rights, were opposed to the spirit of much of the social legislation, and none of them could determine the outcome of particular cases. Again, the crucial element was the approach and the attitude of the court.\textsuperscript{38}

By 1938 much had been written about statutory interpretation, and assertions that words did not have plain meanings and that judges often had a choice were far from novel. The \textit{Nutshell} was distinctive because of its effective unmasking of the traditional sources and techniques, and its emphasis on particular contexts and approaches. It gave a lawyers seeking either to guess what a court might do or to persuade a court to reach a particular result a realistic understanding of the process of interpretation. It may have seemed dangerous — and impertinent, but it contained nothing that challenged the supremacy of parliament or a rule of law, and it affirmed the obligation of courts to respect the purposes of the legislature and to make sense of a statute. However, despite its fame, it seems to me to be less perceptive and creative than \textit{Three Approaches}. . . , and less carefully ordered.

Willis' next major article was \textit{Administrative Approaches and the British North America Act}, which appeared in the Harvard Law Review in 1939.\textsuperscript{39} Its major purpose was to demonstrate that courts in England and Canada had imposed limitations on administrative powers that were similar to the constitutional requirements of separation of powers and due process in the United States. These limitations had been imposed despite legislative supremacy, through interpretation of statutes and the British North America Act. The first part discussed the possibility that a faith in the separation of powers might support common law limitations on delegated legislative powers (delegated legislation). In the United States limitations had been imposed in the late nineteenth and early twentieth centuries and had been ressurrected in the late 1930s. The Supreme Court of Canada and the Privy Council had approved these powers, but had left open the possibility of imposing limits. In 1937, trial courts in British Columbia and Alberta had characterized grants of wise rule-making powers as abdications of the legislative function, although an appeal to the Privy Council

\textsuperscript{38} \textit{Id.}, 14, 15 and 17  
\textsuperscript{39} (1939), 53 Harvard LR 251.
had upheld the particular powers. Willis thought that limits might still be imposed, although he did not explore their nature or extent. The second part of the article discussed Section 96 of the British North America Act, which provided that the federal government “shall appoint the Judges of the Superior District and County Courts in each Province.” The original purposes of this section are obscure, but it had been interpreted by the courts as forbidding the provinces from granting at least the powers that were exercised by Superior Court judges at confederation and perhaps from granting powers to perform any “judicial” functions at all. Willis argued that this interpretation strained both the terms and any possible purposes of the section, and was a product of the courts’ desire to protect their accustomed authority. “We can only . . . marvel at the way in which deeply held political beliefs succeed in establishing themselves in the most unlikely phrases of constitutions.”

The last and most important part considered the work of the courts in review of administrative action. He expanded the insight, which he had introduced in the *Nutshell*, that the courts had created a “common-law bill of rights” and here he used the presumptions about access to the courts, and about procedure as examples. He argued that use of the presumption about access in interpreting privative clauses demonstrated a lack of respect for the declared preferences of the legislatures, and that the courts had again sought to protect their accustomed power.

To set up the presumption on the teeth of [the] legislative history is to fly in the face of the legislature. . . . They now use it . . . as a means of controlling an expressed intent of which they happen to disapprove. The presumption is now, in substance, a rule of constitutional law masquerading as a rule of construction.

The presumptions about procedure expressed important values, although Willis wondered whether in recent cases the courts had diminished the range of choice were permitted to exercise agencies and begun to require a trial-type hearing

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40. *Id.*, 271.
41. *Id.*, 274 and 281.
42. *Id.*, 276. Again, he was the first Canadian scholar to present an insight that eventually became part of the common stock; see Evans, Janisch, Mullan and Risk *Administrative Law* (Toronto 2ed 1984) ch. 11.
regardless of context. The observation that the results courts reach in England, the United States, and Canada — especially in administrative law — are often similar despite deep constitutional differences is now commonplace, but Willis was the first scholar to express it coherently, and his phrase — "a common law bill of rights" — is wonderfully expressive.

In 1941 he edited a collection of essays, Canadian Boards at Work, for which he wrote a preface and short introductions to several parts. The purpose was to give "a description of what Canadian boards in fact do." In the preface, he described the growth of the administration more extensively than he had in Parliamentary Powers. Governments had undertaken a "creative role" and legislature and courts were unable to provide "creative realization of policy . . . continuous realization of policy . . . and specialized knowledge . . ." In Canada, the independent commission had become the dominant form of administration, perhaps because Canadians had a "horror of 'politics'" and this form "helps to preserve the illusion that questions of policy can be 'kept out of politics.'" He returned to his emphasis on commissions as 'governments in miniature,' and stressed the diversity "in history, object and methods of operation."43 Again he stressed discretion, and saw that legislature often left development of policy to the agencies.

If anybody asks what, exactly, the legislature thought it meant by the indefinite expressions 'unjust discrimination' or 'public convenience and necessity there is no difficulty about the correct answer; it meant nothing. Their 'meaning' was deliberately left to the boards; the boards were expected to put into these expressions the 'meaning' that experience demanded; they were expected, in the economist's language, to invent their own economic theory, or in the language of a lawyer, to find their own law. And this they have done — with the result that we have in Canada an impressive body of administrative case law, which owes nothing to legislatures and practically nothing to courts but is not nearly as well known as it deserves to be.44

But the major theme of his contributions was the emphasis on what boards do; "who, except a lawyer or a political theorist, cares what any board conceptually ‘is’ as long

43. Id., v-viii.
44. Id., 69-70.
as he knows what it in fact does?” No simpler statement of the functionalist creed could be made. He pursued this theme in two contexts — control of the agencies, and their procedures. About controls by the courts and the legislatures he said, “In practice these controls are almost always unreal . . . but the absence of the traditional safeguards does not mean there are no safeguards at all; the professional pride which is not peculiar to judges and the glare of publicity which beats more fiercely on boards than it ever does on courts well be substitutes.” He returned to the argument he made in *Parliamentary Powers* — “too much attention is paid to what boards are permitted to do on paper and too little to what the individual board really does in real life . . . which boards in fact behave irresponsibly and how and when, is the only question which there is any point in answering.” The effect of studying what really happened would “exorcise the bogey of the ‘new despotism’ with which Lord Hewart and others have tried to frighten us.”

His analysis of procedures perceived clearly the problem of the appropriateness of procedures and the limits of the trial-type hearing. Most lawyers “assume that in the orthodox hearing before a court the technique of fair-minded investigation has reached a fixed and final form.” He specified some of the pressing problems of procedure, for example, the utility of lawyers, the representation of the public interest, the need for openness, the utility of the common-law rules of evidence, and the difficult balance between designing distinctive procedures for the particular contexts and having uniform and familiar procedures to enable lawyers to participate without being specialists.

Problems like these — and these are the real problems of administrative procedure — cannot be met by the quoting of concepts culled from the philosophic blue; they can only be resolved by facts, finding out what actually goes on, and by experience, doing something and then seeing what happens.

45. *Id.*, 2, 66, 70 and 71.
46. *Id.*, 117.
47. *Id.*, 119.
His perceptions of the issues to be thought about, especially the function of agencies in elaborating policy, the effectiveness of different kinds of controls, and the procedural needs and problems, was better than anything being written in England or Canada, although it was not as sophisticated and sustained as the best writing in the United States.48

Early in the early 1940s he wrote two more articles about law and government — Section 96 of the British North America Act (1940) and Delegatus Non Potest Delegare (1943).49 Both were utterly different from the writing I have already described, because they were straightforward and straightfaced expositions of doctrine.50 They demonstrated a powerful ability to see patterns and trends in cases, and to organize and generalize, but this ability alone would hardly make him worth writing about now.51 They are an expression of a faith, which appears in other passages in his writing, that doctrine can make sense. They also demonstrate an ambivalence about lawyers. Despite the implications and power of his own writing, he often took the lawyers' enterprise seriously and wished them to take him seriously. He acknowledged this ambivalence in 1969 in a convocation address entitled “What I Like and What I Don't Like about Lawyers.” He explained his title by saying “I have, all my working life, been torn between admiration and dislike

48. See, for example, Landis The Administrative Process (New Haven 1938), and a symposium, (1937), 47 Yale LJ 515.
49. (1940), 18 Can BR 517, and (1943), 21 Can BR 267.
50. When he sent “Section 96” to his friend “Caesar” Wright, the editor of the Canadian Bar Review, he said, “I have sternly repressed my incessant desire to be funny or caustic about constitutional law.” (University of Toronto Archives, Wright Papers, Willis to Wright, June 19, 1940).
51. See Evans, Janisch, Mullan and Risk, supra note 42, at 264, where a passage from “Delegatus non potest delagare” is used to present the basic ideas about delegation. Another example of this ability is contained in the letter referred to in note 50, supra. He said that if he had a secure future at Dalhousie — he feared for its very existence — he would try to write a book on “judicial control of administrative authorities, which would deal with such matters, inter alia as certiorari, persona designata, jurisdictional fact, bias, and a host of other matters which have to be dug out at the present from the most unlikely articles in Halsbury . . . This book could be based largely on a course I give on Judicial Control here . . .” In short he perceived “administrative law” as a discrete and unified subject long before DeSmith wrote Judicial Control of Administrative Action, and made it apparent to the English. This perception probably began in his experience in the United States.
of the whole lot — what in the jargon of today would be called love-hate relationship."  
In the decade from 1933 to 1943, Willis wrote a total of twenty-two items — two books, nine articles, two case comments, and one letter to the editor. Almost all were about law and government, and they expressed the thoughts and beliefs he held throughout his working life. The performance is remarkable, and it is all the more remarkable considering a heavy teaching load, administrative responsibilities, and worries that his school might vanish overnight and with it his job. It was the best writing about law and government done in Canada in the 1930s, by lawyers, political scientists, or historians, and it was the best common law scholarship of any kind. It deserves to be compared to the best writing done in England and the United States.

His later writing elaborated these beliefs and widened into other areas, especially criminal law, taxation, and legal education. For the purposes of this study, four of the later articles can usefully be discussed and they can be divided into two pairs. The first is Administrative Law in Canada, written for an international conference in 1961, and Canadian Administrative Law in Retrospect, the Cecil Wright Memorial Lecture at the Faculty of Law at the University of Toronto in 1974. The first was an attempt “to describe in a dead-pan and non-polemical way for non-Canadians what seemed to me to be distinctively Canadian attitudes and methods.” It served its purpose, but here it is interesting only for observations about the ways in which the experience in Canada combined the

52. Willis “What I like and what I don’t like about lawyers” (1976) 76 Queen’s Quarterly 1, at 53.
53. See his own history of Dalhousie — A History of Dalhousie Law School (Toronto 1979), Part II, Section Four.
54. This may be a debatable claim, but this is not the appropriate place to defend it thoroughly. Most of the writing in the journals was description and formal analysis of doctrine, and the efforts to do more were dominated by uplifting but vague invocations of Pound and Cardozo. There are some sparkling exceptions, especially in some of the writing by Wright, the young Laskin, and Kennedy (whose vision is underestimated), but none of them produced as much original and insightful scholarship during the 1930s as Willis.
55. A list of his publications is given in the appendix.
56. (1961), 39 Can BR 251, and (1974), 24 U Toronto LJ 225,
57. Id., 251.
experiences in England and the United States, and for a provocative guess about Canadian legal history:

Administrative law has never raised in Canada the storms of public controversy that it did in England and the United States. The reason may be that Canada has never been is not and never could be a laissez-faire state.\textsuperscript{58}

The observation is correct, and the explanation parallels much of the thinking of the historians at the time, although the full explanation must include consideration of ideologies and the power of economic interests.

The "Retrospect" summarized much of what he had thought throughout his life. He warned his audience that he was a "government man," a "legislation man," and a "what actually happens man." He contrasted "what really happens" to the "theology" of administrative law" and he made this plea to his audience: "Do not, I beg of you, be global and theological: be specific and practical. . ." He also made a telling observation about narrowing visions of scholarship and teaching. He said that any administrative law course given in the 1970s "will always be far more professional and far less political-science oriented today than it would have been in the thirties. . ."\textsuperscript{59}

In the second pair of articles Willis fought dragons that he had fought long ago on the battlefields of the 1930s. The first was a case comment about \textit{Canadian Wheat Board v. Hallet and Carey} and a letter to the editor in response to two attacks that it provoked,\textsuperscript{60} and the second was \textit{The McRuer Report: Lawyers' Values and Civil Servants' Values},\textsuperscript{61} which was a review of the first volume of the McRuer Report. Both were full of exaggerations and oversimplifications aroused by the heat of battle, but they have passion and insight that are still striking and useful. The \textit{Wheat Board} case arose out of the readjustment of the economy after World War Two. The National Emergency Transitional Powers Act gave the government power to "make . . . such . . . regulations as it may . . . deem necessary or

\textsuperscript{58} Id., 253.
\textsuperscript{59} Id., 225-28.
\textsuperscript{60} "Case Comment" [Statute interpretation — real constitution versus lawyer's constitution — form versus substance — courts and public law — \textit{Canadian Wheat Board v Hallet and Carey and Nolan}, [1951] 1 DLR 468 (1951), 29 Can BR 296, and "Letter to the editor" (1951), 29 Can BR 580.
\textsuperscript{61} (1968) 18 U Toronto LJ 351.
It decided to raise the floor price of barley, and, in order to avoid permitting commercial dealers to reap windfall profits, sought to expropriate the grain they held, pay them the old floor price, and resell it to them at the new price. Nolan, a dealer who lived in Chicago, challenged the regulation that implemented this policy, and the Supreme Court declared it ultra vires.

Willis was outraged by the result in favour of "the Chicago Hampden," and more outraged by the reasoning, and especially by its "appalling air of unreality." He alleged two reasons for this unreality. The first was "the symbolical language of the law," which was "harmless enough if not allowed to conceal realities," but unfortunately, the courts "from time to time . . . pass imperceptibly from the twilight of this symbolical language of the law into a Stygian fairyland peopled by bogies of dead tyrants." Issues about the modern state perceived as battles between Lord Coke and the Stuart despots. The second reason was presumptions, especially the presumption about property, which led lawyers "to read measures implementing the twentieth century constitution through the spectacles of the nineteenth century constitution." All of this learning about the "lawyers constitution" had led the Supreme Court to be "unerringly wrong" in asserting the intention of the legislature, "which it is their constitutional function to implement." Willis did not explain how he determined the intention, but presumably his reasoning was that avoiding windfall profits was an incident of "controlling prices." He was torn about the prospects of an appeal, because it might bring a sensible result at the cost of damage to the newly-gained independence of Canadian courts. Whatever his preference might have been, the Privy Council vindicated his reasoning and reversed the Supreme Court.

62. He did not deal with an issue raised by Rand J, whose judgment was the only one that did seem to him to take account of the twentieth century realities, but who joined the majority, because the regulation did not obligate the government to offer the barley to the dealers, and was therefore not limited to the permitted purposes. Nor did the Privy Council deal with this issue.

63.Id., 229, 239, 302 and 303.
Two lawyers wrote separate letters to the editor, before the Privy Council decision might have given Willis some claim to respectability, and shared the same horror at what he had said. To them, the choice at stake was between the rule of law and totalitarianism, and between private enterprise and socialism, and there was no doubt which choices they attributed to Willis and preferred themselves. Review of the agencies by the courts stood between civilization, and totalitarianism, Hitlerism, and Stalinism. “Freedom in thought and speech must go hand in hand with a free economy, . . . in which there is some respect for private property . . . . It is not yet a crime to make a profit.”

Willis did not recant. In his reply, he restated his beliefs even more passionately, especially his beliefs about “the immense gap between the legal theory of the State and the State as she actually operates — a source of perpetual astonishment to the bewildered layman,” which, he illustrated by saying, “It is not yet a crime to make a profit, is only perfectly true in an economy which knows not price control.”

The review of the McRuer Report demonstrated the same spirit. In 1964, the Honourable J.C. McRuer, then Chief Justice of the High Court of Ontario, was appointed a commissioner to enquire into “personal freedoms, rights, and liberties.” In 1968 he submitted his first report, which was composed of three volumes. The first was a statement of general principles, and it was an elegant and uncritical expression of faith in the traditional vision of the law about government and the basic common law principles of administrative law doctrine. The second volume was about the courts and the third was about specific governmental functions, such as expropriation and professional regulation.

In his review, Willis observed a difference between the “abstract and legalistic” tone of the first, and the “practical and sensible” tone of the second and third. He saw the first as “characteristic of the ‘establishment’ side of the thirties,” and wished for “a posse of Davids,” to fight the Goliath. He fought against the preoccupation with “ideology,” rather than the

64. Id., 552, 578, and 580. These attacks were similar to attacks made on the realists at the end of the 1930s.
65. Id., 583.
question "who is now getting hurt by what and in what ways," and against a bias in favour of lawyers' values — individual rights, the common law, and the courts. He summarized the entire approach of the volume in his discussion of judicial review by saying "the Commission, however, once again approaches its problem globally, ideologically, and legalistically." His comments were not unfair. The general approach of the commission was dominated by lawyers' thinking, and it failed to consider some of the basic issues of the modern administrative state, for example, procedures for policy-making and the ways of making the exercise of discretion efficient and humane.67

Willis' thinking about law and government can best be summarized by dividing it into three parts. The first is his observations and attitudes about government and its institutions, which were expressed in almost every piece he wrote, and especially in Parliamentary Powers and Three Approaches. He perceived the nature and extent of the expansion of government, and its implications for the structure and functions of the legal institutions. He perceived a changing relation between the individual and the community, and how legislative policies were expanding the claims of the community against the individual, and circumscribing common law powers.68 He seemed enthusiastic about these changes and about the erosion of the traditional ideals, although he never declared this enthusiasm openly. He had a great faith in experts, and he believed the courts should give liberal scope to the agencies on review. He expressed this attitude best in 1951: "the judges ... [should] exercise this exceedingly delicate power with understanding and restraint; for it is the power to interfere with the normal functioning of a government system of which in these democratic days they are the least important arm."69 This first part of his thought was the least original part and least developed.

67. "The McRuer report ..." supra note 61, at 351, 356 and 359. Some evidence of the narrow visions of scholarship in the 1950s and 1960s, which he had politely suggested in the Wright lecture by talking about the scope of administrative law courses, is that he was the only academic to write in a substantial way about more than doctrine and technical detail in considering the report.
68. In his later writing his respect for the claims of the community led to some strong arguments against civil liberties.
69. "Letter to the editor" supra note 60, at 585.
The second part was his functionalism and his concern for facts and "what really happens," in contrast to the abstractness of the traditional vision, its faith in comprehensive rules, and its preoccupation with doctrine, especially common law doctrine. In its most general form, this concern was a belief that facts were crucial to knowledge and understanding, and its more simple and specific form was the argument that the new despotism must be tested by looking at the exercise of powers and not their mere existence. Institutions should be assessed and designed according to their functions, and administrative law scholarship, in particular, should not be limited to abstract analysis of the doctrines of judicial review. The most useful subjects for study were confined and specific ones, and the most effective legal arrangements were ones designed for particular contexts. In 1968 Willis declared "the principle of 'uniqueness' is the principle for me."

The third part of his thought was a challenge to the traditional ideals for legal reasoning. In its most general form this challenge was a skepticism of conceptual thinking, and this skepticism was demonstrated most effectively in his analysis of the work of courts in statutory interpretation and review of administrative action, rather than in abstract speculation about the nature of legal reasoning. He argued that interpretation and review were not apolitical and autonomous, and that the traditional doctrines and techniques did not determine results and often masked choices made by courts. He described some of the patterns and trends the choices made, especially the courts determination to protect their vision of the constitution and their own power. His explanations of these results usually emphasized institutional considerations, for example, the common law and its values, the general faith in the traditional constitution, and the rules about the legitimate sources of meaning in statutory interpretation. He also asserted that the values of the courts themselves determined results, but he did not generalize about the nature of these values and he did not expressly discuss power or class.

The most distinctive form of his challenge to the traditional ideals were his comments about the constellation of ideals he called the lawyers' constitution — the rule of law, the separation

of powers, the primacy of courts, the distinction between judicial and administrative powers, and the rules about interpretation. This constitution masked unstated assumptions and values, and it was inaccurate, unworkable in the modern government, and inconsistent with democratically-declared values. His most effective insight was the way in which lawyers divided their thoughts to accommodate both the constitution and reality. This insight appeared first in *Parliamentary Powers*, and he expressed it best in 1943 in a comment about *Duncan v Cammell, Laird & Co. Ltd*.

I used to write articles attempting in my feeble way to inform the legal profession of the facts of modern government. That was an impertinent thing to do because they were even better informed on them than I was myself; but it was also ... a useless thing to do because the lawyer seems to have two sides to his mind, one of them taking note of what really happens in government which he uses for every day life, and the other unconsciously disregarding the facts of modern government which he uses when he comes to talk law.71

Although Willis never used the word "ideology," all of this analysis was an striking demonstration of how ideas shape perceptions and understanding.

His writing did not express a comprehensive jurisprudence or a substantial programme for reform, and it contained internal contradictions, and excesses and limitations, some of which were the product of sheer exuberance. In retrospect, the faith in government and expertise did not consider adequately the difficulties of controlling the expert and the bureaucracy, the need to order the exercise of discretion, and the tangle between politics and expertise. The functional approach was not elaborated sufficiently to be much more than an exhortation, and the stress on facts did not consider the need to fashion some ordering conceptions that made facts significant or the great difficulties of designing and doing the kind of research he called for. The analysis of judicial reasoning did not offer a consistent account of the roles of doctrine. Some passages seemed to imply that doctrine had little or no effect and that results were products of the beliefs and values of the courts. Other passages seemed to imply that doctrine did have a

substantial effect, although the nature and effect of the effect was not explained, and some articles and comments were entirely exposition and analysis of doctrine. But ultimately the greatest value of his thought is not the creation of a jurisprudence or a programme. The value is the challenge to the traditional ideals. Much of these ideals remain and much of them are valuable, but they have been transformed. Our understandings of law are different, and the kind of challenge Willis made marks much of the difference.

Context can illuminate the nature and stature of his thought. One of the widely-held propositions about Canadian legal history is that we did not have a realist movement, and doubtless we did not have the kind of transformation that the United States experienced. But we did have at least one realist — John Willis. He would protest at this label, because he would not like being labelled at all, and because he did not participate in any way in the realist movement as it — defined itself. And it is, I suppose, a little late to revise the list of heroes and add an outsider. My assertion is, though, a useful beginning to understanding his context.

Who were the realists? They were a group of academics, most of them at a few eastern law schools, who built on earlier elements in American legal thought, especially insights of Holmes and the sociological jurisprudence of Roscoe Pound, and on general trends in the social sciences, especially scientific naturalism, which professed a mistrust of abstract logic and conceptual systems, and a faith in knowledge derived from observation and experiment. Its crucial assumptions were objecivism, particularism, and functionalism. Against the background the realists made a transformation in American legal thought. They were not a unified school, and a short list of their characteristics may suggest more unity than is justified, but it is useful nevertheless. They believed that law must be openly and thoroughly instrumental, and they challenged conceptual reasoning and the vision of an apolitical and autonomous common law. They criticised the results the courts had reached and ultimately the values that produced these results. They mistrusted general and comprehensive approaches

72. See Purcell The Crisis of Democratic Theory (Kentucky 1973) for an account of the intellectual background of the realist movement
and solutions, and they stressed the importance of facts and particular contexts. And they did not, in the end construct an enduring and comprehensive programme. Does not this list also describe Willis?

Despite these similarities, the influences that shaped his approaches and ideas are difficult to determine. His writing — the topics he chose, his style, and its organization and sources; his relative isolation in Dalhousie; and his later recollections all suggest that he did not steep himself continuously in the current legal literature and that his ideas were not derived from any specific source. His experience at Harvard and especially the exposure to Frankfurter, shaped much of his thought, especially his interest in the law about government and his determination to study "what really happens." But he was not merely a faithful follower. The elements of his thought that distinguished him from Frankfurter and that he shared with the realists were obviously not a product of a common cultural and educational background with the realists — his background was much different. These elements may have been formed long before he became a legal scholar, in his youth and education in England. He may also have grasped the currents of social science thinking that were "in the air" through his general reading. He read widely outside the law, and in a convocation address given in 1973 he advised the graduates to read. "What you must do is feed your imagination; don't read respectable things like biography and history; read verse, read novels, . . . read anything that makes you see into the life of things." 73

His writing had little influence in its own times. The courts and practicing lawyers either ignored him or considered him a dangerous radical. One example is a poignant irony. At the time he wrote Three Approaches, and its attack on conceptual reasoning in administrative law, the courts in Ontario embraced a thoroughly conceptual approach to the distinction between judicial and administrative functions that shaped Canadian administrative law for decades.74 The greatest understanding and influence of his writing came long after the 1930s, and my impression is that the expansion of visions of legal

73. (1973), Law Society Gazette 235, at 238.
74. This episode is described briefly in Risk (1984), 9 Dalhousie LJ 31, at 46.
scholarship during the past decade has made teachers and students respond more enthusiastically to it than they did during the 1950s and 1960s.

My tribute to John Willis is almost done, and one of his own conclusions can be my conclusion. At the end of his letter to the editor about the Wheat Board case, he said,

My Nolan comment has obviously set up an emotional disturbance in the breasts of [the two critics]. I think I know why. I believe, and have believed for years that our constitution is changing and that no banging of constitutional bibles is going to stop it. As for me, I wish I was as “enamoured” of the “brave new world” as [they] think I am; but at any rate I refuse to be like [them] “walking backward into the future lest a worse fate befall them.”

I pay tribute to the wit, the insight, and the courage.

75. “Letter to the editor,” supra note 60, at 585.
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JOHN WILLIS


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