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## Canadian Law Teachers in the 1930s: "When the World was Turned Upside Down"

Richard Risk  
*University of Toronto*

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*During the 1930s, scholars in the Canadian common law schools introduced fundamental changes in ways of thinking about law, changes that made one of them, John Willis, say, "the world was turned upside down." These scholars rejected the past, especially the English legal thought of the late nineteenth century. Instead, they were influenced by changes in the United States, which began early in the century, and by the emerging regulatory and welfare state. In private law subjects, Caesar Wright was central, using American ideas to challenge the dominant English authority, especially in his writing about torts. In public law subjects, the major figures were Willis, W.P.M. Kennedy, Alex Corry, and Vincent MacDonald. They made devastating attacks on the decisions of the Privy Council about the division of powers, made imaginative proposals about statutory interpretation, and justified the emerging administrative state against the challenges of critics such as Lord Hewart. At the end of the decade, Bora Laskin embodied the accumulation of these ideas, and at the same time incorporated tendencies that became dominant after the War.*

*Pendant les années 1930, d'éminents juristes des facultés de droit canadiennes ont introduit des changements fondamentaux aux façons d'envisager le droit, changements qui ont fait dire à l'un d'eux, John Willis, que le monde avait été totalement chamboulé. Ces juristes ont rejeté le passé, en particulier le raisonnement juridique qui prévalait en Angleterre de la fin du dix-neuvième siècle. Ils ont été influencés par les changements qui se produisaient aux États-Unis depuis le début du vingtième siècle et par l'émergence de l'État réglementant et de l'État-providence. Dans les domaines de droit privé, Caesar Wright a été un acteur central, utilisant les idées venues des États-Unis pour contester la domination des arrêts de principe prononcés en Angleterre, en particulier dans ses textes sur le droit de la responsabilité. Dans les domaines de droit public, John Willis, W.P.M. Kennedy, Alex Corry et Vincent MacDonald ont été les figures dominantes. Ils ont lancé des attaques dévastatrices contre les décisions du Conseil privé sur le partage des compétences, ont avancé des propositions originales quant à l'interprétation des lois et défendu l'émergence de l'État administratif contre les contestations des critiques comme Lord Hewart. À la fin de la décennie, Bora Laskin incarnait l'accumulation de ces idées tout en y incorporant les tendances ont dominé après la Deuxième guerre.*

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\* Professor of Law Emeritus, Faculty of Law, University of Toronto. I wish to thank Jim Phillips for reading early drafts and making suggestions, and Philip Girard, not only for suggestions but for letting me read drafts of his forthcoming biography of Laskin.

### *Introduction*

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### *Perspective*

#### *Introduction*

This paper is a study of the scholarship done by the teachers in Canadian common law schools in the late 1920s and the 1930s. A few of them are now remembered, albeit dimly, but most are now forgotten, and today, law teachers have no sense of them as a distinctive generation. Yet they produced a wide range of impressive scholarship, and introduced changes that continue to shape legal thinking. When I told one of them, John Willis, that I was interested in this period, he captured both the accomplishment and a distinctive mood in a single phrase by exclaiming that it was, “when the world was turned upside down”.<sup>1</sup> I seek to understand what he meant,

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1. All I can remember about this conversation is that it took place by phone after Willis retired, and was living in Sandy Cove, Nova Scotia.

and more particularly, to explore the changes they made in ways of thinking about law, legal institutions, and their own roles.<sup>2</sup>

At least forty individuals taught in the common law schools during this period, although many of them stayed only for a year or two before leaving to go into practice.<sup>3</sup> Some were at the forefront of changes, some followed a few gasps behind, and some continued in the established ways of thinking. A list of the ones who did distinctive scholarship, as judged both by their contemporaries and in hindsight, may be useful, even if only to recite some names that may be familiar: Vincent MacDonald, Horace Read, Forrester Davison, Sidney Smith, and John Willis, all at Dalhousie University, Herbert Smith, Percy Corbett, and Frank Scott, at McGill University, John Falconbridge and "Caesar" Wright, at Osgoode Hall, W.P.M. Kennedy, Jacob Finkelman, and Larry MacKenzie at the University of Toronto, James Corry and Russell Hopkins at the University of Saskatchewan, and Bora Laskin. (Laskin did not have a teaching job until 1940, and therefore does not quite fit into the round dates I have set for myself. I have included him nonetheless because he eventually became such an important academic and judicial figure.)<sup>4</sup>

They worked in conditions that are a far cry from the present. The teaching and marking loads were far greater than present ones. Whatever their relations with their colleagues at their own schools, they had little communication with the teachers at other schools. There were no organizations for meetings, or exchanges of ideas and information; distances were great; and their meager budgets offered little support for travel. They did correspond with each other, but not in any widespread, regular way; instead, most of the correspondence was between friends, or about administrative matters. Their major sources of ideas and information were not Canadian, but journals and books from England and the United States.

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2. I do not mean to suggest that law schools in Canada did not flourish and do interesting work before the 1930s. McGill, especially, was a sparkling school throughout the 1920s.

3. The number "forty" does not include many part-time teachers, who were typically practitioners.

4. There was only one major Canadian scholar who did not fit into my topic at all: D.M. Gordon, a practicing lawyer in Victoria, British Columbia, who wrote primarily about Administrative Law. For him, see Kent Roach, "The Administrative Law Scholarship of D.M. Gordon" (1989) 34 McGill L.J. 1.

# 1. *The Major Themes Introduced*

The distinctive moods and ideas appeared first in a few isolated phrases in the late 1920s and 1930,<sup>5</sup> and were announced early in 1931 with remarkable breadth and clarity in two manifestoes, one by "Caesar" Wright and the other by W.P.M. Kennedy.

Although Wright's given names were Cecil and Augustus, they gave way to the "Caesar" throughout his life. In 1931, he was at the beginning of a career that stretched from the late 1920s to the late 1960s. Born in 1900 in London, Ontario, he went to Osgoode Hall Law School after getting a degree in Arts at the University of Western Ontario. He then went to Harvard Law School for graduate work, and returned to Osgoode to teach in 1926. His manifesto was a talk given in January 1931, to the Law Club at the University of Toronto.<sup>6</sup> Among the audience was a Bora Laskin, then in his first year. At the very end of my paper, I shall suggest that this coincidence was a remarkable portent.

Wright began his talk by declaring a new mood:

The day of faith and credence seems going....and in its place, we have a general spirit of skepticism followed often by a move towards the empirical and pragmatic. ...Practically all legal writings of the present time are permeated with a spirit of skepticism as to all our former ideas of law.<sup>7</sup>

Law was woefully inappropriate for the "modern industrial era". In elaborating its failings, he emphasized the ways of common law reasoning. It had been autonomous from its social context, and its goals had been dominated by a quest for internal coherence and elegance. It had been "a subject to be studied and developed in and for itself". Analysis of this kind

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5. See W.P.M. Kennedy, "Theories of Law and the Constitutional Law of the British Empire" in *Minutes of Proceedings of the Fourteenth Annual Meeting of the Canadian Bar Association* (Toronto: Carswell, 1930) at 152, reprinted virtually completely in W.P.M. Kennedy, *Some Aspects of the Theories and Workings of Constitutional Law* (New York: Macmillan, 1931) [Kennedy, *Some Aspects*] (Austin and sovereignty are no longer taken seriously); John D. Falconbridge, "The Revolt of the Silk Merchants" (1929) 7 Can. Bar Rev. 23 (law should be studied as a social science); P.E. Corbett, Book Review of *Essays in Jurisprudence and the Common Law* by Arthur L. Goodhart (1931) 9 Can. Bar Rev. 451 (Austin presents only simple and rigid dogma, and is a paralyzing influence); Jacob Finkelman, Book Review of *Foreign Relations of the Federal State* by Harold W. Stoke (1931) 9 Can. Bar Rev. 603 (scholars are inclined these days to eschew theoretical discussions, and to deal with concrete problems); Horace E. Read, "The Divorce Jurisdiction Act, 1930" (1931) 9 Can. Bar Rev. 73 (the need for law to express social need and conditions, and references to Pound and Cardozo).

6. Cecil A. Wright, "An Extra-Legal Approach To Law" (1932) 10 Can. Bar Rev. 1 [Wright, "Extra-Legal Approach"].

7. *Ibid.* at 1.

— “analyzing and comparison of the rules of law themselves” was still a large part of lawyers’ work, but it was not alone enough. As well, law must be studied as “a means to an end .... The end of law must always be found outside the law itself.” He was especially concerned about the needs of business, arguing that the proper approach was “from the standpoint of what business requires from law, rather than from that of what the law demands from business.”<sup>8</sup>

Entangled with this call to make law serve the needs of contemporary society was an approach he had suggested in the phrase “the empirical and pragmatic”. The essential notion was that the law should be tested by its results. Speaking of the old beliefs that no longer commanded allegiance merely because they were old, he said, “there is, ...a demand that they work and above all produce results. ... Today our concern is not so much with what law is, but why it is and what it is for.” Closely related to this demand was an emphasis on facts, contrasted to the doctrine. “...[N]ot what the courts *say* they are doing but what they actually *do* is the important inquiry today.”<sup>9</sup>

In the past, the claims of individuals against each other and against the state were labeled rights, which were typically perceived to be hard-edged and absolute. Yet the contemporary society that law must serve was complex, changing and interdependent, a world for which these rights were entirely inappropriate. A more efficient way of recognizing and reconciling the various claims was to assign interests, which could be evaluated, adjusted and balanced.

Last of all, Wright saw the need to reform legal education, although he did not make any proposals, except to say that students must be enabled to understand the needs of business, and “adapt the formulas of a pre-commercialized age to the new situations.”<sup>10</sup>

Kennedy’s manifesto was given a few months later, in a set of public lectures at Lafayette University.<sup>11</sup> In contrast to Wright, he was at the last stage of his career — a long and remarkable one. Born in 1879 in Northern Ireland and educated at Trinity in Dublin, he began his scholarly career as an historian of Elizabethan England, publishing a small handful of books about ecclesiastical affairs. He came to Canada in 1913, perhaps because he was unable to get a job in an English University, and after spending a couple of years at St Francis Xavier College, in Nova Scotia, he moved to

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8. *Ibid.* at 15, 2, 2, 2 and 13.

9. *Ibid.* at 1, 5 [emphasis in original].

10. *Ibid.* at 15.

11. Kennedy, *Some Aspects*, *supra* note 5.

the University of Toronto. He became interested in Canadian constitutional history, and wrote a survey in 1922, which became a standard text. In the late 1920s, his interests shifted again, first to contemporary constitutional affairs, and then to a wide range of legal subjects. At that time, law was a small branch of the Faculty of Arts, limited to the upper years. Frustrated in his hopes of becoming head of either political science or history, Kennedy managed to have law made a separate department, and himself made its head — and as its head, invited Wright to give the talk that was Wright's manifesto.<sup>12</sup>

Speaking to the American audience Kennedy lamented that “[o]ur progress is slow, our legal traditions extremely conservative” and our law contains “many ancient and obfuscated features which are still far out of tune with the complex civilization of a modern state.” He feared “the dead hand of legal precedent” but saw hope, especially because “our younger lawyers are in close touch with your legal literature which has become a vast social advance-guard of legal reform.” He was pleased that “in some degree, our law is taking on a social point of view”. This word, “social,” was pervasive throughout the lectures, used in such phrases as “sociological jurisprudence”, “social standards,” “a social point of view” and “the socialization of law.” The essential idea it expressed was that the law must be “in functional agreement with social demands”; that is, it must be made to serve the needs of this society, not its own internal elegance or some past society.<sup>13</sup>

The complexity of modern life required different ways of understanding social conduct, for example, a shift away from an understanding of crime as a particular event to “a social evil which may be anticipated and prevented.”<sup>14</sup> This complexity and a new conception of the individual required that individual rights and duties should no longer be the central elements of the legal framework. Like Wright, he argued that they should be replaced by social interests, a concept that suggested overlap, accommodation and balancing.<sup>15</sup>

Law making of this kind required a thorough knowledge of social facts and values, so that law would not be based on “undigested principles or

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12. For an account of Kennedy's life and scholarship, see Richard Risk, “The Many Minds Of W.P.M. Kennedy” (1998) 48 U.T.L.J. 353.

13. “... we maintain personality as something inviolate and incommunicable and ultimate and, at the same time, we maintain that “self” must imply other “selves.” In a word, the individual and the social have a necessary reciprocal implication.” (*Some Aspects*, *supra* note 5 at 23-24.) The earlier quotations in this paragraph are taken *ibid.* at 22-23, 23, 20, and 25.

14. *Some Aspects*, *supra* note 5 at 21.

15. In speaking of the shift from rights to interests, he said, “before law takes any interests within its protection there must be a previous comprehensive survey of social values” (*ibid.* at 24).

the untried theories of social cranks.” He returned several times to this need for facts, saying, for example, that “[w]e must learn to create social machinery for making law, if law is to serve social ends ...[T]he processes of lawmaking must themselves be socialized.” And it was clear that he included courts in this requirement. Turning to the education of lawyers, he argued that “[law] must not be taught *in vacuo*, apart from the other social sciences.” Their training must include “history, economics, sociology, political science and philosophy.”<sup>16</sup>

All these new ways of thinking about law were to be in the service of a new politics: The individual, even though the basic element of civil society, must not be conceived as the autonomous individual of the nineteenth century — “the older individualism.”<sup>17</sup>

The two manifestoes shared a bundle of assumptions, ideas and beliefs, which can be gathered into five themes. The first is that they shared the sense of excitement and urgency that John Willis remembered so clearly decades later. Even though this mood is implicit in all the other themes, it is important enough to be made separate. The second, and closely related, theme was an assumption, sometimes explicit, and implicit when it was not declared, that the world was fluid and changing. Third, they rejected the past — both its ways of thinking about law and its politics. Fourth, in the place of the past, they sought new ways of thinking about law that would be — in their words — “functional” and “realistic,” and that would serve the changing needs of their own, modern, society. And fifth, they would be participants in making this new world, not merely observers. These themes were widely shared during the next decade, displayed in scores of articles, case comments and book reviews.

Kennedy and Wright also differed. Their few words about legal education alone represented a deep gulf. Kennedy sought to make a humane and liberal education, and Wright sought to prepare students to practice law. I shall not, though, explore this difference here. More important for my purposes, Kennedy considered a wider range of sources; he had less interest in common law doctrine; he considered more of the contemporary political and economic context; and he expressed his political faiths more openly — the short reference to “the older individualism” was revealing. Just as the themes they shared were widely shared among the other scholars, these differences between the two manifestoes represented sig-

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16. *Ibid.* at 21, 27 and 25

17. *Ibid.* at 21. “[W]e maintain personality as something inviolate and incommunicable and ultimate; and, at the same time, we maintain that ‘self’ must imply other ‘selves.’ In a word, the individual and the social have a necessary reciprocal implication” (*ibid.* at 23-24).



nificant differences. Together, the shared themes and the differences were what made this generation distinctive, and they are what I seek to explore.

### *A Map of What Follows*

For the most part, I will proceed by discussing a parade of scholars and their writing about a single subject, taking some of them alone and others in groups. This parade will be ordered by separating common law and public law subjects. I do not wish this distinction to serve any rigorous theoretical purposes. Instead, I wish simply to mark off writing about common law doctrine from writing about topics that entailed the extensive use of legislation, even though this legislation required interpretation. As we shall see, this distinction marks a major difference in the scholarship, which, as we shall see, was a difference that separated Wright and Kennedy.

This much is straightforward, but two long passages, which follow immediately, create the need for a map, or at least an assurance that I have a plan. Both provide essential background. The first is an account of legal thought in late nineteenth century England, which is needed because it was dominant throughout the legal profession in Canada until the 1920s, and we have already seen how much effort the scholars devoted to rejecting it. The second passage is a description of challenges in the United States to this nineteenth century thought, which is needed because one of my central arguments is that these challenges influenced the scholars greatly.

#### *1. England in the Late Nineteenth Century: The World Left Behind*

English legal thought was the predominant model for Canadian lawyers in the late nineteenth century. It has been given several names, which tend to be associated with different perspectives. For example, “formalism” is usually used by modern scholars continuing the campaign of rejection, especially in the ritual slaying that still takes place in first year classrooms. Instead, I shall use the simple term “the nineteenth-century tradition.”

The common law was its essence and foundation, pervading the day-to-day work of lawyers, their courts, their constitution, their ceremonial speeches, and their ways of understanding their work and their world. I shall limit the description here to the common law in the sense of doctrine made primarily by judges, and postpone considering the public law elements. The basic elements of this common law were its principles, arranged among subjects such as contracts and property, and ideally

consistent with each other.<sup>18</sup> Beliefs about the sources of these principles were complex and contested, but it is sufficient for me to suggest that in England, most lawyers assumed that they were induced from the decided cases, and ultimately expressed the experience of the community, elaborated by the judges. The principles changed over time, although the process of the change and the values at stake were rarely explored.

Courts determined disputes, by finding the facts and then selecting and applying the appropriate principle. Even though they changed, the principles were stable enough to enable making these decisions. The outcomes might be contested, but they could and must be reached by reasoning from the principles, independent of context, values, or social need.<sup>19</sup> A lawyer's prediction, or a judge's decision might be influenced by some considerations outside this structure of authority, but such an outcome would be a mistake — a failure to reason properly.

The primary job of scholars was to synthesize and teach these principles. In England, after the accumulation of great changes in central topics such as torts and contracts, and the abolition of the forms of action, the common law desperately needed reconstitution. A small group at Oxford, including Anson, Dicey, Markby, and Pollock, wrote great texts synthesizing the principles from this mass of cases for students and for lawyers to use in their daily work.

In Canada, these ways of thinking were adopted as a matter of course, and continued to be virtually the only way of thinking from the late nineteenth century to the late 1920s. The leading scholar was A.F.N. Lefroy, who taught at the University of Toronto, and explored questions that were pressing at the turn of the century: did judges make law, how did they make it, and what were their sources?<sup>20</sup>

This common law and its ways of thinking were an expression of political values as well as the technical apparatus for the work of a profession. In short, they were the legal structure of mid-nineteenth century liberalism, and from this perspective, the texts the scholars wrote were making or legitimating an ideology. The core tenets were that individuals

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18. In the United States, scholars tended to pursue an ideal form, in which, subsidiary principles were arranged beneath these primary ones, and the entire structure was internally consistent and coherent, without gaps or overlaps. In contrast, the scholars in England did not pursue this ideal with nearly the same rigour.

19. The obligation to follow single precedents, which was established late in the century, complicated this structure, but not in ways that need be pursued here.

20. For an account of Lefroy's life and scholarship, see Richard Risk, "A.H.F. Lefroy: Common Law Thought in Late Nineteenth Century Canada: On Burying One's Grandfather" (1991) 41 U.T.L.J. 307 [Risk, "A.H.F. Lefroy"].

were to have autonomy to make choices about their lives, free from interference by other individuals or the state, and that their liability to others was to be determined by the expressions of their wills or by conduct that failed to meet objective standards. The state, through the courts, simply enforced their choices by applying the principles, objectively and without discretion.

## 2. *American Legal Thought in the Early Twentieth Century: The Coming World*

Challenges to this thinking began in the United States in the late nineteenth century and flourished early in the twentieth century. Oliver Wendell Holmes was the beginning, albeit an enigmatic one. In a few short aphorisms — “the life of the law has not been logic, it has been experience,” and “general propositions do not decide concrete cases” — he seemed to prophesy much of what was to happen. Early in the twentieth century, scholars now labeled the Progressives emerged, in a context shaped by pragmatism, by the burgeoning social sciences, and by political turmoil and calls for a new social order. The major figures were Roscoe Pound, at Harvard Law School and later its dean, and Benjamin Cardozo, a judge of the New York Court of Appeals.

The titles of two of Pound’s articles capture much of their spirit: “Mechanical Jurisprudence”<sup>21</sup> and “Sociological Jurisprudence.”<sup>22</sup> Calling for “pragmatism as a philosophy of law”<sup>23</sup> he protested at the abstraction from social life, the pursuit of an elegant internal structure, and the faith that results could be deduced “mechanically” from general rules. The common law,

must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.<sup>24</sup>

Instead, common law reasoning should be instrumental and seek social welfare. For Pound, the objective was “putting the human factor in the central place and relegating logic to its true position as an instrument,”<sup>25</sup> and for Cardozo, “[t]he final cause of law is the welfare of society.”<sup>26</sup>

21. (1908) 8 Colum. L.R. 605 [Pound, “Mechanical Jurisprudence”].

22. “The Scope and Purpose of Sociological Jurisprudence” (1911) 24 Harv. L.R. 591 & (1912) 25 Harv. L.R. 140 & 489.

23. Pound, “Mechanical Jurisprudence”, *supra* note 22 at 609.

24. *Ibid.* at 605.

25. *Ibid.* at 609-610.

26. Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 66.

Lawyers should become, in Pound's phrase, "social engineers," a function that included paying more attention to facts and to enlisting the social sciences. Nonetheless, the Progressives believed that legal reasoning could be and should be objective. For them, the common law was a coherent structure, and systematization of its doctrine was a coherent and useful enterprise. Its principles were not rigid rules, but guidelines that governed all but a few difficult cases, which would be decided in the light of social welfare and be the impetus for change. The similarity to Wright's manifesto is both obvious and important to my story, and I shall return to it later.

In the late 1920s and 1930s, another group appeared — the Realists. Even though they created much excitement and controversy, they cannot be separated sharply from the Progressives. Their common ground makes isolating the differences between them difficult, and these difficulties are compounded by the diversity among the Realists themselves. Nonetheless, the sharpest difference was that the Realists tended to be skeptical about the coherence of the common law, arguing, for example, that its principles were intelligible only in the context of particular facts, and could not provide determinate outcomes. Instead, in deciding disputes, much depended upon the context and the judge. The Realists did not, though, deny a large element of predictability. Instead, they sought stability and objectivity in the social sphere, and turned to the social sciences, especially the behavioral sciences, for guidance for both courts and scholars.

## *II. The Common Law: The Scholarship Introduced*

Most of the writing by my scholars was about the common law, and such subjects as contracts, property, estates, and torts. Most of it was comments about recent cases, and the rest was short articles, often prompted by a case or series of cases, or book reviews. This emphasis on the common law is hardly startling. These scholars perceived their function to be not only to educate lawyers, but to support their daily work as practitioners and judges. Because the welfare and regulatory state was still in its beginnings, the bulk of this work was directed at the ordering of private affairs, and the common law and the interpretations of a few statutes that consolidated or modified it.

Most of this writing was exposition and analysis of the doctrine. Sydney Smith is a remarkable example. After serving in the War, getting a degree from Dalhousie and doing graduate work at Harvard, he returned to teach at Dalhousie in 1921, where he introduced the case method. After a few years of growing popularity as a teacher, he went to Osgoode Hall, and

returned to Dalhousie as dean in 1929. He left law teaching in 1934 to be President of Manitoba University, and later President of the University of Toronto. In 1957, he moved to the political world, becoming Secretary of State under John Diefenbaker, and died shortly afterwards.

Between 1928 and 1934, Smith wrote over eighty case comments, as well as a large handful of book reviews and a couple of short articles. The range of topics and his knowledge of doctrine were remarkable, and far beyond the reach of legal scholars today. The comments, which were no more than a few pages long, typically described the case and its context in the doctrine, and demonstrated either that it expressed an important principle in an interesting way, or was at odds with the settled doctrine. Values and social and economic implications were never considered, except for a few expressions of a faith in individual responsibility and effort.

Yet understanding Smith is not so simple as reading all these comments might suggest. In the late 1920s, he wrote to a colleague, Horace Read, that he hoped to be remembered for "molding and shaping of Canadian destiny through the instrumentality of law, rather than an erudite analysis of the rule in Shelley's case"; he spoke of "law as a social science" and hoped that Dalhousie would become a "centre of creative legal thought."<sup>27</sup> Later, in discussing teaching materials, he said that he wanted to make the students "respond to the new social idea, ... To treat legal principles as a mere tool for a livelihood ... would leave the science of law, in this new country, out of step with the mark [?] of the other social sciences, and in it lurks a social danger."<sup>28</sup>

How can these ambitions be reconciled with his scholarship? To say that he just did not understand what he was saying, or that he was not able to do what he dreamed of doing, assumes that he lacked intelligence, which was simply not true. Another possibility is that he did not have time to do the more adventurous scholarship. True, his teaching, his administrative duties, and his work as an assistant editor of the *Canadian Bar Review*, all made a remarkable load, but it doesn't explain the lack of regrets or even a few small tries. The beginning of a more promising explanation is the realization that these comments were designed primarily to assist the practicing profession. I shall seek to develop this possibility later, in discussing Caesar Wright.

A handful of other scholars did the same kind of writing as Smith,

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27. Letter from Sydney Smith to Horace Read (3 February 1939), Halifax, Dalhousie University Archives (MS 1-13, Box E-16).

28. Letter from Sydney Smith to Norman Rogers (13 January 1933), Halifax, Dalhousie University Archives (MS 1-13, Box E-19).

especially Gordon Cowan and George Crouse of Dalhousie, Frederick Read of Manitoba, and John Weir of Alberta. Among them, Read and Weir demonstrated distinctive power and thoroughness, but none of them undertook any analysis of the nature of the common law or its reasoning, described context, or looked for justification to social need or values.

The large amount of this kind of writing — modest exposition and analysis of doctrine within the limits of the nineteenth-century tradition — is hardly surprising. Even in a period of challenge and change, most of the scholars did what scholars like them had done for decades. Even though they were aware of the changes, and sympathetic to them, and even though some professed to have embraced them, their day-to-day work continued in the familiar ways

### 1. *The Common Law: Falconbridge and the Conflicts of Laws*

In the common law writing, two scholars towered over the others: John Falconbridge and Caesar Wright. In short, Falconbridge represented the world that was being left behind, and Wright represented the world that was emerging.

Falconbridge was born in 1875, and practiced from 1899 to 1915, when he began to teach at Osgoode Hall, where he stayed throughout his long career. His output was immense. Before 1940, he wrote texts on mortgages, negotiable instruments, and banking, and over sixty articles and case comments. The largest and most interesting part of this writing was about Conflicts. He was regarded in England as one of its dominant scholars, being often cited and discussed.

Conflicts was a battlefield during the 1920s and 1930s. The dominant approach was a traditional one, expressed most famously by Joseph Beale, of Harvard, the Reporter for the Restatement of Conflicts, which appeared in 1934, having been preceded by drafts, which appeared in the 1920s. At its centre was the notion of vested rights, created by the courts of one jurisdiction, which another court would enforce. The doctrine was a self-contained, internally consistent set of rules, derived from a few basic principles, such as the territorial sovereignty of nations. The English doctrine was much the same, although much less conceptual and hierarchical.

Challenges to Beale began in the 1920s, especially from the Realists. In 1924, Walter Wheeler Cook argued “[o]n the basis of actual observation of what courts have done and are doing,”<sup>29</sup> that the forum did not enforce a right created by another jurisdiction, but instead enforced “a right created

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29. “The Logical and Legal Bases of the Conflict of Laws” (1924) 33 Yale L.J. 457 at 464.

by its own law,"<sup>30</sup> and its decision must be defended entirely "on the basis of social convenience and practical expediency."<sup>31</sup> In the same year, Ernest Lorenzen challenged the enterprise of deducing the doctrine from a few basic principles,<sup>32</sup> and four years later, in 1928, Hessel Yntema argued that principles could have meaning only in particular contexts and could not control decisions.<sup>33</sup>

Almost all of Falconbridge's writing during the late 1920s and early 1930s was straightforward exposition and synthesis of the doctrine, for example, a survey of the entire subject for his text on Bills and Notes, or studies of particular corners, such as contracts or administration of estates.<sup>34</sup> Here, he was occasionally critical of particular decisions, but only for their failure to conform to authority.

Two changes appeared after the mid-1930s. First, he sought to suggest new ways of ordering the doctrine, and to make proposals for change more openly than he had before. In pursuing these objectives, he invoked a wide range of European literature, as well as the more familiar English and American sources. An example is two articles about *renvoi*, a renowned and problematic doctrine.<sup>35</sup> In the first, in 1930, he sought to demonstrate that *renvoi* was not a part of the English law by undertaking a thorough analysis of the cases.<sup>36</sup> Nine years later, in 1939, he treated it in a more expansive way, discussing individual cases less and seeking, instead, to clarify the doctrine and openly suggesting a compromise among the competing views.<sup>37</sup>

Second, and more important for my purposes, he made an effort to take account of the challenges to the traditional approach. In 1935, in a review

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30. *Ibid.* at 469.

31. *Ibid.* at 467.

32. "Territoriality, Public Policy, and the Conflict of Laws" (1924) 33 Yale L.J. 736.

33. "The Hornbook Method and the Conflict of Laws" (1928) 37 Yale L.J. 468.

34. See e.g. "Conflict of Laws Relating to Bills and Notes" (1928) 6 Can. Bar Rev. 356 & 430; "Contract and Conveyance in the Conflict of Laws" (1933) 81 U. Pa. L. Rev. 661 & 817; and "Administration and Succession in the Conflict of Laws" (1934) 12 Can. Bar Rev. 66 & 125.

35. Fortunately, for my purposes, it need not be fully described; it is enough to say that in its simplest form, it raised the specter of two jurisdictions playing ping pong — the doctrine of the first one specifying the second as the jurisdiction whose doctrine would govern the problem and the doctrine of the second saying that such a problem should be solved by the doctrine of the first one — or a third one. The question was, what should the first one do? Accept the *renvoi*, which was required by the doctrine named "*renvoi*," or solve the problem by applying the domestic law of the second?

36. "*Renvoi* and Succession to Movables" (1930) 46 Law Q. Rev. 465 & (1931) 47 Law Q. Rev. 271. Clearly, he disapproved of the doctrine, but apart from pointing out a few strange results it could cause, there was no demonstration of disadvantage or advantage, and, more generally, no reference to social need and values.

37. "*Renvoi*, Characterization, and Acquired Rights" (1939) 17 Can. Bar Rev. 369 [Falconbridge, "*Renvoi*"].

of Beale's text, he referred to the debate about the basic principle of "vested rights," and said, "It would seem better ... to say nothing about the power of a law or state to create a right, and rather to say that the proper law in a given situation should be chosen with the object of reaching a socially satisfactory result. Inevitably, each country must decide for itself what rules of conflict of laws are likely to reach such a result."<sup>38</sup>

But this was a review. In his own work, he did not integrate this approach with the general structure of his reasoning or his proposals for changes in doctrine. For example, in 1937, he discussed characterization — the process of determining "the juridical nature" of a problem.<sup>39</sup> He analyzed the nature of the question and the different contexts in which it arose, and then discussed a series of cases and problems, making only a few small references to the challenges.<sup>40</sup> His analysis demonstrated he had no doubt that characterization was an objective process. Determining the "judicial nature" of an issue might be difficult and debatable, but it did not entail any consideration of social context or values. In contrast, four years before, Cook had mocked the assumption that lines between categories had an objective existence, permitting them to be discovered by some "mechanical or logical process." Classifications were inescapably surrounded by a "twilight zone or penumbra," and meaningful distinctions could only be made by considering the purposes for which each one was made.<sup>41</sup>

Two years later, in his 1939 article on *renvoi*, Falconbridge went a bit further towards embracing the challenges. Considering the doctrine of *renvoi* generally, he disapproved of accepting it or rejecting it on "supposedly logical ... grounds." Turning to characterization he said, "it is sometimes a good thing to look before you leap," and made the radical suggestion that a court could peek at the content of a foreign law that might be

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38. Book Review of *A Treatise on the Conflict of Laws* by Joseph H. Beale (1935) 13 Can. Bar Rev. 531 at 533.

39. "Characterization in the Conflict of Laws" (1937) 53 Law Q. Rev. 235 & 537 [Falconbridge, "Characterization"]. See also "Conflict of Laws: Examples of Characterization" (1937) 15 Can. Bar Rev. 215.

40. At the outset, he referred to challenges and their quest for means of reaching "desirable social or economic result[s]" instead of "the mechanical application of rules," and then said that his purpose was the more modest one of discussing specific problems and making suggestions about the doctrine (Falconbridge, "Characterization", *ibid.* at 240). As well, he made a short reference to reaching a "socially desirable result" in making new rules for situations that did not fall within the existing ones (*ibid.* at 246).

41. "'Substance' and 'Procedure' in the Conflict of Laws" (1933) 42 Yale L.J. 333 at 334, 335. Cook did not, though, deny that most problems were comfortably within the core of a classification, and that logic was nonetheless useful.



chosen to govern the problem before it, to help it reach “a reasonable economic or social result.” He did not, though, pursue the implications of this suggestion, instead saying that they needed “further consideration.”<sup>42</sup>

In short, Falconbridge continued to be committed to the nineteenth-century tradition. He read the challenges, and respected them, but did not make substantial changes in his basic approaches. Happenstance, though, may have been significant. The challengers were some of the more enthusiastic Realists. He might have been tempted more if they had chosen some other field, and some moderate Progressives had written about Conflicts.

At the end of the decade, another major Conflicts scholar emerged, Moffat Hancock. After graduating from the law school at the University of Toronto in 1933 and Osgoode Hall, he did graduate work at Michigan, and returned to Toronto in 1937. From there, he went to Dalhousie and then to Stanford, where he became one of the major contributors to the post-war rearrangements of conflicts scholarship. He wrote little about conflicts while he was at Toronto — a review, a case comment, and an article — but enough to suggest the future of his ideas, and the difference between him and Falconbridge. In 1937, while he was still a student, he declared allegiance to the challengers, approving both Ytema and Lorenzen.<sup>43</sup> Three years later, he tackled choice of law in torts cases, especially the meaning of a notoriously vague passage in an old English case.<sup>44</sup> Seeking a “functional approach” and eschewing “purely logical deductions” and “mechanical reasoning,” he offered a reading of this passage that was grounded in basic purposes of the conflicts doctrine, for example, the interest of states in enforcing their laws for conduct occurring within their boundaries.

Within months, Falconbridge challenged this reading in a case comment,<sup>45</sup> relying on a close reading of the passage, its “natural construction,”<sup>46</sup> and the tendency of the cases. Again, within months, another case offered Hancock an opportunity to revisit the topic.<sup>47</sup> Suggesting that the English doctrine originated at a time when courts were wary about applying the law of other states, he defended the American doctrine, which was similar to his proposed formulation of the English doctrine, because it

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42. Falconbridge, “Renvoi”, *supra* note 37 at 370, 373, 374, 397. This suggestion was likely prompted by reading an article by David F. Cavers, of Harvard Law School: “A Critique of the Choice-of-Law Problem” (1933) 47 Harv. L.R. 173.

43. Book Review of *Principles of Conflict of Laws* by G.W. Stumberg (1937) 2 U.T.L.J. 449.

44. “Torts in the Conflict of Laws: The First Rule in *Phillips v. Eyre*” (1940) 3 U.T.L.J. 400.

45. Case Comment on *Phillips v. Eyre* (1940) 18 Can. Bar Rev. 308.

46. *Ibid.* at 311.

47. Case Comment on *Dalton v. McLean* (1940) 18 Can. Bar Rev. 642.

was flexible, offering the court an opportunity to distinguish between mere differences and results that were “harsh or unjust.”<sup>48</sup>

## 2. *The Common Law: Caesar Wright and Torts*

Wright needs careful study, simply because he was a major figure, arguably the dominant figure, in scholarship and education from the mid-1930s to his death in 1967. Between 1928, when he began to teach and 1940, he published about 120 pieces, the vast majority of them after 1935. Seven were articles about the common law, legal education and the profession, and the remainder were divided almost equally between book reviews and case comments. The book reviews covered a vast range of topics, including jurisprudence, biographies, and texts. The case comments were virtually all about cases involving the common law, and they too covered a vast range of topics, including torts, wills, contracts, and evidence. Amidst this wealth, the case comments were the major and the most revealing part of his writing, and among them, the comments about torts were representative.<sup>49</sup>

Many of these comments were powerful scholarship, and are all the more impressive in light of the realization that many of them must have been written in an evening or two. His most common undertaking was to criticize a court’s reasoning for being confused, inconsistent, or at odds with the established doctrine, and then to demonstrate how the reasoning should have been done. An example is his comment on an Ontario case, *Hutson v. United Motor Service*.<sup>50</sup> The claim was for damage done to a building leased by the plaintiff to the defendants, who had sought to clean the floor using gasoline, which exploded in some unexplained way. The Court of Appeal allowed an appeal from a trial judgment dismissing the action. Wright approved the result, but criticized the judgments for failing to distinguish between two different grounds of liability: negligence and strict liability. Each had its own distinct elements, which the judgments had jumbled together. Having demonstrated this confusion and presenting the proper structure of the doctrine, Wright went on to explain how the doctrine of *res ipsa loquitur*, which one judgment had mentioned in an aimless way, applied to the doctrine of negligence.

As well, Wright often criticized confusion, inconsistency, or gaps in the doctrine itself, rather than the court’s reasoning, usually proposing a

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48. Ibid. at 645. Again, he rejected the “mechanical application of verbal formula” (ibid. at 646).

49. For a survey of the entire span of Wright’s tort scholarship, see R. Blake Brown, “Cecil A. Wright and the Foundations of Canadian Tort Law Scholarship” (2001) 64 Sask. L. Rev. 169.

50. Case Comment on *Hutson v. United Motor Service* (1936) 14 Can. Bar Rev. 514.

reformulation. An example is a comment written in 1939 about *Paine v. Colne Valley Electricity Supply*, a trial decision in England.<sup>51</sup> It dealt with a question left by the watershed decision in *Donoghue v. Stevenson*, which had held that a manufacturer could be liable in negligence to a consumer. In *Paine*, a worker was injured by a defective piece of electrical equipment supplied to his employer by its manufacturer. The liability of the employer was clear, but whether the manufacturer was liable depended upon the answer to the question that had been left unanswered in *Donoghue*: what was the significance of the possibility that the employer could have inspected the equipment before installing it? Wright's proposal was that the duty of the manufacturer continued regardless of an opportunity for inspection by a stranger, and that a separate inquiry could be made to determine whether the stranger also owed a duty to the plaintiff.<sup>52</sup>

The crucial element of his proposal was a decision of the Supreme Court about the liability of an occupier of land, in which the court held that the occupier was liable to a plaintiff, even though the plaintiff knew about the danger that caused the injury (and reduced the damages by the degree of his negligence). Wright argued that this result could only make sense if the occupier's duty continued regardless of the plaintiff's carelessness. Therefore, in considering products liability, a failure to inspect by the injured plaintiff should not bar recovery, and consistency required that a failure to inspect by a stranger should be treated the same way.

This reasoning, and by implication the justification for his proposal, were derived from the basic principles of the established doctrine. Wright never challenged these principles, nor did he seek justification for his proposals in some general theory of liability, or consider the social context, for example, industrialization, the rise of the large corporation, or the Depression. He often said that the modern world was bustling, complex and changing, but he did not explain how these features shaped the doctrine or his thinking.

Nonetheless, the accumulation of comments suggests a large measure of his beliefs. The beginning was the basic principles of the doctrine: liability should be based primarily upon negligence, supplemented by

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51. Case Comment on *Paine v. Colne Valley Electricity Supply* (1939) 17 Can. Bar Rev. 210.

52. As well, he proposed that a failure to inspect by the plaintiff be considered as contributory negligence, and not a bar to recovery, not, at least, in most provinces in Canada, where legislation had established that contributory negligence was not a bar to liability and, instead, the damages would be limited by the proportion of the plaintiff's fault.

intentional torts and strict liability.<sup>53</sup> Within this structure, he preferred results that imposed liability on enterprises for the losses caused by their activities. An example is his discussions of vicarious liability, one of his favorite topics, beginning with his comment on *Kerr v. T.G. Bright*, a decision of the Ontario Court of Appeal.<sup>54</sup> The plaintiff's husband was killed by a motorcycle carelessly driven by a person whom the defendants had hired to deliver wine. Her claim that the defendants were vicariously liable succeeded in the Ontario Court of Appeal. The result pleased Wright, but the reasoning did not.

Using both English and American sources he synthesized the general principles about liability for an agent in both contract and tort. For tort, the liability was based on control — did the defendant have a right to control the conduct of the agent? Having finished this synthesis, he argued that the inconsistent results of the cases demonstrated that the notion of control was not “capable of satisfactory or uniform application under prevailing business conditions...” Instead, it was a conclusion that followed from some other considerations. Having reached this stage, he went on to assert that “vicarious liability is an economic and social, rather than a legal problem,” and that if an agent had become integrated into the defendants business, liability was “only fair.”<sup>55</sup>

He pursued this analysis of control at length in a series of comments about cases involving the liability of hospitals for the liability of nurses.<sup>56</sup> In 1936, commenting on a set of cases from England, New Zealand, and Canada, he spoke of “the futility of arguing pure control.” The results depend upon “some other factor which does not appear in the text-book rules”, and upon the answer to “a broader question, does a hospital board undertake to supply properly qualified nurses...” He did not declare his preference expressly, but it was clear enough: he believed this undertaking should be implied.<sup>57</sup>

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53. His understanding of the foundations was derived from American literature, especially from Bohlen, his teacher, and from Fowler Harper. A text by Harper appeared in 1933, and Wright's review was not only his first writing about torts, but embodied much of what he would say during the next five years. See Cecil A. Wright, Book Review of *A Treatise on the Law of Torts* by F.V. Harper (1935) 1 U.T.L.J. 193.

54. Case Comment on *Kerr v. T.G. Bright* (1937) 15 Can. Bar Rev. 285.

55. *Ibid.* at 291, 292. In the Court of Appeal, Rowell, C.J.O., had gone further, by saying that more and more business was done by corporations, who could act only through agents, who would usually be unable to pay a damage award. The employer could insure against liability, and the cost would ultimately be borne by the general public. Wright said simply that he agreed, and no more.

56. Case Comment on Hospital Liability (1936) 14 Can. Bar Rev. 699.

57. *Ibid.* at 704, 701, 703.

He did not explain or justify this preference, but not because he lacked the power to undertake the task. Instead, he was simply not much interested in theory. He did not explain or justify his preference to impose liability on enterprises for the losses created by their activities, by considering, for example, internalizing the costs of business, deterrence, passing costs on to consumers, or widespread spreading of losses, and he did not explain its relation to the basic principle of negligence. Thinking about these questions was beginning to appear in American periodicals,<sup>58</sup> but in Canada, only George Curtis, at Dalhousie University, explored them, in an article proposing loss-spreading as the basis for vicarious liability.<sup>59</sup> Outcomes of this kind shared the same basic justifications as workers' compensation schemes, which had already been established. As well, they paralleled the more explicit beliefs and programmes of the welfare and regulatory state that were being debated in the public law scholarship, for example, unemployment insurance schemes.

Having sought to understand Wright's ideas about torts, I turn to his beliefs about the common law. Here, he sought a delicate balance between three elements: the structure of principles, a need to make choices in deciding particular cases, and continual change to respond to changing social needs.

He spoke often of principles as the basic structure and content of the common law, sometimes adding such adjectives as "fundamental" or "working." They were generalizations from decided cases, and he had no doubt that they could be formulated and understood independent of any particular context, and used to decide cases. One of the major responsibilities of the profession, especially the academics, was to formulate them carefully, and to design and use precise and consistent terminology. The restatements undertaken by the American Law Institute were the outstanding fulfillment of this responsibility, one to which Wright referred often, and about which he wrote his longest piece of the decade.<sup>60</sup>

The principles were essential for deciding cases, but alone they were not enough. Wright disdained the belief that they could always simply be applied to facts to produce decisions, scorning it as a "slot machine" or "static or mechanical" conception of deciding. This disdain, usually expressed as a rejection of "logic", was widely shared throughout this

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58. George L. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law" (1985) 14 J. Legal Stud. 461.

59. "Vicarious Liability for Tortious Acts" (1936) 14 Can. Bar Rev. 725.

60. "The American Law Institute's Restatement of Contracts and Agency" (1935) 1 U.T.L.J. 17 [Wright, "Restatement"].

generation. Therefore courts must make choices, and these choices must involve “some conception of the value of the result.”<sup>61</sup> Whether Wright believed that these choices must be made in every case, or whether there were some that could be decided by a straightforward application of principles was not entirely clear. A few short passages in general discussions were conflicting, but his discussions of cases in the comments clearly demonstrated an assumption that many cases, probably the vast majority, could be, and should be, decided without discretion, and for the others, the principles were essential guidelines for ordering thinking.

Wright had no doubt that principles changed. “[T]he static or mechanical concept of law has never at any stage in our legal history been true — nor can it be true. That our law has changed and will change, is undoubted.”<sup>62</sup> The change came from the challenge of difficult cases, ones that did not fit comfortably within the terms of an existing principle. The decisions in these cases depended upon “logic, a view as to what is expedient, [and] some notion of the social or economic implications of the problem before the court.”<sup>63</sup> In using “logic” in this context, he was not referring to the belief that general principles could decide all cases. Instead, he probably meant a combination of technical craft and the limits of the changes that seemed to be permitted by the existing structure. In 1931, he said, “the courts may not make law out of thin air. ...they are limited by the existing legal material before them. But they can shape and reshape that material by choosing different starting points...”<sup>64</sup> He said no more about the limits of change, but my understanding is that he meant the courts must respect the basic structure and principles of the doctrine. Nor did he consider the force of precedents at any length, but his case comments demonstrate that he considered them to be useful guidelines and often a sufficient justification, but just as often not compelling. Within these limits, the standards or contents of the changes must come from “something external”<sup>65</sup> — from some social need or value outside the doctrine. He said little, though, about these sources, except for several comments about the need for law to meet the needs of business.<sup>66</sup> In general, he seemed to accept the prevailing values of the contemporary society, and to assume that these values were unproblematic.

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61. “Law and the Law Schools” (1938) 16 Can. Bar Rev. 579 at 583, 585 [Wright, “Law Schools”].

62. *Ibid.* at 583-84.

63. *Ibid.* at 584.

64. Wright, “Extra-Legal Approach”, *supra* note 6 at 15.

65. Wright, “Law Schools”, *supra* note 61 at 585.

66. One example is his 1931 manifesto (Wright, “Extra-Legal Approach”, *supra* note 6). In one unusual passage, he spoke of the values of comparative law as a source of ideas. See Wright, “Law Schools”, *supra* note 61 at 600.

The manifesto also declared an “empirical and pragmatic” approach. These words pointed to the developments in philosophy at the turn of the century,<sup>67</sup> but for Wright — and all the other scholars of this generation except Kennedy, these changes were in a very dim background. Instead, these words were a call for the law and its institutions to be continuously tested by current social need, and a suggestion of a fluid and changing world. Associated with this “empirical and pragmatic” approach, was a need to be “realistic” in reading judgments and doctrine. By saying this, Wright did not mean an inquiry into the social effects of the decisions. Instead, he usually meant that the doctrine masked the considerations that pushed a court to a result. The considerations he uncovered were not, though, ones like class, power, value, or the underlying reasons for allocating losses. Instead, they were ideas that were consistent with the general structure of the doctrine.

These understandings of the common law were the rejection of the past that Wright had announced in his manifesto. This rejection was complex, because he shared more with his ancestors than he acknowledged. Like most of the scholars of his generation, he created a caricature for the purpose of a ritual slaying.<sup>68</sup> Lefroy, too, believed that the common law changed, that it sometimes was incomplete, and that judges made choices, and he was no less vague than Wright about the sources for making changes.<sup>69</sup> Nonetheless, there were two large differences between them. First, the nineteenth century scholars had much more faith than Wright in the power of precedent and the feasibility of deducing results from principles, independently of context. This was the “logic” that he and most of his generation scorned. Second, Wright believed that larger changes were needed, and needed urgently.<sup>70</sup> Yet these differences alone do not explain the forcefulness of the rejection. It was amplified by a rejection of the politics that the nineteenth century doctrine embodied. As we have seen, Wright did not openly declare his own politics. Nonetheless, he shared the prevailing liberal beliefs of most Canadian intellectuals.

His beliefs about the common law were not original or distinctive. Instead, they were the mainstream of the Progressive thought that was

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67. See e.g. James T. Kloppenberg, *Uncertain Victory* (New York: Oxford University Press, 1986).

68. For a good account of the similarities and differences, see Anthony J. Sebok, *Legal Positivism In American Jurisprudence* (Cambridge: Cambridge University Press, 1998) at 83-112.

69. See Risk, “A.H.F. Lefroy”, *supra* note 20.

70. There were two other differences, less important for my purposes: first, the rejection of the past was accompanied by the removal of any interest in the study of history, either as a guide or for its own value, and, second, Lefroy was much more inclined to make binary distinctions, rather than distinctions of degree.

dominant in the United States during the 1920s, when he did his graduate work at Harvard. Pound, especially, seems to have had a large influence on Wright. One moment that might serve as a symbol came on February 22, 1926, when Pound lectured about "the deficiencies of nineteenth century legal thought," and Wright took extensive notes.<sup>71</sup>

He turned continually to the United States for guidance. It was there, and not in England, that the models were to be found for common law reasoning, for legal education, and for the role of scholars. He pointed to the American cases and scholarly literature, especially the Restatements, as sources of ideas for change, and to its schools, scholars, and texts as inspirations for the Canadians.<sup>72</sup> When he became editor of the *Canadian Bar Review*, he avowedly sought American contributions.<sup>73</sup> In contrast, he saw the English legal thought as unimaginative and parochial. Its prevailing Austinian positivism was "as deadening to the spirit as it is unproductive of result," excluding as it did, assessing law by any social or moral standards.<sup>74</sup> It was, though, the developments in the early part of the century that Wright turned to — Pound and the Progressives. He demonstrated little interest in the Realists; nor did the other Canadian teachers. They cited the writing of the Realists only rarely, and in a few short passages, they disapproved their more radical ideas.<sup>75</sup>

Wright's beliefs about common law reasoning were in tension with his thinking about torts. He scorned autonomous analysis of doctrine, and called for realism, responsiveness to social change, and "an extra-legal approach to law." Yet, as we have seen, his case comments did not discuss values or

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71. Papers of Cecil A. Wright, Toronto, University of Toronto Archives (Accession B82-0028, Box 001 [Lecture Notes], Jurisprudence Notes at 157-167) [Wright Papers].

72. See e.g. Wright, "Restatement", *supra* note 60; Wright, "Law Schools", *supra* note 1 at 588, 596; and the following, all by Cecil A. Wright: Book Review of *Selected Cases on Commercial Contracts* by A. Cecil Caporn (1938) 16 Can. Bar Rev. 73; Book Review of *Readings in Jurisprudence* by Jerome Hall (1939) 17 Can. Bar Rev. 365 [Wright, Review of *Readings*]; Book Review of *Legal Essays: In Tribute to Orrin Kip McMurray*, ed. by Max Radin & A.M. Kidd (1935) 13 Can. Bar Rev. 425; Book Review of *Principles of Contract* by the Right Honourable Sir Frederick Pollock (1936) 14 Can. Bar Rev. 783.

73. See e.g. Letter from Cecil A. Wright to Roscoe Pound (8 October 1935) in Wright Papers, *supra* note 71, Box 3; and Letter from Cecil A. Wright to Warren Seavey (30 October 1936) in *ibid.*, Box 10.

74. Wright, Review of *Readings*, *supra* note 72 at 366. In the late 1930s, Wright did, though, see hope in some small signs of change; see e.g. Book Review of *Legal Essays and Addresses* by the Right Honourable Lord Wright of Durley (1940) 18 Can. Bar Rev. 71.

75. Cecil A. Wright, Book Review of *A Digest of English Civil Law* by Edward Jenks, *et al* (1938) 16 Can. Bar Rev. 505; John Willis, Book Review of *The Administration of Justice*, ed. by Raymond Moley & Schuyler C. Wallace (1933) 11 Can. Bar Rev. 705; Bora Laskin, Book Review of *The Law in Quest of Itself* by Lou L. Fuller (1940) 18 Can. Bar Rev. 660; and Speech of Frederick C. Cronkite to the Law Society of Saskatchewan (1937), Saskatoon, University of Saskatchewan Archives (MG 33 S1, Speeches and Articles). The only sustained account of the Realists was Jacob Finkelman, "Williston on Contracts" (1940) 3 U.T.L.J. 387.



context. Instead, he adopted the prevailing values, assuming they were widely shared and unproblematic, and the familiar contexts of middle-class urban life. Not even the Depression intruded. To look for an explanation of this tension by reading his work more closely is to look for thinking he never did, and to dwell on its existence is to miss the heart of his efforts. Wright was well read, but he did not care much for theory. The dominant purpose that ran through all his work was to educate lawyers: the courts who had to decide cases, lawyers who had to argue before them, and students who had to be trained for both jobs. They were the audience for whom he wrote. The limits of useful criticism and proposals, and the limits of leadership were the limits of the changes courts could make, and to criticize them was just not part of this task. In this light, much of his general declarations were a call for work by someone else, perhaps at some other time.

This emphasis on the profession is difficult to explain. One possible reason was a simple delight in using his immense powers of analysis. Another is his passionate beliefs about a legal education: it should be a professional education, yet freed from the dead hand of the Benchers at Osgoode Hall. His writing demonstrated the useful work that could be done by scholars, and at the same time accepted the prevailing economic order — which lawyers usually prefer.

Last of all in this discussion of Wright, I remember that many pages ago, I suggested that Falconbridge and Wright represented the world that was disappearing and the world that was emerging. The differences between them were much the same as the differences between Wright and the scholars in the nineteenth century. Both of them believed that principles were the centre of the common law, and that these principles changed in response to changes in their social contexts. A sense of excitement and urgency, though, shone through Wright's work. He had much less respect for precedent, and argued, in a way that Falconbridge never did, that judges often must choose between results that the doctrine permitted. He stressed change more, and was more inclined to criticize and to advocate change. For Falconbridge, the role of scholar was deferential, and his main function was to synthesize; for Wright, it was to educate the profession to better ways of thinking and its responsibilities. And last, Falconbridge looked primarily to England and secondarily to Europe for ideas and models, and Wright looked primarily to the United States.

### III. *An Introduction to the Public Law Subjects and the Constitution*

So far, I have considered a couple of the common law scholars, Falconbridge and Wright. I turn now to the scholars who wrote about the constitution, interpretation, and administrative agencies, gathering these subjects under the heading “public law.” This turn marks major differences in the scholarship, which were the differences suggested by the differences between Wright’s and Kennedy’s manifestoes.

First, a brief introduction to the lawyers’ understandings of the constitution in the late nineteenth century is needed. The classic exposition was Dicey’s *Law of the Constitution*, written in 1885 as a text for students.<sup>76</sup> In the Introduction, he set himself the task of describing and classifying the “first principles.” He saw three, although only the first two are significant here.<sup>77</sup> The first was the sovereignty of Parliament. Parliament had power to make any law it wished, and no other institution had power to override its laws. For our purposes, this principle is straightforward, even though explaining it led Dicey into long technical analysis, for example, about law making by courts and about federalism. The second principle was the rule of law, which had three parts. First, no individual could be coerced by the state “except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.” Contrasted to this ideal were “wide, arbitrary, or discretionary powers of constraint.” The second part was formal equality: government and its officials were subject to the law in the same way as all individuals. The individual was free to do whatever she wished, unless restrained by a law enforced by the courts. Both these principles had been at the heart of the ideal of constitutional government for generations, generating images of the tyranny of the Stuart Kings and their overthrow. Third, the constitution was the accumulation of “judicial decisions determining the rights of private persons.” It was the courts that made the constitution. In this way, liberty was embedded in the fabric of the law, and better protected than it was by the elegant statements of paper constitutions — especially the flimsy European constitutions. Throughout, the liberty of the individual was the central value, and it was best protected by the courts. This union of the common law, the courts and lawyers was central to the constitution that Dicey articulated for the lawyers of his generation.

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76. Albert Venn Dicey, *Law of the Constitution* (London: Macmillan, 1885).

77. The third was a minor account of conventions.

### 1. *Federalism*

The Canadian constitution combined Dicey's British constitution and federalism. This proposition, both simple and adventuresome, was declared in 1867 in the British North America Act: the provinces "desired to be federally united into one dominion ... with a Constitution similar in principle to that of the United Kingdom." The importance of federalism in Canadian political life made the constitution a central topic for these scholars and the one that they wrote about most passionately.

An account of the nineteenth century understandings can best be presented by returning to Lefroy, who wrote about constitutional law as well as the common law, especially a massive text about the division of powers that appeared in 1897.<sup>78</sup> Like Dicey, he sought to synthesize principles, setting out sixty-eight of them, each followed by an extensive discussion of the cases from which it was derived. The cases were analyzed in ways that tended to make them consistent with each other, and the principles were constructed in ways that made a coherent pattern. Both were divorced from their social and political context, including Confederation itself, which was barely mentioned, and the struggle between the Dominion and the provinces that raged while Lefroy was writing.

The interpretation of the B.N.A. Act was far from as consistent and coherent as Lefroy believed, both at the time he wrote and after his death. Most scholars agree that by the middle of the 1930s, the power of the Dominion government was much weaker than the makers of Confederation had intended, and less than any reasonable reading of the B.N.A. Act would permit. When and how this reduction happened is still debated, but a reasonably safe suggestion is that much of it was done by Lord Haldane in three cases decided during the 1920s. The last of these three was *Toronto Electric Commissioners v. Snider*, decided in 1925.<sup>79</sup> In the following year, H.A. Smith, who taught at McGill, wrote a case comment, which set the frame for analysis for the next decade, at least.<sup>80</sup>

Smith arrived in Canada in 1921, from England, where he had been born and educated. For eight years, he was a powerful force, teaching and writing about a wide range of subjects, and making ambitious proposals for reforming legal education.<sup>81</sup> In his comment about *Snider*, he argued

78. A.H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book and Publishing, 1897-8) [Lefroy, *Legislative Power*].

79. [1925] A.C. 396 (P.C.).

80. "The Residue of Power in Canada" (1926) 4 Can. Bar Rev. 432 [Smith, "Residue of Power"].

81. For accounts of his career, see R. St. J. Macdonald, "An Historical Introduction to the Teaching of International Law in Canada" (1974) 12 Can. Y.B. Int'l Law 67 at 72-74; and Roderick A. Macdonald, "The National Law Programme at McGill: Origins, Establishment, Prospects" (1990) 13 Dal. L.J. 211 at 256-261.

that the Privy Council had misunderstood the structure of sections 91 and 92, making the Dominion's power to legislate for "peace, order and good government" one that was to be used only in emergencies, rather than an omnibus power to legislate for the benefit of the country. The result was that Canada had a constitution "the precise opposite of that which our fathers hoped and endeavoured to attain."<sup>82</sup> Smith argued further that the reason the Privy Council went astray was its misguided approach to interpretation, which I shall consider in the next section. In short, it failed to consider the context of the making of the B.N.A. Act, and the clearly expressed vision of the founders they would have found there.

After Smith left, three Canadian scholars emerged: W.P.M. Kennedy, who has already been introduced, Frank Scott, of McGill, and Vincent MacDonald, of Dalhousie. Scott, the youngest, is still an awesome figure. After studying humanities at Oxford in the early 1920s and taking a law degree at McGill, he began to teach in 1928. Even then, he was not only a legal scholar, but also a poet, a socialist activist, an advocate for civil liberties, and sympathetic to French Canadian culture. During the next four decades, he pursued all these paths with passion, becoming a major poet and a founder of the C.C.F., defending civil liberties against the Duplessis regime, and offering Canada a vision of a bicultural country.<sup>83</sup> Compared to such remarkable figures as Kennedy and Scott, MacDonald was relatively straightforward. After getting a law degree from Dalhousie, he practiced in Toronto and Halifax before returning to Dalhousie to teach in 1930, where he became dean in 1934.<sup>84</sup> Among the three, Kennedy was the most prolific, by far, writing seven substantial pieces between 1929 and 1937, as well as a handful of short notes. MacDonald and Scott each wrote half as much.

All three continued the attack on the Privy Council, largely in the framework Smith established. The makers of Confederation intended to make a strong national government, responsible for all matters of general or national scope, and expressed this vision clearly in the B.N.A. Act. The Privy Council ignored the terms and their context, and the result was that the Dominion had far less power than had been intended, and the provinces had far more. Canada's federalism was fundamentally different than the federalism its makers had intended.

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82. Smith, "Residue of Power", *supra* note 80 at 434.

83. See Sandra Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto: McClelland and Stewart, 1987); and *On F.R. Scott: Essays on His Contributions to Law, Literature, and Politics*, Sandra Djwa & R. St. J. Macdonald, eds. (Kingston: McGill-Queens University Press, 1983).

84. See John Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979).

During the first few years of the attack, from Smith's comment in 1926 to around 1930, the protests were about the technique of interpretation — the failure to consider the context. In the early 1930s, a different kind of protest emerged: the mistaken interpretation had rendered the Dominion unable to perform crucial functions. This protest had two branches, both based on a firm belief that the original design of the B.N.A. Act — to create a strong Dominion government — was the appropriate allocation of powers for the modern nation Canada had become. The first branch of the protest was about the power to implement treaties. Canada must be able to make treaties and to implement them, and the powers to perform these functions should be assigned to the Dominion. The Dominion government doubtless had power to make treaties, but its power to implement them was at best problematic. Second, Canada should establish a welfare and regulatory state, and only the Dominion could undertake this function, but its power was at best partial and incomplete. These scholars were the first to declare this vision of Canada in a sustained way: a modern nation, having power to determine its own international obligations, and a strong Dominion government, with responsibility and power to guide the making of a modern state.

Most of the writing was about the second branch. At the outset, it was a protest about the confusion caused by uncertainty about the terms of the division of powers. For example, in 1932, Scott asked, "What has become of our federalism? It is a legal morass in which ten governments are always floundering; a boon to lawyers and obstructionist politicians, but the bane of the poor public whose pathetic plea is simply for cheap and efficient government."<sup>85</sup> At the same time, though, he was concerned about the shrinking of the Dominion's powers, and gave as examples its inability to regulate the grain market, water power in the St Lawrence River, airplanes, and unemployment insurance, all subjects of national importance. In the same year, Kennedy feared that the powers and the independence of the provinces could be exploited by "vast economic interests," observing that "the interests at the local centres are often too strong to allow progress, and they are all too frequently able to strengthen their economic and financial purposes by an appeal to provincial rights."<sup>86</sup>

As the ravages of the Depression mounted, the protests became passionate. In 1934, Kennedy declared a crisis.

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85. "The Development of Canadian Federalism" (1931) 3 *Proceedings of the Canadian Political Science Association* 231 at 231.

86. *Some Aspects*, *supra* note 5 at 103.

The truth is that we have outgrown the British North America Act. The Dominion of Canada is attempting to-day to carry on the highly complex life of a modern industrial state under a constitution drawn up for a primitive community, scarcely emerging from pioneer agricultural conditions. ... Worse still, under cover of all this has been preserved the legal, political and economic philosophy of *laissez-faire* utilitarianism.... Upheld with an almost suicidal tenacity, provincial "rights" have become national wrongs. ... We have now a clear choice to make: shall we continue as a loose league of "sovereign" provinces, into which the unfortunate judgments of the Privy Council had practically transformed us, surviving legally in order to break culturally and economically? Or shall we boldly recognise that a nation of vast potential wealth and remarkable human achievements must not be sacrificed at a constitutional altar erected in a far-off pioneer past, and itself long since robbed of creative vitality by the barren processes of judicial obscurantism?<sup>87</sup>

A year later, MacDonald said simply that the constitution is "ill-adapted ... to our new status within the empire, to our present social and economic organization and needs, and to prevailing political theories which indicate the propriety or necessity of a greater degree of national control over, and governmental intervention in, matters of social welfare and business activity."<sup>88</sup>

When the Privy Council declared most of the New Deal legislation ultra vires in 1937, the three joined in a remarkable symposium in the *Canadian Bar Review*. They all agreed that the B.N.A. Act as it had been interpreted was a denial of the intentions of the makers, and was now woefully inappropriate for a modern nation. There was no hope for change from the courts, and therefore it must be amended and appeals to the Privy Council must be terminated. Scott, after retelling the story of the frustration of the original design, said, "None but foreign judges ignorant of the Canadian environment and none too well versed in Canadian constitutional law could have caused this constitutional revolution."<sup>89</sup> A few pages later, speaking of the restrictions on cooperation between the Dominion and the provinces, he said,

This legalistic straining at technicalities will do little to enhance the prestige of the courts.... Canada has suffered a national set-back of grievous proportions. A federal government that cannot concern itself with questions

87. "Crisis in the Canadian Constitution" (1934) 24 Round Table 803 at 815-16, 819.

88. "Judicial Interpretation of the Canadian Constitution" (1935) 1 U.T.L.J. 260 at 282.

89. "The Consequences of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485 at 489.

of wages and hours and unemployment in industry, whose attempts at the regulation of trade and commerce are consistently thwarted, which has no power to join its sister nations in the establishment of world living standards, and which cannot even feel on sure ground when by some political miracle it is supported in a legislative scheme by all the provinces, is a government wholly unable to direct and to control our economic development. ... It would seem ... that the doctrines of *laissez-faire* are in practice receiving ample protection from the courts.<sup>90</sup>

The rejection of the nineteenth century beliefs and the embrace of the regulatory and welfare state were obvious throughout, together with an urgent need to respond to the Depression. Seen from this perspective, these protests are a remarkable parallel to the protests of scholars in the United States to *Lochner v. New York*.<sup>91</sup> Perverse interpretations, shaped by political faiths from the nineteenth century, had frustrated making the modern state. At the same time, the distance from scholars in the late nineteenth century like Lefroy was made clear by the role of scholars as critics, their open belief that the law must express the needs and values of the present, and their aspiration to create the new state.<sup>92</sup>

## 2. Interpretation

The furor about federalism was a part — a dramatic one — of a much wider question: how should courts interpret statutes and constitutions? Again, the beginning is an account of the thinking in the late nineteenth century. The basic principle was that the courts must determine and implement the intent of the legislature. The primary step in making this determination was to decide whether the words being interpreted had a clear mean-

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90. *Ibid.* at 491-492. Kennedy agreed: "We must no longer live in the vain world of delusion that the Judicial Committee will do for the Act what the Supreme Court of the United States has been able to do. . . . We would have faced this issue long ago had we not too largely believed that constitutional and legal wisdom never really crossed the Atlantic." ("The British North America Act: Past and Future" (1937) 15 Can. Bar Rev. 393 at 398) MacDonald said simply that the decisions "go a long way towards depriving Canada of adequate legislative power to meet effectively pressing national necessities." ("The Canadian Constitution Seventy Years After" (1937) 15 Can. Bar Rev. 401 at 421.)

91. 198 U.S. 45 (1905).

92. The scholarship about federalism was almost the only topic within the usual range of the term "constitutional." There was, in particular, little writing about individual rights, and virtually all of it was by Scott. In 1930, in "The Privy Council and Minority Rights" (1930) 37 *Queens Quarterly* 668, he challenged the argument that the appeals to the Privy Council protected minority rights, demonstrating that what it had done was to protect provincial rights, not minority rights. During the next few years, he published a handful of powerful indictments of efforts to restrict the political activities of labour leaders and communists.

ing, and if they did, it must be followed, even if it was contrary to the known preferences of the legislature, or to the court's sense of justice or the public good. These lawyers did not, though, contrary to what is sometimes now assumed, believe that words always had clear meanings, considered either alone or in their textual context. If the words did not have clear meaning (or if the meaning led to a startling result) most texts agreed that the court must reconstruct the intent of the legislature.

Nonetheless, this call for an inquiry into intention was obscured, even sometimes negated, by sharp restrictions on the sources the courts could consider. Among the sources that were permitted, the primary ones were the common law and other statutes. What had happened in the legislature when the statute was discussed was put firmly beyond bounds. In this scheme, the dominant source of meanings became the common law, especially its presumptions, such as the preferences for property and individual liberty.<sup>93</sup>

Two Canadian examples illustrate this approach. The first is Lefroy's federalism text. For him, interpretation of the B.N.A. Act entailed discerning the meaning embedded in its terms. Many of these terms were terse and general, leaving much to be determined by courts, but even for this purpose, he rejected considering "the demands of public policy and the public welfare."<sup>94</sup> The second example is a debate about the decision of the Privy Council in the *Royal Bank* case, which need not be described at length. Two quotations will suffice. Replying to a claim that no one could doubt the "perfect justice or wisdom" of the Privy Council's decision, Lefroy said,

All I can assume to discuss is law, not perfect justice or wisdom. Law may be, and ought to be, just and wise. But whether it is or not, is a matter with which a lawyer, as such, has nothing to do. That is what the old philosopher Hobbes meant when he laid down the *dictum* so shocking to weak minds, that "no law can be unjust."<sup>95</sup>

Another participant, Henry Labatt, agreed. Faced with the claim that the Privy Council was ignorant of Canadian conditions, he argued that its ignorance was really a blessing:

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93. These ideas are considered at greater length in Richard Risk, "Here Be Cold and Tygers: A Map of Statutory Interpretation in Canada in the 1920s and 1930s" (2000) 63 Sask. L. Rev. 195.

94. *Legislative Power*, supra note 78 at 475.

95. "Royal Bank of Canada v. The King", Letter to the Editor (1914) 50 Can. L.J. 622 at 624.



A controversy determined by jurists of ample practical experience, who consider the law and the facts with the intellectual detachment of college professors forming an opinion in regard to the soundness of abstract doctrines, may well be said to have been determined under ideal conditions.<sup>96</sup>

The first appearance of a new world was the case comment about *Snider* by Herbert Smith, which was introduced in the last section. He agreed that the object of interpretation was to discover the intent of the legislature as expressed in the words of the statute, but he argued that meanings depended upon purposes and contexts. Therefore, evidence about the making of a statute, such as parliamentary debates and public speeches, should be considered. Yet the English courts had deprived themselves of this information by an "arbitrary and unreasonable rule ...".<sup>97</sup> This argument was ultimately much more than an attack on a small corner of doctrine. It was, as well, a challenge to the power of the courts to govern interpretation by imposing the common law presumptions and to preserve values that were being threatened by the rise of the welfare and regulatory state.

To understand the Canadian scholarship that followed Smith, it is necessary first to understand developments in the United States that began in the late 1920s and early 1930s. An exchange in 1930 between Max Radin and James Landis is a landmark.<sup>98</sup> Radin denied that the search for the intent of the legislature could be a meaningful undertaking. For issues that had not been foreseen, the legislature could have had no intent at all. Moreover, a legislature could not have an intent in any meaningful sense, for the legislators who supported a typical statute shared a multitude of different understandings of its meanings, and most of them had little or no knowledge of its details. The chances that they would all have the same intent about a particular issue were smaller than "infinitesimally small."<sup>99</sup> The text did, though, set limits beyond which the judge must not go, and within which a choice must be made. Radin's claim became famous:

... [S]omewhere, somehow, a judge is impelled to make his selection — not quite freely as we have seen, but within generous limits as a rule — by those psychical elements which make him the kind of person that he

96. "Power of Provincial Legislatures to Enact Statute Affecting the Rights of Non-Residents: A Reply to Some of My Critics" (1915) 51 Can. L.J. 265 at 287.

97. "Residue of Power", *supra* note 80 at 433.

98. Max Radin, "Statutory Interpretation" (1930), 43 Harv. L.R. 863; and James M. Landis, "A Note on 'Statutory Interpretation'" (1930) Harv. L.R. 886.

99. Radin, *ibid.* at 870.

is. That this is pure subjectivism and therefore an unfortunate situation is beside the point.<sup>100</sup>

In his reply, Landis argued first that an intent about the particular issue at stake was much more likely to be apparent than Radin had suggested, especially from looking at the evidence of legislative history. More important, if no intent in this sense were discoverable, he proposed that the court be guided by purpose of the statute, that is, by the general policy of the legislature. “[L]egislative purposes and aims are the important guideposts for statutory interpretation.”<sup>101</sup>

In Canada, three major articles appeared during the next handful of years, written by Alex Corry, John Willis, and Vincent MacDonald. Corry and Willis were in the mainstream of change. Both explicitly rejected the nineteenth century and proposed a new approach. Because Willis did the more effective job of the rejection, and Corry contributed more to the new approach, they can be best presented by taking Willis first.

Willis was born in England, was educated at Winchester and Oxford. In 1929, he went to Harvard for two years, where he studied under Felix Frankfurter. Upon returning to England, his hopes for a teaching job were frustrated by the Depression, so he went to Dalhousie to take a job for a year and stayed in Canada for the rest of his life. To me, he was the most imaginative scholar of this generation. Even as late as the 1970s and 1980s, he continued to be admired by administrative law scholars.

“Statute Interpretation in a Nutshell”<sup>102</sup> appeared in 1937, written in the preceding summer as a guide for students about to take his new course in legislation. Still a delight to read, it is one of the landmarks in the campaign to demolish the traditional approach. The central message was announced at the outset, and clear throughout. The traditional sources of meaning were all hopeless guides for “guessing” (a suggestive word that he used throughout) what a court would do, and for guiding a judge. The words could not determine results, especially in the world of the modern regulatory and welfare state, in which “wide and general language” abounded. Nor could precedent. Instead, the doctrine offered a set of approaches among which judges could choose freely, and which served, in the end, to justify some “desired result” — some result desired by the judges. In the same way, the courts chose whether to invoke a presumption

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100. *Ibid.* at 881.

101. Landis, *supra* note 98 at 892.

102. (1938) 16 Can. Bar Rev. 1 [Willis, “Nutshell”].

and among them, which one to choose. "What will they do, and not what will they say, is your concern."<sup>103</sup>

Yet, although demolition was the main aim of "Nutshell," Willis did not say that interpretation was inescapably no more than an expression of personal and political attitudes. In one short passage, in talking about the common law doctrine, he came to the mischief rule — the courts should be guided by the "mischief" at which the statute was aimed. This approach was "so sensible and so thoroughly in accord with the constitutional principle of 'the supremacy of Parliament'" that it was "amazing" to find it used so rarely.<sup>104</sup>

Corry is now widely known as a political scientist, and few remember that he began his academic career as a law teacher. Born in southwestern Ontario, he farmed during World War One and then went west to study law at the College of Law of the University of Saskatchewan. After graduating and articling for a year, he went to Oxford for another law degree. In 1927, he returned to Saskatchewan to teach at the College of Law, remaining there until the 1934-35 academic year, when he spent a year's leave at Columbia Law School. After returning to Saskatchewan for a year, he went to Queen's University, forsaking law as his primary interest for political science.<sup>105</sup> "Administrative Law and the Interpretation of Statutes,"<sup>106</sup> appeared in 1936, a few months after he returned from Columbia.

Corry's rejection of the past was based on Radin. Both words and intent were hopeless guides to meaning, for words typically had no clear meanings, and intent was a myth.<sup>107</sup> The words did, though, set limits, within which the judge must choose. Like Landis, Corry argued that the judge must respect and implement the purpose of the legislature, grounding this obligation on society's basic commitment to democracy.<sup>108</sup>

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103. *Ibid.* at 11, 11, 11 and 2.

104. *Ibid.* at 14. Like Smith, he said that the refusal to consider the legislative materials made this approach "unworkable."

105. See James Alexander Corry, *My Life & Work, A Happy Partnership: Memoirs of J.A. Corry* (Kingston: Queen's University, 1981).

106. (1936) 1 U.T.L.J. 286 [Corry, "Administrative Law"]. The discussion of interpretation was a few pages sandwiched between an introduction about the ways courts had dealt with the modern administrative state, and a long account of the history of interpretation in private law contexts in the eighteenth and nineteenth centuries.

107. This claim about words, which appeared throughout the writing of this generation, misunderstood its target, for most writers in the late nineteenth century did not claim that words always had clear meanings. The crucial difference, and one which was not clearly expressed, was that Corry and his generation assumed, contrary to the earlier scholars, that the uncertainty of words was pervasive, and that a text alone would rarely give clear meanings about realistic problems.

108. He did not explain the difference between intent and purpose, but it was the distinction Landis had made, between a specific meaning about the particular problem and the general policy of the legislature. This distinction was far from radical. It had been a part of the late nineteenth century approach, but at its margin, as a circumscribed inquiry when no clear meaning was apparent.

Though the intention of the legislature is a fiction, the purpose or object of the legislation is very real. No enactment is ever passed for the sake of its details; it is passed in an attempt to realize a social purpose.<sup>109</sup>

This purpose was "very real", an ascertainable fact, and therefore the judge was not a "despot," even though the judge's opinions about "the proper functioning of the state and its relation to the individual" must shape the choices about some ambiguities about details. Only rarely was the judge left to "trust himself." This "real" purpose was a particular form of the social record in which Pound and Wright sought guidance.<sup>110</sup>

Looking at his footnotes and the surrounding literature, especially the exchange between Radin and Landis, Corry's proposals made a significant step in the mainstream of change. He embraced Landis' idea of purpose, but presented it more fully. More important, not only did he ground the obligation in democracy, he saw it as an obligation to cooperate with the legislatures. As well as rejecting the past, Corry, like Willis, instructed his readers to watch what courts did, rather than what they said. This admonition was a rejection of a faith in doctrine, paralleling Wright's call to be "realistic" and the rejection of "logic".

For both Willis and Corry there was much more at stake than a preference for the word "purpose" rather than the word "intention." Like Wright, although much more openly, and like the protests at the decisions about federalism, their thinking about interpretation was part of a campaign for a change in politics. The older approach to interpretation, especially the presumptions about property and individual liberty, defied statutes that were intended to regulate property and redistribute wealth. A new doctrine was required by a new society. The fighting edge of the talk about purpose, whatever its analytical difference from intent may have been, was an attack on the common law and its values as a source of meaning, and a demand that judges respect these social and political changes and interpret statutes generously. In the Introduction to "Administrative Law and the Interpretation of Statutes" Corry spoke of the modern world in which "the activities of the state are increasing rapidly day by day,"<sup>111</sup> and suggested that often: "efficient administration is being embarrassed by judicial interpretation."<sup>112</sup> And at the end of the discussion of interpretation, he gave judges a blunt warning about the consequences of recalcitrance:

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109. Corry, "Administrative Law", *supra* note 106 at 292.

110. *Ibid.* at 292, 291, 291 and 293.

111. *Ibid.* at 288.

112. *Ibid.*

...there is no other way in which judges can supply the necessary co-operation for maintaining an orderly process of social change. The modern state everywhere is engaged in adjusting itself to the machine age. We are attempting to do under forms of law in an orderly way what is accompanied elsewhere by violent upheavals, quite regardless of law, of rights, or of individuals. That is the meaning of the statutes which give us social legislation and state control over various forms of economic life. At present the judges interpret and apply these statutes and thus can further or obstruct their objects. Unless they are familiar with the aim and purpose of the legislation so as to aid in the adjustment, the orderly process will fail or pass to other hands.<sup>113</sup>

Like Corry, but at much greater length and more colourfully, Willis demonstrated that the courts had frustrated modern legislation, especially by invoking presumptions. The presumptions that counseled against interpretations that changed the common law or interfered with established rights and property were tolerably accurate expressions of legislative attitudes in the nineteenth century, for legislatures then were not inclined to take such radical steps.

But times have changed. ...If in 1937, a court resorts to these old presumptions, it is doing something very different from attempting to ascertain the probable intention of the legislature. It is flying in the face of the legislature. Only one conclusion can be drawn from the present judicial addiction to the ancient presumptions and that is that the presumptions have no longer anything to do with the intent of the legislature; they are a means of controlling that intent. Together they form a sort of common law "Bill of Rights." English and Canadian judges have no power to declare Acts unconstitutional merely because they depart from the good old ways of thought; they can, however, use the presumptions to mould innovation into some accord with the old notions. The presumptions are in short "an ideal constitution" for England and Canada.<sup>114</sup>

If these two articles were in the mainstream, the third, written by MacDonald, was certainly not. Yet it is one that has a remarkable appeal to modern scholars. It dealt with the power to implement treaties, and particularly with Section 132 of the B.N.A. Act, which gave the Dominion power to implement obligations of Canada "as part of the British Empire ... arising under treaties between the Empire and ... foreign countries." These

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113. *Ibid.* at 293.

114. Willis, "Nutshell", *supra* note 102 at 17.

terms seemed to be limited to treaties entered into by Britain for its colony, and inapplicable to treaties made by Canada as an independent nation. Moreover, if intent was the test, surely the British Parliament in 1867 could barely have conceived of a colony having such a power, let alone have decided to confer it. Did it have any effect after Canada had become an independent nation?

In 1933, after the Privy Council gave several confusing interpretations of Section 132, MacDonald wrote “Canada’s Power to Perform Treaty Obligations.”<sup>115</sup> The essence of his argument was that the basic purpose of Section 132 was to give the federal government power to implement all of Canada’s international obligations. Even though its particular terms were designed for the obligations of Canada as a colony, it should be interpreted “progressively and liberally”<sup>116</sup> to give the same general power, decades later, after Canada had become an independent nation. The courts must,

effectually translate into modern terms the language of 1867 so that it will speak with equal vitality today with regard to circumstances essentially similar to those envisaged for its application in 1867. A constitution is never to be outgrown but to speak permanently and to be given a progressive construction which will keep it an apt instrument of government even in its application to circumstances not foreseen by its framers.<sup>117</sup>

MacDonald’s argument depended upon a crucial distinction between, on the one hand, the particular contexts and outcomes that the makers had in mind and the particular terms they had used — which he usually labeled “intent,” and, on the other hand, the general policy of the legislature, which he labeled “purpose,” “essential purpose”, “spirit,” “dominant intention,” and “general policy.” What made him distinctive was not simply giving

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115. (1933) 11 Can. Bar Rev. 581.

116. *Ibid.* at 599.

117. *Ibid.* at 582. A few years later, in 1935, he made the same argument in a comment about *British Coal v. The King*, [1935] A.C. 500 (P.C.), in which the Privy Council decided that Canada could bar appeals to the Privy Council in criminal cases, using remarkably convoluted reasoning based on the premise that this power had been included from the outset. The result pleased MacDonald, because it confirmed Canada’s status as an independent nation, but the reasoning did not, because in 1867 the British Parliament would hardly have intended to give such a power to a colony. Instead, he argued, the Privy Council should openly have acknowledged Canada’s independence and interpreted the B.N.A. Act as giving the power, even though the interpretation would have been different in 1867. Courts should read constitutions “as speaking the language of today against the background of present legal and political facts.” (“British Coal Corporation and Others v. The King: Three Comments” (1935) 13 Can. Bar Rev. 615 at 632.) The “general policy” of a constitution should prevail, even if it required “occasional disregard of the intention of the draftsmen” (*ibid.* at 633).

priority to purpose, rather than intent, for we have seen that other scholars, especially Landis and Corry, made this argument at the same time, and made it more clearly. Instead, what was distinctive was his argument that interpretation should be shaped by the contemporary context, and that it might be at odds with the particular perceptions of the original intent and even the terms that expressed that intent. Much of the classic literature had proclaimed the need for law to respond to changing needs and contexts, but no scholar had been so bold as MacDonald.<sup>118</sup>

### 3. *Administrative Law*

In England, the expansion of the welfare and regulatory state brought much debate and much protest from the legal establishment. The protest was aimed, of course, at the new politics of regulation and redistribution. As well, though, it was aimed at the institutions and doctrine that implemented the changes, especially the expanded functions of the executive. The foundations of these constitutional protests were articulated in Dicey's text, especially in his version of the rule of law. The new state threatened liberty by displacing the courts and the common law, and giving arbitrary powers to the executive, which became the modern embodiment of the Stuart Kings.

The protests continued throughout the 1920s, and in response, the government appointed the Committee on Ministers' Powers in 1929, just before Lord Chief Justice Hewart published his famous tirade, *The New Despotism*.<sup>119</sup> In Canada, the legal establishment made the same protests and lauded Lord Hewart when he came on a lecture tour. In contrast, the Canadian legal scholars embraced the new state and the politics it expressed, and the Depression made their embrace passionate. Among them, Willis, Corry, Kennedy, Jacob Finkelman, and E.A. Hopkins were outstanding.<sup>120</sup>

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118. The Privy Council paid no attention. In *Canada (A.G.) v Ontario(A.G.) (Labour Conventions)* [1937] A.C. 326 (P.C.) it decided that Section 132 was limited to treaties made by Britain for Canada.

119. (London: E. Benn, 1929).

120. Three others need mention. J. Forester Davison graduated from Dalhousie and did graduate work at Harvard Law School. After returning to Canada for a few years, he moved to the United States, where he collaborated with Frankfurter on a casebook. Among the handful of articles and comments he wrote about Canadian topics, only one had lasting significance: "The Constitutionality and Utility of Advisory Opinions" (1938) 2 U.T.L.J. 254. Nigel Tennant, who also graduated from Dalhousie and did graduate work at Harvard Law School, wrote one article, "Administrative Finality" (1928) 6 Can Bar Rev. 497, which pointed to the importance of this new field. It sought to synthesize the doctrine of review, and at the end, suggested that an appeal to the courts was not likely to give a better decision than the administration had made, and that better appointments were a more effective means of obtaining good decisions. John Humphrey, of McGill, who later became an important figure in the international field, wrote an article about review and administrative courts: see *infra* note 155. See also R. Blake Brown, "The Canadian Legal Realists and Administrative Law Scholarship, 1930-1941" (2000) Dal. J. Leg. Stud. 36.

They probably did not think much about their intended audience, but the journals in which they wrote and the terms and analysis they used pointed to the legal profession. Their message, though, was different from Wright's, because they sought to make a larger change in attitudes and commitments than he did.

Willis was the jewel. His first major publication, *The Parliamentary Powers of English Government Departments*,<sup>121</sup> appeared in 1933 as a response to *The New Despotism*. Two years later, he wrote "Three Approaches to Administrative Law ...,"<sup>122</sup> in which the central theme was the design of the new institutions. Another two years later, in 1938, came "Statute Interpretation in a Nutshell," followed quickly by two more articles. The first, "Administrative Law and the British North America Act,"<sup>123</sup> elaborated an argument that he introduced in the "Nutshell." American lawyers would feel more at home in Canada than the absence of Bill of Rights might suggest, for the Canadian courts had employed interpretation and presumptions to fashion parallel protections of property and contracts. The second, "Section 96 of the British North America Act,"<sup>124</sup> developed one thread of this argument at length. Under the cloak of interpreting this "innocuous section," the courts had created a substantial limitation on the powers of provincial legislatures to create agencies exercising judicial powers, thereby smuggling the doctrine of separation of powers into the Canadian constitution. As well, in 1941, just beyond my round ending date of 1940, he edited a collection of essays, entitled *Canadian Boards at Work*.<sup>125</sup>

Corry wrote two articles. The first, "Administrative Law in Canada,"<sup>126</sup> which appeared in 1933, described the new politics and the need for new institutions it had created. Throughout, his analysis was sensible and useful, although it lacked the imagination of Willis or of his own article

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121. (Cambridge: Harvard University Press, 1933) [Willis, *Parliamentary Powers*].

122. (1935) 1 U.T.L.J. 53 [Willis, "Three Approaches"].

123. (1939) 53 Harv. L.R. 251 [Willis, "Administrative Law"].

124. (1940) 18 Can. Bar Rev. 517.

125. (Toronto: Macmillan, 1941) [Willis, *Canadian Boards*]. Although he wrote little in this collection, the very undertaking demonstrated one large strand of his approach: the importance of "what really happens." Between 1933 and 1941, as well as these six pieces, Willis wrote a clutch of reviews, including two sparking reviews of books by Thurman Arnold, and two articles about entirely different topics, the nature of joint bank accounts, and a comparison of English and American approaches to conflicts of laws. The range of topics is impressive, and so is the range of approaches. Most of these pieces combined careful analysis of doctrine, with political critique, and middle level theory.

126. (1933) 5 Proceedings of the Canadian Political Science Association 190 [Corry, "Administrative Law"].



about interpretation. The second appeared in 1936 — the same year as the interpretation article, and presaged his shift to political science. It dealt with the public corporation, and especially its promise to solve the central problem of the twentieth century: “to make economic government ... responsible to the public weal.”<sup>127</sup> As well, he did a study for the Rowell-Sirois Commission, which is well known to Canadian scholars, even though it was never published. Entitled “The Growth of Government Activities Since Confederation,”<sup>128</sup> it was just what its title promised: a detailed description of the expansion of government, which was a large accomplishment and still useful, even though by 1939 none of it was distinctive.

Kennedy wrote only one major article, “Aspects of Administrative Law in Canada,” which appeared in 1934.<sup>129</sup> It demonstrated his remarkably wide range of interests, and an enthusiasm for change and a perceptiveness that were remarkable in someone who was then 65 years old and had already done major scholarship in an entirely different field and was at the same time administering the law school and writing about constitutional law. It included a self-congratulatory account of the work being done at his school, including the introduction of a course in Administrative Law in 1931, the first in Canada, which Kennedy assigned to a young faculty member, Jacob Finkelman.

Finkelman graduated from Kennedy’s school in 1926, worked for a year to save his tuition, and spent three years at Osgoode Hall. He was appointed a lecturer in 1930, becoming the first Jew appointed to a permanent position at the University. In 1936, he published his major contribution to administrative law, “Separation of Powers: A Study in Administrative Law.”<sup>130</sup> Three years later, in 1939, he wrote “Government by Civil Servants,”<sup>131</sup> where he dealt more generally with the new state. Last in this group came Russell Hopkins, who was born on the prairies, graduated from the Law School at Saskatchewan, and went to Oxford as a Rhodes scholar. After teaching at Kennedy’s school for a year, he returned to Saskatchewan for financial and family reasons, replacing Corry. His “Administrative Justice in Canada”<sup>132</sup> was a comprehensive survey of the thinking that had accumulated since the late 1920s.

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127. “The Fusion of Government and Business” (1936) 2 Can. J. Econ. and Pol. Sc. 301.

128. (Study prepared for the Royal Commission on Dominion-Provincial Relations, 1939) [unpublished] [“The Growth of Government Activities”].

129. (1934) 46 Juridical Review 203 [Kennedy, “Aspects of Administrative Law”].

130. (1936) 1 U.T.L.J. 313 [Finkelman, “Separation of Powers”].

131. (1939) 17 Can. Bar Rev. 166 [Finkelman, “Civil Servants”].

132. (1939) 17 Can. Bar Rev. 619 [Hopkins, “Administrative Justice”].

All these scholars shared a belief that this new state was a product of fundamental change in social values and demands. Phrases such as "...new social standards," "new standards," and "new social philosophy" appeared throughout their writing, and Corry announced, "[s]ocialistic legislation ... is the mainspring of administrative discretion."<sup>133</sup> They also believed that this change was a response to political demands by segments of society that had been disadvantaged by the workings of nineteenth century economic liberalism. Their understanding of *laissez-faire*, a term they commonly used, may have been simplistic, but they firmly believed that it was harsh and unfair. Finkelman's account was more forceful than the others, but they would not have disagreed.

Then came the rude awakening. The romance was ended. Laissez-faire had failed to bring happiness to the masses of mankind. In fact, the untold misery and suffering and the social waste which followed in the wake of the new industrial system caused a revulsion of feeling which is gradually undermining even the positive achievements of the past century. ...[T]he operation of that doctrine doomed millions of people to want and privation.<sup>134</sup>

They were not philosophers and only Kennedy speculated about the theory of this new state. Building on theories of the new state, including the English pluralists and, likely, another faculty member at the University of Toronto, Robert MacIver,<sup>135</sup> and scattered European writers, he argued that the state should be conceived not as an abstract sovereign, but as an association constructed by society to achieve shared purposes. In the Lafayette lectures, his manifesto, he argued,

we must ...conceive of the state as a definite group-life. ...established by society as a means to achieve certain purposes. ...It is not a mere policeman standing on guard to see that we get our share of liberty and of rights, and that our neighbour gets his. ...In other words, the state is a great social engineer and its laws ...are socially created rules of social engineering.<sup>136</sup>

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133. "Administrative Law", *supra* note 126 at 194. In "Aspects of Administrative Law in Canada" Kennedy spoke of a new social philosophy that was committed to, "[c]are of the sick, the poor, the aged, and the infirm, elimination of slums, control of industry in the interests of humanity, protection of children, universal education, development of natural resources for the benefit of mankind, all demand immediate attention" (*supra* note 129 at 221).

134. "Civil Servants", *supra* note 131 at 171-72 [emphasis in original].

135. MacIver's major work was *The Modern State* (Oxford: Clarendon Press, 1926). Kennedy never referred to it, but it was published when he was beginning to think about these topics, and his ideas paralleled much of its thinking.

136. *Some Aspects*, *supra* note 5 at 8-9, 14-15.

Beginning with this understanding, he turned to the relation between the individual and the state, arguing that the individual could only be understood and could only flourish as a member of a community, and that because the state was made by the will of the citizens, there was "no antithesis between individual and state." Instead, the function of the state was to enable the citizen, "to realize 'the good life,'" and be, "in truth *civis*."<sup>137</sup> His thinking about the state also included a challenge to the Austinian sovereignty of the state that was at the heart of nineteenth century English legal theory. As early as the middle 1920s (thinking not about the administrative state, but about federalism and the struggles to make the League of Nations), he declared sovereignty to have been vanquished by both theory and facts. "No one seriously follows John Austin, and sovereignty is as dead as Queen Anne."<sup>138</sup>

Even though the others eschewed such flights of theory, they were not content merely to observe and record the changes. Instead, they were participants. In short, paralleling the writing about federalism and interpretation, they sought to help construct and legitimate the legal structure of this new state and the legal structure of the new liberalism.<sup>139</sup> Kennedy proclaimed this new role, and called on scholars to be creative in pursuing it.

...[T]he teacher of law or jurist is no longer merely a contemplative creature describing the law as it exists. The very development of the administrative system has forced him to be constructive, not only in interpreting the tendencies of social existence, but also in assisting in moulding and guiding them.<sup>140</sup>

The basic ideas about this structure emerged in England during the 1920s, and was accepted by the Donoughmore Committee in 1932.<sup>141</sup> The existing institutions of government, particularly the legislatures and the courts, were adequate to perform the limited functions of the nineteenth century state, but they did not have the time, the knowledge and expertise, or the appropriate structures and procedures to perform the new functions.

137. "The Workings of the British North America Acts, 1867-1931" (1936) 48 *Juridical Review* 57 at 58-59.

138. *Some Aspects*, *supra* note 5 at 57.

139. They might usefully be added to historians' understanding of the "government generation". See Doug Owsam, *The Government Generation: Canadian Intellectuals and the State, 1900-1945* (Toronto: University of Toronto Press, 1986).

140. "Aspects of Administrative Law", *supra* note 129 at 214.

141. U.K., H.C., "Committee on Ministers' Powers Report", Cmd. 460 in *Sessional Papers*, vol. 12 (1931-32) 341.

Appropriate institutions must be created, if they did not already exist, and given the necessary powers.

The Canadian scholars echoed these arguments, most of them in a moderate way. Willis, though, was fervent about the need to respect expertise. In *Parliamentary Powers*, he asked, "why should our system of government be conceived of as a pyramid with the courts at the apex...and the actions of the Civil Service, the best informed and most forward looking body of persons in England today, regulated from the point of view of an outside jurisdiction?"<sup>142</sup> Forty pages later, he said that the purpose of most delegation was "to give full play to the determinations of the expert."<sup>143</sup> None of the others went so far, and Finkelman, had reservations, wondering, in particular, whether the Canadian civil service had developed the necessary professionalism.<sup>144</sup> None of them wondered about a tension between democracy and the experts, although their frequent use of the distinction between policy — the responsibility of the legislature, and implementation and detail — the responsibility of the experts, suggests their answer.

The Canadian scholars realized that even though the new state had been accepted, questions of design remained and would change as needs and values changed. They saw a fluid future, in which change would be constant, and flexibility and experiments would be needed, often using phrases such as "experimental laboratories" and "new experiments."<sup>145</sup> They tended to look to experience and "reality" as guides to action, and some, especially Willis, Finkelman and Kennedy expressly called for research into "what really happens," a call corresponding to the calls for realism and what courts did. Moreover, most of them were sensitive to the Depression, which amplified their sense of urgency, and to the distinctive circumstances of Canada.

Willis was the one who thought most about these questions of design. In "Three Approaches...", he said the central question was, "how to fit into our constitutional structure these new institutions whose growth seems inevitable."<sup>146</sup> This question was essentially a choice of an approach to

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142. *Supra* note 121 at 113.

143. *Ibid.* at 157.

144. Book Reviews of *The Administrative Process* by J.M. Landis, *State and Federal Grants-in-Aid* by H.J. Bitterman, and *Women Servants of the State, 1870-1938: A History of Women in the Civil Service* by H. Martindale (1940) 3 U.T.L.J. 519 at 520.

145. See e.g. Hopkins, "Administrative Justice in Canada", *supra* note 132 at 621; and Corry, "Administrative Law in Canada", *supra* note 126 at 191.

146. *Supra* note 122 at 59.

designing institutions. After concluding that the approach of the courts and the "conceptual approach" were utterly inadequate, he suggested a "functional 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 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*.<sup>147</sup>

Here, "functionalism" had much the same meaning as "empirical and pragmatic" had for Wright. The agencies must be designed and assessed to serve current, concrete social need, and not some abstract ideal. Later, in *Canadian Boards At Work*, Willis specified some particular issues of design, and suggested a connection between his functionalism and the earlier developments in philosophy by saying that an agency must be understood by knowing what it did.<sup>148</sup>

This thinking about designing the new institutions and powers was entangled with the response to the claims of critics that parliament, the courts and individual liberty were all threatened. One thread of these claims, based on the principle of separation of powers, was that judicial powers should not be given to the executive or agencies, or at least that any delegation should be restricted and mistrusted, to protect individual liberty and abuse of power. The new powers threatened to offend the principle. In England, the outcome was expressed in vague phrases such as "quasi-judicial." In Canada, Finkelman made the most elaborate response. Separation of powers was not a part of the constitution or the common law, and it was not and should not be a rigid rule.<sup>149</sup> Precision was both impossible and undesirable. Instead, the allocation of functions should "serve practical ends...grow[ing] out of necessity and common sense." In particular, the courts needed discretion, to "balance between working effi-

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147. *Ibid.* at 75.

148. *Supra* note 125 at 2.

149. "Separation of Powers", *supra* note 130. It was not a part of the constitution because Parliament, the executive and the judiciary had each exercised all three functions: legislative, executive, and judicial. Nor was it part of the common law, because the courts had not developed any clear and consistent meanings of the functions. In both these paths, the reasoning was grounded upon experience and "reality."

ciency and the life of the individual citizen.”<sup>150</sup> Willis made another closely related response: the rigid form of the principle was an unworkable and incoherent product of lawyers’ tendency to “conceptual thinking.” “Difficulties arise ... as soon as maxims enunciating generalities acquire particular and fixed meanings. ...[T]here is no essential distinction between the three supposedly distinct types of power.”<sup>151</sup> The only test was, what sorts of questions were courts best equipped to administer — the functional test.

The major claim of the critics, though, was simply that the agencies recklessly intruded upon liberty, through mistake or excessive zeal. Here, the scholars made two kinds of responses. The first, made by Willis alone, was a stark demonstration of the importance of facts and experience, contrasted to abstract faiths and doctrines. The claim was wrong, because there had been no abuses. Speaking of powers to modify statutes, he said,

It is easy to understand a lawyer’s horror at this section, for there is nowhere any provision for control by the courts; ...No one can deny that there is some risk involved in so wholesale a delegation, but so far there has been no suggestion of hardship to individuals or of usurpation of the parliamentary power. The generality of the words used is not in itself important; the proper question is what has in fact been done under those words... I was almost disappointed to find that the orders were uniformly uninteresting.<sup>152</sup>

The second response, which was the more common one, took different forms, but its essence was that the intrusions upon liberty were typically limitations of property interests entailed in programmes of regulation and redistribution that had been chosen democratically. The critics were simply defying democratic choice, and the courts had shared this defiance by hostility to the new state. Willis was the most expansive and insightful. Throughout, his claims were not sweeping abstract generalizations, but instead, grounded upon the results of the cases. For example, in both “...Nutshell” and “Administrative Law...” he analyzed cases about presumptions, and in “Three Approaches...” he considered cases on discretions and procedural requirements, where much of the doctrine was about the highly technical limits of the prerogative writs, and where the results were “a direct product of judicial hostility.”<sup>153</sup>

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150. *Ibid.* at 341, 342.

151. “Three Approaches”, *supra* note 122 at 71.

152. *Parliamentary Powers*, *supra* note 121 at 151-52.

153. “Three Approaches”, *supra* note 122 at 62.

He saw the values of class and property as the major source of the hostility. In *The Parliamentary Powers* ...he pointed to "[t]he scandals from a social point of view...whereby great improvement schemes were held up for months by slum owners upon technical points...."<sup>154</sup> and in his account of presumptions in "Administrative Law..." he said,

The years of depression since 1929 have induced legislatures to pass laws which are right out of line with traditional ways of thought and therefore distasteful both to those guardians of the past, the lawyers, and to their wealthy clients who have, of course, been adversely affected by these laws. Once more the old ghost of Lord Coke stalks abroad ...<sup>155</sup>

But class and property were not the entire source of hostility. By training and experience, the minds of lawyers were shaped to have a predilection for the common law and its principles, and for courts, contrasted to the statutes that made the new state, the agencies that administered it, and their discretions.

...to a lawyer a statute does not speak the living language of the day. Lawyers' ears are attuned to the accents of a forgotten past, new commands are faintly apprehended through the fog of the Common Law.<sup>156</sup>

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. ... The common law has much to say about private rights, little of public duties. It is uncompromisingly individualistic. Rights of property and freedom from personal restraint are sacred. ... The judges have never forgotten the part which their predecessors took in the struggle between king and commons: as men they are uncompromisingly hostile to the executive.<sup>157</sup>

In these responses to the critics, both Finkelman and Willis argued that the doctrine had not given coherent, determinate results. Neither suggested that doctrine was inescapably indeterminate or that judicial decisions were inescapably the product of politics or chance, and their own common law writing demonstrated a faith in the enterprise. Instead, their protests were aimed at the use of rigid abstract concepts, divorced from context, experi-

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154. *Supra* note 121 at 42.

155. *Supra* note 123 at 273.

156. Willis, *Parliamentary Powers*, *supra* note 121 at 51. The same thought appears at *ibid.* 171.

157. Willis, "Three Approaches", *supra* note 122 at 60-61.

ence, and function. These arguments suggest the American Realists, although the suggestion depends greatly upon a choice of identity for the Realists. Neither of them offered any references to make the connection, and a much firmer connection was to the rejection of "logic". Their aim was not so much to analyze judicial reasoning as it was to demonstrate the effect of class and professional prejudice.

In a sharp contrast to post-war scholarship, supervision of the agencies was rarely a major topic or a major battleground. Instead, the discussions tended to be sanguine, except for some support for rejecting review by courts on functional grounds and creating an administrative court instead.<sup>158</sup> Kennedy was the most imaginative. He considered the potential role of legislatures in supervising rule-making by the executive, stressing the need to protect democratic principles and encouraging advisory committees. He also suggested a specialized branch of the courts for review; and, most remarkable, he made a suggestion that would become part of modern thinking decades later: the most promising way to facilitate review was to encourage the agencies "to develop their standards consciously, and by requiring the publication of reasons for their decisions."<sup>159</sup>

#### 4. *The Public Law Scholarship Reviewed*

Much of this writing about public law was simply excellent, especially compared to writing in England, which was scant indeed. Saying this, though, does little more than please my national pride. More important, it was different from the contemporary Canadian common law scholarship in three important ways.<sup>160</sup>

First, it openly espoused political beliefs, especially campaigning for the new liberalism, and it openly considered context. Like Wright, all of these scholars, except Scott, shared the prevailing liberal faiths of most Canadian intellectuals. Because Scott's writing about public law was primarily about federalism, and because the making of a socialist state

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158. Willis firmly advocated review by an administrative court, in "Three Approaches", *ibid.* at 79-81; John Humphrey, of McGill, agreed, in "Judicial Control Over Administrative Action with Special Reference to the Province of Quebec" (1939) 5 Can J. Econ. and Pol. Sci. 417, but on the basis of awkward doctrinal reasoning. Two others suggested that such a step might be necessary: Corry, in "The Growth of Government Activities", *supra* note 128 at 15-18, and Kennedy, "Aspects of Administrative Law", *supra* note 129 at 224-228.

159. "Aspects of Administrative Law", *ibid.* at 228.

160. Note that it is the subject matter that seems to make the difference and not the identity of the scholars. Most of the scholars who did the major public law scholarship also did major pieces of common law scholarship without a trace of these distinctive differences. See e.g. J.A. Corry, "The Custom of a Month's Notice" (1932) 10 Can. Bar Rev. 331; Vincent C. MacDonald, "Statutory Conversion of Land Into Goods" (1931) 9 Can. Bar Rev. 691; and John Willis, "The Nature of a Joint Account" (1936) 14 Can. Bar Rev. 457.



required the same strong central government as the new liberalism did, he did not differ from them. Perhaps the reason for this openness may be that the new state, which the scholars wanted so much, would be made by the legislature, and the courts were at best supplementary institutions, and at worst, undemocratic obstacles. The lessons that law cannot be separated from its context and that the legislature should make the major social changes were needed only in a world in which the courts were at the centre of the scholars' legal visions, and not in a country where legislatures were supreme and that had used the state so much to make its economy. The need for detachment and objectivity in doing common law analysis was not as pressing for this work.

Second, it was greatly influenced by the English experience, especially the rise of the regulatory and welfare state, the debates at the end of the 1920s, and the pervasive perception of the tension between individual liberty and government tasks. Lord Hewart and his cohort needed to be refuted. Except for Corry's article about interpretation, the experience and writing in the United States was mentioned only very rarely, and the contrast of its appeal to Wright neatly reflected the delicate and shifting balance of the two Empires in Canadian life generally. Third, it contained little analysis of doctrine — and almost all of the analysis it did contain was directed towards responding to critics, not describing doctrine to help lawyers. Again, the reason may be simply that this analysis was not among the most pressing issues.

##### *5. Labour Law: Herein of Bora Laskin and the State of the Art*

As the devastation of the Depression mounted during the 1930s, the struggle between workers and employers intensified. Violence often erupted, and the state often intervened to support the employers. Late in the decade, the conflicts began to appear more and more frequently in the courts, and two scholars began to write extensively about the results: one was Jacob Finkelman, whom we have already seen in the discussion of Administrative Law, and the other was Bora Laskin. Born in Fort William, he came to the University of Toronto and Kennedy's school in 1930, where he heard Wright's manifesto. After graduation, he went to Osgoode Hall for three years, at the same time working for an M.A. at Toronto. In 1936-37, he went to Harvard for an LL.M, and then returned to Toronto, where he worked for a commercial legal publisher and involved himself in labour research and education, until Kennedy appointed him in 1940, at the very end of my story.<sup>161</sup>

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161. I have taken this account of Laskin's life from the drafts of Philip Girard's biography.

Both Finkelman and Laskin believed in the legitimacy and utility of collective bargaining and peaceful picketing. Finkelman declared, perhaps a bit hopefully, "the social utility of trade unions in the modern industrial community has become almost axiomatic."<sup>162</sup> They also shared the belief that the courts had too often imposed the values of their class and the nineteenth century faith in individual liberty.

Finkelman's major contribution was a long article about picketing,<sup>163</sup> in which his major objective was to "analyze the decisions...for the purpose of discovering the principles, if any, upon which the courts proceed."<sup>164</sup> This might well have been the purpose of a scholar in the late nineteenth century, but as well as providing a guide for the profession, Finkelman sought to demonstrate confusion and inconsistency in the doctrine, and a pervasive hostility to labour, and as well to demonstrate that both were greater in Canada than in England. Speaking of the lingering effects of the nineteenth century, he spoke about the way half-forgotten ideas from the past can shape attitudes:

[T]he notion that there exists a right to trade has coloured the whole interpretation of the legal principles relating to trade unions and has often beguiled the courts into resting judgments on vague generalizations relating to freedom of trade and individual liberty, rather than on relevant legal principles. In fact, anyone reading the voluminous judgments relating to trade-union activities cannot but feel that the approach of the courts has been instinctive (the act complained of is abhorrent to their economic, social, and political predilections: such conduct must be circumvented) rather than properly judicial and impartial.<sup>165</sup>

Laskin's major contributions were two articles, both comments on recent Canadian cases, both written while he was at Harvard, both demonstrating his support for labour, and both shaped by American scholarship and his teachers. The first,<sup>166</sup> which dealt with the trial judgments in a couple of cases from Manitoba, began by advocating the use of American cases as guides for deciding labour issues, and criticizing the courts for blindly following English cases that had been repudiated by statute. Instead, the courts should be willing to use the statutes themselves as starting points for common law development that accommodated the changing social values, an idea that seems likely to have been stimulated by reading Pound or Landis.

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162. "The Law of Picketing in Canada" (1940) 2 U.T.L.J. 67 & 344 at 69.

163. *Ibid.*

164. *Ibid.*

165. *Ibid.* at 76.

166. "Picketing: A Comparison of Certain Canadian and American Doctrines" (1937) 15 Can. Bar Rev. 10.

In the cases that prompted the article, the court barred picketing in the absence of lawful strike. Laskin disagreed, arguing that the picketing was justified by "the remoter interests of labour generally. "...[M]ore than the sanctity of profits is involved in these controversies."<sup>167</sup> As well, assuming the workers could picket, the court prohibited statements about working conditions that used such terms as "unfair." Laskin was scornful. "[T]he bare statement of unfairness as an opinion honestly held should not be objected to in a country which still boasts of freedom of speech."<sup>168</sup> Moreover, he argued, both in this article and in a comment written after the Manitoba Court of Appeal affirmed the trial judgment, that the court's assessment of fairness tended to express its economic faiths, which were equally likely to be the faiths of the past — the faith in individualism and freedom to contract.<sup>169</sup> Therefore, statements should not be prohibited unless they were defamatory, deceptive, or intimidating.

The second article, about the labour injunctions to restrain picketing,<sup>170</sup> began with a long account of the injunction and its abuses in the United States. Here it was an Ontario case that prompted Laskin to write. Workers had picketed, and after an injunction was granted, some union members who were not employees but who knew the injunction had been granted, began to picket. The Ontario Court of Appeal held they were guilty of contempt, and Laskin was again scornful, arguing that the effect of the holding was that an injunction granted to enforce a private right had been turned into a public criminal prohibition against the whole community. Unless the courts exercised their equitable jurisdiction "with a spirit of social understanding,"<sup>171</sup> their role was likely to be circumscribed by legislation.

Laskin returned to labour only once more during the decade,<sup>172</sup> but he wrote about thirty articles, comments and reviews about a wide range of other topics. Among them, the major one was "The Protection of Interests by Statute and the Problem of 'Contracting Out,'" written while he was in

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167. *Ibid.* at 13.

168. *Ibid.* at 16.

169. In a case comment in the same year, Laskin spoke bluntly about choices of this kind: "A court which makes a choice here is exercising a purely legislative function. It is not desirable, nor is it possible to shut the judiciary off from legislative considerations. But the notions that a court may adopt here, if it decides to act, must be in line with the current *mores* of the community." (Case Comment on *Allied Amusements Ltd. v. Reaney & Kershaw Theatres Ltd. v. Reaney* (1937) 15 Can. Bar Rev. 813 at 817.)

170. "The Labour Injunction in Canada: A Caveat" (1937) 15 Can. Bar Rev. 270.

171. *Ibid.* at 283.

172. Case Comment on *Moscrop v. London Passenger Transport Board* (1940) 18 Can. Bar Rev. 810, which used the case as a springboard for general comments about the need for strong unions and legislative support for industrial democracy.

his second year at Osgoode Hall, in 1936, but not published until 1938.<sup>173</sup> As its title suggests, it dealt with the question when courts should permit an individual from making a contract to give up a benefit or protection given to him or her by statute. Again, the introduction revealed much of his general thinking. Two themes in particular were important. The first was his version of the underpinnings of the new state. The nineteenth century theories, which had made the individual will paramount, failed to understand that individuals could "be rendered so helpless through economic privation as to be incapable of having a free will." Change was needed, "by throwing the weight of the state behind those interests which the individualistic legal theories of an evanescent period have proved pitifully inadequate to protect." The second was his beliefs about the role of courts and legislatures. In the past, the courts had sometimes changed law to respond to social change, but their potential was spent. "[T]he responsibility for the protection of new interests and the legal recognition of new social forces must hereafter be primarily the concern of the legislature and not of the courts."<sup>174</sup> These thoughts were heady stuff for a young student, and suggest that he had been introduced to the new ideas at Kennedy's school.

At the end of this long introduction, he set out the basic principle: whether contracting out of a protection given by statute could be surrendered depended upon policy of the statute. The bulk of the article followed: a thorough description of what the courts had done. In the conclusion, he returned to this basic principle, and the question how to determine the policy of a statute. Here, Laskin presented an elegant survey of the developments of the 1930s, especially Corry's article: the rejection of literal meaning and the will of the legislature, the shift to purpose, the need to understand the context of making the statute, and the need for cooperation between courts and legislatures.<sup>175</sup>

In a few comments about common law topics, especially torts, he repeated his admonition to think in terms of interests, not rights, and suggested that the reasoning must always be "tentative."<sup>176</sup> In writing about interpretation, he repeated, the need to respect "motivating considerations" and the changes in the public philosophy.<sup>177</sup> When the Supreme Court

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173. (1936) 16 Can. Bar Rev. 669.

174. *Ibid.* at 673, 670, 671.

175. The introduction and this conclusion were remarkably detached from the account of the cases. Perhaps they were added later.

176. Case Comment on *Camden Nominees Ltd. v. Slack* (1940) 18 Can. Bar Rev. 393 at 394.

177. Case Comment on *Beresford v. Royal Insurance Co., Ltd.* (1938) 16 Can. Bar Rev. 393 at 405. See also Bora Laskin, Case Comment on Industrial Standards Act (1937) 15 Can. Bar Rev. 660 and Bora Laskin, Case Comment on *Tolton Manufacturing Co. Ltd. v. Advisory Committee* (1940) 18 Can. Bar Rev. 657.

invoked the freedom of commerce to sanction a tavern owner's refusal to serve a coloured person, he argued it had imposed the right to trade, an economic faith from the past, which had been displaced by comprehensive legislative regulation. Instead, the court should have interpreted this legislation as prohibiting discrimination.<sup>178</sup>

He wrote about administrative law only once, in a short note apparently prompted by a Supreme Court decision by his former teacher, Felix Frankfurter.<sup>179</sup> Here he asserted that regulation was necessary, and the task was to balance "the maximum of administrative regulation required ... with the minimum of arbitrary interference in the life of the citizen."<sup>180</sup> The major purpose of the note seemed to be to introduce American sources, especially Frankfurter, to Canadian lawyers.

None of Laskin's major ideas about legal reasoning and institutions was distinctive. Instead, Canadian scholars had introduced all of them in the first half of the decade. One symbol of this accomplishment was the first volume of University of Toronto Law Journal, which Kennedy established, and which appeared in the academic year of 1935 and 1936, just as Laskin was beginning to write. It was a dazzling collection of the new thinking: Corbett on the new international law, which we will see in a moment, Wright on the Restatement of Torts and Agency, Willis on administrative law, MacDonald on federalism, Corry on interpretation, Finkelman on separation of powers, and a host of reviews that shared the same stances. Yet Laskin was nonetheless remarkable. He incorporated virtually all the innovations in a wide range of subjects, and can best be understood as representing the state of the art of legal thinking at the end of the 1930s.

## 6. *International Law*

Only two scholars had a sustained interest in international law: Larry MacKenzie, at Toronto, and Percy Corbett, at McGill. Both were interesting and important figures, albeit for very different reasons. MacKenzie was born in Nova Scotia, served in the War, and then went to Dalhousie. After obtaining degrees in Arts and Law, he worked at the International Labour Office for a couple of years, before coming to Toronto in 1926.

178. Case Comment on *Christie v York Corp.* (1940) 18 Can Bar Rev. 314. See also Bora Laskin, Case Comment on *Burton v. Power* (1940) 18 Can. Bar Rev. 646, a case about speech in public places, where Laskin demonstrated that the freedom of speech really depends upon the permission and discretion of the police, and argued for firmer standards.

179. Case Comment on Administrative Tribunals (1940) 18 Can. Bar Rev. 227. This comment was not signed, but considering both the style and the subject matter, it was almost certainly written by Laskin.

180. *Ibid.* at 227.

The list of his scholarship was long, but most of it was short, descriptive notes and book reviews. The few substantial pieces demonstrated enthusiasm and good judgment, but little analysis or imagination. His abilities lay in managing and leading people, not scholarship. He left Toronto in 1940 to be President of the University of New Brunswick, and later became President of the University of British Columbia.<sup>181</sup>

Corbett, who was born in Montreal, obtained two degrees in Arts at McGill, before going to Oxford as a Rhodes scholar, where he obtained a B.C.L. He stayed as a junior fellow and wrote his first article about International Law, an inquiry into the legal nature of the League of Nations.<sup>182</sup> The task was urgent. According to the prevailing doctrine, made in the late nineteenth century, sovereignty was the central concept and the nation states were the sole form of international authority. Even more than in the domestic world, taming the past was crucial to a modern international order. Corbett sought to enable the construction of international institutions that were not nation states, by separating sovereignty from personality.

In 1935, after he had returned to Montreal and joined the faculty at McGill, he revisited the task of finding an escape from sovereignty in "Fundamentals of a New Law of Nations."<sup>183</sup> It was, he declared, unacceptable simply because it was unrealistic. Observation revealed a community of states, bound together by interdependence and extensive common interests, and accepting order in their relations. "No state can, for any considerable period, successfully withstand the common will of a strong majority in this society."<sup>184</sup> The doctrine of sovereignty persisted only because, "the legal mind is notoriously conservative; it persists in clinging to theories and twisting the new facts of life to fit them, rather than admit new theories to account for the facts."<sup>185</sup> He derived much of his analysis from European thinkers, especially from Hans Kelsen and his Vienna school.<sup>186</sup>

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181. For an account of MacKenzie's career, see Peter B. Waite, *Lord of Point Grey: Larry MacKenzie of U.B.C.* (Vancouver: University of British Columbia Press, 1987).

182. "What Is The League of Nations?" (1924) 5 Brit. Y. B. Int'l L. 119. For an illuminating account of this article and early twentieth century international law thought generally, see David Kennedy, "International Law and the Nineteenth Century: History of an Illusion" (1997) 17 QLR 99.

183. (1935) 1 U.T.L.J. 3.

184. *Ibid.* at 8.

185. *Ibid.*

186. His other contributions to international law were a couple of descriptive books about Canada's role in international affairs and a bundle of reviews. At the outset of his scholarly career, he wrote a handful of articles and a short book about Roman Law, and during the 1930s, he continued his interest in European sources by introducing Canadian lawyers to the thinking of Francois Geny.

*Perspective*

The sense of excitement and urgency, the making of new roles, the rejection of the nineteenth century legacy, and the embrace of new ways of thinking about law and a new state were all large changes. Of course, much of the common law ways of thinking remained, but enough was done to justify Willis' exclamation: he and his colleagues had turned their world upside down.

After the war, the United States became the dominant, often the exclusive, exemplar for legal scholars, and England was usually dismissed as mired in the past or simply ignored. At the same time, the distinctive elements of the Canadian public law scholarship disappeared. Analyzing cases, albeit done with a sense of urgency, became a much larger component of scholarship, even in constitutional law and administrative law, and the open expression of political beliefs disappeared. In the background of this change were the emergence of the legal process school in the United States, and the determination of the Canadian scholars to establish and legitimate their professional schools.

This story, especially the triumph of the American thought, can be encapsulated, albeit oversimplified, by seeing it as the triumph of Wright over Kennedy, and especially by looking again at Laskin. He acknowledged much later how much Kennedy had influenced him while he was an undergraduate. Nonetheless, a few years afterwards, Wright became Laskin's mentor. Laskin looked to American models just as much as Wright did, and wrote a flock of case comments that looked just like Wright's.<sup>187</sup> After the war, the two became the most powerful figures in scholarship and education, and what was distinctive in Kennedy's manifesto and public law scholarship disappeared.

Yet this look at the future is not part of my story. It has been, instead, the story of a generation that needs to be remembered, especially in a time when Canadian law schools seem to be looking for a new identity.

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187. See e.g. Case Comment on *Johnson v. Summers* (1939) 17 Can. Bar Rev. 448; Case Comment on *Spencer Clarke & Co., Ltd. v. Goodwill Motors Ltd.* (1939) 17 Can. Bar Rev. 604; Case Comment on *In the Goods of Knight* (1939) 17 Can. Bar Rev. 677; Case Comment on *United Australia Ltd. v. Barclays Bank Ltd.* (1940) 18 Can. Bar Rev. 62; Case Comment on *Commercial Credit Corp. v. Niagara Finance Corp. Ltd.* (1940) 18 Can. Bar Rev. 120; Case Comment on *Lockhart v. Stimson and C.P.R.* (1940) 18 Can. Bar Rev. 205; Case Comment on *Weld Blundell v. Synott* (1940) 18 Can. Bar Rev. 504; Case Comment on *Staples v. Isaacs* (1940) 18 Can. Bar Rev. 573.