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HADLEY AND THE COMMON LAW: ORIGINS AND DEVELOPMENT

WORK-IN-PROGRESS: EVOLUTION AND COMMON LAW

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"Evolution is change, nothing more or less."

Carl Zimmer[1]

It is a trite observation that time and tide wait for no one. Canute learned this much to his chagrin. And every other would-be commander or commentator is well advised to remember this mundane wisdom. Indeed, change is one of the few indisputable facts of life. In truly paradoxical fashion, it can safely be reported that change is a constant feature of the world. Whether considered locally or over vast eons of time, change is what makes the world what it is. The central challenge, therefore, for any one who wishes to understand or affect the world, is to come to terms with change and incorporate its dynamics into any account of how the world, or its constituent parts, work. Consequently, any account of legal and biological life that offers an important role for the fact and effects of change will soon itself become a victim of historical change. Nevertheless, human attitudes to change are no less complex or perplexing than the phenomenon of change itself. Being part of the changing world, human views on the hows and whys of change are themselves constantly changing. At the heart of this intellectual challenge is the persistent effort to fathom the relation, if any, between "change" and "progress." While there is a wide, if often begrudging, acceptance that change is inevitable and inexorable, there is also considerable disagreement over not only the pace and dynamics of such movement, but also its direction and putative destination. This debate and controversy is as heated in law as it is in any other field of study. In a world in which law has a relatively privileged place in addressing and channelling political power, the issue of whether the common law is merely changing or making progress is of considerable moment.

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In plotting a present course for the future, common lawyers have given considerable weight to the past. Nevertheless, it is largely recognised that while the legal past must and should play a central

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1. CARL ZIMMER, EVOLUTION: THE TRIUMPH OF AN IDEA 135 (2001).

role in the law's present and future development, that resort to the legal past need not be restricted to particular decisions made or a mechanical application of them. Incorporating, but not restricting itself to, such decisions, the modern perception of common law development emphasises that the most appropriate use of the legal past is less about a formal and technical enforcement of precedential authorities and more about a dynamic and expansive meditation on their underlying rationales and structure. It is accepted that the past does matter, but there is considerable disagreement over why and how it matters. Taking as their slogan Holmes's statement that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,"[2] modern jurists look as much to the substantive values that animate and integrate the law as to the formal attributes of stare decisis.

Accordingly, common law adjudication is viewed as an exercise in principled justification in which the body of previous legal decisions is treated as an authoritative resource of available arguments, analogies, and axioms. Judges are considered to judge best when they distil the principled spirit of the past and rely upon it to develop the law in response to future demands. As Lord Scarman put it, "whatever the court decides to do, it starts from a baseline of existing principle and seeks a solution consistent with or analogous to a principle or principles already recognised."[3] From a more theoretical standpoint, the prevailing idea is that it is the task of legal theory and also the responsibility of adjudication to understand the accumulation of legal decisions as fragments of an intelligible, if latent or implicit, plan of social life, and to extend law in accordance with the plan so that it becomes less fragmentary and more intelligible. In a dangerously close to bootstrapping argument, the claim is that although there are recalcitrant areas, the common law is best understood as being the practical expression of connected and abstract principles: the task of the judge is to elucidate those deeper ideals and to extend that structure so as to better render the common law more practical and coherent. Although there are many advantages to this more sophisticated way of proceeding over an old-style practice of stare decisis, the pressing challenge remains the same—how is it possible to balance stability and continuity against flexibility and change such that it results in a state of affairs that is neither only a case of stunted development nor a case of "anything goes"?

The traditional set of answers to this balancing conundrum is that, by and large, the law evolves according to its own methodology. Indeed, the evolutionary methodology of the common law is defended

2. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

3. McLoughlin v. O'Brian, [1983] 1 A.C. 410, 430 (H.L. 1982). In Holmes's famous phrase, the common law develops "from molar to molecular motions." S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917).

and celebrated by almost all traditional jurists and lawyers. Eschewing notions of revolution or stasis, most judges and jurists insist that law evolves incrementally rather than leaping convulsively or stagnating idly. Glossing its apparent messy, episodic, and haphazard workings, most judges and jurists would choose to treat and defend the common law as a polished, integrated, and teleological process which gives rise to a resourceful, flexible, and just product. Although there is much disagreement among traditional scholars about the precise dynamics and thrusts of this process, there remains the unifying commitment to demonstrating that not only can the common law balance the competing demands of stability and change, but that it can do so in a legitimate way that respects the important distinction between law and politics. In doing this, jurists strive to move beyond a discredited formalism to a more sophisticated account of adjudication as a creative and disciplined practice, without turning it into an open-ended ideological exercise. Accordingly, although the extent of their confidence waxes and wanes, traditional jurists and judges maintain that it is possible to provide compelling answers to the questions about how to balance tradition and transformation, about how to justify creativity in a supposedly stable system, and about how to distinguish the common law from its informing political and social context.

This kind of account of the workings and development of the common law underpins most legal literature and is endemic in jurisprudential writings. For example, in an otherwise unexceptional judgment on personal injury damages, the Chief Justice of Canada gave expression to the common understanding about how the law evolves. So typical is Chief Justice McLachlin's account and so uncontroversial is it in most legal circles that it deserves stating in full:

> Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.
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> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished

> through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.
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> Considerations such as these suggest that major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution.[4]

In its relatively short span, McLachlin's judgment encapsulates and highlights all the motifs of the traditional understanding of how the common law does, and should, work both as a general process and a particular undertaking for individual judges—slow growth, principled extension, institutional deference, professional competence, political neutrality, cautious revision, and, most importantly, progressive development. It is entirely clear that, while she is attuned to the competing demands of tradition and transformation, she also is convinced that some satisfactory, principled, and long-term trade-off is possible and recommended. On this view, the common law is a firmly grounded, finely balanced, ethically defensible, institutionally justified, politically legitimate, and self-improving enterprise.

In championing an evolutionary methodology, common lawyers trade off the established theories of biological development and, most importantly, benefit from its scientific pedigree. It has been a constant worry of many common law judges and jurists that their discipline is treated as "unscientific" and, therefore, second-rate or substandard by other scholars.[5] By drawing striking parallels between nature's operation and common law development, legal theorists have been able to reduce that insecurity. In one fell swoop, they can both explain the common law's development and legitimate it as an objective and natural process—this is a powerfully seductive possibility for judges and jurists. Of course, the idea of "evolution" is almost as old as society itself. It can be traced to the Greeks of whom Aristotle offered the most compelling ideas about the continuity and developing nature of all living things. In the many centuries before Darwin's mid-nineteenth century seminal contribution, "evolution" appeared in

4. Watkins v. Olafson, [1989] 2 S.C.R. 750, 760–61 (Can.) (quoting from an opinion by McLachlin, J., as she was known then).

5. It remains a constant jurisprudential refrain that the study of law can and should become more "scientific" if it is to be accorded sufficient scholarly respect. *See, e.g.*, Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875, 877 ("[T]he move toward a more scientific study of law will have greater benefits than costs."). This is a vain and unnecessary aspiration.

many different incarnations. Yet the common thread to most offerings was that there was some notion of progress at work in which the world was not simply on the move, but heading towards some sophisticated end-point, be it theological in plan and purpose or not. The etymological roots of evolution are in the Latin *evolvere* which means "to unroll" or "to unfold"; it was generally used as a synonym for "predictable progress." Perhaps because of its own insecurities, jurisprudence jumped on the Darwinian bandwagon of the nineteenth century more quickly and with more zeal than most other disciplines. Indeed, from the pioneering work of Maine, Holmes, Wigmore, and Corbin through to more recent technical efforts, the evolutionary motif has always loomed large over jurisprudential efforts to explicate the nature of the common law. While the resort to an evolutionary methodology is well-nigh universal, it is deployed across the full range of uses from metaphorical through analogical and homological to even literal.[6] Contributing to a general tendency in the humanities at large, jurists have utilised evolution not only to explain the past of the common law and its present dynamic, but also to predict and propose its future direction. Consequently, whether used in a casual or causal way, "evolution" is a ubiquitous and persisting concept in jurisprudential discourse about the common law.

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So is "evolution" at work in the common law? While most scientists concur with Theodosius Dobzhansky's assessment that "nothing in biology makes sense except in the light of evolution,"[7] can the same be said for jurists and jurisprudence? As with most legal answers, the best that can be said is that "it depends." The answer is a resounding "no" if it is meant that the common law develops slowly and incrementally by an internal methodology which mandates the cautious extension of established principles in the direction of refined justice. As in nature, there is no inherent logic or overarching purpose to the common law such that it progresses by dint of a self-improving ethic which allows it to approximate more closely to its own purified essence. This is the stuff of fantasy and says more about the hubristic aspirations of its juristic apologists than the actual operation of the common law itself. However, the answer is a guarded "yes" if it is meant that the common law is a messy, episodic, and experimental effort to respond and adapt to the contingent demands that the political and social milieu places upon it. If there is a method to the com-

6. For a brief history of this historical division and other suggestions, see generally ALAN WATSON, THE EVOLUTION OF LAW (1985), E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985), and Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985).

7. Theodosius Dobzhansky, *Nothing in Biology Makes Sense Except in the Light of Evolution*, 35 AM. BIOLOGY TEACHER 125, 125 (1973). *See generally* THEODOSIUS DOBZHANSKY, GENETICS AND THE ORIGIN OF SPECIES (3d ed. 1951).

mon law's madness, it is to be found in its participants' diverse and unorchestrated attempts to adapt to changing conditions and shifting demands. Nature and the common law, like all efforts to explain and understand them (including this one), are works-in-progress: they are the revisable result of manifold compromises between variability and stability in which present utility is always a give-and-take between past promise and future potential. As such, biological and legal evolution are both a strange mix of universal predictability (*i.e.*, change will occur as organisms and behaviour adapt to changing circumstances) and local unpredictability (*i.e.*, the specific outcomes of that general process in any given circumstances will be uncertain). In other words, life and law are works-in-progress which thrive on the productive tension between tradition and transformation so that they are better able to make the best of their environmental lot. And what is "best" will itself, of course, be susceptible to such processes and forces.

The courts are want to proclaim that "judges can and should alter the common law to reflect these [social, moral, and economic] needs as they change over time."[8] That judges "should" strive to do this is neither surprising nor controversial; any other position would be eccentric and unreasonable. However, it is the "can" that has proved more controversial. Obviously, judges can do whatever they want; they can augment, amend, abandon, or ignore legal doctrines as they see fit. However, in seeking to "alter the common law to reflect these needs as they change over time,"[9] judges are caught in a debilitating double-bind. First, they require some politically neutral device by which to calculate and calibrate the changing needs of society: this seems to be an unavoidably political and contested task. Secondly, having elucidated such needs, the judges must alter the common law to "reflect" such needs. Apart from the difficulty of ascertaining what rules best satisfy certain needs, they must alter the law in a way that best respects the common law's own evolutionary expectations about itself—the legitimacy of adjudication is seen to reside in the fact that judges keep in check their partisan political preferences by resort to the formal discipline of principled argumentation. It is simply not accurate or convincing to claim that judges can or do perform such a formal and disciplined mode of alteration. It is not that judges ignore the extant rules or that they follow the rules in a mechanical manner. It is that, in "applying the rules," they are engaging in a profoundly political and value laden act because what the rules are, and what it means to apply them, inescapably and inevitably implicates the very ideological commitments that they are suppose to avoid.

Contrary to what traditional scholars insist, the common law is awash in the roiling and mucky waters of political power. While

8. R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156, 166 (Can.).

9. *Id.*

judges and lawyers claim to keep relatively clean and dry by wearing their institutional wet-suits of abstract neutrality and disinterested fairness, they are up to their necks in ideological muck. And this is no bad thing. Because it is only when judges come clean, as it were, and admit that they have political dirt on their hands that they will appreciate that the common law is an organic and messy process that has a similarly organic and messy connection to those social needs which it claims both to reflect and shape. So enlightened, they might begin to accept that they are involved in a political enterprise whose success and legitimacy are best evaluated not by its formal dexterity and technical competence, but by its substantive contribution to the local advancement of social justice. Abandoning the persistent attachment to a false distinction between a relatively unsoiled practice of principled adjudication and a contaminated involvement in crude politics would be an excellent place to begin such a commitment. As long as its practitioners present the common law as an insulated and insular process, the common law will run the considerable risk of being unresponsive and unreflective of the needs it is supposed to address. On the other hand, if judges and jurists are more willing to concede that the worlds of law and politics are intimately related, it might become possible to give society's needs the kind of direct and substantive attention that they merit. It is difficult enough for judges (and anyone else) to *do what is best* without pretending at the same time that they are engaged in an entirely different enterprise. Efforts at local substantive justice are not enhanced by a mistaken belief that universal formal coherence is at stake. Legitimacy is best attained by candour and frankness, not by denial and dissemblance.

It has become almost cliché to admonish people that if they ignore the past they will be destined to repeat it. However, when it comes to the common law, judges and jurists work from the converse premise—that, by ignoring the past, lawyers will run the present risk of not repeating history and thereby compromise society in its future pursuit of justice. The common law professes the maxim that the past is the repository of wisdom and that it is ignored at society's (and lawyers') peril. However, this backward looking stance does a disservice to the past as well as the present. This "turn to history" makes the same mistake that Vico, Comte, Hegel, Marx, and even Fukuyama do when they insist that there is a predictable and law-like explanation to the workings and direction of history. To some extent, the official credo of the common law reflects elements of this historical and pseudo-scientific method of thinking—the reliance on formal methods and argumentative techniques that somehow operate independently of the substantive values and commitments on which they are premised and to which they arrive. The traditional emphasis is more on the "method" than on the "history"; it is about history with a capital *H*. Yet, as Holmes emphasised in his seminal statement that "[t]he life of

the law has not been logic: it has been experience,"[10] it is not so much the past that animates the common law, but a selective account of it. Even in its more formalist guises, the common law distills history into "experience" and uses it to validate particular practices and positions. However, it is not history that is doing the work here, but the specific values and commitments that inform the process of distillation; substance is not so much hidden in the formal techniques of legal reasoning as secreted in the putatively neutral category of "experience." While the resort to the wisdom and guidance of experience is not good or bad in itself, there is nothing impartial or detached about that manoeuvre. The invocation of "experience" is less an escape from politics and more a reliance upon it by more indirect means.

Nevertheless, contrary to the theoretical pronouncements of judges and jurists, common lawyers have been wise enough in practice to realise that those who only remember the past are destined to miss out on the future. The common law has retained its present vitality and future relevance by playing fast-and-loose with the past: its practitioners have taken an "anything might go" approach to its operation and development. While its past has operated as a presumptive baseline for action and adjudication, the common law has never allowed the past to hinder its present practice or to determine its future. It is the willingness of the common law to adopt a cavalier and experimental attitude to its own formal techniques and substantive commitments that is at the dynamic heart of its organic development. Consequently, an important lesson to be drawn from the Author's account of the common law's evolution is not that the past has no merit. Nor is it that the past cannot or should not be utilised to resolve present disputes. It is that resort to the past is no more legitimating than any other legal manoeuvre because there is no *one* past to be identified, no *one* way of applying that past to the present, and no way of knowing whether the present utilisation of the past will be relevant to the problems of the future. The common law is more tentative than teleological, more inventive than orchestrated, and more pragmatic than perfected. It is not that no sense can be made of the common law, but that any such effort to make sense of it must itself be contextualised and tentative. As a work-in-progress, the common law does not possess some enduring or essential core which transcends its historical elaboration; there is nothing more (or less) to the common law than the "on the move" and "seat of the pants" workings of its own development.

Insofar as reported cases comprise the residual depository of common law wisdom, the system amounts to little more than "chaos with a full index."[11] However, this Author maintains that it is possible to

10. O. W. HOLMES, JR., THE COMMON LAW 1 (1881).

11. Norman S. Marsh, Book Review, 30 INT'L & COMP. L.Q. 486, 488 (1981) (quoting Sir Thomas Holland); *see also* HAROLD J. SPAETH & JEFFREY A. SEGAL,

offer a sensible account that suggests that there is little global coherence to law even if there are local and contingent patches of sense. While the law takes shape by virtue of a series of creative and purposeful local interventions, the sheer number of these interventions and the bewildering complexity of the changing circumstances in which they are made render them unpredictable. Of course, it is merely sloppy scholarship to announce, without more, that law is chaotic, undisciplined, and unpredictable. Any account that suggests that law is beyond rational and compelling organisation bears a heavy burden of demonstration. However, it is not simply a cop-out to urge that law is indeed chaotic and undisciplined, provided that this conclusion is reached after extensive study and scrutiny. It is this Author's belief (and, hopefully, not conceit alone) that such a claim can be made about law. As always, the challenge is to offer sensible accounts of why local phenomena may have a sensible explanation, but, when aggregated, these phenomena have no sense as a systemic set. While the common law is always moving, it is not progressing in any planned or concerted fashion. As such, the common law inhabits perpetually that narrow and precarious present between the old and dying and the new and about-to-be-born. No legal doctrine is, or can be, ideal and pure. As one commentator has aptly described it, "laws are not static, forever preserved in their original state like flies in amber; they are living things, which evolve over time and adapt to new needs and circumstances."[12] However, like flies, these laws evolve in no particular direction and according to no particular methodology: they are works-in-progress whose development is a matter of local adaptiveness, not universal design.

When it comes to the common law, the best that can be hoped for is that doctrines might develop that are "useful" in the sense that they serve particular purposes, that they adapt to local conditions, and that they have a certain flexibility to remain relevant in a changed environment. The success or persistence of any particular innovation is a context-sensitive assessment; there is nothing inherently superior about one type of legal principle over another. Accordingly, any Darwinian talk about contingency is not to be taken as denoting only random occurrences or blind chance. The law takes shape by virtue of a series of creative and purposive local interventions: "[f]or evolution, the archaic features of life merely reveal its tortuous history, like the archaic features of human language or common law."[13] Whereas

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MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 287–315 (1999) (discussing the Supreme Court and stare decisis). For a more satirical account, see JONATHAN SWIFT, GULLIVER'S TRAVELS 296 (London, Dent 1966) (1906).

12. Brian Slattery, *The Organic Constitution: Aboriginal Peoples and the Evolution of Canada*, 34 OSGOODE HALL L.J. 101, 110 (1996).

13. MICHAEL R. ROSE, DARWIN'S SPECTRE: EVOLUTIONARY BIOLOGY IN THE MODERN WORLD 81 (1998).

chance operates in such a way as to prevent any explanation of particular events, contingency precludes the possibility of *ex ante* prediction but allows for the possibility of sensible *ex post* explanations. As in so much else, jurisprudential insight is always wiser in retrospect. The problem is that most judges and jurists blur the *ex ante* and the *ex post* such that the common law is presented as more coherent and less contingent than it is and as more the progressed work than the work-in-progress that it is. Any cogent account of the common law must be thoroughly pluralistic and multi-faceted if it is to respect and reflect the complexity and contingency of the common law's workings. Consequently, not only is the common law best thought of as an organic work-in-progress, but so are the jurisprudential efforts to explain its operation and development.

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It will be remembered that Darwin spent much of his life demonstrating why William Paley's claims—"every manifestation of design, which existed in the watch, exists in the works of nature, of being greater and more"[14]—were false. Emphasising that even the most complex of biological creatures required no designing hand or orchestrating intent, Darwin insisted that the wonder of nature was in the very fact that flora and fauna were as sophisticated and as adapted to their environment as they were—the historical, opportunistic, and unguided process of evolution had done the work all by itself. However, despite Darwin's best efforts, the most complete refutation of Paley did not come until 1986 when Richard Dawkins took direct aim at Paley. Using Paley's own examples, he showed how it was even more wondrous and awe-inspiring that nature's intricate complexity should be the result of gradual and insistent evolution over time than the draughtsmanship of a designing deity. Emphasising the unplanned, unconscious, and automatic processes of nature, Dawkins concluded that "[n]atural selection . . . has no purpose in mind[,] . . . has no mind and no mind's eye[,] . . . does not plan for the future[,] . . . has no vision, no foresight, no sight at all[, and] . . . [i]f it can be said to play the role of watchmaker in nature, it is the *blind* watchmaker."[15] It was a devastating refutation of the design thesis.

Nevertheless, while there are some advantages to thinking about nature through this mechanistic "watchmaker" metaphor, there are definite limitations. It tends to suggest a too inorganic and planned dimension to nature. Indeed, Darwin himself preferred to talk about the process of natural selection in more organic terms. His most favoured and most celebrated simile was "the great tree of life":

> The affinities of all the beings of the same class have sometimes been represented by a great tree. I believe this simile largely speaks

14. WILLIAM PALEY, NATURAL THEOLOGY 473 (1970) (1802).
15. RICHARD DAWKINS, THE BLIND WATCHMAKER 5 (1986).

> the truth. The green and budding twigs may represent existing species .... At each period of growth all the growing twigs have tried to branch out on all sides .... The limbs divided into great branches, and these into lesser and lesser branches, were themselves once, when the tree was small, budding twigs .... From the first growth of the tree, many a limb and branch has decayed and dropped off; and these lost branches of various sizes may represent those whole orders, families, and genera which have now no living representatives, and which are known to us only from having been found in a fossil state .... As buds give rise by growth to fresh buds ... so by generation I believe it has been with the great Tree of Life, which fills with its dead and broken branches the crust of the earth, and covers the surface with its ever branching and beautiful ramifications.[16]

There is much here that can be profitably used to understand the growth and development of the common law—the budding of new ideas, the branching out from old ideas, the decay of some rules, the varied ramifications of different rules, etc. While it can be easily observed that common law is not Paley's rock, jurists have still not learnt this lesson entirely. As skeptical and as pragmatic as some claim to be, jurists still seem to believe that they might one day stumble across the "philosopher's stone" which will allow them to turn the prosaic materials of the common law into a burnished example of essential law. Indeed, at different times and in different ways, jurists rely on such a forlorn hope and forget that the common law is as much an activity as a thing. Yet, even if law is understood as a way of acting, the common law is not the horological enterprise that Dawkins suggests. While law is more like a watch than it is a rock, it is certainly less like a watch than many common law jurists would like to believe. Although law is a human creation, it is not a device which has no life of its own or which is unaffected by the rich environmental milieu in which it functions and which it strives to regulate. While law can occasionally seem like a rock in its brute thereness and seem like a watch in its created sophistication, it is better understood as a more organic and less precise entity than a rock or a watch:

> the common law perpetually is in flux, always in a process of further becoming, developing, and transforming ... with a suppleness that resides in its inseparability from each discrete, concrete set of facts,

16. CHARLES DARWIN, THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION 171–72 (Avenel Books 1979) (1859). Some still persist in seeing a designing hand at work in the tree's growth. *See* MICHAEL J. DENTON, NATURE'S DESTINY: HOW THE LAWS OF BIOLOGY REVEAL PURPOSE IN THE UNIVERSE 320 (1998) ("[T]he evolutionary tree of life on earth was generated by direction from a unique program embedded in the order of nature ....").

> the facts of the lived experiences which formed the basis of the litigation that led to the prior relevant court adjudications.[17]

Of course, there is a distinction between the growth of biological organisms which are randomly mutating and those of the "common law" species which are at least trying to adapt with some degree of designing intent to the changing historical circumstances. However, it remains productive to think about the common law as an organic work-in-progress and to draw upon the imagery of the evolutionary tree of life in explicating its hermeneutical existence.

Mindful that it is more an activity than a thing, the common law can be understood as the cultivation of a stand of trees by a devoted band of professional arborists who work together, but not in concert. Indeed, one of the most popular metaphors in Canadian constitutional law is the idea of the constitution as a "living tree." Originally coined by Lord Sankey to justify a large and liberal interpretation of the British North America Act 1867,[18] which planted "a living tree capable of growth and expansion within its natural limits,"[19] it can be used to powerful metaphorical effect when understood in a slightly different way.[20] Importantly, law is to be found neither in the trees themselves nor in the arborists' efforts, but is best understood in terms of the interaction between them: law is most definitely not a stone and it has no inherent tendency to shape itself into any particular form. The specific configuration which law takes at any specific time will be a result of the ceaseless interaction between the growth of the trees, the environmental context, and the efforts of the arborists. Law can be grasped both as a site, with all the practical possibilities and parameters that this suggests, and as an exercise, with all the imaginative openings and occlusions, that this implies. Within such an understanding, it is more likely for people to recognise that law is neither a perfectly operating restraint on human actions nor a completely realisable occasion for human fulfilment; law is to be found in the organic engagement between restraint and realisation, limit and possibility, and design and accident. Like nature, law is always an active and adaptive work-in-progress.

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17. Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 75 (2001) (footnotes omitted).

18. The British North America Act 1867 is Canada's founding constitutional document.

19. Edwards v. Attorney General for Canada, [1930] A.C. 124, 136 (P.C. 1929) (appeal taken from Can.).

20. Resort to this metaphorical understanding of law remains commonplace in Canadian courts. *See, e.g.*, Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429, 431–34, 441–46 (Can.) (holdings of McLachlin, J., majority, and Arbour, J., dissenting); Reference re Prov. Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, 180 (Can.) (majority opinion by McLachlin, J.). For a different and more traditional defence, see Aileen Kavanagh, *The Idea of a Living Constitution*, 16 CAN. J.L. & JUR. 55 (2003).

By thinking of legal and judicial practice as the tending and training of social trees, there is an opportunity to capture the created and creative aspect of law in which human ingenuity, organic development, and environmental context interact; it suggests both agency and determination, choice and constraint, and chance and necessity. Moreover, by presenting evolution as not being about a ladder-like climb to some designated spot, but about the growing tips of a tree, Sankey's metaphor wonderfully illustrates as it contradicts the main thrust of Darwinian evolution when applied to the common law: "natural limits" are distinctly the stuff of political and, therefore, decidedly non-natural contestation. Also, when these "natural limits" are set against "growth and expansion," the dynamic tension is caught between a kind of spontaneous evolutionary growth in response to changing environmental conditions and a more reflective form of human husbandry in law's development. The common law is a combination of the tree's organic capabilities in adjusting to its environment and also the deliberative intervention of gardeners and topiarists in order to facilitate its growth and configuration. The limits to growth and expansion are a site for the constant negotiation between human initiatives and biological opportunities: climate, soil conditions, and other environmental factors present both an obstacle and an opportunity for social development. The idea of the "natural" is a contested and contingent limit to change that is part of the very process of development that it is considered to contain. Accordingly, in law, it is not so much that there is a blind watchmaker at work, but that there is a coterie of fully-sighted arborists who take charge of the trees' cultivation and who, despite their frequent claims to the contrary, are unable to foresee or control fully the trees' future development. The illusion of total command is maintained by a willingness to accept that the environment will need to be respected. While it is true that law might "evolve in the direction of greater fit with its environment,"[21] there will always be a productive tension between the law's notion of fit and the changing social, political, and cultural make-up of that environment; law and environment will interact in organic ways that will defy simple, consistent, or coherent explanation. In short, law will always be a relatively open ended and stylised form of politics in which "anything might go."

In evoking this arboreal metaphor, the Author has not sought to assert that evolution is applicable to legal development, let alone that there is a Darwinian dynamic at work. The Author's claim is only that it is a useful metaphor to think about law and legal change. Moreo-

21. E. Donald Elliott, *Law and Biology: The New Synthesis?*, 41 ST. LOUIS U. L.J. 595, 600 (1997); *accord* J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996) (explaining the different forces that are involved in the interaction of law and society).

ver, while law is a self-reflective process of decision-making, it is far from reducible to an activity that is governed by a strict philosophical discipline or that is exclusively explainable in its own internal terms. All the talk about grand purposes or guiding minds is pitched at such a high level of generality that what they might or might not recommend in any particular situation is almost impossible to predict. Or, to turn that around, the solution to any particular problem can be interpreted in accordance with a variety of very different, often competing, and occasionally contradictory ideals which can each claim a plausible threshold purchase on the extant legal materials. Consequently, while law is undeniably a teleological enterprise in that judges act with a purpose, the system as a whole cannot be said to have a directing mind such that it moves forward in one direction as if pulled along or pushed toward a given goal. In law, there are many theoretical possibilities, but the actual decision made is as much about external circumstances as anything else: principles prosper or perish not only by their intellectual merit, but also by their capacity to adapt to material conditions. Holmes's warning has been ignored and especially by those evolutionary jurists who claim to follow in his intellectual footsteps: "We have evolution in this sphere of conscious thought and action no less than in lower organic stages, but an evolution which must be studied in its own field."[22]

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Consequently, in contrast to the dewy-eyed accounts of traditional jurisprudence, the Author has taken seriously Lon Fuller's assessment that the common law "mirrors the variety of human experience; it offers an honest reflection of the complexities and perplexities of life itself."[23] Like life, law is an organic process (*i.e.*, events are the products of functional and localized causes) rather than a miraculous one (*i.e.*, events are the result of some divine plan or supernatural intervention). How "honest" that process is at any particular time, in the sense of being a complete and authentic reflection of life's manifold forces, may be debatable, but there is little doubt that the common law is a progeny of life's rich and controversial activity. In short, the common law is a work-in-progress—evanescent, dynamic, messy, productive, tantalising, and bottom-up. The common law is always moving, but never arriving, is always on the road to somewhere, but never getting anywhere in particular, and is rarely more than the sum of its parts and often much less.

22. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 447 (1899).

23. LON L. FULLER, ANATOMY OF THE LAW 106 (1968).