

# PROLEGOMENON TO AN INTELLECTUAL HISTORY OF ADMINISTRATIVE LAW IN THE TWENTIETH CENTURY: THE CASE OF JOHN WILLIS AND CANADIAN ADMINISTRATIVE LAW<sup>©</sup>

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The intellectual legal history—the history of ideas—of modern administrative law has yet to be written. The first part of this article suggests that one way to approach this necessary task is to posit the writings of leading administrative law thinkers in the context of cases, controversies, doctrines, events, and movements throughout the twentieth century. The work of pioneer administrative lawyer John Willis is used to exemplify this type of contextualized intellectual legal history. The second part of this article seeks to gauge Willis's influence on the development of Canadian administrative law.

L'histoire juridique intellectuelle (l'histoire des idées) du droit administratif moderne n'a pas encore été écrite. La première partie de cet article propose qu'une des façons d'aborder cette indispensable tâche serait d'avancer les écrits des principaux penseurs du droit administratif dans le contexte des cas, des controverses, des doctrines, des événements et des mouvements dans tout le XX<sup>e</sup> siècle. Le travail de pionnier de John Willis, avocat spécialisé en droit administratif, est utilisé pour illustrer ce type d'histoire juridique intellectuelle contextualisée. La deuxième partie de cet article cherche à évaluer l'influence de M. Willis sur le développement du droit administratif canadien.

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This lecture is dedicated to the memory of Professor J.F. (Jack) Northey (1920-1983). Jack Northey was a postgraduate student of Professor Bora Laskin's at the University of Toronto in the early 1950s. Laskin's biographer, Professor Philip Girard of Dalhousie University, tells me that Jack was one of his most memorable postgraduate students. Certainly, Jack's time in Toronto began a lifelong "academic love affair with Canada": B. Brown, "Jack Northey" in N. Tarling, ed., *Auckland Minds & Matters* (Auckland: Auckland University Press, 2003) 105 at 107. Jack taught me administrative law (albeit briefly) and it was in his teaching materials I discovered Willis's writings. More personally, Jack opened up Auckland Law School to students from working class backgrounds, supported me in ways that were more apparent to me later than at the time, and hired me to take over administrative law teaching at Auckland in 1982 when his health was failing. For all of those things I remain grateful.

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This article is in two parts. First, I will discuss how one might undertake an intellectual history of twentieth-century administrative law. Second, I will apply the method developed in the first part to the life and work of a famous Canadian administrative lawyer, John Willis, and attempt to trace his influence, not least on this law school. I hope to demonstrate why intellectual history is interesting as well as enlightening.

## I. METHODOLOGY

I will begin by sketching how I would go about “doing” an intellectual history of twentieth-century administrative law. There are many ways of doing intellectual history; few have been attempted in the context of Anglo-Commonwealth administrative law.<sup>1</sup> This is my way of approaching the task.

What do I mean by intellectual history? It sounds rather grand, even pompous. At the outset I beg your leave to beg some fundamental questions, such as: what is an intellectual? Can lawyers be intellectuals? Is law an intellectual study? Must one be an intellectual to “do” intellectual history? Important as these issues are, they will unduly divert this article.

Not too long ago, intellectual history was called the history of ideas.<sup>2</sup> In a nutshell, intellectual history attempts to understand ideas, thoughts, arguments, beliefs, assumptions, attitudes, and preoccupations

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<sup>1</sup> I leave almost entirely to one side U.S. administrative law and its intellectual history. There are significant cultural, social, political, economic, and legal differences between the U.S. and the Anglo-Commonwealth world (comprising for my present purpose the U.K., Canada, Australia, and New Zealand). Moreover, the traditions and conventions of legal scholarship diverged sharply between the U.S. and the rest of the common law world by mid-twentieth century. My inability to read French means that much of Quebec administrative law scholarship is inaccessible and so I will confine my treatment to the English-speaking provinces of Canada.

<sup>2</sup> Donald R. Kelley, *The Descent of Ideas: The History of Intellectual History* (Aldershot: Ashgate, 2002) at 2 [Kelley, *The Descent of Ideas*].

that comprise the intellectual or reflective life of societies in the past.<sup>3</sup> These ideas are shaped, of course, by culture, context, concepts, and by the permeating influence of the past and swirling current events.<sup>4</sup> In studying what is sometimes called the “life of the mind,” one has to endeavour to gauge the influence of many factors on the thinker and her thought, before one can examine her influence on other people and events.

The intellectual history of twentieth-century Anglo-Commonwealth administrative law sketched here adapts and applies the tools of intellectual history developed in other disciplines, particularly philosophy and history, to the practical, grounded, and authoritative world of law. This can be done by selecting influential figures who thought and wrote about administrative law in the twentieth century, tracing the spread of their works and ideas, and gauging the influence of that work.<sup>5</sup>

I have chosen to focus on the twentieth century for several reasons. It is now possible to get some perspective on the century, or at least much of it.<sup>6</sup> The century began with Albert Venn Dicey’s claim that the common law knew nothing of administrative law, and ended with influential judges and commentators saying that the recognition and rapid development of administrative law was one of the greatest legal developments of the century. The twentieth century also saw the emergence of a professionalized legal academy and the gradual emergence of a voluminous literature on administrative law. There are links between the historiography of law and legal education in the twentieth century, and that of political science and history.<sup>7</sup> At the start of the twentieth century, legal and constitutional history ranked in England and Canada as the most prestigious form of historical inquiry,<sup>8</sup> and the same was true in respect of

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<sup>3</sup> Stefan Collini, “What is Intellectual History?” *History Today* 35:10 (October 1985) 46.

<sup>4</sup> See Robert W. Gordon, Book Review of *Tort Law In America* by G.E. White (1981) 94 Harv. L. Rev. 903 at 908-09.

<sup>5</sup> Felix Gilbert, “Intellectual History: Its Aims and Methods” (1971) 100 *Daedalus* 80 at 81-82.

<sup>6</sup> Witness the outpouring of *fin de siècle* literature. See e.g. Vernon Bogdanor, ed., *The British Constitution in the Twentieth Century* (Oxford: The British Academy, published by Oxford University Press, 2003); Jack Hayward, Brian Barry & Archie Brown, eds., *The British Study of Politics in the Twentieth Century* (Oxford: The British Academy, published by Oxford University Press, 1999).

<sup>7</sup> Julia Stapleton, *Englishness and the Study of Politics: The Social and Political Thought of Ernest Barker* (Cambridge: Cambridge University Press, 1994) [Stapleton, *Englishness*]; David Easton, John G. Gunnell & Luigi Graziano, eds., *The Development of Political Science: A Comparative Survey* (London: Routledge, 1991).

<sup>8</sup> Richard A. Cosgrove, “The Culture of Academic Legal History: Lawyers’ Law and Historians’ Law 1870-1930” (2002) 33 *Cambrian L. Rev.* 23; John E. Trent & Michael Stein, “The Interaction of the State and Political Science in Canada: A Preliminary Mapping” in Easton, Gunnell & Graziano, *ibid.* at 59, 61-62, 64. Indeed, it appears to have hung on longer in Canada.

the nascent discipline of political studies (in Britain, deliberately *not* styled “political science”).<sup>9</sup> This changed rapidly thereafter and it is only in the last third of the century that law is once again looking over its disciplinary parapet.

Of course, the twentieth century is not self-contained. The ideas that shaped society and the law in that century obviously can and should be traced back much earlier,<sup>10</sup> and many of these earlier ideas were challenged by developments and thinkers in the twentieth century and, as a consequence, were modified or rejected altogether. So it is neither possible nor desirable to ignore them. It is enough to mention by way of example the ubiquitous A.V. Dicey, who died in 1922 but, like the Phantom, is the ghost who still walks in the grove of administrative law. Fortunately, there is good work already done on Dicey and his ideas and influence,<sup>11</sup> and it should not be necessary to reinvent that wheel.

The type of intellectual history I propose can be pursued in a number of ways. One can focus on one or more of the following: the ideas, the thinkers, the cases and controversies, events or movements, particular doctrinal developments, and/or the broader contexts within which change is taking place. As the Marxist historian Eric Hobsbawm quipped, one needs both a telescope and a microscope,<sup>12</sup> and, I would add, a camera with a wide-angle lens.

To make this task manageable as well as grounded, one can weave this legal doxography into studies of particular controversies—most often

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<sup>9</sup> See Stapleton, *Englishness*, *supra* note 7 at c. 2; D. Kavanagh, “British Political Science in the Inter-War Years: The Emergence of the Founding Fathers” (2003) 5 *Brit. J. of Politics and Int’l Rel.* 594; and Jack Hayward, “British Approaches to Politics: The Dawn of a Self-Deprecating Discipline” in Hayward, Barry & Brown, *supra* note 6 at 1.

<sup>10</sup> One could go back, to follow J.G.A. Pocock’s example, to Machiavelli’s ideas and influence. See A.B. McKillop, “Culture, Intellect, and Context” (1989) 24:3 *J. Can. Stud.* 7 at 15-16.

<sup>11</sup> See H.W. Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17 *Osgoode Hall L.J.* 1 [Arthurs, “A Slightly Dicey Business”]; Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (London: Macmillan, 1980); Trowbridge H. Ford, *Albert Venn Dicey: The Man and His Times* (Chichester: Barry Rose, 1985); Patrick McAuslan & John F. McEldowney, eds., *Law, Legitimacy and the Constitution: Essays Marking the Centenary of Dicey’s Law of the Constitution* (London: Sweet & Maxwell, 1985); P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990) at c. 2; Martin Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) at c. 7 [Loughlin, *Public Law*]; David Sugarman, “The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science” (1983) 46 *Mod. L. Rev.* 102; B.J. Hibbitts, “The Politics of Principle: Albert Venn Dicey and the Rule of Law” (1994) 23 *Anglo-Am. L. Rev.* 1; Julia Stapleton, “Dicey and his Legacy” (1995) 16 *History of Political Thought* 234; Carol Harlow, “Disposing of Dicey: From Legal Autonomy to Constitutional Discourse?” (2000) 48 *Political Studies* 356; Lord Bingham, “Dicey Revisited” [2002] *P.L.* 39; and Rivka Weill, “Dicey Was Not Diceyan” (2003) 62 *Cambridge L.J.* 474.

<sup>12</sup> *Interesting Times: A Twentieth-Century Life* (London: Allen Lane, 2002) at 294.

“leading” cases, inquiries, events, or doctrinal developments—that were sometimes influenced by the work of those thinkers and which, in turn, they frequently reacted to. The point of alternating focus between the lives and opinions of thinkers, and contextualized studies of particular cases/controversies/events/doctrines is to give a realistic (and usable) picture of the continuities and discontinuities of ideas in twentieth century administrative law. Which ideas and texts gained traction, which did not, and why? In this way the intellectual history of administrative law will reside not only in the abstract realm of ideas, philosophies, and ideologies, but will be grounded in texts, contextualized and posited within legal thought and the broader culture.<sup>13</sup>

There are two risks in contextual study. The first risk is that the ever-widening circles of context are seemingly infinite, and that no person, however intelligent and well read, can come to grips with all the material in a lifetime, let alone in the life of a publisher’s contract. The second risk of contextualizing legal disputes and doctrine is that one can lose sight of the law entirely. Some would say this is no bad thing, but a lawyer—certainly *this* lawyer—is most likely to add the most value by speaking about law and legal thought.<sup>14</sup> As in all scholarly work, lines must be drawn in order to produce a manageable piece of work. This can be illustrated by the life and work of John Willis, to which I will turn shortly.

If one looks at a number of thinkers and cases/controversies/events/themes in context, decisions must be made constantly as to which paths will most likely prove fruitful. Some context is necessary, as Quentin Skinner said, for we need to know “who is wielding the concept in question, and with what argumentative purposes in mind.”<sup>15</sup> In carrying on these “dialogues with the dead,”<sup>16</sup> we are attempting to find what questions they were responding to in their day and perhaps, to shed light on questions we face today—questions that pertain to current concerns that might have

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<sup>13</sup> Robert Post, “Introduction: The Relatively Autonomous Discourse of Law” in Robert Post, ed., *Law and the Order of Culture* (Berkeley: University of California Press, 1991) vii.

<sup>14</sup> See also Graham Parker, “Legal Scholarship and Legal Education” (1985) 23 *Osgoode Hall L.J.* 653 at 661.

<sup>15</sup> “What is Intellectual History?” *History Today* 35:10 (October 1985) 50 at 51.

<sup>16</sup> The phrase is quoted and used by Kelley, *The Descent of Ideas*, *supra* note 2 at 313 (he is talking about the long dead). Many of the influential twentieth-century thinkers died sometime in that century or this, but happily quite a few are alive and capable of modifying and developing their views (and responding to contemporary intellectual historians).

meant little or nothing to the authors of those texts.<sup>17</sup> As Rodney Barker observed, the arguments of the 1940s centred on “[s]ocialism, capitalism, class, cold war, equality, rationalism, modernisation, society,” whereas in the 1990s they were “replaced or eclipsed by nationalism, religion, pluralism, autonomy, citizenship, post-modernism, and gender.”<sup>18</sup>

Law is a fruitful discipline for discerning the influence of ideas because it is text-based, authoritative, and highly precedent-dependent. Administrative law is particularly well-suited to this type of study because the subject has gone from supposed nonexistence to professional acceptance and respectability in the course of the twentieth century, and its development has gone hand-in-hand with the emergence of a substantial literature and with the professionalization of law teaching. One advantage of studying administrative law thinkers is that some of them in the second half of the twentieth century produced textbooks in successive editions, allowing us to draw textual and contextual pictures, and to identify significant events and changing concepts. (It also allows us to see what was not considered significant enough to record, and to mark the absence of certain concepts.) Moreover, it is slightly easier in law to gauge the influence of texts on legal culture—on judges, practitioners, legal discourse, the policy-making process, and legislation—and in the professionalization and specialization of legal education. So these texts reflect as well as contribute to changing ideas and arguments.

Administrative law was one of the fastest growing bodies of Anglo-Commonwealth law in the twentieth century.<sup>19</sup> The conventional reasons given for this growth are the occurrence of two world wars and the Great Depression, the consequent increase in state control and regulation, and the rise (and fall?) of the welfare state. When the twentieth century began, the prevailing view denied that Anglo-Commonwealth law knew any such subject as “administrative law.”<sup>20</sup> The first British book with these words in the title appeared in 1928, and the first comprehensive textbook was

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<sup>17</sup> Thereby blurring the line between the “contextualists” and “textualist” camps in intellectual history. See William W. Fisher III, “Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History” (1997) 49 *Stan. L. Rev.* 1065 at 1068-70; John Henry Schlegel, “Does Duncan Kennedy Wear Briefs or Boxers? Does Richard Posner Ever Sleep? Writing About Jurisprudence, High Culture and the History of Intellectuals” (1997) 45 *Buff. L. Rev.* 277 [Schlegel, “Writing About Jurisprudence”].

<sup>18</sup> “Political Ideas since 1945, Or How Long Was the Twentieth Century?” (1996) 10 *Contemporary Brit. History* 2 at 6.

<sup>19</sup> See e.g. Jeffrey Jowell, “Administrative Law” in Bogdanor, *supra* note 6 at 373 [Jowell, “Administrative Law”].

<sup>20</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885) c. IV.

published as late as 1959.<sup>21</sup> In Canada it took longer still.<sup>22</sup> Major doctrinal developments occurred in the U.K. in the 1960s and 1970s, decades commonly associated with “judicial activism” in administrative law. In Canada, the significant doctrinal developments occurred in the late 1970s and 1980s. The textbooks that first appeared in the late 1950s and early 1960s became “classics,” and a large literature emerged from the 1970s onwards.

On the surface, these textbooks were expository, purporting to order and organize the existing legal material, but it became increasingly clear that the works were actually prescriptive and normative without laying bare the norms or values at play.<sup>23</sup> There was a dearth of theory and a corresponding insularity and resistance to looking outside law for guidance or to the much more theoretically sophisticated and interdisciplinary legal literature in the United States. A clarion call went out for more theoretically explicit administrative law scholarship.<sup>24</sup> This call was answered, and in the last twenty years—especially since the early 1990s—administrative law literature has taken a marked theoretical turn.

Within this excellent body of work, a few theorists have focused on the ideology of administrative law scholars and the socio-political and intellectual influences on them.<sup>25</sup> The work emanating from the U.K. has tended to be taxonomic. Carol Harlow and Richard Rawlings employed the metaphor of the traffic light, labeling administrative lawyers as “red light,” “green light,” or “amber light” theorists.<sup>26</sup> Martin Loughlin produced a rival trichotomy: distinguishing conservative normativists, liberal normativists,

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<sup>21</sup> William A. Robson, *Justice and Administrative Law: A Study of the British Constitution* (London: Macmillan, 1928); S.A. de Smith, *Judicial Review of Administrative Action* (London: Stevens & Sons, 1959).

<sup>22</sup> Robert F. Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1971).

<sup>23</sup> See D.J. Galligan, “Judicial Review and the Textbook Writers” (1982) 2 *Oxford J. Legal Stud.* 257; Tony Prosser, “Towards a Critical Public Law” (1982) 9 *J.L. & Soc’y* 1.

<sup>24</sup> Patrick McAuslan, “Administrative Law and Administrative Theory: The Dismal Performance of Administrative Lawyers” (1978) 9 *Cambrian L. Rev.* 40; Jeffrey Jowell, “Administrative Law and Jurisprudence” (1977) *Acta Jur.* 55.

<sup>25</sup> In Canada, the exemplar is R.C.B. (Dick) Risk. For his publications and tributes, see G. Blaine Baker & Jim Phillips, eds., *Essays in the History of Canadian Law* (Toronto: Published for the Osgoode Society by University of Toronto Press, 1999) vol. 8.

<sup>26</sup> *Law and Administration*, 2d ed. (London: Butterworths, 1997) c. 1-4 [Harlow & Rawlings, *Law and Administration*]. For critique, see M. Taggart, “Reinvented Government, Traffic Lights and the Convergence of Public and Private Law. Review of Harlow and Rawlings: *Law and Administration*” [1999] *P.L.* 124 [Taggart, “Reinvented Government”]; L. Hancher & M. Ruete, “Forever Amber” (1985) 28 *Mod. L. Rev.* 236.

and functionalists.<sup>27</sup> One difficulty with lumping scholars into “categorical conceptions of schools of thought”<sup>28</sup> is that often those identified dispute the grouping, sparking further and often personalized debate;<sup>29</sup> in the process, the focus can shift away from improving understanding of the doctrine and practice in the workaday world of administrative law in the courts and the bureaucracy.<sup>30</sup> The widening gulf between theoretical scholarship and its utility to judges and practitioners is often remarked upon in the American literature,<sup>31</sup> and may be sensed in some of the recent Anglo-Commonwealth literature (which often draws heavily on American theory<sup>32</sup>).

There is no monograph or extended survey of twentieth-century developments in Anglo-Commonwealth administrative law that seeks to explicate systematically the role and influence of ideas and administrative law thinkers in the modern evolution of the subject. Few of the leading theorists and influential judges have been studied in any great depth.<sup>33</sup> Moreover, there have been comparatively few contextual studies of

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<sup>27</sup> *Public Law*, *supra* note 11; Martin Loughlin, “The Pathways of Public Law Scholarship” in Geoffrey P. Wilson, ed., *Frontiers of Legal Scholarship: Twenty-Five Years of Warwick Law School* (Chichester: John Wiley & Co., 1995) 163.

<sup>28</sup> D. LaCapra, “Intellectual History and Its Ways” (1992) 97 *Am. Hist. Rev.* 425 at 426.

<sup>29</sup> See e.g. P.P. Craig, Book Review of *Public Law and Political Theory* by Martin Loughlin (1993) 13 *L.S.* 275.

<sup>30</sup> See P. Cane, “Theory and Values in Public Law” in P. Craig & R. Rawlings, eds., *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford: Oxford University Press, 2003) 3 at 9 (although he thinks this preoccupation detracts from the search for values).

<sup>31</sup> A catalyst for much debate was the article by Judge Harry Edwards, “The Growing Disjunction between Legal Education and the Legal Profession” (1992) 91 *Mich. L. Rev.* 1921.

<sup>32</sup> For criticism of misplaced reliance on American theoretical perspectives, see M. Loughlin, “The Importance of Elsewhere” (1993) 4 *Pub. L. Rev.* 44; C. Harlow, “A Special Relationship? American Influences on Judicial Review in England” in I. Loveland, ed., *A Special Relationship? American Influences on Public Law in the UK* (Oxford: Clarendon Press, 1995) 79.

<sup>33</sup> See e.g. J.L. Jowell, “Administrative Law” in J.L. Jowell & J.P.W.B. McAuslan, eds., *Lord Denning: The Judge and the Law* (London: Sweet & Maxwell, 1984) 209 [Jowell & McAuslan, *Lord Denning*] (on Lord Denning); K. Roach, “The Administrative Law Scholarship of D.M. Gordon” (1989) 34 *McGill L.J.* 1 [Roach, “D.M. Gordon”]; M. Loughlin, “Sitting on a Fence at Carter Bar: In Praise of J.D.B. Mitchell” (1991) 30 *Jurid. Rev.* 13; R.C.B. Risk, “John Willis—A Tribute” (1985) 9 *Dal. L.J.* 521 at 525 [Risk, “Tribute”]; Harlow & Rawlings, *Law and Administration*, *supra* note 26 at c. 1-3 (on J.A.G. Griffith and H.W.R. Wade); J.A.G. Griffith, “The Common Law and the Political Constitution” (2001) 117 *Law Q. Rev.* 42 (on Sir Stephen Sedley); P. Leyland & T. Wood, “Public Law History and Theory: Some Notes Towards a New Foundationalism: Part 2: Some Contemporary Developments and a Sketch for the Future” in P. Leyland & T. Wood, eds., *Administrative Law Facing the Future: Old Constraints & New Horizons* (London: Blackstone, 1997) 405 (surveying the work of Trevor Allan, Norman Lewis, Paul Craig, Martin Loughlin, Jurgen Habermas, and Michel Foucault); and D. Dyzenhaus, “The Left and the Question of Law” (2004) 17 *Can. J.L. & Jur.* 7 (on Martin Loughlin).

important public law cases and controversies by lawyers,<sup>34</sup> nor much interest in, or integration of, what other disciplines have had to say about them. Thus far this relatively new genre of legal scholarship has flourished more in private law.<sup>35</sup>

Little in the Anglo-Commonwealth legal literature comes close to the sophisticated, nuanced, and stimulating intellectual histories produced in disciplines cognate to law. The role of administrative law scholars in receiving, forming, and communicating ideas to various audiences for particular purposes, and the discovery (as far as texts and surviving records allow) of their influence on legal development and on society is at present unwritten. This is a large gap in the history of twentieth-century legal thought, and attempts to fill that gap should transcend the parochialism of law and be of interest to cognate disciplines.<sup>36</sup>

The contextualised intellectual legal historical method outlined here will allow closer examination of the “creation story” of modern administrative law.<sup>37</sup> The story that almost invariably is told about the growth of administrative law in the twentieth century is as follows: it begins with Diceyan denial; proceeds through modest restraint in the exercise of official power, then a judicial retreat in the face of wars, depression, and the creation of the modern welfare state; is followed in the second half of the century by an awakening of judicial concern for administrative justice; and evolves in the century’s death throes into a concern for fundamental rights or “common law constitutionalism.”<sup>38</sup> Legal study and the practice of law are particularly susceptible to the perpetuation of myths. Lawyers

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<sup>34</sup> The honourable exceptions include *Roberts v. Hopwood*, [1925] A.C. 578; *Liversidge v. Anderson*, [1942] A.C. 206.

<sup>35</sup> See generally A.W.B. Simpson, *Leading Cases in the Common Law* (Oxford: Clarendon Press, 1995); K. O’Donovan & G.R. Rubin, “Introduction” in K. O’Donovan & G.R. Rubin, eds., *Human Rights and Legal History: Essays in Honour of Brian Simpson* (Oxford: Oxford University Press, 2000) 1 at 7 [O’Donovan & Rubin, “Introduction”].

<sup>36</sup> *Contra* M. Tushnet, “Legal Scholarship: Its Cause and Cure” (1981) 90 Yale L.J. 1205 at 1205.

<sup>37</sup> See Sir Stephen Sedley, “The Sound of Silence: Constitutional Law without a Constitution” (1994) 110 Law Q. Rev. 270; Jowell, “Administrative Law,” *supra* note 19; and Jowell & McAuslan, *Lord Denning*, *supra* note 33. For contrasting snapshots at the half-century, see W.A. Robson, “Administrative Law in England, 1919-1948” in Lord Campion *et al.*, eds., *British Government since 1918* (London: George Allen and Unwin, 1956) 85; W.A. Robson, “Administrative Law” in M. Ginsberg, ed., *Law and Opinion in England in the 20th Century* (London: Stevens & Sons, 1959) 193.

For a contextual and empirical challenge to the assumption of judicial non-intervention after the Second World War, see Susan Sterett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (Ann Arbor: University of Michigan Press, 1997) (written by a legally-trained American academic political scientist).

<sup>38</sup> T. Poole, “Back to the Future? Unearthing the Theory of Common Law Constitutionalism” (2003) 23 Oxford J. Legal Stud. 435.

want a past that suits their particular purpose at the time they look back. Focusing on particular cases or controversies in context and attempting to understand them from the inside out, as well as from the outside in, can be “profoundly subversive” of the orthodox legal understanding of legal doctrine and debunk myths.<sup>39</sup> While contextualization tends to reveal a complicated, messy reality, this does not necessarily displace the influence of ideas;<sup>40</sup> often they can be seen more realistically and clearly at work.

Such studies might also provide an antidote to a court-centred view of administrative law that comes about because of that bias on the part of most of the influential scholars and the focus on leading cases. This is mitigated somewhat by the fact that the pathology of cases almost always becomes a study of policy choice and execution. Still there remain significant theories and ideas of bureaucratic and political behaviour concerning policymaking, lawmaking, and the implementation and enforcement of law and policy that have not been as influential as they could and should be in Anglo-Commonwealth administrative law thinking.<sup>41</sup> This often explains the tensions between critics and supporters of particular events, cases, or initiatives.<sup>42</sup>

In all contextual and comparative study one must be vigilant against falling into the trap of “boosterism”;<sup>43</sup> that is, of accentuating or overestimating the importance of a particular case, controversy, idea, scholar, jurist, or jurisdiction. A judicious blend of common-law comparativism and contextualized study may counteract the ever-present danger of simplistic or superficial comparisons between jurisdictions and their laws.

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<sup>39</sup> R.W. Gordon, “Simpson’s Leading Cases” (1997) 95 Mich. L. Rev. 2044 at 2044. Compare A.C. Hutchinson, “The Importance of Leading Cases: A Critical Analysis” in Eoin O’Dell, ed., *Leading Cases of the Twentieth Century* (Dublin: Round Hall Sweet & Maxwell, 2000) 1.

<sup>40</sup> Gordon, *ibid.* at 2049.

<sup>41</sup> This appears most frequently in the American literature contrasting legal and bureaucratic conceptions of rationality and responsibility. See generally J.L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1983); J.P. Burke, *Bureaucratic Responsibility* (Baltimore: Johns Hopkins University Press, 1986). See also K. Hawkins, ed., *The Uses of Discretion* (Oxford: Oxford University Press, 1992); S. Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing, 2004).

<sup>42</sup> See J. Willis, “The McRuer Report: Lawyers’ Values and Civil Servants’ Values” (1968) 18 U.T.L.J. 351 [Willis, “The McRuer Report”]; P. Boyer, *A Passion for Justice: The Legacy of James Chalmers McRuer* (Toronto: The Osgoode Society for Canadian Legal History, University of Toronto Press, 1994) at 314-15.

<sup>43</sup> See M. Taggart, *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply* (Oxford: Oxford University Press, 2002) at 195.

At the same time one can see a tremendous amount of cross-fertilization of ideas and doctrines in Anglo-Commonwealth administrative law. This is what makes the comparative study of the history of ideas in the development of U.K., Canadian, Australian, and New Zealand administrative laws throughout the twentieth century so interesting. Some common-law scholars and jurists were “global” before we had the word to describe the phenomenon—John Willis was in that class.

Why is it important to map the growth of administrative law theory and doctrine on to the changing ideas of the roles and functions of the state throughout the twentieth century? Because administrative law is the space where the state (and its emanations) and the subject/citizen/rights-bearing individual come into contact—and sometimes clash—and the maintenance of a relatively free and democratic society depends on the fair and orderly resolution of those disputes. Understanding the ideas that have shaped those encounters enables us to better shape our future. With the state currently challenged by globalization from without and privatization from within, it is crucial to understand how we got to where we are, and where the ideas may be taking us. John Maynard Keynes pointed out many years ago that practical people (he actually said “[m]admen in authority”) are usually the “slaves” of “some academic scribbler of a few years back.”<sup>44</sup>

It might be conceded that intellectual legal history can be illuminating, but why focus on the intellectual history of administrative law? Is administrative law not simply part of the larger subject of constitutional law or, as we tend to say these days, public law? Is it not artificial to examine this corner of public law when some/many/most/all of the ideas that animate it are the same or similar to those operating elsewhere in public law? There is much to be said for this criticism. I agree that the interrelationship between administrative and constitutional law is important, but this argument misses the point about why people first wanted to recognize administrative law as legitimate—legitimate as a legal topic, an organizing set of principles, a teaching subject, and a discrete sub-discipline of constitutional law. Why did they fight over its recognition? And when that battle was won, what did they turn their attention to next? An important part of the history of administrative law is the way it became recognized and then disentangled from constitutional law (in legal education, legal literature, and the legal profession). The creation of subjects, disciplines, or disciplinary boundaries is a feature of every area of

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<sup>44</sup> J.M. Keynes, *The General Theory of Employment, Interest and Money* (New York: Harcourt, Brace, 1936) at 383. On the immense influence of Keynes himself, see Richard Cockett, *Thinking the Unthinkable: Think-Tanks and the Economic Counter-Revolution 1931-1983*, rev. ed. (London: HarperCollins, 1995).

intellectual endeavour,<sup>45</sup> and boundary maintenance and disintegration is part of the process of knowledge production. Indeed, by the end of the twentieth century, administrative law appears to be increasingly reabsorbed by constitutional law, and its separate existence challenged by this constitutionalization, as well as by privatization and regulation theory.<sup>46</sup>

So far I may have given the impression that the only administrative law thinkers worthy of study are scholars—legal academics—but, of course, in the common law system it is the judge rather than the scholar that has had pride of place. The academic role has not been as glorious, central, or appreciated as the judicial one.<sup>47</sup> As Carol Harlow put it, “[i]n the English variant of the common law tradition ... scholars may not be judges and judges have seldom been scholars.”<sup>48</sup> This is not true in Canada, as shown by the career of the scholar-turned-judge that Osgoode Hall’s Bora Laskin lecture series commemorates.<sup>49</sup> Still, the barricades between the academy and the profession were real, and were constructed on both sides. They may not be completely gone today, but they are hardly visible.<sup>50</sup> So a balanced

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<sup>45</sup> See generally T. Becher & P. Trowler, *Academic Tribes and Territories: Intellectual Enquiry and the Culture of Disciplines*, 2d ed. (Philadelphia: Open University Press, 2001).

<sup>46</sup> On the constitutionalization of administrative law, see generally D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004); M. Taggart, “Reinventing Administrative Law” in N. Bamforth & P. Leyland, eds., *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2004) 311; and D. Dyzenhaus, M. Hunt & M. Taggart, “The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation” (2001) 1 O.U.C.L.J. 5. On the suggestion that privatization may “see off” administrative law, see Harlow & Rawlings, *Law and Administration*, *supra* note 26 at 635. On the “threat” posed by the recent flowering of empirical and socio-legal studies to the dominant court-centred conception of Anglo-Commonwealth administrative law, see P. Cane, “Review of Executive Action” in P. Cane & M. Tushnet, eds., *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 146 at 149-53.

<sup>47</sup> See Peter Birks, “Adjudication and Interpretation in the Common Law: A Century of Change” in B.S. Markesinis, ed., *The Clifford Chance Lectures: Volume I—Bridging the Channel* (Oxford: Oxford University Press, 1996) 135.

<sup>48</sup> “Changing the Mindset: The Place of Theory in English Administrative Law” (1994) 14 Oxford J. Legal Stud. 419 at 420. This is not, of course, the case in the United States. See J.T. Noonan, “Judges as scholars. Are they? Should they be?” (2000) 84 *Judicature* 7. See generally R.C. van Caenegem, *Judges, Legislators and Professors* (Cambridge: Cambridge University Press, 1987).

<sup>49</sup> Gordon Bale says that Vincent C. MacDonald was the first full-time academic lawyer to be appointed to the Canadian bench, in 1950. See G. Bale, “W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada” (1993-94) 19 *Queen’s L.J.* 36 at 58 [Bale, “W.R. Lederman”]. MacDonald was an older colleague of John Willis’s at Dalhousie and was the Dean of Law (1934-1950) for almost all of Willis’s first stint at Dalhousie. Willis was hired in 1933 by the then Dean, Sidney Smith.

<sup>50</sup> For attitudes towards the significance of academic work of more enlightened members of the British bench and bar, see Lord Woolf, “The Atlantic Divide” (1999) 34 *Tulsa L.J.* 657 at 663-65; M. Beloff, “The Academic Influences on Judicial Review” in R.J.F. Gordon, ed., *Judicial Review in the New Millennium* (London: Sweet & Maxwell, 2003) at 91.

approach to intellectual history would look at the thought and judgments of the more reflective and influential judges.<sup>51</sup> For the most part those judgments have been the building blocks of scholars.

By any measure, enormous changes occurred in legal education in the twentieth century, which saw the professionalization of law teaching, the emergence of full-time legal training, the diminished role of professional training, a vast expansion of research and publication outlets, acceptance of law as a worthy university discipline, and the rise of global law schools and legal scholars, to name but a few.<sup>52</sup> One cannot understand fully the contemporary influence of thinkers unless one recovers a realistic context portraying the conditions in which they wrote and the conventions that operated at the time. As we will see, when John Willis joined the oldest law school in Canada in 1933 there were four full-time teachers, the “plant” was atrocious, there was one recognizable law journal in Canada,<sup>53</sup> judges did not cite academics’ work,<sup>54</sup> the remuneration was barely adequate and, the law school was run on a shoestring.<sup>55</sup>

What kind of influence can scholars have by their writing?<sup>56</sup> They can make other people think and, hopefully, influence their opinions. Who are those people? The potential audiences (sometimes overlapping) include other teacher-scholars (in law and/or cognate disciplines), students, lawyers (generalist or specialist), judges, politicians, policymakers, decision-makers,

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<sup>51</sup> This is not to say that scholars and judges do or should perform the same role in their reflective scholarship.

<sup>52</sup> For the historical position in Canada see *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1983). In the U.K., see F. Cownie, *Legal Academics: Culture and Identities* (Oxford: Hart Publishing, 2004).

<sup>53</sup> In argument in a 1950 case, Chief Justice Rinfret is reported to have said that “he was not going to accept the opinion of the Canadian Bar Review—a lawyer’s magazine—as authority for the court”: Bale, “W.R. Lederman,” *supra* note 49 at 50.

<sup>54</sup> *Ibid.* at 49-61; G. Nicholls, “Legal Periodicals and the Supreme Court of Canada” (1950) 28 *Can. Bar Rev.* 422.

<sup>55</sup> See generally J. Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979) [Willis, *History*].

<sup>56</sup> This supposes that this is what writers want to do, and that may not be the case. As John Schlegel once said in a challenging discussion about the doing of intellectual legal history: “Humans do things, including the production and use of ideas, for their own purposes.” See John Schlegel, “The Ten Thousand Dollar Question” (1989) 41 *Stan. L. Rev.* 435 at 456 [Schlegel, “Ten Thousand Dollar Question”]. For instance, one might write simply for fun, in order to keep one’s job, for purposes of self-esteem or self-improvement, to fill in the day, or as therapy.

and the lay public or sections of it.<sup>57</sup> How can we know that the scholarship has been read, and by whom?<sup>58</sup> And how can you show that scholarship—particular pieces or as a whole—*caused* a change of opinion? What is the time period over which one hopes to influence one's target audience? If that audience consists, for instance, of future leaders of the legal profession and judges, then one might have to wait a generation or two.<sup>59</sup> Very little work has been done on these issues, and what has been done is problematic.<sup>60</sup>

With this methodological outline in mind, I turn to the second part of this article.

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<sup>57</sup> See B. McDowell, "The Audiences for Legal Scholarship" (1990) 40 J. Legal Educ. 261. McDowell makes the point that many scholars are unsure of the audience(s) they are writing for. See also E. Chemerinsky & C. Fisk, "In Defense of the Big Tent: The Importance of Recognizing the Many Audiences for Legal Scholarship" (1998-99) 34 Tulsa L.J. 667.

<sup>58</sup> If the audience is, or includes, academics then the "traces" of a scholar's influence *may* be seen "in the footnotes of the scholars who follow," but if it is directed to non-lawyers or the lay public, who "have little use for footnotes," no trace may be left. See G.B. Packert, "The Relentless Realist: Fred Rodell's Life and Writings" (1984) U. Ill. L. Rev. 823 at 855. The practice, etiquette, and ethics of footnoting and attribution vary considerably over time and place, and there is even considerable individual variation at any given time and place. There is no research of which I am aware on these aspects of legal scholarship.

<sup>59</sup> M. Bouchard, "Administrative Law Scholarship" (1985) 23 Osgoode Hall L.J. 411 at 422.

<sup>60</sup> F. McChesney, "Intellectual Attitudes and Regulatory Change: An Empirical Investigation of Legal Scholarship in the Depression" (1988) 38 J. Leg. Educ. 211. McChesney attempted to test empirically what influence the writings of legal academics had on the adoption or support of New Deal regulatory reforms. He gathered interesting and valuable data that supported the view that legal academics were no more supportive of government intervention in 1931-1935 than they were in 1921-1925. (The casual empiricism of Blake Brown suggests that in Canada the pro-intervention legal scholars made more headway in professional legal opinion by the late 1930s. See R.B. Brown, "The Canadian Legal Realists and Administrative Law Scholarship, 1930-1941" (2000) 9 Dal. J. Leg. Stud. 36 at 70-72 [Brown, "Canadian Legal Realists"].) To my mind, however, McChesney does not prove that legal academics' writings did not influence the adoption or implementation of the New Deal reforms. To test that you would need to trace the sources of inspiration of those policies or reforms. Of course, and this is perhaps beside McChesney's point, many of the pro-intervention legal scholars were beckoned to Washington to practice what they had preached (often not in law reviews), and were too busy to write at that time. There is considerable literature on this. See generally P. Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982); J.A. Schwarz, *The New Dealers: Power Politics in the Age of Roosevelt* (New York: Knopf, 1993); R.W. Gordon, "Professors and Policymakers: Yale Law School Faculty in the New Deal and After" in A.T. Kronman, ed., *History of the Yale Law School: The Tercentennial Lectures* (New Haven: Yale University Press, 2004) 75. These were men, as John Willis said of his "hero" Thurman Arnold, that were "equally at home in the world of action and the world of ideas." See J. Willis, Book Review of *Voltaire and the Cowboy: The Letters of Thurman Arnold* ed. by Gene M. Gressley (1979) 5 Dal. L.J. 810 at 810 [Willis, "Book Review of *Voltaire*"].

## II. JOHN WILLIS

### A. *His Life and Times*

Bora Laskin once said that he was “an unabashed admirer” of John Willis.<sup>61</sup> They were close friends, and taught together for fifteen years, the first five of which were at Osgoode Hall, before they departed with Cecil (“Caesar”) Wright to establish the modern law school at the University of Toronto in 1949. Laskin described Willis as a “legal titan,” and so he was. My purpose here is to say something about Willis’s life and work and to attempt to gauge his impact on law and scholarship.<sup>62</sup>

John Willis, the “grand old man”<sup>63</sup> of Canadian administrative law, died on 16 June 1997, a week shy of his ninetieth birthday. Willis’s professional life coincided with the development of the “infant subject of Administrative Law”<sup>64</sup> to maturity. His close intellectual and personal links with legal scholars of similar persuasion at the London School of Economics and at Harvard Law School meant that he brought to Canada in the early 1930s the fermenting realist scepticism of judicial review, and added to it a distinctive voice.<sup>65</sup> It is difficult to overestimate his influence on students and scholars of administrative law in Canada, particularly on the scholars of the next generation or two at this law school.

Born in Buckinghamshire England in 1907, Willis was educated at Winchester College and New College, Oxford. He graduated with a “double first” in classics and jurisprudence.<sup>66</sup> Little is known of his Oxford

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<sup>61</sup> “Foreword” (1983) 7 Dal. L.J. 3 (special issue in honour of John Willis) [Laskin, “Foreword”]. For an earlier tribute, see B. Laskin, “John Willis: An Appreciation” (1972) 22 U.T.L.J. 3 at iii. But see B. Laskin, “Judges and Book Forewords” (1954) 32 Can. Bar Rev. 118.

<sup>62</sup> Any writer about Willis and his work owes a large debt to Dick Risk, the only person to seriously study Willis’s work and influence during his lifetime. See R.C.B. Risk, “Tribute,” *supra* note 33; R.C.B. Risk, “Volume 1 of the Journal: A Tribute and a Belated Review” (1987) 37 U.T.L.J. 193 at 201-03 [Risk, “Volume 1”]; R.C.B. Risk, “In Memoriam: John Willis” (1997) 47 U.T.L.J. 301 [Risk, “Memoriam”].

<sup>63</sup> These words, used by Willis in his tribute to John D. Faclonbridge, seem to aptly describe Willis. See J. Willis, “Introduction” (1957) 35 Can. Bar Rev. 607 at 609.

<sup>64</sup> Willis, *History*, *supra* note 55 at 88.

<sup>65</sup> See Risk, “Tribute,” *supra* note 33 at 548; R.W. Gordon, “Without the Law II” (1987) 24 Osgoode Hall L.J. 421 at 431 [Gordon, “Without the Law II”].

<sup>66</sup> For bibliographical information I have relied heavily on the work of Dick Risk. See *supra* note 62. The death notice in the Halifax paper is also very informative: “Obituary” *The Mail Star*, (17 June 1997) A8. Thanks to Philip Girard for confirming this source.

years, except that he excelled among illustrious company.<sup>67</sup> The *Oxford University Calendar for the year 1930* has “J. McK. Willis”<sup>68</sup> in the first class for classics in Hilary Term 1928, along with his contemporaries at New College, R.H.S. Crossman (later Sir Richard Crossman) and R.O. Wilberforce (later Lord Wilberforce),<sup>69</sup> and Q. McG. Hogg (later Lord Hailsham) of Christ Church. The following year in Trinity Term, Willis shared his first-class standing in jurisprudence with, among others, an American Rhodes Scholar named M.S. McDougal, who went on to fame as an international lawyer at Yale Law School.<sup>70</sup> (Incidentally, in that year another New College man, H.L.A. Hart, gained first class “In Literis Humanioribus.”)

After graduating with a B.A. from Oxford,<sup>71</sup> Willis went to Harvard Law School on a Commonwealth Fund (Harkness) Fellowship to study for two years. Felix Frankfurter was his supervisor and became his mentor.<sup>72</sup> The Oxford B.A. was not considered a law degree and so Willis was not eligible to enroll in a postgraduate law degree at Harvard.<sup>73</sup> The official record has Willis listed as a “special student” from 1930–1932. In any event,

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<sup>67</sup> I am indebted to Peter Skegg of the University of Otago and formerly of New College who kindly provided copies of the calendar entries. See *Oxford University Calendar for the year 1930* (Oxford: Clarendon Press, 1930) at 267, 271, 289, 442.

<sup>68</sup> Willis’s middle name was McKenzie, which was his mother’s maiden name. Willis never used his middle name or initial in any published work.

<sup>69</sup> Richard Wilberforce and Willis were contemporaries at Winchester as well. It is a remarkable coincidence that arguably the best British administrative law judge of the twentieth century and one of the most elegant and pungent critics of judicial review should have been classmates throughout secondary school and university. On Wilberforce, see D.G.T. Williams, “Lord Wilberforce and Administrative Law” in M. Bos & I. Brownlie, eds., *Liber Amicorum for the Rt. Hon. Lord Wilberforce PC, CMG, OBE, QC* (Oxford: Clarendon Press, 1987) 235.

<sup>70</sup> The school of “policy science” that Myres McDougal founded with Harold Lasswell at Yale after World War II, however, is generally thought “never [to have] had any significant influence on American lawyers, judges, or legal scholars.” See T.C. Grey, Book Review of *Patterns of American Jurisprudence* by Neil Duxbury (1996-97) 106 Yale L.J. 493 at 513.

<sup>71</sup> A modest, not to say self-deprecating, man, Willis styled himself “John Willis, B.A.” in official University publications. See M. Orkin, “Lives Lived,” *The Globe and Mail* [Toronto], 3 July 1997, A18. He never applied to “upgrade” his bachelor’s degree to an M.A., as Oxford graduates were entitled to do.

<sup>72</sup> Frankfurter is reported to have described Willis “as the most brilliant student he ever had.” See Peter Fraser, “John Willis” *The Globe and Mail* (24 July 1997) A14 [Fraser, “John Willis”]. Willis’s affection and respect for Frankfurter can be seen in his reviews of books by and about Frankfurter. See J. Willis, Book Review of *Mr. Justice Holmes and the Supreme Court* by Felix Frankfurter (1961/1962) 14 U.T.L.J. 279 at 280 [Willis, “Review of *Mr. Justice Holmes*”] and Book Review of *Felix Frankfurter: A Tribute* by Wallace Mendelson (1966) 16 U.T.L.J. 467.

<sup>73</sup> Risk, “Tribute,” *supra* note 33 at 526. Willis “shrank from the three-year grind that the [Harvard] LLB would take” (letter from Willis to Dick Risk, dated 4 October 1984).

Frankfurter did not think it important for postgraduate students to work for a degree. He wrote to one aspiring postgraduate student around this time: “Personally I care little about degrees. I assume you are coming here to begin an inquiry that will do you and the Law School credit.”<sup>74</sup> And in another letter to the same prospective student a few months later, Frankfurter declared: “What is important is to do a piece of work.”<sup>75</sup> That is exactly what Willis did, producing his classic monograph entitled *The Parliamentary Powers of English Government Departments*, published by Harvard University Press under the imprint “Harvard Studies in Administrative Law.”<sup>76</sup> The book was critically acclaimed and was one of the most reviewed law books of the year.<sup>77</sup>

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<sup>74</sup> Letter from Felix Frankfurter to Nathan L. Jacobs (22 October 1929) in Felix Frankfurter's Papers, Harvard Law School Library (Part III, Reel 19, frame 00609). Quoted with the permission of the Harvard Law School Library.

<sup>75</sup> Letter from Felix Frankfurter to Nathan L. Jacobs (20 January 1930), *ibid.*

<sup>76</sup> The imprint was funded from some monies made available to Frankfurter and was the publication outlet for the work of his most promising students. The other books in the series of six titles are: E.W. Patterson, *The Insurance Commissioner in the United States: A Study in Administrative Law and Practice* (Cambridge: Harvard University Press, 1927); J. Dickinson, *Administrative Justice and the Supremacy of the Law in the United States* (Cambridge: Harvard University Press, 1927); H.M. Stephens, *Administrative Tribunals and Rules of Evidence: A Study in Jurisprudence and Administrative Law* (Cambridge: Harvard University Press, 1933); Carl McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission 1920-1930* (Cambridge: Harvard University Press, 1933); and L.L. Jaffe, *Judicial Aspects of Foreign Relations, in Particular of the Recognition of Foreign Powers* (Cambridge: Harvard University Press, 1933). That Frankfurter did not have total control over publication in the series is evident from the inclusion of H.M. Stephen's work. See D. R. Ernst, “Dicey's Disciple on the D.C. Circuit: Judge Harold Stephens and Administrative Law Reform, 1933-1940” (2002) 90 *Georgetown L.J.* 787 at 794.

<sup>77</sup> C.T. Carr, Book Review of *The Parliamentary Powers of English Government Departments* by John Willis (1934) 16 *J. Contemp. Legal Issues* 96; J.A. Corry, Book Review of *The Parliamentary Powers of English Government Departments* by John Willis (1934) 12 *Can. Bar Rev.* 60 [Corry, “Book Review of *Parliamentary Powers*”]; Armistead M. Dobie, Book Review of *The Parliamentary Powers of English Government Departments* by John Willis (1933) 82 *U. Pa. L. Rev.* 198; John A. Fairlie, Book Review of *The Parliamentary Powers of English Government Departments* by John Willis (1933) 27 *Am. Pol. Sci. Rev.* 994; J. Finkelman, Book Review of *The Parliamentary Powers of English Government Departments* by J. Willis (1935) 1 *U.T.L.J.* 196; Ralph F. Fuchs, “The March of the Bureaus” (1934) 20 *St. Louis L. Rev.* 189; H.J. Laski, Book Review of *The Parliamentary Powers of English Government Departments* by John Willis (1934) 47 *Harv. L. Rev.* 1452 [Laski, “Book Review of *Parliamentary Powers*”]; John W. MacDonald, Book Review of *The Parliamentary Powers of English Government Departments* by John Willis (1934) 20 *Cornell L.Q.* 536; William A. Robson, Book Review of *The Parliamentary Powers of English Government Departments* by John Willis (1934) 34 *Col. L.Rev.* 189; William A. Robson, Book Review of *The Parliamentary Powers of English Government Departments* by John Willis (1934) 50 *Law Q. Rev.* 283; Paul L. Sayre, Book Review of *The Parliamentary Powers of English Government Departments* by John Willis (1934) 19 *Iowa L. Rev.* 652; Roland S. Vaille, Book Review of *The Parliamentary Powers of English Government Departments* by John Willis (1934) 20 *A.B.A.J.* 776; E.C.S. Wade, Book Review of *The Parliamentary Powers of English Government Departments* by John Willis (1933-34) 5 *Cambridge L.J.* 428.

Following Frankfurter's advice, Willis audited classes given by the great Harvard "names": Williston, Beale, and Scott.<sup>78</sup> The influence of these courses can be seen in the eclecticism of his early writings, and no doubt stood him in good stead for the remarkably wide range of subjects he would be asked to teach, first at the understaffed Dalhousie Law School and later at law schools in Toronto.

Intent upon embarking on a career teaching political science in his home country, even with the aid of the anglophilic Frankfurter,<sup>79</sup> Willis was unable to hold on to the promise of a position "in a first-rate department of political science" in the depths of the Depression.<sup>80</sup> Harold Laski, who later wrote a favourable review of Willis's book, wrote to Frankfurter in October 1932 that he had "got Willis a good offer of a six months' job in Peking [*sic*] and Nanking," expressing the hope that he would take it "as there are very few academic posts about just now."<sup>81</sup> Willis must have declined this offer. However, an opening came up in 1933 at Dalhousie Law School, whose teaching complement at around this time was described as "three men and a boy." When one of the "men" departed for Harvard on short notice, Willis was hired on a one-year contract.<sup>82</sup> Unbeknownst to him at that time, this was a life-changing move and from that point onwards he was lost to England. When the Harvard "man" did not return, Willis got his permanent post. He married a Canadian and made his home in Canada.

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<sup>78</sup> Willis, *History*, *supra* note 55 at 122.

<sup>79</sup> On the close connections between Frankfurter and leading British intellectuals, especially Harold Laski, see R.A. Cosgrove, *Our Lady the Common Law: An Anglo-American Legal Community, 1870-1930* (New York: New York University Press, 1987) c. 8-9.

<sup>80</sup> Willis, *History*, *supra* note 55 at 122. It is likely the promise that could not be fulfilled was from the London School of Economics and Political Science (LSE) in the University of London. The evidence for this is that Willis's link with the LSE was strong. Frankfurter had close links with Harold Laski, and Willis featured at least once in their (unpublished) correspondence. Harold Laski reviewed glowingly Willis's book in the *Harvard Law Review*. William Robson, also from LSE, praised the book in reviews in Britain and the U.S.A. Laski tried hard to find a position for Willis, which could be because LSE had let Willis down. Willis contributed an article on "Parliament and the Local Authorities" to a LSE-inspired and edited collection: H.J. Laski, W.I. Jennings & W.A. Robson, eds., *A Century of Municipal Progress: The Last Hundred Years* (London: George Allen & Unwin, 1935) c. 17. Lastly, LSE is likely to have been the only place at that time in Britain that could be described as a "first rate department of political science" [emphasis added].

<sup>81</sup> Letter from Harold Laski to Felix Frankfurter (29 October 1932) in the Felix Frankfurter Papers, Library of Congress, Container Number 74.

<sup>82</sup> Unsurprisingly, Frankfurter recommended Willis. See Bora Laskin, Book Review of *A History of Dalhousie Law School* by John Willis (1982) 30 Am. J. Comp. L. 385 at 386. The relationship between Dalhousie and Harvard Law Schools had been close since the early 1920s, when the first of a line of Dalhousie law graduates went to Harvard to pursue postgraduate study. See Willis, *History*, *supra* note 55 at 88; E. Griswold, Book Review (1981) 31 J. Legal Educ. 677 at 679; and J.E. Bickenbach & C.I. Kyer, "The Harvardization of Caesar A. Wright" (1983) 33 U.T.L.J. 162 at 164-65.

Willis remained in the Canadian legal academy for most of the rest of his professional life, and, with only a few exceptions, published in Canadian law journals and university presses.

Willis taught at Dalhousie Law School from 1933-1944 and returned there towards the end of his teaching career from 1972-1975, before finally retiring. In between, he taught at Osgoode Hall Law School in Toronto from 1944-1947 and 1948-1949,<sup>83</sup> broken by a year working in the legal department of the International Monetary Fund in Washington. Willis, Bora Laskin, and Cecil (Caesar) Wright left Osgoode Hall in 1949 to establish the modern professional University of Toronto Law School.<sup>84</sup> Willis left Toronto to return to Nova Scotia as a partner in a private law firm in Halifax from 1952-1957. Enticed out of practice by George Curtis, his former Dalhousie colleague and founding dean of the newly established law school at the University of British Columbia, Willis taught at UBC from 1957-1959 but was unsettled.<sup>85</sup> He returned to the University of Toronto in 1959 and stayed there until 1972 when he eased himself into retirement in Nova Scotia.

Willis's legacy is a handful of classic articles on administrative law. He was one of the originators, and certainly the best-known proponent,<sup>86</sup> of a distinctive Canadian realist strand of scepticism towards judicial review that has been hugely influential in Canadian administrative law and is its most distinctive feature. As we will see, this approach is most closely associated in Canada with Osgoode Hall Law School and in Britain with the London School of Economics and Political Science. Willis had ties to both institutions.<sup>87</sup>

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<sup>83</sup> See B.D. Bucknall, T.C.H. Baldwin & J.D. Lakin, "Pedants, Practitioners and Prophets: Legal Education at Osgoode Hall to 1957" (1968) 6 Osgoode Hall L.J. 137 at 213. The impression is given that Willis joined the teaching staff in 1948, but this is incorrect.

<sup>84</sup> See C.I. Kyer & J.E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, The Benchers and Legal Education in Ontario 1923-1957* (Toronto: Osgoode Society, University of Toronto Press, 1987); Bucknall, Baldwin & Lakin, *ibid.* The other teacher to resign at this time was Stanley Edwards, who went into practice. Wright's position had become untenable and he had resigned. The others resigned in support of him and his ideals for professional legal education in Ontario. This act of loyalty was especially courageous of Willis and Laskin, who as career legal academics resigned with no guarantee of employment elsewhere as law teachers. Within two months all three had secured positions up the road at the University of Toronto, but there was no assurance of that when they resigned from Osgoode Hall in January 1949.

<sup>85</sup> Interview of George F. Curtis, Professor and Dean Emeritus, University of British Columbia Law School, Vancouver (19 December 1988).

<sup>86</sup> This group included J.A. Corry, J. Finkelman, and W.P.M. Kennedy. See generally Brown, "Canadian Legal Realists," *supra* note 60; Risk, "Volume 1," *supra* note 62; Richard Risk, "Canadian Law Teachers in the 1930s: 'When the World was Turned Upside Down'" (2004) 27 Dal. L.J. 1 at 30-48.

<sup>87</sup> See *supra* note 80 and *infra* notes 194-96 and accompanying text.

B. *The Human Side*

Everyone who studies Willis senses the restlessness of unfulfilled promise. His brilliant writings of the 1930s (when he was in his late twenties and early thirties) were never bettered later in life,<sup>88</sup> and seldom equaled. His rate of production dropped off sharply. His most (in)famous later work, his blistering attack on the McRuer report (1968), was “scribbled ... over a weekend” because it raised all the bogies that Willis fought in the 1930s.<sup>89</sup> His writing did not evolve; he did not grow further as a scholar.<sup>90</sup> As noted later, the exciting ideas littered throughout his casebook and some of his writings (most often book reviews) about empirical study of law enforcement, proposals to teach law in socio-legal context, et cetera, came to little in the end.<sup>91</sup>

Of the small number of Willis’s contemporaries at Oxford who went into legal academic life, Myres McDougal and H.L.A. Hart made big names for themselves at Yale and Oxford, respectively. Of his other contemporaries in the first rank, Richard Crossman went on to moderate fame in politics, and Richard Wilberforce and Quintin Hogg (a.k.a. Hailsham) are assured of partial immortality through the high judicial offices they held. Some of those who knew Willis speak of an underlying discontent, a sense of under-fulfillment, and a lifelong self-effacement, turning to reclusivity in his later years.<sup>92</sup> Throughout his life he abhorred tributes, and more than twenty years ago refused to sanction a *Festschrift* if it contained any biographical material or tributes to his teaching. Willis said he did not want to be memorialized like Frank Scott!<sup>93</sup> But

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<sup>88</sup> Willis realized this himself. He said in 1977, when reflecting on his time at Dalhousie University in the 1930s: “looking back on it, I thought more, worked harder, learned more, taught better and wrote better ... than I have done since.” See Willis, “In my day,” *infra* note 133 at 62.

<sup>89</sup> Risk, “Memoriam,” *supra* note 62 at 303.

<sup>90</sup> Risk puts this more softly but I do not sense disagreement. See Risk, “Tribute,” *supra* note 33 at 541.

<sup>91</sup> See *infra* notes 156-59 and accompanying text.

<sup>92</sup> See Fraser, “John Willis,” *supra* note 72: “He was not a happy man. His career began like a rocket: double honours at Oxford and, when he went to Harvard, described by Felix Frankfurter as the most brilliant student he ever had. But Canada seemed a compromise for Mr. Willis. My belief is that he really would have liked to go back to his native England.”

<sup>93</sup> In 1981 Professor Ian Hunter of the Faculty of Law in the University of Western Ontario approached Willis, his former teacher, for his blessing regarding a book of essays in his honour. Willis had no objection to work about his scholarship but vetoed any other tributes. As Hunter’s interest was primarily in those other aspects, the project did not go ahead. See Letter from Ian Hunter to M. Taggart (3 August 1982). The reference to Frank Scott is recorded in a letter from Ian Hunter to M. Taggart (14 September 1988). On Scott, see S. Djwa, *The Politics of the Imagination: A Life of F.R. Scott*

psychobiography is a problematic genre, and one in which I have no training to undertake.<sup>94</sup>

I am acutely aware that I have not gone any distance here in uncovering the real Willis—libraries and archives have not been scoured, private papers of Willis (if any survive) and those of his peers have not been combed, extensive interviews of family, friends, colleagues, and students have not been conducted.<sup>95</sup> I need no convincing that intellectual history should include as much as possible about the intellectual himself. But if I had needed convincing, John Schlegel's impassioned denunciation of intellectual history's attempts to suppress the "hero" and his plea to celebrate the lives of the intellectuals themselves, warts and all, would have convinced me of its importance.<sup>96</sup> Surely, as Schlegel indicated, it is significant that Willis experienced public school and Oxford life, witnessed the rise of English socialism, felt the brunt of the Depression, and missed out on a job at Barclay's Bank in Chile because he did not have the right accent.<sup>97</sup> Is it true that he left Dalhousie Law School for more money at Osgoode Hall,<sup>98</sup> or was it to avoid the burdens of acting deanship, or a combination of these things, or something different? Why did he take a year off from teaching at Osgoode Hall to work in the legal department of the International Monetary Fund? Why did he come back to teaching, and how, if at all, did it inform his teaching (since it had no visible impact on his writing)? Was it the same restlessness that took him back to Nova Scotia to practice law for five years in the fifties? At what should have been his most productive period as a scholar, why and what was Willis seeking—money, financial security, challenge, real-world action? Contextualized, socialized intellectual history should make these and a hundred other inquiries. Willis

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(Toronto: McClelland & Stewart, 1987) and his *Festschrift*: S. Djwa & R. St J. MacDonald, eds., *On F.R. Scott: Essays on his Contributions to Law, Literature, and Politics* (Kingston: McGill-Queen's University Press, 1983).

<sup>94</sup> Felix Frankfurter has received this attention. See H.N. Hirsh, *The Enigma of Felix Frankfurter* (New York: Basic Books, 1981) c. 1, 7. For the mixed reaction of reviewers, see W.A. Bogart, Book Review of *The Enigma of Felix Frankfurter* by H.N. Hirsch (1983) 5 Sup. Ct. L. Rev. 405 at 411-15.

<sup>95</sup> N.E.H. Hull has stressed the importance of intellectual, institutional and personal networks as revealed by private sources. See N.E.H. Hull, "Networks & Bricolage: A Prolegomenon to a History of Twentieth-Century American Academic Jurisprudence" (1991) 35 Am. J. Legal Hist. 307.

<sup>96</sup> "Writing About Jurisprudence," *supra* note 17.

<sup>97</sup> Recounted by H.W. Arthurs, "The Administrative State goes to Market (and Cries Wee, Wee, Wee All the Way Home)" (2005) 55 U.T.L.J. 797 at 799.

<sup>98</sup> This is what George Curtis told me: *supra* note 85.

himself saw this as “gossip” and of no interest to others,<sup>99</sup> but in this he was wrong.

If the histories of the respective law schools are any indication, the move from Oxford to Harvard in 1930 must have been a considerable culture shock for the young Willis.<sup>100</sup> At that time, American legal academic life was electrified by the current of legal realism.<sup>101</sup> In terms of administrative law, Dicey’s denial of the subject held academic and professional sway in Great Britain. The infant subject was more developed in the United States, largely through the pioneering work of Goodnow, Freund, and Dickinson.<sup>102</sup> The explosion of interest and literature lay ahead in the 1930s, provoked by the Depression and its aftermath. Frankfurter was close to the heart of the ferment. It was in this crucible that Willis wrote *The Parliamentary Powers of English Government Departments*.

Goaded by Lord Hewart’s fulminations in *The New Despotism*,<sup>103</sup> Willis searched the British statute book from 1848 onwards for evidence of the extent of Parliament’s delegation of law-making powers to departments, and reviewed the volumes of *Statutory Rules and Orders* and the *Law Reports* to view the departments’ exercise of these “parliamentary powers.” Willis’s study focused on those provisions considered the most constitutionally odious (“the most glittering trappings of the new

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<sup>99</sup> Willis, “In my day,” *infra* note 133 at 62.

<sup>100</sup> Compare F.H. Lawson, *The Oxford Law School, 1850-1965* (Oxford: Clarendon Press, 1965) c. 5 and A.E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967* (Cambridge: Harvard University Press, 1967) 277. See also J. Stone, “The School: A Quarter Century Retrospect” (1957) 8 Harv. L.S. Bull. 3.

<sup>101</sup> While Harvard Law School withstood the challenges of legal realism, several scholars opposed legal formalism and were at least “part time” realists. Felix Frankfurter was in that group. See L. Kalman, *Legal Realism at Yale, 1927-1960* (Chapel Hill: University of North Carolina Press, 1986) at 49-56; N.E.H. Hull, “Some Realism About the Llewellyn-Pound Exchange Over Realism: The Newly Uncovered Correspondence, 1927-1931” [1987] Wis. L. Rev. 921 at 964, 967, 969.

<sup>102</sup> See generally C.G. Haines & M.E. Dimock, eds., *Essays on the Law and Practice of Governmental Administration: A Volume in Honor of Frank Johnson Goodnow* (Baltimore: Johns Hopkins Press, 1935); O. Kraines, *The World and Ideas of Ernst Freund: The Search for General Principles of Legislation and Administrative Law* (Alabama: University of Alabama Press, 1974). Freund produced the first systematic law school casebook on administrative law in 1911. John Dickinson awaits a biographer.

<sup>103</sup> Gordon Hewart, *The New Despotism* (London: Ernest Benn, 1945) [Hewart, *The New Despotism*]. In a letter to Dick Risk, Willis said he read Hewart’s *New Despotism* and some of C.K. Allen’s writings “with fury and disgust” (letter dated 4 October 1984). For a more detailed treatment of Lord Hewart’s position and Willis’s counter blast, see M. Taggart, “From ‘Parliamentary Powers’ to Privatization: The Chequered History of Delegated Legislation in the 20th Century” (2005) 55 U.T.L.J. 575 at 576-96.

despotism”<sup>104</sup>), precisely because they were likely to give rise to “misconceptions”<sup>105</sup> unless seen in historical perspective and in the light of their justification and actual usage. The provisions studied included those declaring that rules made under any Act are to have the same effect as if they were contained in that Act (“as if enacted” clauses); those providing that the making of any order is conclusive evidence that the requirements of the Act have been complied with and that the order is *intra vires* (“conclusive evidence” clauses); and those delegating power to modify an Act of Parliament (so-called Henry VIII clauses).

Following the realist tenet that it is the law in action that matters, Willis said:

Bare quotation from statutes can be oddly misleading. The words of grant are not in themselves important; it is the action taken under them which should as a practical matter decide the case for or against such delegation.<sup>106</sup>

Willis’s historical treatment showed the ever-increasing reliance on departments, which had markedly accelerated since the First World War, and an increasing use of “novel” provisions granting delegated powers to overcome difficulties caused by skeletal legislation.<sup>107</sup> But it did not follow from this, as Hewart had speculated, that this “[lead] to arbitrary methods.”<sup>108</sup> A detailed consideration of all the uses of “as if enacted” clauses in British legislation from 1870 forward disclosed no cause for alarm.<sup>109</sup> Nor did examination of the few and innocuous instances of the exercise of powers to modify statutes justify the constitutional clamour.<sup>110</sup> Marshalling a gang of ugly facts that beat the brains out of Hewart’s beautiful theory,<sup>111</sup> Willis concluded that these clauses, whose presence had

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<sup>104</sup> J. Willis, *The Parliamentary Powers of English Government Departments* (Cambridge: Harvard University Press, 1933) at 170 [Willis, *Parliamentary Powers*].

<sup>105</sup> *Ibid.* at 57.

<sup>106</sup> *Ibid.* See also *ibid.* at 152. See generally W. Rumble Jr., “Law as the Effective Decisions of Officials: A ‘New Look’ at Legal Realism” (1971) 20 J. Pub. L. 215.

<sup>107</sup> Willis, *Parliamentary Powers*, *supra* note 104 at 35.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.* at 101.

<sup>110</sup> *Ibid.* at 152, 164.

<sup>111</sup> Felix Frankfurter was fond of quoting Adrian Huxley’s observation that many a beautiful theory had survived long after it had had its brains beaten out by ugly facts. See F. Frankfurter, “Foreword” (1938) 47 Yale L.J. 515 at 517.

provided the heavy ammunition in the recent battle over the delegation of power, had “made a noise out of all proportion to their size” or use.<sup>112</sup>

Willis pointed out the partisanship of commentators, intimating that their opposition stemmed from the political ascendancy “for the first time in English history [of] an avowedly Socialist Party.”<sup>113</sup> Willis turned the tables on Hewart, who had earlier castigated “[t]he apologists and champions of the new despotism” for exhibiting “remarkable gifts of inaccuracy”<sup>114</sup> by demonstrating that the House of Lords had vindicated the department concerned in every case that had come before it, often overruling vitriolic criticism in the courts below.<sup>115</sup> But Willis’s politics is evident too: in his obvious support of the “social values” of the newly elected Labour Party, and the occasional unguarded reference to “worthless slum-owners.”<sup>116</sup> Willis also had a fond and lifelong faith in civil servants, describing the civil service as “the best informed and most forward looking body of persons in England today.”<sup>117</sup> Willis summed up the body politic in this way: “Parliament is the heart, the Civil Service the head and hands, of our government.”<sup>118</sup> Great store was placed in the civil servant’s expertise,<sup>119</sup> and it is here that Willis believed the civil service had it all over the lawyers, who are “better versed perhaps in the constitutional learning of the seventeenth century than in the present-day practice of government.”<sup>120</sup>

Thus commenced a withering critique of adjudication in administrative law cases. Interpretations by expert officials, who in all likelihood drafted the provisions they had to interpret and apply, were subject to judicial override by judges who were wholly dependent on counsels’ arguments and precluded from referring to legislative history or policy arguments, and who read the legislation “against the background of

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<sup>112</sup> Willis, *Parliamentary Powers*, *supra* note 104 at 170.

<sup>113</sup> *Ibid.* at 40. The Labour Party first gained parliamentary power as a junior partner in a minority government from January to November 1924. Defeated in the 1924 elections, Labour was out of power until June 1929, when it formed a second minority government that lasted until August 1931. See K. Laybourn, “Labour Party” in J. Ramsden, ed., *The Oxford Companion to Twentieth-Century British Politics* (Oxford: Oxford University Press, 2002) 358.

<sup>114</sup> Hewart, *The New Despotism*, *supra* note 103 at 91.

<sup>115</sup> Willis, *Parliamentary Powers*, *supra* note 104 at 41.

<sup>116</sup> *Ibid.* at 104.

<sup>117</sup> *Ibid.* at 113. See also *ibid.* at 37, 40, 170.

<sup>118</sup> *Ibid.* at 171.

<sup>119</sup> *Ibid.* at 157.

<sup>120</sup> *Ibid.* at 148.

the Common Law,” thereby “replac[ing] the assumptions of 1931 by the assumptions of Lord Coke.”<sup>121</sup>

To Willis, what contribution courts could make to government would always be minimal. Judicial review would always be “sporadic” and, in any event, the judges’ ignorance of policy should disqualify them from a major role.<sup>122</sup> Willis asked:

Granted that there must be checks and balances, why should our system of government be conceived of as a pyramid with the courts at the apex, where even the enactments of a legally supreme Parliament may be “construed,” 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>123</sup>

In *Parliamentary Powers*, Willis ultimately despaired of the courts’ ability and suitability to contribute constructively to issues of government.<sup>124</sup> He thought the judiciary would continue to stultify Parliament “by the arbitrary application of a long dead philosophy.”<sup>125</sup> In the brief “Epilogue,” Willis suggested that administrative courts might be one solution to the conflict between the judiciary on the one hand and the executive and Parliament on the other. This would allow a “fresh start in a new field,”<sup>126</sup> interrupting the “lawyers’ séances with the common law.”<sup>127</sup> The only alternative to administrative courts, according to Willis, was to exclude the courts altogether from the delegated legislation field, replacing judicial control with parliamentary oversight.<sup>128</sup> Perceptive reviewers of his book questioned the implicit denial by Willis that attitudinal change on the part of the judiciary was possible.<sup>129</sup> J.A. Corry, another pioneering Canadian administrative lawyer, thought “the astigmatism which affects judicial vision of economic and social legislation” could be corrected by providing a “special lens” in Acts—such as preambles, purposive declarations, and the like—through which the judges can read the statutes “in the light of the

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<sup>121</sup> *Ibid.* at 171.

<sup>122</sup> *Ibid.* at 112-13.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.* at 173.

<sup>125</sup> *Ibid.* at 172.

<sup>126</sup> *Ibid.*

<sup>127</sup> This wonderful Willisian phrase is Martin Shapiro’s. See Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens: University of Georgia Press, 1988) at 28.

<sup>128</sup> Willis, *Parliamentary Powers*, *supra* note 104 at 172.

<sup>129</sup> Laski, “Book Review of *Parliamentary Powers*,” *supra* note 77; Corry, “Book Review of *Parliamentary Powers*,” *supra* note 77.

social and economic life in which they deal.”<sup>130</sup> However, as Corry acknowledged, this would only work if the judges became convinced that they, and the common law canons of statutory interpretation they administered, should move with the times.

So, in the early 1930s at Harvard, Willis consigned the courts to the dust heap of history, too old-fashioned and set in their ways to be willing or able to adjust to the new facts of government. This anti-judge stance can be traced back to Bentham.<sup>131</sup> And if the job teaching politics at the University of London had not evaporated due to the Depression, it is likely Willis would never have taught in a law school.<sup>132</sup> Like J.A. Corry, Willis felt the pull of political science. He read widely in that field and in the early years at Dalhousie he was friendly with Professor Robert MacKay, a leading Canadian political scientist of the day.<sup>133</sup> Willis described himself as a person who tried “to talk law with a ‘political science’ accent.”<sup>134</sup>

Willis pulled back from where a relentless critique of judging and judges would have led him. One can see the shift from the talk in *Parliamentary Powers* (1933) through “Three Approaches to Administrative Law” (1935) to “Statutory Interpretation in a Nutshell” (1938).<sup>135</sup> As we have seen, Willis’s distaste for judges is palpable throughout *Parliamentary Powers*.<sup>136</sup> This is the “dark stain” in Willis’s work that Dick Risk has

<sup>130</sup> Corry, *ibid.* at 64. See also J.A. Corry, “Administrative Law and Interpretation of Statutes” (1935-6) 1 U.T.L.J. 286; Risk, “Volume 1,” *supra* note 62 at 199-201. Then teaching at the oldest law school in Western Canada—the College of Law at the University of Saskatchewan—Corry was one of the leading administrative lawyers of his generation, although his reputation suffered from an early move from law teaching into political science and much later into senior university administration. His interest in administrative law was whetted by reading Lord Hewart’s *The New Despotism*, *supra* note 103, and that changed the course of his life. J.A. Corry, *My Life & Work: A Happy Partnership: Memoirs of J.A. Corry* (Kingston: Queen’s University, 1981) at 63-64.

<sup>131</sup> See generally G. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986).

<sup>132</sup> See *supra* note 80 and accompanying text.

<sup>133</sup> Interview of George Curtis, *supra* note 85; J. Willis, “In my day at Dalhousie Law School” [1976] *The Anslu: Dalhousie Law Forum* (Special Issue) 62 [Willis, “In my day”].

<sup>134</sup> J. Willis, *Cases and Materials on Public Authorities* (1971) [unpublished, archived at Osgoode Hall Law School Law Library] at 2 [Willis, *Public Authorities*]. A later version of this same text is kept at the University of Western Ontario. See J. Willis, *Cases and Materials on Public Authorities*, ed. by Ian Hunter (1979) [unpublished, archived at University of Western Ontario Faculty of Law Library]. See also J. Willis, “Canadian Administrative Law in Retrospect” (1974) 24 U.T.L.J. 225 at 225 [Willis, “Retrospect”].

<sup>135</sup> J. Willis, “Three Approaches to Administrative Law: The Judicial, The Conceptual, and the Functional” (1935-36) 1 U.T.L.J. 53 [Willis, “Three Approaches”]; J. Willis, “Statute Interpretation in a Nutshell” (1938) 16 *Can. Bar Rev.* 1.

<sup>136</sup> *Supra* note 104 at 51, 171-72.

perceptively noted.<sup>137</sup> It would have been simply impossible to maintain that stance teaching law in the oldest university law school in Canada in the conditions that existed in the 1930s.<sup>138</sup> This dark stain, as Risk rightly says, was covered over pretty quickly. George Curtis, Willis's colleague at Dalhousie Law School from 1934-1944 and his dean at UBC from 1957-1959, described the "Nutshell" article "as vintage Willis—not wanting to throw out the judges but wanting to talk sense to them."<sup>139</sup> It was left to a later generation of Canadian scholars to try to throw the judges out.<sup>140</sup>

So from the mid-thirties onwards Willis made a sort of peace with the judges. Willis chose the optimistic path that led to institutional design and evaluation of fitness for institutional purpose or function, and put his faith in old judicial dogs learning new tricks.<sup>141</sup> In this, he came around to J.A. Corry's point of view.<sup>142</sup> Thereafter the major themes in Willis's scholarship were minimizing the judicial role in government,<sup>143</sup> exhorting judges to do better in the small area of *vires* which was rightly theirs,<sup>144</sup> and

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<sup>137</sup> Risk, "Volume 1," *supra* note 62 at 203. To the extent that Willis accepted the notion of subjectivity in judicial decision-making (see Willis, *Parliamentary Powers*, *supra* note 104 at 80) he was susceptible to the criticism leveled at American legal realists, that this led to judicial despotism, a government of men not laws, and hence was anti-democratic. It is difficult to see in Willis's work, however, any support for the ethical relativism that attracted the broader criticism that legal realism paved the way for totalitarianism. These "dark sides" of legal realism, as portrayed by the critics in the 1930s and early 1940s, are expertly laid bare in Edward A. Purcell, "American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory" (1969) 75 *Am. Hist. Rev.* 424.

<sup>138</sup> It is a secret of the commonplace that "the sine qua non" of the professional mission of legal training is "training lawyers." See D.R. Ernst, "The Lost Law Professor" (1996) 21 *Law & Soc. Inquiry* 967 at 979.

<sup>139</sup> Interview of George Curtis, *supra* note 85. Accord, R. Risk, "Here Be Cold and Tygers: A Map of Statutory Interpretation in Canada in the 1920s and 1930s" (2000) 63 *Sask. L. Rev.* 194 at 205 [Risk, "Cold and Tygers"]; "Nothing [Willis] said was at odds with the idea that the job of interpretation could be done differently or better."

<sup>140</sup> Harry Arthurs said more than sixty years after *Parliamentary Powers* that "the agency of judges" is "the Achilles' heel of law." See H.W. Arthurs, "'Mechanical Arts and Merchandise': Canadian Public Administration in the New Economy" (1997) 42 *McGill L.J.* 29 at 47 [Arthurs, "Mechanical Arts"].

<sup>141</sup> *Supra* notes 138-39 and accompanying text.

<sup>142</sup> *Supra* notes 129-30 and accompanying text.

<sup>143</sup> Willis said judges should think of themselves as "civil servants in the Department of Dispute Resolution": quoted in H. Arthurs, "Woe Unto You, Judges: or How Reading Frankfurter and Greene, *The Labor Injunction*, Ruined Me as a Labour Lawyer and Made Me as an Academic" (2002) 29 *J.L. & Soc'y* 657 at 665, n. 22 [Arthurs, "Woe Unto You, Judges"]. See also J. Willis, "What I Like and What I Don't Like About Lawyers" (1969) 76 *Queen's Q.* 1 at 4.

<sup>144</sup> J. Willis, "Correspondence: More on the Nolan Case" (1951) 29 *Can. Bar Rev.* 580 at 581: "Something can and should be done by the judges about this gap" between "the twentieth century constitution" and "the ideologies of a late seventeenth century constitution" [Willis, "Nolan Case"].

studying the workings of the important tribunals and agencies.<sup>145</sup> In that latter respect, he thought making broad statements about “boards in general” was futile,<sup>146</sup> and advocated what he later called the “principle of uniqueness.”<sup>147</sup> By the late 1950s, Willis had abandoned the idea of creating administrative courts, saying they would be “unfamiliar to most Canadians and [do] not seem very suitable to our conditions.”<sup>148</sup>

During the Second World War, Willis edited a collection of essays entitled *Canadian Boards at Work*<sup>149</sup> that was decades ahead of its time in Canada.<sup>150</sup> Willis’s stated ambition was empirical—to describe “what Canadian boards in fact do” and how they “go about their daily business.”<sup>151</sup> The collection treated the administrative process “as a phenomenon in its own right, and not [as] a bastard or run-away version of the judicial process.”<sup>152</sup> It was only in the 1970s that the Law Reform Commission of Canada picked up where Willis’s pioneering collection left off. The Commission stated in 1973

that too little is known about the workings of administrative tribunals, [and] that the practice of a tribunal cannot be understood without reference to its context and [that] the legal framework for a tribunal makes little sense without an understanding of its practices.<sup>153</sup>

Consequently, the Commission embarked upon a series of valuable case studies in order to provide information upon which reform could be

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<sup>145</sup> Risk, “Volume 1,” *supra* note 62 at 202-03. This emphasis on tribunals and agencies as a separate genus is completely at odds with the mainstream, Diceyan scholarship that refused to recognize “boards or tribunals as a functional category” and persisted in wrapping them indistinguishably with all “inferior bodies.” See Roach, “D.M. Gordon,” *supra* note 33 at 20.

<sup>146</sup> J. Willis, “Foreword” in J. Willis, ed., *Canadian Boards at Work* (Toronto: Macmillan, 1941) at viii [Willis, “Foreword”].

<sup>147</sup> Willis, “The McRuer Report,” *supra* note 42 at 360.

<sup>148</sup> J. Willis, “Administrative Decision and the Law: The Canadian Implications of the Franks Report” (1959) 13 U.T.L.J. 45 at 55.

<sup>149</sup> J. Willis, ed., *Canadian Boards at Work* (Toronto: Macmillan, 1941).

<sup>150</sup> See G.B. Doern, “Preface” in G.B. Doern, ed., *The Regulatory Process in Canada* (Toronto: Macmillan, 1978) at i. It had contemporary parallels in England, however. See R.S.W. Pollard, ed., *Administrative Tribunals at Work* (London: Stevens & Sons, 1949); W.A. Robson, ed., *Public Enterprise: Developments in Social Ownership and Control in Great Britain* (London: George Allen & Unwin Ltd, 1937).

<sup>151</sup> Willis, “Foreword,” *supra* note 146 at viii.

<sup>152</sup> S. Wexler, “Discretion: The Unacknowledged Side of Law” (1975) 25 U.T.L.J. 120 at 126, n. 16.

<sup>153</sup> Law Reform Commission of Canada, *The Worst Form of Tyranny: Second Annual Report 1972-73* (Ottawa: Law Reform Commission of Canada, 1973) at 24.

based.<sup>154</sup> That ambition is of a piece with Willis's. But, as with many of his insights, Willis never did the work to take it anywhere himself. *Canadian Boards at Work* contained no board study by him, and he never focused attention on any particular board in his later writing.<sup>155</sup> He preached the principle of uniqueness but did not practice it in his published work.

One can see the same pattern with his strong interest in sanctions. Willis was fascinated by enforcement, with "what actually happens."<sup>156</sup> He had plans approved for a seminar course on sanctions: studying the problem of translating policy into action through law, with emphasis on methods of enforcement and their efficacy. In the proposal to the University of Toronto Law School curriculum committee, Willis was disarmingly frank about his doubts as to his ability to pull such a course off, but wanted to give it a go and to get it out of his system. "I shall learn something even if the students don't," he said.<sup>157</sup> Unfortunately, as he told his students in his 1971 administrative law teaching materials, he abandoned the seminar proposal as being too difficult to carry out.<sup>158</sup> Once again, Willis was before his time in Canada. Socio-legal studies of enforcement started to appear a decade or so after he retired.<sup>159</sup>

Willis shared this fascination with sanctions and focus on institutional competence—the institution best fit for the job should

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<sup>154</sup> Reports were produced on the Immigration Appeal Board, the Atomic Energy Control Board, the National Parole Board, the Unemployment Insurance Commission, the Canadian Transport Commission, the Canadian Radio-Television and Communications Commission, the Canada Labour Relations Board, and the Tariff Board. Unfortunately, the Commission did not succeed in pulling together that work in any productive way.

<sup>155</sup> He was one of a three-man committee that inquired into the Ontario Securities Commission. See Ontario Securities Commission, *Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure Raised for Investors by Business Combinations and Private Placements* (Toronto: Dept. of Financial and Commercial Affairs, 1970). Willis also served part-time for a period on the Ontario Securities Commission.

<sup>156</sup> J. Willis, Book Review of *Enforcing the Law* by R.M. Jackson (1968) 18 U.T.L.J. 98 [Willis, "Review of *Enforcing the Law*"].

<sup>157</sup> Willis, *Public Authorities*, *supra* note 134 at 7 [emphasis in original].

<sup>158</sup> *Ibid.* He did review admiringly R.M. Jackson's *Enforcing the Law* (London: Macmillan, 1967), which was a pioneering book in its day. See Willis, "Review of *Enforcing the Law*," *supra* note 156. He reveals the difficulty of the contextual, interdisciplinary task for lawyers in another admiring review of a book by an economist on water pollution control. See J. Willis, Book Review of *Pollution, Property and Prices* by J.H. Dales (1969) 19 U.T.L.J. 277.

<sup>159</sup> See e.g. M.J. Trebilcock *et al.*, *The Choice of Governing Instrument* (Ottawa: Economic Council of Canada, 1982); K. Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Clarendon Press, Oxford, 1984); B. Hutter, *The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers* (Oxford: Clarendon Press, 1988); M.L. Friedland, ed., *Securing Compliance: Seven Case Studies* (Toronto: University of Toronto Press, 1990).

decide—with adherents of the legal process school in the United States and Canada.<sup>160</sup> This school of legal thought is associated particularly with Harvard and the famously unpublished “Legal Process” materials for a course taught by Henry Hart and Albert Sacks.<sup>161</sup> This approach was highly influential in Canada due to the fact that, for most of the twentieth century, a Harvard LL.M. was “the union card” for entry into the law teaching profession in Canada.<sup>162</sup> In the United States, the legal process school is credited with beating back the darker side of legal realism for the best part of two generations.<sup>163</sup> Although the exact contours of the legal process school are almost as disputed as those of legal realism, Willis would have been comfortable with the process school’s minimization of the judicial role and its emphasis on judicial restraint. He would, however, have scorned as theological its emphasis on impersonal, durable, and neutral principles, in the same way his “hero” Thurman Arnold did.<sup>164</sup> Willis was too much a square peg to fit the round holes of the legal process school, and this distinguishes him from his good friends and colleagues Caesar Wright and Bora Laskin.<sup>165</sup>

### C. *The Influence of the Teacher-Scholar*

Willis was passionate about writing, which he thought was an academic’s first and true duty. He thought if academics put their teaching

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<sup>160</sup> The writing on the legal process school is large. For an introduction, see W.N. Eskridge, Jr. & P.P. Frickey, “The Making of *The Legal Process*” (1994) 107 Harv. L. Rev. 2031. For a Canadian take see K. Roach, “What’s New and Old about The Legal Process?” (1997) 47 U.T.L.J. 363.

<sup>161</sup> A 1958 tentative edition of Hart and Sacks was published posthumously. See Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. by W.N. Eskridge & P.P. Frickey (Westbury: Foundation Press, 1994).

<sup>162</sup> Willis, *History*, *supra* note 55 at 88. See also P. Horwitz, “Bora Laskin and the Legal Process School” (1995) 59 Sask. L.R. 77; Paul C. Weiler, “Two Models of Judicial Decision-Making” (1968) 46 Can. Bar Rev. 406 (Weiler later left Canada to teach at Harvard Law School).

<sup>163</sup> See e.g. G.E. White, “The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change” (1973) 59 Va. L.R. 279.

<sup>164</sup> For an entrée to the neutral principles debate, see G. Peller, “Neutral Principles in the 1950s” (1988) 21 U. Mich. J.L. Ref. 561. For Arnold’s critique, see T. Arnold, “Professor Hart’s Theology” (1960) 73 Harv. L. Rev. 1311. Willis’s admiration is evident from his reviews of Arnold’s realist tracts, autobiography and edited correspondence. See J. Willis, Book Review of *The Symbols of Government* by Thurman W. Arnold (1936) 14 Can. Bar Rev. 1; J. Willis, Book Review of *The Folklore of Capitalism* by Thurman W. Arnold (1938) 16 Can. Bar Rev. 417; J. Willis, Book Review of *Fair Fights and Foul: A Dissenting Lawyer’s Life* by Thurman Arnold (1967) 17 U.T.L.J. 231 [Willis, “Book Review of *Fair Fights*”]; and Willis, “Book Review of *Voltaire*,” *supra* note 60.

<sup>165</sup> See generally R.B. Brown, “Cecil A. Wright and the Foundations of Canadian Tort Law Scholarship” (2001) 64 Sask. L. Rev. 169 [Brown, “Cecil A. Wright”]; Horwitz, *supra* note 162.

first, they “become ... just a high school teacher masquerading as a university professor.”<sup>166</sup> He often lamented that the then-state of legal education in Canada forced him and his generation of law teachers “against its will” to “put teaching first.”<sup>167</sup> It is true that he taught a remarkable range of courses. Bora Laskin doubted “that any other full-time teacher, at a time when the curriculum was limited and structured, exhibited his command of as many subjects,” and compiled this list of his most important teaching subjects: “administrative (and constitutional) law; history of English law; equity (including mortgages and sale of land); bills of exchange and promissory notes; statute law; taxation; wills and trusts.”<sup>168</sup> Indeed, Willis characterized himself as “a public lawyer in embryo who had to teach other things and so never got a chance to develop into anything.”<sup>169</sup> Typically self-deprecating, but wrong.

The first thing to say is that, by every account, Willis was a “superlative” teacher.<sup>170</sup> His case book on administrative law was used at some Ontario law schools well into the 1980s and is still worth reading.<sup>171</sup> Everyone who knew Willis as a teacher or colleague says that to see the man teach or to talk to him was even more vivid and invigorating than his writing, which is no small claim.

An early exponent of what we now call “research-informed” teaching, some of his classic articles flowed from teaching preparation or

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<sup>166</sup> J. Willis, “Convocation Address, Osgoode Hall Law School of York University” (1973) 7 L. Soc’y Gaz. 235 at 236.

<sup>167</sup> *Ibid.*

<sup>168</sup> Laskin, “Foreword,” *supra* note 61.

<sup>169</sup> Letter from J. Willis to M. Taggart (14 January 1989).

<sup>170</sup> D.A. Soberman, Book Review of *A History of Dalhousie Law School* by John Willis (1980) 6 Dal. L.J. 711 at 711. See also I. Hunter, Book Review of *A History of Dalhousie Law School* by John Willis (1981) 19 U.W.O. L. Rev. 387 at 388-89; H.W. Arthurs, Book Review of *A History of Dalhousie Law School* by John Willis (1981) 59 Can. Bar Rev. 232. Ian Hunter, who revered Willis as a teacher, said once in a letter something that encapsulates everything I have heard or read about his teaching over more than twenty years: “He had the most fecund mind, thought for himself, and taught like a volcano about to erupt.” See Letter from Ian Hunter to M. Taggart (14 September 1988).

<sup>171</sup> Willis, *Public Authorities*, *supra* note 134 at 2. Eventually these materials were supplanted by the work product of a new generation of Canadian administrative law scholars. See J.M. Evans, H.N. Janisch, R.C.B. Risk & D.J. Mullan, *Administrative Law: Cases, Text, and Materials*, 5th ed. (Toronto: Emond Montgomery, 2003) [Evans *et al.*, *Administrative Law*]. Of the authors (for they are much more than editors and compilers), John Evans (Osgoode Hall, and before that LSE) became a judge of the Federal Court, Dick Risk (Toronto) is in active retirement, Hudson Janisch (Toronto) retired this year, and David Mullan (Queen’s) took early retirement this year, and is currently the Integrity Commissioner for the City of Toronto. Who are the successors?

from making sense of puzzles thrown up by teaching.<sup>172</sup> Despite the obvious connections, there is a tension between teaching and scholarship (writing) simply because there are only so many hours in the day and the demands of one cut across the doing of the other. By which route is one (and one's institution) more influential? This is an old question. The answer is less clear in Willis's case than in many others.

His writings were read around the common law world, and long after they were written. For instance, I read his famous "Nutshell" piece (1938) and the one on *delegatus non potest delegare* (1943) in the mid-1970s half the world away from its source. I was taught by Jack Northey, who had studied at the University of Toronto in the early 1950s. I am told by Laskin's biographer Philip Girard that Northey was one of Bora Laskin's most memorable postgraduate students.<sup>173</sup> This proves once again that taught law is tough law and that the world of legal education is a small one. At that time, it was minute. When the Association of Canadian Law Teachers was formed in 1950 the full-time law teachers across Canada numbered forty.<sup>174</sup>

This illustrates some of the difficulties of measuring influence.<sup>175</sup> It appears from colleagues' and students' reminiscences and writings that Willis was highly influential as a teacher. He goaded thousands of students over more than forty years into critical thought, many of whom enjoyed and benefited from the experience. Willis's teaching and writings influenced other teachers, who used his writings in their teaching and writing, and so on. No citation index can capture this influence.<sup>176</sup>

So much for teaching, then; how can we trace the influences upon Willis's own thinking and the influence of his scholarship on others?

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<sup>172</sup> Dick Risk recalls that the 1938 classic "Statute Interpretation in a Nutshell" "was written during the summer of 1937 for the students in a new course on legislation" at Dalhousie Law School: Risk, "Memoriam," *supra* note 62 at 302.

<sup>173</sup> See *supra* note \*. Jack Northey completed his S.J.D at the University of Toronto in the early 1950s under Bora Laskin's supervision. Further evidence of the "small world" thesis (taken from the title of a David Lodge novel about academic life) is that Philip Girard and I started teaching law at the University of Western Ontario Faculty of Law in 1980.

<sup>174</sup> Bale, "W.R. Lederman," *supra* note 49 at 57.

<sup>175</sup> On the difficulties of determining influence in law in general and in administrative law in particular, see e.g. R.A. Posner, *Cardozo: A Study in Reputation* (Chicago: University of Chicago Press, 1990); N. Duxbury, *Jurists & Judges: An Essay on Influence* (Oxford: Hart Publishing, 2001); R.A. Cass & J.M. Beerermann, "Throwing Stones at the Mudbank: The Impact of Scholarship on Administrative Law" (1993) 45 Admin. L. Rev. 1. For the more stringent requirements of intellectual historians in identifying positive influence on subsequent writers, see Quentin Skinner, "Meaning and Understanding in the History of Ideas" (1969) 8 History and Theory 25.

<sup>176</sup> For use and advocacy of quantitative citation survey to determine influence and reputation, see Posner, *ibid.* at 71, 149.

Textual study of scholarship looks first and foremost at the text for overt or covert signs of influences. Scholarly writing has the advantage that there are the footlights of footnotes, illuminating sources of thought.<sup>177</sup> But the etiquette of footnoting is a rather personal matter and varies also over time and place. Willis was never flashy, and wore his considerable learning lightly on his sleeve. His footnotes were largely black letter and to the point.<sup>178</sup> As his former student and Dalhousie colleague, Graham Murray observed:

Some writers of legal articles, write them, of course, to display the learning they possess. John Willis, in all his writing, does, perhaps, the reverse. He skillfully<sup>179</sup> conceals the magnitude of his researches into the law, in the books as well as in action.

We know Willis to be well-read outside law and to have rubbed shoulders at Dalhousie University with political scientists and economists,<sup>180</sup> but none of that is traceable from his writing. There are a great many gaps to fill, and the bigger the gaps the greater the danger of inaccuracy.

Similarly, when trying to establish what sort of reputation and influence Willis had, we are once again largely at the mercy of footnotes. Fortunately, others were less Delphic than Willis, and his “classic” articles are so described by scholars in their work. There were few administrative law books published at that time, but Willis’s articles were invariably cited. For most of the period in which Willis wrote, judges did not cite academics’ work,<sup>181</sup> at least not the works of scholars who were still alive.<sup>182</sup> From what

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<sup>177</sup> Much has been written on footnotes in many disciplines, including law. See generally A. Grafton, *The Footnote: A Curious History* (London: Faber & Faber, 1997).

<sup>178</sup> In a reminiscence of law teaching at Dalhousie University in the 1930s Willis did say this: “Our attitude to scholarship was devoted but light-hearted. I particularly remember how ... [he and a colleague, who shared an office] competed with one another in the number of footnotes (which, and rightly, we regarded with derision) we could squash into our respective pieces of learning.” See Willis, “In my day,” *supra* note 133 at 64.

<sup>179</sup> R. Graham Murray, “In my day at Dalhousie Law School” (1976) *Ansul: Dalhousie Law Forum* (Special Issue) 67 at 67.

<sup>180</sup> Willis, “In my day,” *supra* note 133.

<sup>181</sup> R.B. Brown makes this point also that the lack of judicial citation hinders an evaluation of academic influence. See Brown, “Cecil A. Wright,” *supra* note 165 at 215.

<sup>182</sup> The convention that the work of living authors is not authoritative persisted well into the twentieth century. See Duxbury, *supra* note 175 at 62-84; Bale, “W.R. Lederman,” *supra* note 49 at 49-55; and B.M. Komar, “Textbooks as Authority in Anglo-American Law” (1922-23) 11 *Cal. L. Rev.* 397.

we know of the reactions of practitioners, they were aghast at Willis's plain speaking and his left-of-centre politics.<sup>183</sup> Dick Risk concludes that Willis's

writing had little influence in its own times. The courts and practicing lawyers either ignored him or considered him a dangerous radical . . . . The greatest understanding and influence of his writing came long after the 1930s, and my impression is that the expansion of visions of legal scholarship during the past decade [the 1970s] has made teachers and students respond more enthusiastically to it than they did during the 1950s and 1960s.<sup>184</sup>

Willis's major influence was on his students and his colleagues, and through his teaching and theirs he influenced the thinking of literally thousands of students, many of whom went on to practice law and some of whom became judges or academics.

One of the reasons for the impact and influence of Willis's work is his fluid and memorable writing style. The rigours of a classical education are evident in the clarity and precision of expression, but this is mixed in good proportion with verve, passion, and wit. Someone once said of his mentor Frankfurter's writing that it "crackles,"<sup>185</sup> and that seems to me to describe exactly much of Willis's writing as well. Many an academic career has been launched upon a good turn of phrase, and Willis was never short of a memorable one. My favourites from *Parliamentary Powers* include: "it is here that the constitutional shoe pinches";<sup>186</sup> "[t]he 'intent of Parliament' is not that shy modest virgin with whom the judges sometimes like to flirt; the department concerned knows her well";<sup>187</sup> "[l]awyers' ears are attuned to the accents of the forgotten past, new commands are faintly apprehended through the fog of the Common Law";<sup>188</sup> "all these factors combined to give the courts leave to treat the case as Jack Horner's Christmas Pie, to 'put in a thumb and pull out a plum and say what a good

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<sup>183</sup> See e.g. W.H. Jost, "The Days of John Willis," *Hearsay* (Fall 1991) 30 at 31-32, the vitriolic tone of the responses to Willis's highly critical comment on the *Nolan* case, and Willis's surrebutter in Willis, "Nolan Case," *supra* note 144 at 572, 573, 580, 708. Willis's position was vindicated on appeal to the Privy Council when the Supreme Court of Canada was overturned. See *Attorney-General v. Hallett & Carey* [1952], A.C. 427 (P.C.).

<sup>184</sup> Risk, "Tribute," *supra* note 33 at 549-50. Compare Brown, "Canadian Legal Realists," *supra* note 60 at 170-72.

<sup>185</sup> Quoted by A.M. Bickel, "Applied Politics and the Science of Law: Writings of the Harvard Period" in W. Mendelson, ed., *Felix Frankfurter: A Tribute* (New York: Reynal & Company, 1964) 164 at 198. Dick Risk has spoken of Willis's "wit and sparkle." See Risk, "Memoriam," *supra* note 62 at 303. Willis compared Frankfurter's writing to a "darting, shimmering dragonfly." See Willis, "Review of *Mr. Justice Holmes*," *supra* note 72.

<sup>186</sup> Willis, *Parliamentary Powers*, *supra* note 104 at 4.

<sup>187</sup> *Ibid.* at 34.

<sup>188</sup> *Ibid.* at 51.

boy am I”;<sup>189</sup> “[q]uestions of government cannot be settled by drawing analogies from the behaviour of a pickpocket when the policeman is off his beat”;<sup>190</sup> and finally, “[i]n the Never-never Land of legal formalism it may well be that phrases coined some fifty years ago by way of incisive generalisation for the use of undergraduates should pass as unalterable canons of good government.”<sup>191</sup> In Canada, in the relevant period, Willis’s skill as a wordsmith was arguably rivaled only by his University of Toronto colleague, Albert Abel.<sup>192</sup>

#### D. *Court Scepticism, Labour Law, and Deference*

In the twentieth century, some administrative lawyers were highly sceptical of the utility of judicial review in the social and economic spheres. The most articulate early spokespersons of that view worked at the London School of Economics in the 1920s; the honour roll includes Harold Laski, William A. Robson, and Ivor Jennings.

These LSE scholars were instrumental in forging a distinctive, dissenting view of administrative law in Britain.<sup>193</sup> Their work “was of a strongly functionalist, often empiricist character and was special in being administration- rather than solely court-centred.”<sup>194</sup> The impact of legal realism was plainly evident too. This “tradition of dissent” manifested itself in the teaching of labour law decades ahead of other British law schools.<sup>195</sup>

These left-leaning scholars were deeply resentful of what they saw as conservative judges twisting the pliable rules of statutory interpretation to favour the existing order, privileging the rich and the powerful, and defeating the purposes of statutes intended to further the interests of the workers, the homeless, and the least well-off in society. This antagonism

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<sup>189</sup> *Ibid.* at 76.

<sup>190</sup> *Ibid.* at 104.

<sup>191</sup> *Ibid.* at 176. See also Willis, “Review of *Mr. Justice Holmes*,” *supra* note 72.

<sup>192</sup> Abel strikes me as an interesting candidate for contextualized intellectual historical study. Headhunted by Bora Laskin from the University of West Virginia, he became known primarily as a constitutional law scholar at the University of Toronto, but wrote also about administrative law in often non-traditional ways. It seems to me Abel never reaped the fame his intellect deserved.

<sup>193</sup> See generally Harlow & Rawlings, *Law and Administration*, *supra* note 26; Loughlin, *supra* notes 11 and 27.

<sup>194</sup> R. Rawlings, “Distinction and Diversity: Law and the LSE” in R. Rawlings, ed., *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1895-1995* (Oxford: Clarendon Press, 1997) 1 at 7.

<sup>195</sup> *Ibid.* at 10.

can be traced back to the lamentable treatment of trade unions by the Courts.<sup>196</sup>

As we have seen, Willis shared in spades the LSE scholars' scepticism about judges. Indeed, as an English born and bred and public-school trained social democrat, he carried these scepticisms to New England and then to Canada. His concerns about the role of the courts in judicial review were always "more general" than just in respect of the labour field.<sup>197</sup> Somewhat surprisingly, unlike his friend Bora Laskin, Willis never taught labour law. And, apart from the odd reference to the irresponsible performance of some Canadian courts in reviewing provincial labour boards,<sup>198</sup> Willis did not dwell on labour law in his writing either. This was not the case with the generation of scholars after Willis, who took many of his insights and applied them specifically to labour law.

It was mainly in labour law that the "dark stain" (of law without judges<sup>199</sup> that we saw in the earliest work of Willis) appears in the work of other scholars. Bora Laskin in the 1950s supported the use of privative clauses in labour legislation to keep the courts out.<sup>200</sup> Harry Arthurs, a student of Laskin's, turned this disposition into a "general campaign against any role whatsoever for courts in industrial relations—either original or reviewing."<sup>201</sup> A group of scholars—some labour lawyers, some administrative lawyers—based at Osgoode Hall Law School loudly took up this cause, and largely succeeded in giving judicial review a bad name.<sup>202</sup> In addition to Harry Arthurs,<sup>203</sup> this group in the 1960s included Paul

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<sup>196</sup> This distrust continued into the 1990s in the UK. See F. Belloni, "The Labour Community and the British Judiciary" (1992) 13 *Int'l Pol. Sci. Rev.* 269. For the position in Canada, see Judy Fudge & Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto: Oxford University Press, 2001).

<sup>197</sup> D.J. Mullan, "Reform of Judicial Review of Administrative Action—the Ontario Way" (1974) 12 *Osgoode Hall L.J.* 125 at 127.

<sup>198</sup> By this Willis meant without proper understanding and restraint. See Willis, "Nolan Case," *supra* note 144 at 585.

<sup>199</sup> Taggart, "Reinvented Government," *supra* note 26 at 136.

<sup>200</sup> B. Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952) 30 *Can. Bar Rev.* 986.

<sup>201</sup> Arthurs, "Woe Unto You, Judges," *supra* note 143 at 665.

<sup>202</sup> D. J. Mullan, "Judicial Restraints on Administrative Action: Effective or Illusory?" (1976) 17 *C. de D.* 913 at 924 [Mullan, "Judicial Restraints"]; H. Janisch, "Bora Laskin and Administrative Law: An Unfinished Journey" (1985) 35 *U.T.L.J.* 557 at 578 [Janisch, "Bora Laskin"].

<sup>203</sup> See e.g. H.W. Arthurs, "Protection against Judicial Review" (1983) 43 *R. du B.* 277; H.W. Arthurs, "'Dullest Bill': Reflections on the Labour Code of British Columbia" (1974) 9 *U.B.C. L. Rev.* 280. Of all the scholars in this rather loose grouping Harry Arthurs is the most readily identifiable successor to Willis's thought and approach. *Accord*, Gordon, "Without the Law II," *supra* note 65 at 431.

Weiler,<sup>204</sup> Terry Ison,<sup>205</sup> Harry Glasbeek, Bill Angus,<sup>206</sup> and to a lesser extent, Peter Hogg and, a little later on, John Evans.<sup>207</sup> Some in the Osgoode Hall camp repudiated the courts altogether—Terry Ison, for example<sup>208</sup>—while Harry Arthurs has flitted in and out of that part of the camp for much of his career.<sup>209</sup> Most of the others stopped short of dismissing the courts out of hand, but directed their withering critiques toward minimizing the judicial role and defining the small compass within which judicial intervention in the administrative process was both justifiable and desirable. In this, they followed in the footsteps of John Willis.

In 1951 Willis put this most clearly in a letter to the Editor of the *Canadian Bar Review*, replying to two blistering responses to an ill-tempered article of his own. Accused of wanting to get rid of judicial control of administrative action, Willis replied:

I am not quite sure where I stand on judicial control of administrative action and in any case the question is so complicated and so hedged about with ifs and ans [sic] that I do not propose to enter into it at the end of what is already a Gargantuan letter. But there are ... [some] things of which I am absolutely sure.

... I am absolutely sure that I do not want to get rid of the doctrine of ultra vires... I do not think that "the judicial process is outmoded and inadequate to deal with the realities of

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<sup>204</sup> See e.g. Paul C. Weiler, "The 'Slippery Slope' of Judicial Intervention" (1971) 9 Osgoode Hall L.J. 1; Paul C. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974) [Weiler, *Last Resort*]; and Paul C. Weiler, "The Administrative Tribunal: A View from the Inside" (1976) 26 U.T.L.J. 225.

<sup>205</sup> See e.g. T.G. Ison, "The Sovereignty of the Judiciary" (1986) 10 Adel. L.R. 1 [Ison, "Sovereignty"]; T.G. Ison, "The Sovereignty of the Judiciary" (1986) 26 C. de D. 503; and T.G. Ison, "Appeals on the Merits" (1992) 30 Osgoode Hall L.J. 139.

<sup>206</sup> W.H. Angus, "The Waning Jurisdiction of the Courts" (1963) 28 Sask. L. Rev. 133.

<sup>207</sup> See e.g. P.W. Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: *Bell v. Ontario Human Rights Commission*" (1971) 9 Osgoode Hall L.J. 203 [Hogg, "Jurisdictional Fact Doctrine"]; P.W. Hogg, "The Supreme Court of Canada and Administrative Law, 1949-1971" (1973) 11 Osgoode Hall L.J. 187 [Hogg, "The Supreme Court"]; P.W. Hogg, "Is Judicial Review of Administrative Action Guaranteed by the *British North America Act*?" (1976) 54 Can. Bar Rev. 716. John Evans, who edited the fourth edition of S.A. de Smith's *Judicial Review of Administrative Action* (London: Stevens & Sons, 1980), visited Osgoode Hall in 1974 and moved there permanently from the LSE in 1975. For an overview of his approach, see J.M. Evans, "Administrative Appeal or Judicial Review: A Canadian Perspective" [1993] Acta Jur. 47.

<sup>208</sup> See *supra* note 205. Ison's heir apparent is Allan Hutchinson. See A.C. Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 Mod. L. Rev. 293.

<sup>209</sup> "Judicial review has always been too slow, costly, clumsy, incoherent and unpredictable to be much use to anyone." See Arthurs, "Mechanical Arts," *supra* note 140 at 52. See also Arthurs, "A Slightly Dicey Business," *supra* note 11 at 42: "Judicial review has only a limited useful role." Outside labour law, I am not aware that Arthurs ever said that judicial review was never any use to anyone and should be abolished.

“modern socialistic legislation”. What I am saying is something quite different. I am asking ... that the judges in administering the law of ultra vires exercise this exceedingly delicate power with understanding and restraint; for it is the power to interfere with the normal functioning of a government system of which in these democratic days they are the least important arm.<sup>210</sup>

As Peter Hogg put it years later, “[t]he answer—vague, unsatisfactory and unenforceable though it may be—is that the courts should exercise restraint” in the application of the jurisdictional principle.<sup>211</sup> In the early 1970s a series of annual lectures was held at Osgoode Hall Law School that were published under the title *The Individual and Bureaucracy*. As part of that series, Bill Angus asked “Judicial Review: Do We Need It?” and Peter Hogg’s contribution was subtitled “How Much Do We Need?”<sup>212</sup> These articles were republished in law reviews on both sides of the border and brought together neatly many of the strands of the contemporary critique of judicial review. Like Willis, they argued that for a variety of reasons the courts should have a minor and restrained role in judicial review.

Peter Hogg, drawing on American administrative law,<sup>213</sup> made more headway than Willis ever did in articulating when courts should show restraint. In his prescient article, Hogg proposed that any reasonable interpretation by an administrative tribunal should prevail, unless it offended general or fundamental values of the legal order.<sup>214</sup> The courts’ true role was to guarantee the protection of those fundamental values,

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<sup>210</sup> Willis, “Nolan Case,” *supra* note 144 at 584-85.

<sup>211</sup> Hogg, “Jurisdictional Fact Doctrine,” *supra* note 207 at 216. Hogg was speaking of the jurisdictional fact doctrine, but it applies equally to all jurisdictional errors. Willis thought this long letter to the editor, in reply to critics, was “by miles” the best thing he ever wrote. See Letter from J. Willis to M. Taggart (14 January 1989). See also H.W. Arthurs, “*Without the Law*”: *Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) 190 (“judicial restraint now rests on no more than a self-denying ordinance”) [Arthurs, *Without the Law*].

<sup>212</sup> The lecture series was published as Daniel J. Baum, ed., *The Individual and the Bureaucracy* (Toronto: Osgoode Hall Law School, York University, 1975). The articles by Angus and Hogg were republished in the McGill Law Journal and the Administrative Law Review. See W.H. Angus, “The Individual and the Bureaucracy: Judicial Review—Do We Need It?” (1974) 20 McGill L.J. 177; W.H. Angus, “Judicial Review in Canada: Do We Need It?” (1974) 26 Admin. L. Rev. 301; Baum, *ibid.* at 101; P.W. Hogg, “Judicial Review: How Much do We Need?” in Baum, *ibid.* at 81, republished as P.W. Hogg, “Judicial Review: How Much Do We Need It?” (1974) 20 McGill L.J. 157; P.W. Hogg, “Judicial Review in Canada: How Much Do We Need It?” (1974) 26 Admin. L. R. Rev. 337. I will cite to Baum.

<sup>213</sup> Hogg in Baum, *ibid.* at 92, citing K.C. Davis, *Administrative Law Treatise* (St. Paul: West Pub. Co., 1958) vol. 4 at s. 30.05, and comparing it with L.L. Jaffe, *Judicial Control of Administrative Action* (Boston: Little, Brown, 1965). Hogg correctly portrays Jaffe as advocating a stronger, more interventionist approach. See generally D.B. Rodriguez, “Jaffe’s Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory” (1997) 72 Chicago-Kent L. Rev. 1159.

<sup>214</sup> Hogg, *ibid.* at 91 (“civil libertarian values”).

reflecting “the Canadian commitment to a democracy based on the English parliamentary system,”<sup>215</sup> and that entailed curial enforcement of the requirement that official action be authorized by positive law and the protection of civil liberties.

This tension between legal centrism and pluralism is longstanding. The Victorians conceived of the law as “a whole, unified, integrated thing”<sup>216</sup> with the courts at the top “fully competent to administer the whole law.”<sup>217</sup> This is one of the premises upon which Dicey built his rule of law. This legacy is with us still, and the pull towards coherence across the whole legal landscape is very strong.<sup>218</sup> It is vital to remember, however, notwithstanding the potent symbolism of “ordinary” courts atop the interpretive heap administering the “ordinary” law,<sup>219</sup> that historically the courts never claimed to determine conclusively the meaning of all “law.”<sup>220</sup> The concept of jurisdiction operated as a saw cutting off those questions that the courts would subject to a “correctness” standard of review from those it left to the administrators. In Harry Arthurs’ words, the concept of jurisdiction operated as a mediating principle, mediating between the ordinary law and the distinctive, special laws of the administration,<sup>221</sup> and thereby leaving room, within jurisdiction, for pluralism to survive, if not flourish.

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<sup>215</sup> Hogg, *ibid.* at 88-89. Hogg quoted and relied upon Jaffe, *ibid.* at 589 for the proposition that the court is “guarantor of the integrity of the legal system.” When push came to shove at a conference where the Hogg-Angus articles were rerun, David Mullan fell back on Jaffe’s views to defend the availability of judicial review against abuse of power: Mullan, “Judicial Restraints,” *supra* note 202 at 925. Sir William Wade expressed this view most memorably in a commentary following one by Harry Arthurs, when he said “[h]owever conscientious the tribunals themselves may be, there is a real risk of letting loose a legal Frankenstein’s monster.” See H.W. Arthurs, “Judicial Review—Comment” in Peter A. Gall, ed., *Proceedings of the Administrative Law Conference, Faculty of Law, University of British Columbia, Vancouver, BC, 18-19 October 1979* (Vancouver: U.B.C. L. Rev., 1981) 375 at 377.

<sup>216</sup> S. Wexler, “The Forms of Action and Administrative Law” in Gall, *ibid.* 292 at 295.

<sup>217</sup> Frederic William Maitland, A. H. Chaytor & W. J. Whittaker, *The Forms of Action at Common Law: A Course of Lectures* (Cambridge: The University Press, 1958) at 10, quoted by Wexler, *ibid.*

<sup>218</sup> See generally R. Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986); M. Allars, “On Deference to Tribunals, with Deference to Dworkin” (1994) 20 *Queen’s L.J.* 163; W.N. Eskridge, *Dynamic Statutory Interpretation* (Cambridge: Harvard University Press, 1994) at 239.

<sup>219</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan & Co., 1959) at c. 4.

<sup>220</sup> Recall the valiant but quixotic attempt by the Canadian legal practitioner, D. M. Gordon, to define and confine jurisdictional control. See generally Roach, “D.M. Gordon,” *supra* note 33.

<sup>221</sup> Arthurs, *Without the Law*, *supra* note 211 at 208-09.

### E. *Doctrinal Influences*

An outsider looking in on contemporary Canadian administrative law is struck by several distinctive features.<sup>222</sup> First, until very recently, by the muted role that the doctrine of reasonableness has played in the control of discretionary power.<sup>223</sup> Second, that Canadian courts clung to the concept of jurisdictional error as the central organizing principle longer than most Commonwealth courts, and its displacement by the “pragmatic and functional” test is not yet complete.<sup>224</sup> Third, the Canadian courts have adopted a decidedly deferential attitude towards administrative interpretations of statutes in the last quarter of the twentieth century. Part and parcel of that development is a respectful and finely calibrated treatment of privative clauses. These features are interrelated and all may be traced back in one way or another to Willis’s thought and writings.

Perhaps the most famous Canadian administrative law case since 1960,<sup>225</sup> and certainly the most symbolically important, is *CUPE v. New*

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<sup>222</sup> I draw in this section on some previous work. See M. Taggart, “Outside Canadian Administrative Law” (1996) 46 U.T.L.J. 649; M. Taggart, “The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective” in P. Rishworth, ed., *The Struggle for Simplicity in Law: Essays for Lord Cooke of Thorndon* (Wellington: Butterworths, 1997) 189 at 204-07.

<sup>223</sup> See D.J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 121-22. That is, until *Baker v. Canada (Minister of Immigration)*, [1999] 2 S.C.R. 817. For wide ranging consideration of the implications of that case, see D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) and especially D.J. Mullan, “Deference from *Baker* to *Suresh* and Beyond—Interpreting the Conflicting Signals” in Dyzenhaus, *ibid.* at 21, 28, 36.

<sup>224</sup> One reason for this is that the right to judicial review on jurisdictional grounds has been held to be enshrined in, and protected by, the judicature provisions of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5. See *Crevier v. Attorney-General of Quebec*, [1981] 2 S.C.R. 220. I accept that after *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 “jurisdictional error” became (or should have become) simply an *ex post* description whenever the “pragmatic and functional” test pointed towards correctness, but subsequent cases have begun to muddy the waters. See R. Lechey, “Territoriality in Canadian Administrative Law” (2004) 54 U.T.L.J. 327 at 341-43.

<sup>225</sup> 1960 is chosen because pride of place, in my opinion, goes to *Roncarelli v. Duplessis*, [1959] S.C.R. 121 [*Roncarelli*]. Although there is much interesting commentary in several disciplines about the treatment of Jehovah’s Witnesses in Quebec, the context within which the particular dispute unfolded, its judicial resolution and the aftermath, *Roncarelli* cries out for a contextualized book length treatment *à la Simpson*. For further explanation as to what it means “to do a Simpson,” see O’Donovan & Rubin, “Introduction,” *supra* note 35. Willis would surely have approved of this as he spent a lot of time on *Roncarelli* in his teaching materials and included extracts from Charles Reich (United States), Edward McWhinney (Canada), Gordon Borrie (U.K.), Paul C. Weiler (Canada) and Amnon Rubinstein (Israel). See Willis, *Public Authorities*, *supra* note 134 at 1-59(g)-159(i), 1-59(n)-1-61, 1-61-1-63, 1-63-1-63(a), 1-63(a)-1-64.

*Brunswick Liquor Corporation*.<sup>226</sup> Prior to *CUPE*, the Supreme Court of Canada employed a “correctness” standard of review determining for itself “perfectly simple, short and neat” questions of law without deference to the agency’s interpretation.<sup>227</sup> In *CUPE*, the Court combined a narrow concept of jurisdictional error with a decidedly deferential attitude toward administrative interpretations of statutes; this left many issues of statutory interpretation to the agency, whose view was to prevail unless “patently unreasonable.”

It seems clear that the Court in *CUPE* was reacting principally to sustained and severe academic criticism that the Court was too interventionist and unprincipled in the area of judicial review.<sup>228</sup> Much of the discontent stemmed from the Court’s perceived lack of sympathy for organized labour, but this “spotty record” in the labour relations area gave judicial review more generally a “bad name” in Canada.<sup>229</sup> Several scholars thought that the facts did not justify this “bad press” in the labour area, while another said that the “outcries from labour lawyers at excessive and ill-conceived judicial intervention” had “all but drowned out calls for a positive dialogue” between courts and administrative agencies in Canada.<sup>230</sup>

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<sup>226</sup> [1979] 2 S.C.R. 227 [*CUPE*].

<sup>227</sup> For a convenient overview, see C. L’Heureux-Dubé, “The ‘Ebb’ and ‘Flow’ of Administrative Law on the ‘General Question of Law’” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 308 at 309-11 [Taggart, *Province of Administrative Law*]. The reference to “perfectly simple, short and neat question of law” comes from *R v. Tottenham and District Rent Tribunal, ex parte Northfield (Highgate) Ltd.*, [1957] 1 Q.B. 103 at 108, Lord Goddard C.J., which was quoted approvingly in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 at 772 [Bell]. Bell’s case and *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425 were the *bête noire* of the commentators, especially those associated with Osgoode Hall Law School.

In this sketch I am following others in depicting this era based on a misleadingly small number of high profile cases. Both Peter Hogg and David Mullan have shown that this fails to recognize the many instances in which the Supreme Court of Canada showed considerable respect and deference to the administrative process in this period. See Hogg, “The Supreme Court,” *supra* note 207 at 221; D.J. Mullan, “The Supreme Court of Canada and Tribunals—Deference to the Administrative Process: A Recent Phenomenon or a Return to Basics?” (2001) 80 Can. Bar Rev. 399 at 422-25 [Mullan, “Supreme Court of Canada and Tribunals”].

<sup>228</sup> I rely here primarily on J. Evans, “Developments in Administrative Law: The 1984-85 Term” (1986) 8 Sup. Ct. L. Rev. 1 at 26-29 [Evans, “The 1984-85 Term”], which was quoted from extensively and approvingly by Wilson J. in her concurring judgment in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1337-38 [*National Corn Growers*].

<sup>229</sup> Mullan, “Judicial Restraints,” *supra* note 202 at 924.

<sup>230</sup> Janisch, “Bora Laskin,” *supra* note 202 at 578. Clearly a process of (sub)disciplinary boundary maintenance is at work here. The processes of defining the groups, and the intellectual and personal inclusion in and exclusion from groups, are matters that Schlegel’s work suggests should be explored in developing a fully socialized intellectual history. See Schlegel, “Ten Thousand Dollar Question,” *supra* note 56 at 438, 466.

It comes as no surprise then, that when the (re)turn to deference came—the start of that positive dialogue or partnership<sup>231</sup>—it was in a labour relations case.

Academic reaction to the Supreme Court's pre-*CUPE* stance was part of a wholesale challenge to the Court's formalism and barren conceptualism.<sup>232</sup> As noted earlier, there had been relentless pressure on the Supreme Court to rethink the relationship between the judiciary and administrative agencies, and to accept that those agencies had been given "the primary statutory responsibility for implementing and elaborating the legislative mandate within their area of regulation."<sup>233</sup> This rethinking had implications for statutory interpretation and cast doubt upon the positivist premises of the Supreme Court's previously interventionist approach, namely, that there was one uniquely correct meaning of an agency's constitutive legislation and that it must be provided by the judges. The Court accepted that there was no bright line to be drawn between law and policy, and so the knowledge, expertise, and insights of the front-line agency should be respected and deferred to whenever possible.<sup>234</sup> This Canadian effort to reconcile the rule of law with the modern state—and to leave Dicey behind—has aroused much interest elsewhere in the Commonwealth.<sup>235</sup>

The adoption in *CUPE* of a policy of judicial restraint towards the review of administrative agencies' determinations was seen by many as bringing "Canadian administrative law out from under the long shadow cast by Dicey."<sup>236</sup> *CUPE* has been followed nominally by the Supreme Court

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<sup>231</sup> This notion of partnership between courts and administrative agencies can be seen in A.S. Abel, "Courts and Tribunals: Partners in Justice" in G.M. Wilner, ed., *Jus et Societas: Essays in Tribute to Wolfgang Friedmann* (The Hague: Martinus Nijhoff, 1979) 1. Allan Hutchinson describes a similar notion as "a pious self-delusion." See A.C. Hutchinson, "Mice Under A Chair: Democracy, Courts, and the Administrative State" (1990) 40 U.T.L.J. 374 at 403.

<sup>232</sup> See generally Weiler, *Last Resort*, *supra* note 204.

<sup>233</sup> Evans, "The 1984-85 Term," *supra* note 228 at 27.

<sup>234</sup> See e.g. *National Corn Growers*, *supra* note 228, quoting from J.M. Evans, H.N. Janisch, R.C.B. Risk & D.J. Mullan, *Administrative Law: Cases, Text, and Materials*, 3d ed. (Toronto: Emond Montgomery, 1989) at 414.

<sup>235</sup> See e.g. P.P. Craig, *Administrative Law*, 5th ed. (London: Sweet & Maxwell, 2003) c. 10; P. Bayne, "The Court, the Parliament and the Government—Reflections on the Scope of Judicial Review" (1992) 20 Fed. L. Rev. 1; *Contra* M. Aronson, B. Dyer & M. Groves, *Judicial Review of Administrative Action*, 2d ed. (Sydney, LBC Information Services, 2000) at 182-83.

<sup>236</sup> J.M. Evans, H.N. Janisch, R.C.B. Risk & D.J. Mullan, *Administrative Law: Cases, Text, and Materials*, 4th ed. (Toronto: Emond Montgomery, 1995) at 820. See also *National Corn Growers*, *supra* note 228 at 1332-25, per Wilson J.; Mullan, "Supreme Court of Canada and Tribunals," *supra* note 227 at 425-49. See also D. Dyzenhaus, "Dicey's Shadow" (1993) 43 U.T.L.J. 127; D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy," in Taggart, *Province of Administrative Law*,

ever since, but the path of the Court's jurisprudence has been anything but straight and smooth. The one thing that has not resulted is certainty; the avalanche of Supreme Court cases continues, to the chagrin of casebook compilers, teachers, students, and practitioners. Regular lapses back into a more aggressive jurisdictional approach have provoked allegations of departure from *CUPE*'s spirit.<sup>237</sup>

In much of this one can see Willis's hand. He favoured restricting the courts' role to the area of *ultra vires* (that is, jurisdiction).<sup>238</sup> He did not want judges to be able to use doctrines like reasonableness to stray into policy, and hence to interfere in politics. He would have applauded the adoption of deference, for he argued all his professional life for judges to learn their rather minor place in government and to keep within it. The "pragmatic and functional" test would have won his approval also, insofar as it focused on the particular tribunal. This is his principle of "uniqueness" in operation. Willis championed functionalism as far back as 1935.<sup>239</sup> That the judges' monopoly on statutory interpretation should be broken was a foundational belief of Willis.<sup>240</sup> He would have joined the academic tub-thumping that accompanied *CUPE*.

Nevertheless, Willis would have been troubled, just as numerous contemporary commentators are,<sup>241</sup> by the failure of the *CUPE* schema to prevent lapses back into Diceyanism. Moreover, he would be aghast at the development of reasonableness *simpliciter*—the recently-developed *via media* between the "patently unreasonableness" and "correctness"

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*supra* note 227, c. 13.

For a critical view of the *CUPE* project, see I. Holloway, "A Sacred Right: Judicial Review of Administrative Action as a Cultural Phenomenon" (1993-94) 22 *Man. L.J.* 28 at 69-71.

<sup>237</sup> See generally J.M. Evans, "Jurisdictional Review in the Supreme Court: Realism, Romance and Recidivism" (1991) 48 *Admin. L. Rev.* 255; B. Etherington, "An Assessment of Judicial Review of Labour Laws Under the *Charter*: Of Realists, Romantics and Pragmatists" (1992) 24 *Ottawa L. Rev.* 685; B. Etherington, "Arbitration, Labour Boards and the Courts in the 1980: Romance Meets Realism" (1989) 68 *Can. Bar Rev.* 405.

<sup>238</sup> See *e.g.* Willis, "Nolan Case," *supra* note 144.

<sup>239</sup> Willis, "Three Approaches," *supra* note 135.

<sup>240</sup> Willis, *Parliamentary Powers*, *supra* note 104 at 171-72.

<sup>241</sup> Compare Arthurs, *Without the Law*, *supra* note 211 and D.J. Mullan, Book Review of "Without the Law": *Administrative Justice and Legal Pluralism in Nineteenth-Century England* by W.H. Arthurs (1987) 12 *Queen's L.J.* 106 at 110-16.

standards of review—that arguably splits asunder the *CUPE* methodology and rationale,<sup>242</sup> potentially allowing Diceyan tendencies to creep back in.<sup>243</sup>

John Willis wanted to keep judicial review in its place, and it was a rather small place. He accepted, after a shaky start, that in that space judges were needed. It was the definition of that space, the settling of who would decide its dimensions, and how, that bedeviled administrative law for much of the twentieth century. To the generation of scholars after Willis at Osgoode Hall Law School, who saw that space occupied by the judicial protection of fundamental values, I think he would have said “phooey.”<sup>244</sup> He was, after all, a “government man,” not a “civil liberties man.”<sup>245</sup>

And that brings me finally to the “C” word, which I have so far avoided. Willis never had to grapple with the *Charter of Rights and Freedoms*,<sup>246</sup> for he had retired by the time the Constitution was patriated. It would not have been a welcome development in his eyes.<sup>247</sup> Undoubtedly, he would have seen it as the ultimate triumph of “lawyers’ values,” legalism, and the juridification of politics. His critique of the judicial role in administrative law applies with bells on to the judicial review of legislation.<sup>248</sup> And many teacher-scholars at Osgoode Hall Law School have carried the critique forward into what Willis would surely have called the “Never-never Land” of the *Charter*.<sup>249</sup> And once again, labour lawyers are

<sup>242</sup> See generally M-H. Blais *et al.*, *Standards of Review of Federal Administrative Tribunals* (Markham: Butterworths, 2003); Donald J. M. Brown, J.M. Evans & Christine E. Deacon, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998).

<sup>243</sup> J. Sprague, “Another View of Baker” (1999) 7 *Reid’s Administrative Law* 163.

<sup>244</sup> He did call it “theological”: Willis, “Retrospect,” *supra* note 134 at 228.

<sup>245</sup> In his teaching materials, Willis included a paragraph from an unpublished section of a talk (entitled “Why are the Cases on ‘Natural Justice’ Confused and Uncertain”) he gave to the 1962 annual meeting of the Administrative Law section of the Canadian Bar Association. I have applied to him what he said there of judges: “we are in the field of public law where the unspoken assumptions of the individual judge—is he, for instance, a ‘government man’ or a ‘civil liberties’ man—is likely to make all the difference in a close case.” See Willis, *Public Authorities*, *supra* note 134 at 2-106.

<sup>246</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>247</sup> See J. Willis, “Foreign Borrowings” (1970) 20 *U.T.L.J.* 274 at 279-81.

<sup>248</sup> See Ison, “Sovereignty,” *supra* note 205 at 17: “Almost all of the objections to judicial review ... apply to the Charter, but their significance is greater in this context, and more objections must be added.”

<sup>249</sup> See *e.g.* H. Glasbeek & M. Mandel, “The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms” (1984) 2 *Socialist Stud.* 84; A.C. Hutchinson & A. Petter, “Private Rights/Public Wrongs: The Liberal Lie of the Charter” (1988) 38 *U.T.L.J.* 278; J. Fudge & H. Glasbeek, “The Politics of Rights: A Politics with a Little Class” (1992) 1 *Soc. and Legal Stud.* 45; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, 2d ed. (Toronto: Thompson Educational Press, 1994); A.C. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights*

among the leaders of the charge. And so the proud (and once again dissenting) tradition of public law scholarship continues to this day in Canada at Osgoode Hall Law School.

### III. CONCLUSION

Much of what one learns today in administrative law classes in Canada has its roots back in the “far-off Thirties”<sup>250</sup> and in the writings of John Willis, among others.<sup>251</sup> In these days of globalization and at a time of considerable theoretical imperialism from the United States, it is important to recall and remember the influences that have shaped Canadian law and society. Intellectual history allows us to see those influences, and to celebrate those “titans” who wrote and taught in inhospitable conditions, and whose voices echo down to us today.<sup>252</sup> Like all teachers they created frameworks of reference and understanding, and influenced thousands of students and lawyers. Inevitably of course, the most able prisoners of those frameworks break out and create new ones for themselves and future generations of students and lawyers. As that intellectual cycle continues, it is fitting to pause and celebrate our intellectual sometime-gaolers.<sup>253</sup> If intellectual legal history does nothing else, this may be reason enough to undertake it.

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(Toronto: University of Toronto Press, 1995); J. Fudge, “The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts” in T. Campbell, K.D. Ewing & A. Tomkins, eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 335 at 337.

<sup>250</sup> Willis, “Book Review of *Fair Fights*,” *supra* note 164 at 232.

<sup>251</sup> The focus on Willis should not overshadow other important thinkers from this period. See more generally Risk, “Cold and Tygers,” *supra* note 139; Brown, “Canadian Legal Realists,” *supra* note 60.

<sup>252</sup> The histories of Dalhousie Law School and the pre-1957 period at Osgoode Hall depict atrocious working conditions. See Willis, *History*, *supra* note 55; Bucknall, Baldwin & Lakin, *supra* note 83.

<sup>253</sup> On the theme of law schools as intellectual prisons, see W. Twining, *Blackstone’s Tower: The English Law School* (London: Stevens & Sons, 1994) and the review by P. Goodrich, “Metaphors of Distance and Histories of the English Law School” (1995) 49 U. Miami L. Rev. 901.