

NEGLECTING THE VIRTUES OF THE COMMON LAW

BY DAVID HACKING¹

THIS IS AN EDITED VERSION OF THE LECTURE, UNDER THE TITLE
“IGNORING THE VIRTUES OF THE COMMON LAW: A VIEW UPON THE
PRACTICE OF LAW TODAY IN LONDON AND NEW YORK”, WHICH LORD
HACKING GAVE AT THE HOUSE OF THE ASSOCIATION OF THE BAR OF
THE CITY OF NEW YORK ON JUNE 3, 1976.

“The Common Law,” as Lord Justice Scarman commented in his 1974 Hamlyn Lectures, “knows as little of its birth as you or I know of ours. It has grown, like Topsy: it is as natural in the English scene as the oak, the ash and the elder. It antedates Parliament and the legislative process. We cannot point to any body of learned men sitting around a table and designing the law and the system. It is customary law developed, modified, and sometimes fundamentally redirected by the judges and the legal profession working through the medium of the courts. Thus it is, in essence, a lawyer’s law. Further, it is lawyers’ law of universal application. The common law has, in theory, no gaps or omissions, only a few silences which at any time, upon the instigation of a litigant, the voice of the judge can break.”²

To the litigant this has its advantages and disadvantages. The Old Bailey, London 3rd
September 1670:

“William Penn: I affirm I have broken no law, nor am I Guilty of the indictment that is laid to my charge; and ... I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment.

Recorder Thomas Howell (the presiding judge):
Upon the Common-Law.

Penn: Where is that common-law?

Recorder: You must not think that I am able to run up so many years, and over so many adjudged cases, which we call common-law, to answer your curiosity.

Penn: This answer I am sure is very short of my question, for if it be common, it should not be so hard to produce.

Recorder: Sir, will you plead to your indictment?

Penn: Shall I plead to an Indictment that hath no foundation in law? If it contains that law you say I have broken, why should you decline to produce that law, since it will be impossible for the jury to determine, or agree to bring in their verdict, who have not the law produced, by which they should measure the truth of this indictment, and the guilt, or contrary, of my fact?

Recorder: You are a saucy fellow, speak to the Indictment...The question is, whether you are Guilty of this Indictment?

Penn: The question is not, whether I am Guilty of this Indictment, but whether this Indictment be legal. It is too general and imperfect an answer, to say it is the common-law, unless we knew both where and what it is. For where there is no law, there is no transgression; and that law which is not in being, is so far from being common, that it is no law at all.

Recorder: You are an impertinent fellow, will you teach the court what law is? It is 'Lex non scripta,' that which many have studied 30 or 40 years to know, and would you have me to tell you in a moment?

Penn: Certainly, if the common law be so hard to be understood, it is far from being very common; but if the Lord Coke is his Institutes be of any consideration he tells us, That Common-Law is common right, and that Common Right is the Great Charter-Privileges.

Recorder: Sir, you are a troublesome fellow, and it is not for the honour of the court to suffer you to go on.

Penn: I have asked but one question, and you have not answered me; though the rights and privileges of every Englishman be concerned in it.

Recorder: If I should suffer you to ask questions till to-morrow morning, you would be never the wiser.

Penn: That is according as the answers are!"³

Such difficulties did not deter (or perhaps they encouraged?) those early adventurers into this new land, to adopt the English Common Law. Sixty-four years earlier, The Virginia Charter (1606) carried to those who had settled in the Colony, the rights to "enjoy all Liberties, Franchises and Immunities...to all Interests and Purposes, as if they had been abiding and born, within this realm of England..."⁴ It is noteworthy, too, that two thirds of your Declaration of Independence consists of complaints that common law rights, to which your forefathers claimed to be entitled, had been violated by George III and the English Parliament. This is not to state there was a

whole-sale adoption of the English common law. As Justice Story stated in the early 19th Century, “Our ancestors brought with them the general principles (of the English Common Law) and claimed it as their birth right: but they brought with them and adopted only that portion which was applicable to their condition”⁴.

As an English Common Law Lawyer I take comfort in noting, therefore, that the Common Law did survive attempts here, after your revolution, for its substitution by a code based upon Roman Law. As Professor Thorne of Harvard generously said a few years ago in his Selden Society Lecture on Sir Edward Coke:

“American law does not begin in 1607, or in 1602, or 1776. It begins when English law begins....and the slow evolution of the ideas by which Englishmen regulated their legal relationships with one another is as important and interesting on the other side of the Atlantic as it is on this.”⁴

Indeed, in these troubled times, it is further comfort for this English lawyer also to note that one third of the world’s population still lives under jurisdictions of the common law which continues to show its capacity to resist arbitrary government.

On the other hand, the common law lawyer has never fared very well in the esteem of his countrymen. Often he has been the butt of much ill humour...and censure too! Take the ugly threat, as part of the inducement to march into London, uttered by Dick the Butcher to Jack Cade, on Blackheath, during a peasant uprising:

“The first thing we do, lets kill all the lawyers”⁵

or let us look at the Virginia Act (1645) which expelled all ‘mercenary’ lawyers! It would depend, of course, upon the definition of ‘mercenary’ but, on a wide definition, such an expulsion order, if issued today in the cities of London and New York, would leave them rather empty of a major work force!

Discontent, or even suspicion over lawyers can still be turned into legislative action. Both sides of the legal profession in the United Kingdom are currently facing an investigation by a Royal Commission on our legal profession. Yet we have not always had a bad press. Once in a while we have someone who is prepared to say something good about us. It may be that this praise was earned by others of long ago but Maitland, in describing the formation of the English Barristers' Chambers (the Inns of Court) during the 13th Century wrote:

“We see at Westminster a cluster of men which deserves more attention than it receives from our unsympathetic, because legally uneducated, historians. No, the clergy were not the only learned men in England, the only cultivated men, the only men of ideas; vigorous intellectual effort was to be found outside the monasteries and universities. These lawyers are worldly men, not men of sterile caste; they marry and found families, some of which become as noble as any in the land; but they are in their way learned, cultivated men, linguists, logicians, tenacious disputants, true lovers of the nice case and the moot point. They are gregarious, clubbable men, grouping themselves in hospices which became schools of law, multiplying manuscripts, arguing, learning and teaching, the great mediators between life and logic, a reasoning, reasonable element in the English nation.”⁶

What are the virtues of the Common Law...even if these virtues do not always clothe Common Law Lawyers? I believe it possesses four major virtues: firstly, the Common Law is a common law of universal application under which any citizen, President or hobo, King or peasant, is compelled to abide. Secondly the common law is an evolving law reacting, not always spontaneously, but reacting none-the-less, to the winds of change. Thirdly the common law is built on mutual trust and, within this trust, on the respect for the rights of others. Hence it provides, in the words of Lord Denning in his Hamlyn Lecture of nearly 30 years ago, “The Greatest Heritage of all – the Heritage of Freedom”⁷: the freedom of the person against unlawful arrest or detention, the freedom of the mind and conscience to express honest (albeit unpopular) opinions, or openly to observe (or not to observe) religious worship.

Fourthly, and above all, the common law (because it is by the people [lawyers, judges, legislatures], of the people [juries, lay magistrates], for the people) preserves and guards its own independence: the independence of the Judiciary; the independence of the advocate to do his duty not as the servant of his client (there lies a warning to all of us in the 1970's!) but as the officer of an independent court. The independence of the Judiciary has, it is true, produced its own cult which has not always had desirable consequences for both the Bench and Bar. I cannot resist here reminding you of Lord Chancellor Selborne's call to the judges for a meeting before the opening of the Royal Courts of Justice in 1882. I refer to that glorious white cathedral of justice overlooking the East end of the Strand! The draft for the address to Queen Victoria ran: "We, Your Majesty's Judges, conscious as we are of our manifold defects....,"

"Master of the Rolls Jessel (strongly objecting): I am not conscious of manifold defects, and if I were, I should not be fit to sit on the Bench.

Several other Judges also object.

Lord Justice Bowen (comprising): Instead of saying 'conscious as we are of our manifold defects', why not say 'conscious as we are of the manifold defects of each other' " ⁸

For my part, I prefer our judges to possess Mr. Justice Cardoza's more humble approach. This fine American judge while, not doubting,

"The grandeur of the conception which lifts [judges] into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces"

felt that:

"None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on those chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by." ⁹

I seek not to address you further on these, as I believe, major virtues of our common law but I should like to develop with you two other virtues which are so important...if we are to preserve the benefit of our common law systems. I refer to the virtue of clarity and the virtue of oral proceedings.

The development of the English common law is not a model in clarity. There have been times when we have got in an appalling muddle. For example it took the Law of Property Act (1925) to rescue English land law from a morass of complication. Yet the basic concepts of the common law are simple and make for easy application. Consider, for example, the basic law of contract...offer, acceptance and consideration. Consider also the law of negligence...one of the more recent daughters of the common law...the duty of care, the breach of that duty and the consequential damage. It is therefore depressing to observe that legislatures, on both sides of the Atlantic, have almost conspired against the essential simplicity of the common law. Our legislatures have churned out laws, especially in the United Kingdom, which, by their quantity and obtuse detail, have served not to assist the citizen in an increasingly complex society but further to confuse him. The lawyer, who asserts that laws need to be complicated to keep him employed, is wearing, I suggest, thin clothes of self protection. There is the obvious relationship between escalating legal fees and the increasing complexity of law. For lawyers to charge fees which only the rich, whether they are private citizens or corporations, can pay is to perpetuate serious inequalities to the detriment of the society of which we are all members.

It is sobering to compare simple concepts of daily life with some statutory definitions.

Compare, for example, Section 1 of the U.K. Larceny Act (1916):

“Any person who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen intending, at the time of the taking, permanently to deprive the owner thereof”

with one of the ten commandments:

“Thou shall not steal”!

It is true that Article 155 of the New York Penal Code and Sections 1-5 of the U.K. Theft Act (1968), which replaced the Larceny Act (1916), are improvements but they both take several pages to expound a concept which, in daily life, is readily understood. Of course there is the real difficulty of making something which is not absolute (the difference between right and wrong) into an absolute but this cannot be a sufficient answer. After all there has been, for many years, in criminal proceedings, a middle ground between verdicts of “guilty” and “not guilty”, the verdict of “non proven” in Scotland or “no contest” here.

If there was a prize for the most incomprehensible statutory definition, it must go to this clause from the U.K. National Insurance Act (1946)

“For the purpose of this Part of the Schedule a person over pensionable age, not being an insured person, shall be treated as an employed person if he would be an insured person were he under pensionable age and would be an employed person were he an insured person”.

Examples of statutory complexity are alas legion in the United Kingdom and pretty numerous over here. Yet as long as our legislatures insist on legislating in detail, instead of upon general principles, our troubles will persist. Life simply does not consist of absolutes. As poignantly illustrated in the Quinlan case¹⁰, the frontier

between life and death itself is not an absolute. Nor we can define it to be so. Absolutes are not obtainable in our law making nor anywhere else.

The problem of the relationship between the law and the law-makers was well summarised in written evidence presented to a U.K. Committee¹¹ which recently reported on the preparing of legislation. A group of Scottish judges put it in this way:

“Most of the problems encountered by the Courts flow directly from the tendency of Parliament to ignore the virtue of enacting broad general rules in which the principal and overriding intention can be readily seen, and to try to legislate in detail for particular aspects of the mischief which presumably the statute is intended to curb. It is an eternal truth that one can seldom foresee every combination of circumstances which may arise, and the practical consequence of attempting to do so and of drafting a statute so as to concentrate unduly on foreseen examples is more often than not to conceal the general intention, and the ambit of that intention, in a welter of detached provisions which leave one in doubt as to whether a particular combination of circumstances, not expressly provided for, was intended to be covered at all.”¹²

I pause here only to comment that judges, on both sides of the Atlantic, also bear their responsibility for not preserving the essential clarity of the common law. It is time, however, to turn the gaze upon ourselves in the practice of law in London and New York. We may largely be the victims of the defaults of our legislators, but are we not also badly smitten by the same disease? Over recent years, but particularly since the discovery of oil under the North Sea, I have marvelled as an observer (and more so, as a participant!) over the time, skill and energy which we lawyers in New York and London spend in the drawing up of sale agreements, conditional agreements, loan agreements, assignments, pledges, securities, appendices, exhibits and much else besides! Our agreements never seem to diminish in size and our talents never seem to falter. As illustrated to me recently by a friend in New York, we are now grafting some pretty curious branches onto the trunks of our contract trees. You will have, I

know, many examples of your own. I remember, about a year ago, being shown a contract which concerned the employment of one man in one project. He was to give his full time services for about three months and his part time services for about a year. He was to be paid upon a scale directly tied into the profit of the venture. Against the essential simplicity of the agreement, the written contract was a depressing document. It contained long rambling incomprehensible sentences. It ran through forty-eight clauses, one schedule and three exhibits and stretched over 36 foolscap pages.

Where are we going to stop? Are we going to stop? Can we really hope to cover all contingencies or protect ourselves from all ambiguities? Is not Citibank (although dealing with lesser sums) right in reducing its contracts for personal loans to a few simple clauses? Should we not start pulling out the pages of our contracts, even if we do not end up with a “sanity” clause which, I think, was the only clause left in the contract which the Marx Brothers mutilated in “Night at the Opera”?

We must not go on neglecting the virtue of clarity. We are confusing ourselves, our clients and, by doing so, distorting the framework of our practice of the law. Sometimes the default is more acute in London and sometimes more acute in New York. In the field of litigation, listen to this criticism in last week’s Wall Street Journal, citing three cases which are, respectively, in their 5th, 7th and 15th year of active litigation, the article contains these passages:

“In practice, however, the discovery process often brings cases to a standstill. Lawyers will demand too much and respond with too little, and then will spend months fighting about what should be turned over. ‘Excessive discovery is normally the best way to prolong a case and create as much expense for the other side as possible’ says a lawyer in Louisville, Ky. ‘It can take a year before you know what the case is about.’”

* * * * *

“Whatever the causes, suits against big companies seen inevitably to get bogged down, and there is growing concern that long delays are distorting the judicial process. ‘The law becomes a contest to see who can outspend the other in buying legal hours,’ says Alexander Hammond, a New York attorney who often has sued big companies on behalf of clients. Some cases, he says, amount to ‘nothing more than a wearing-down, a smothering, a war of attrition.’ ”¹³

I am reminded of the tax case¹⁴ which was heard at the end of last year by the Court of Appeals in Albany who complained of the appellant’s 284 page brief as being “replete with burdensome, irrelevant and immaterial matter.” If only the case of Myllward v. Weldon has been cited to the Court of Appeals! In this case of 1596 the pleader had drawn up a replication occupying

“six score sheets of paper, and yet all the matter thereof which is pertinent might have been well contrived in sixteen sheets of paper.”¹⁵

The Court was not shy in bringing home to the pleader the errors of his ways. It ordered him to be committed to Fleet Prison from which the Warden was to take him to Westminster Hall at 10 a.m. on the following Saturday

“and then and there shall cut a hole in the midst of the same engrossed Replication which is delivered unto him for that purpose, and put the said [pleader’s] head through the same hole, and so let the same Replication hang about his shoulders with the written side outward, and then, the same so hanging, shall lead the said [pleader] bareheaded and barefaced round about Westminster Hall, whilst the Courts are sitting, and shall shew him at the Bar of every of the three Courts within the Hall, and then shall take him back again to the Fleet, and keep him prisoner until he shall have paid £10 to her Majesty for a fine, and twenty nobles to be the defendant for his costs in respect of the aforesaid abuse.”¹⁵

Even the later case, concerning Daniel Hill of Counsel, in 1603 might have commended itself to the Court of Appeals. Here the pleader, the unfortunate Hill, drew a demurrer to a Bill in Chancery containing

“.....‘many matters of fact, and other things frivolous and vain.’ This not only resulted in an order for five pounds costs against his client, but also occasioned an order by Egerton L.C. ‘that neither bill, answer, demurrer, nor

any other plea, should from henceforth be received under the hand of the said Hill.”¹⁵

What ever next? I opened my mail on return from London a few days ago and I learned there is a new book on the market designed for the “veteran trial lawyer and the occasional litigator” to give instruction in “successful strategies that will enable [him] to anticipate [his] adversary’s case, limit his [adversary’s] efforts at preparation, focus [his] own discovery program”... all in the cause of “liberalisation”, that false prophet of modern times.

The pamphlet began:

“As you are no doubt aware, discovery rules in most if not all jurisdictions have undergone a broad liberalization.

This trend has made available a powerful new array of legal weapons which you must have at your command if you wish to take full advantage of your opportunities and effectively counter your adversary’s tactics.”¹⁶

There was worse to come. I was told in the next envelope, which I opened, about the glorious use of the computer. I quote to you a few excerpts:

“We would like to take this opportunity to inform you of the upcoming publication of a unique and timely group of articles concerning the use of computer-generated evidence in litigation...This acceptance of computer printouts into the courtroom environment places a new and challenging task upon the trial attorney – arguing the credibility of these printouts...”^{*}

“[Mr. X] explains in his article how one evaluates the error producing propensities of the personnel and procedures of his opponent’s computer system. He described how the techniques used by an auditor of data processing systems can be used to generate uncertainty about the credibility of the system behind (the production) of a computer printout.”^{*}

“Attorneys practicing in every area of the law can no longer ignore the presence of computer technology. Computers have invaded every facet of our lives and the legal questions concerning them are being given more attention everyday. Take this opportunity to become familiar with the fundamentals of litigation involving computer-generated evidence.”¹⁷

* Emphasis added

It is time now to turn our gaze upon the neglect of the virtue of oral presentation. Actually at one time pleadings, within the common law, were also oral. As Chief Justice Berefore once complained to counsel “Get to your business. You plead about one point, they about another, so that neither of you strikes the other.”¹⁸

A few years ago the Honorable Erwin Griswold eloquently argued¹⁹ the importance of oral presentation in our system of law. To me this goes to the heart of the common law. To me it is the centre of the creed that justice should be done and seen to be done ...even at the risk of caustic comment from the bench. As Lord Simonds said in an Opinion in the House of Lords in 1952:

“On this question counsel on either side agree in saying that there was no direct authority and they agreed too that the reason for that was that the answer was clear. But unfortunately here harmony ended, for the clear answer given on the one side was the exact opposite of the clear answer given on the other.”²⁰

The law²¹, our common law, is surely an attempt to bring reason and balance into the conduct of our affairs which otherwise would only respond to force, whether right or wrong...whether good or evil. For this reason the law is always seen as an impediment by those who seek to impose their will upon others. By the same token judges and lawyers, within the flexibility of the common law, should be constantly alert to the need of the law to respond to the changing pressures which throng about it. Sometimes the law ought to resist such pressures, sometimes it ought to adjust to them. Too often, however, lawyers do not deem it to be in their interests (or the interests of the clients) for the law to change and to evolve. Yet by clinging to outworn formulas, lawyers can only hold back social progress and precipitate the destruction of the society which they seek to preserve. The law is the first of the social sciences and like all sciences needs to be in a constant state of evolution.

FOOTNOTES

¹ The author, Lord Hacking of Chorley, was a practising Barrister-at-Law in England from 1963 to 1975. He is a member of the House of Lords and the British American Parliamentary Group. He is also a graduate of Clare College, Cambridge University (B.A. 1961, M.A. 1968) and is a former Navy Reserve Officer. While he was in New York in 1975 to 1976, he was admitted to practise as an attorney in the State and Federal Courts. He is a member of the American Bar Association, the New York State Bar Association as well as of this Association and is with the law firm Lovell, White and King of London and Brussels.

² “English Law – The New Dimension” (Stevens and Sons of London 1974) p 1.

³ State Trials 22 Charles II 1670 Ch. 230 Columns: 958-9

⁴ See “The Bond of the common Law” by Professor A.L. Goodhart: Bulletin of the Institute of Historical Research (May 1958) Vol. XXXI No. 83 pp 2-10. See also Professor Goodhart’s “What is the Common Law?” L.Q.R. Jan 1960 pp 7-10.

⁵ William Shakespeare: Henry VI Part 2 Act IV Scene II

⁶ See p 15 “The Inheritance of the Common Law” by Richard O’Sullivan K.C. Hamlyn Lectures (Stevens and Sons of London 1950)

⁷ “Freedom under the Law” (Stevens and Sons of London 1949)

⁸ Miscellany-At-Law by R.E. Megarry (Stevens and Sons of London 1955) pp 8-9

⁹ The Nature of the Judicial Process (1921) p168

¹⁰ In matter of Karen Quinlan an alleged incompetent, 137 NJ Supr 227, 348 A 2d 801 (11/10/75); decision reversed 44 LW 2462 (3/31/76).

¹¹ Report of the Renton Committee on the Preparation of Legislation (command 6053)

¹² See Column 951 House of Lords, Parliamentary Debates, Official Report (10 December 1975) Vol. 366 No.10.

¹³ Article by Wayne E. Green, Staff Reporter, Wall Street Journal May 26, 1976, Column 6, p 1.

¹⁴ Slater v. Gallman: 38 N.Y. 2d 1, 11/20/75.

¹⁵ Miscellany-At-Law (ibid) pp 41-42

¹⁶ Pamphlet issued by Lawyer’s Book Club (Ref. Z-LB/I-1) on publication of “Attorney’s Guide to Effective Discovery Techniques” by Walter Barthold.

¹⁷ Printed announcement by Illinois Institute of Technology, Chicago-Kent College of Law of its “Law and Technology Symposium” on “Coping with Computer-Generated Evidence in Litigation”.

¹⁸ See p 46 Miscellany-At-Law (ibid).

¹⁹ “Appellate Advocacy” The Record (1971) Vol. 26 p 342.

²⁰ St. Aubyn v Attorney-General (1952) AC15 at p 34.

²¹ In expressing these concluding remarks, I was greatly indebted to a speech which Lord Hailsham of St. Marylebone made in India in January 1971, when he was Lord Chancellor of Great Britain – that gifted English (of an American mother!) scholar, lawyer, orator and politician.