

Legal Certainty: A Common Law View and a Critique

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INTRODUCTION

One of the most fundamental principles of English contract and commercial law is that the law needs to be ‘certain’. The principle of certainty is widely accepted as an important working concept, even a standard of legitimacy, in active operation in English private law and indeed in English law more generally. If one were to peruse any standard treatise on the English law of Contract for example, one will find use of the concept to support legal doctrines and case outcomes.¹ In October 2011, Lord Mance, a Justice on the UK Supreme Court, gave the Oxford Shrieval Lecture on ‘Should the Law be Certain?’² Going back to the founding generation of modern English commercial law, Lord Mansfield’s pronouncement in *Vallejo v Wheeler* can be found in leading contemporary texts on English contract and commercial law: ‘in all mercantile transactions the great object should be certainty. And therefore, it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon’.³ In the 2007 House of Lords judgment of *Golden Straight Corporation v Nippon YKK*, Lord Bingham asserted in his dissenting speech that ‘the quality of certainty’ is ‘a traditional strength and major selling point of English commercial law’.⁴

Yet, in contrast, one would be hard pressed to find any such emphasis or pronouncements by American lawyers or judges. Hardly do we hear the word ‘certainty’ uttered in an American law school classroom or in an American courtroom. There are, of course, institutional differences in the structure of court systems in the two countries

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¹ Treitel’s classic text refers to ‘certainty’ 75 times, E Peel, *Treitel on the Law of Contracts*, 14th edn (London, Sweet & Maxwell, 2015).

² Lord Mance concluded that certainty is desirable but ‘not the ultimate aim of the law’. He was referring generally to the role of judges in a society. Lord Mance, ‘Should the law be certain?’ The Oxford Shrieval Lecture given at the University Church of St. Marcy the Virgin, Oxford, on 11 October 2011.

³ *Vallejo v Wheeler* (1774) 1 Cowp 143, 153.

⁴ (The “Golden Victory”) *Golden Straight Corporation v Nippon YKK* [2007] UKHL 12 para 1. I refer throughout this chapter to “English law”, which in the United Kingdom is the law of the jurisdiction of England and Wales.

that lead American Supreme Court justices to give lectures on federalism and public law issues.⁵ Private law is generally state and not federal law. But should not legal certainty be as important to American private and commercial lawyers as it is to their English counterparts?

What is going on here? The aim of this chapter is to aid us in getting clear on the meaning of the concept of certainty in the common law tradition and the role of the concept in that tradition. To strive for clarity, we need to explore some relatively recent intellectual history about how the common law tradition diverged in approach between England and the United States in the twentieth century. Section I provides that intellectual history. It outlines in brief the split in the common law tradition that occurred in the early twentieth century between English conceptualists and American legal realists. The result is a now a demarcation between two sub-traditions within the common law tradition itself, one English and the other American. At the centre of this divergence was a dispute about the meaning of legal certainty. Section II goes over how the more contemporary and tractable concept is predictability, but the divergence in traditions has resulted in two different versions of predictability, one conceptual and about the logical form of legal rules and the other instrumental, about the move of legal rules towards meeting standards of economic efficiency. English and American lawyers appear to agree that the law should be predictable, though they may give predictability a different meaning depending on the context.

CONCEPTUALISM VERSUS REALISM

In their influential *Introduction to Comparative Law*, Konrad Zweigert and Hein Kötz classify legal systems around the notion of legal families. Comparativists are well-familiar with their classifications of ‘Romanistic,’ ‘Germanic,’ and ‘Anglo-American’ legal families, among others. While Zweigert and Kötz classify civilian traditions in separate families, they classify all common law traditions within a single legal family, though they acknowledge that ‘though England is unquestionably the parent system, the law of the United States, while staying in the family’ it has developed a ‘distinctive style’.⁶ Others go further and classify the differences between American and English

⁵ See *Erie Railroad Co. v Tompkins* (1938) 304 U.S. 64.

⁶ K Zweigert and H Kötz, *An Introduction to Comparative Law* (Oxford University Press, 1998) 41.

law as more fundamental.⁷ Still others question these distinctions and whether the United States really is a set of mixed jurisdictions.⁸ These issues are beyond our scope here and I will stipulate for purposes of getting the argument out that American law is broadly within the common law tradition with some exceptions. It is certainly true that lawyers and judges in the early American Republic saw as one of their roles to adapt English common law to American conditions and that ancestral imprint still likely remains on American law. Because of differing political, economic, social, and geographical conditions between the two countries, differences have always existed since the very beginning of the American Republic and even before during the colonial period.

In the eighteenth and nineteenth centuries, American law and legal thought diverged from English law but still was a net borrower of ideas and legislative innovations from Britain. The first wave of commercial legislation in the United States borrowing substantially from British legislation.⁹ In the nineteenth and early twentieth centuries, the United States was in its 'classical' stage of legal thought, which emphasised formal and conceptual reasoning about positive sources of law and supported a wholly individualist approach to the organisation of society.¹⁰ The individualistic ethics that law was supposed to represent in its rules has been overlooked; it can be seen as the forming the most important pillar of support for any legal system grounded in formal and conceptual reasoning. It is reflected in law when the law's focus is primarily on the rights and duties of individual actors. For example, classical legal thought supported a tort law whose purpose was only to correct injustice in a binary relationship between tortfeasor and victim. It could not support a tort law serving social ends beyond corrective justice, such as in getting right the distribution of the risk of accidents. So too, contract and commercial law would focus on the will of the parties and so certainty in the law of market transacting would serve the needs of individuals to engage in voluntary exchange, however these concepts might be understood at the time. In such a society, certainty in the law takes on great importance because society has no real aims other than to support the individual in whatever they choose to do in market transactions.

⁷ See PS Atiyah and Robert S Summer, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions*, new edn (Oxford University Press, 1991).

⁸ See N Garoupa and CI Gómez Ligüerre, 'The Evolution of the Common Law and Efficiency', (2012) 40 *Georgia Journal of International & Comparative Law* 307.

⁹ See, eg, S Williston, 'The Law of Sales in the Proposed Uniform Commercial Code', (1950) 64 *Harvard Law Review* 561; KN Llewellyn, 'Why a Commercial Code?', (1951) 22 *Tennessee Law Review* 779.

¹⁰ A definitive source on this period is WM Wiecek, *The Lost World of Classical Legal Thought* (Oxford University Press, 1998).

If we conceive of private law in these bilateral and individualist ways, then certainty of course will have an important rank in the order of values a legal system purports to serve. Conceptualism offers a very important framework for thinking about the law in such a legal system.

Conceptualism, in the sense used here, refers to a way of thinking about the law that places primary importance on the logical features of legal rules.¹¹ A lawyer uses conceptual analysis to get clear on the meaning of legal concepts and to search for logical coherence among legal concepts. The idea is that we should strive to understand the meaning of, say, legal obligation, right, duty, justice, and so on as those concepts are used by lawyers and judges. A conceptualist understanding of the law relies on a presupposition that law is, in Richard Posner's words, an 'autonomous discipline'.¹²

Differences in how to think about the law as between the United States and England became apparent starting in the early twentieth century, leading to modes of legal thought in the United States focusing more on the social ends of law and in trying to understand the effects of law in society. While such a move has made inroads in the United Kingdom generally sometime later in the twentieth century, conceptualists still have relatively greater influence in English private and commercial law. For example, legal scholarship in commercial and corporate law in the United States is substantially in the law and economics school of thought but less so in the United Kingdom. How did this happen? The answer partly (but clearly not wholly) lies in understanding jurisprudential movements in the two countries from the late nineteenth century until the early 1960s. The brief excursion into intellectual history to follow is disputed by some¹³ but it likely represents the 'mainstream' view.

In the United States, sociological jurisprudence and then American legal realism brought an end to conceptualism as the most influential way of understanding the law. We can begin to comprehend the divergence in legal thought in the common law tradition by starting with Oliver Wendell Holmes Jr.'s lecture for the dedication of a new law building at Boston University, 'The Path of the Law', published in the *Harvard Law*

¹¹ See J Raz, *Practical Reason and Norms*, new edn (Oxford University Press, 1999) 10.

¹² RA Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987', (1987) 100 *Harvard Law Review* 761.

¹³ This is not the place to investigate competing interpretations but it may but it may be well worth reading BZ Tamanaha, *Beyond the Formalist-Realist Divide* (Princeton, Princeton University Press, 2010) and perhaps also investigating some of the recent literature on historical jurisprudence. See DM Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press, 2013); KM Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism* (Cambridge University Press, 2011).

Review in 1897.¹⁴ Thomas Grey describes Holmes as '[t]he greatest oracle of American legal thought'.¹⁵ Sanford Levinson describes 'The Path of the Law' as 'the single most important essay ever written by an American on the law'.¹⁶ Morton Horwitz argues that in 'The Path of the Law' Holmes 'pushed American legal thought into the twentieth century'.¹⁷ Richard Posner argues that it 'may be the best article-length work on law ever written'.¹⁸

In 'The Path of the Law', Holmes offered his clearest criticism of the 'fallacy . . . that the only force at work in the development of the law is logic'.¹⁹ In 'The Path of the Law', he offered a direct attack on certainty:

[T]he logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.²⁰

In his dissenting opinion in the famous case of *Lochner v New York*, Holmes stated his famous aphorism that '[g]eneral propositions do not decide concrete cases'.²¹ Legal rules will only take us so far. They will 'run out' and other more policy-oriented considerations will have to be deployed to solve the particular 'legal' problem at hand.

We must combine Holmes' criticism of the notion of legal certainty with his support for a prediction theory of law. Holmes thought certainty impractical but prediction to be central to the role of law. Holmes offered what is widely considered to be a precursor account to contemporary law and economics.²² Holmes argued: 'a legal duty so called is

¹⁴ OW Holmes Jr., 'The Path of the Law', (1897) 10 *Harvard Law Review* 457.

¹⁵ TC Grey, 'Holmes and Legal Pragmatism', (1989) 41 *Stanford Law Review* 787.

¹⁶ S Levinson, 'Strolling Down the Path of the Law (and Toward Critical Legal Studies?: The Jurisprudence of Richard Posner)', (1991) 91 *Columbia Law Review* 1221.

¹⁷ M Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*, new edn (Oxford University Press, 1994) 142.

¹⁸ RA Posner, 'Introduction' in RA Posner (ed), *The Essential Holmes* (Chicago, University of Chicago Press, 1990) x. I do not want to paint too rosy a picture of Holmes. I rely on him here for the limited purpose of elucidating how the concept of certainty has worked its way into legal thought. For thoroughgoing critiques of Holmes, see SJ Burton (ed), *The Path of the Law and its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Cambridge University Press, 2000).

¹⁹ Holmes, 'The Path of the Law' 465.

²⁰ *Ibid* 466.

²¹ *Lochner v New York* (1905) 198 U.S. 45, 76 (Holmes, J., dissenting).

²² Many have so asserted. See G Minda, *Postmodern Legal Movements: Law and Jurisprudence at*

nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so, of a legal right'.²³ His famous 'bad man' quote is worth repeating here:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.²⁴

He continues: 'But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'.²⁵ In the prediction theory set forth in 'The Path of the Law' we find the origins of the efficient breach doctrine in the economics of contract law: 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, - and nothing else.'²⁶

We need to combine Holmes' argument for law as serving the role of prediction with his argument that inquiry about law must move towards a focus on social ends, using the tools of the social sciences. Holmes said in 'The Path of the Law': 'For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'²⁷

Holmes's approach is a forerunner to American legal realism. Let us now move forward in time to the apex of the legal realist movement in the United States. Karl Llewellyn was the principal architect of the Uniform Commercial Code in the United States and the Code is widely seen as the most important achievement of the legal realists. Llewellyn was commercial lawyer and the most influential figure in the first

Century's End (New York, New York University Press, 1995) 86.

²³ Holmes, 'The Path of the Law' 458

²⁴ *Ibid* 459.

²⁵ *Ibid* 460-1.

²⁶ *Ibid* 462.

²⁷ *Ibid* 469. Beyond our scope here is an investigation of how the economics of Holmes' day differed from contemporary economics. See H Hovenkamp, *The Opening of American Law: Neoclassical Legal Thought 1870-1970* (Oxford, Oxford University Press, 2015) 75-90.

school of jurisprudence (broadly understood) indigenous to the United States. The Code drafters, led by Llewellyn, seem to have agreed with Llewellyn's view that uniformity of language was no guarantee of uniformity of interpretation. Rather, what was needed were clear statements of reason and purpose in the Code, which would prompt courts to justify decisions according to these statements of reason and purpose.²⁸ This approach to drafting the Code led to disquiet among practicing lawyers, who were accustomed to placing the integrity of a commercial statute on the notion of certainty. Llewellyn was aware of this worry and turned the argument on its head in his promotion of the newly drafted Code by arguing that it improved the certainty of the law:

It costs the business man first because of the uncertainty. There are fields in which no man, before the case has been brought up to the supreme court of the particular state in the particular instance, has any assurance as to what the law is. There are fields, therefore, in which the counselor is without a sound foundation for effective counseling.²⁹

The historical evidence suggests, however, that Llewellyn may have held a different and much more nuanced view of the role of certainty than what he offered during the drafting stages for the Uniform Commercial Code. We of course do not know his motives when he was deep in the process of drafting the Code and he may have been assuaging the fears of the bar to promote the success of the Code, or he may have simply changed his views at various stages in his professional life. His writings both before and after the Code project tell us something different about his views on the role of certainty in the law, and perhaps are closer to his true convictions, though we will never know.

Llewellyn's work early in his career, *Präjudizienrecht und Rechtsprechung in Amerika*, published in German in 1933 and not translated into English until 1989, offers perhaps his most sophisticated insights on legal certainty.³⁰ This book, in English, *The Case Law System in America*, was written for a series of lectures that Llewellyn gave at the University of Leipzig Faculty of Law. It can be difficult to segregate legal certainty as a notion from other arguments the legal realists made about law and legal

²⁸ See ZB Wiseman, 'The Limits of Vision: Karl Llewellyn and the Merchant Rules', (1987) 100 *Harvard Law Review* 465, 495.

²⁹ Llewellyn, Llewellyn, 'Why a Commercial Code?' 779-80.

³⁰ KN Llewellyn, *The Case Law System in America* (Chicago, University of Chicago Press, 1989) (translated by M Ansaldi; edited and with an introduction by P Gewirtz).

interpretation because a good deal of what they said was an attack on legal conceptualism more generally, which places great value on certainty. Llewellyn's German scholarship reflects a set of themes that he pursued more generally in his work. At least three claims come out of that work, two of which relate indirectly to legal certainty and one of which is directly about legal certainty. First, Llewellyn argued that the methods of judges and lawyers, which he characterised as the lawyer's craft and 'feel,' are significant sources of certainty about the law. Second, the 'situation sense' of cases and not the legal rules are what lead to the predictability of judicial decisions. In other words, a judge's 'sense of justice' is normatively relevant. Third, while legal certainty refers to predictability of judicial decision making for the lawyer, for the layperson it means consistency of legal rules with social norms. It is this layperson sense of certainty that will make him write an Article 2 of the Uniform Commercial Code, on the sale of goods that places great importance on merchant custom.³¹

Llewellyn's later work dealt with what William Twining has described as the myth of uncertainty, which was really a way to say that the concept of certainty was unhelpful in understanding the quality of law.³² In his book, *The Common Law Tradition*, published in 1960, Llewellyn took the following position on legal certainty:

I reject as useless and misleading the dichotomy which infected so much writing of the '20s and '30s: absolute or 100 per cent certainty versus anything else at all as being 'uncertainty.' I see no absolute certainty of outcome in any aspect of legal life, and think that no man should ever have imagined that any such thing could be, or could be worth serious consideration. Instead I see degrees of lessening certainty of outcome ranging from what to the observer or participant seems pure chance, into a situation where a skilled, experienced guess (though only a guess) is yet a better bet than the guess of the ignorant, through a situation where the odds run plainly a little one way, through one where skilled counsel can be expected to materially increase the odds, and on through the situation which is a business gamble or better into the one which is for human living 'safe.'³³

³¹ Wiseman, 'The Limits of Vision'.

³² See W Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (Cambridge University Press, 2012) 207.

³³ KN Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston, Little Brown, 1960) 17

And also in *The Common Law Tradition*:

[T]he ideal is not ‘certainty’ at all, in any way of the senses in which that term is commonly applied to matters legal. The true ideal is reasonable regularity of decision. If there is regularity, there is continuity enough.... The reasonable aspect of the regularity . . . holds out full room to adjust any complex of tension to the hugely variant needs of whatever the relevant type-situations may be....³⁴

Llewellyn connected these claims to the idea of ‘reasonable reckonability’ in appellate judging. For Llewellyn, reasonable reckonability rather than certainty was the appropriate focus, which connects to his idea of law as a craft and with judges sharing deeply ingrained professional habits of thought, beliefs, and attitudes. He catalogued fourteen ‘steadying factors’ at work in litigation that underwrite what could be expected from judicial decision making.³⁵ Reasonable reckonability shares substantial similarities with the notion of legitimate expectations that one finds in English and European public law.³⁶

Llewellyn was not in the ‘radical’ wing of legal realism and his approach to critiquing the concept of certainty was to substitute what he considered to be more useful concepts that more closely connected to being able to evaluate the behaviour and action of judges for those limited to elucidating the logical form of the law. The radical wing of legal realism was more critical and less reconstructive. Jerome Frank, for example, argued that there was a value to legal uncertainty, in that a person has a ‘positive delight’ for the ‘hazardous, incalculable character of life’ and sees ‘life’s very insecurity’ as offering its ‘most inviting aspect’.³⁷ One must wonder whether Frank’s attempt at a psychology of judging was more fanciful than serious.³⁸ Still, regardless of which wing of legal realism we examine, taking the influence of legal realism as a whole on American legal thought, along with some of its successor movements such as Critical Legal Studies, we can say

³⁴ Ibid 216 (footnotes omitted).

³⁵ Ibid 19-61.

³⁶ P Craig, ‘Legal Certainty and Legitimate Expectations’ in P Craig, *EU Administrative Law* (Oxford University Press, 2012) ch 18.

³⁷ LL Fuller, ‘American Legal Realism’, (1934) 82 *University of Pennsylvania Law Review* 429, 433. J Frank, *Law and the Modern Mind* (Paris, Brentano 1930) 17. Frank dedicated significant parts of his book to the ‘myth of certainty’. J Paul, ‘Jerome Frank’s Attack on the ‘Myth’ of Legal Certainty’, (1957) 36 *Nebraska Law Review* 547.

³⁸ See Roscoe Pound’s critique. R Pound, *The Ideal Element in Law* (Calcutta, University of Calcutta Press, 1958).

with some confidence that the concept of legal certainty has received less emphasis in American legal education and in American law more generally after the rise and fall of the legal realists.

Llewellyn's approach to certainty did seem to prevail on the drafting style of the Uniform Commercial Code. Homer Kripke, a key member of the drafting team of the original Code and a practitioner, summarises the tensions between the academics and the practitioners about legal certainty in Code drafting as follows:

The extent to which the draftsmen left commercial law without rules operating with certainty made some of the practicing members of the sponsor organizations very unhappy. Here again, the draftsmen's academic orientation was apparent. They could view with more equanimity than the practicing lawyers the fact that a question of commercial reasonableness or good faith is uncertain and unpredictable, a question of fact, i.e., a jury question, an invitation to litigation. Where the practitioners wanted problems answered in the statute, the draftsmen were content to leave the answers to the judicial process. The draftsmen pointed out that the fear of jury decisions applies only to the man who practices brinkmanship in his application of the nonautomatic standards. One who keeps himself well within commercial standards, or who acts in unquestionable good faith, has no problem. This was scant comfort to the practicing lawyers who envisioned specific close problems.

The academicians rightly prevailed. In these days of airway bills and forwarders' receipts, of computers, of magnetic tapes and magnetic inks, of communication satellites, the only rule that will not become obsolete is the rule that automatically adjusts to change. In the long run, the Code's efforts to restore the vitality of the law merchant will prove to have been well conceived.³⁹

Much later, these views about trade-offs between flexibility or adaptability and certainty will be challenged⁴⁰ but the challenge has probably not stuck and still the basic

³⁹ H Kripke, 'The Principles Underlying the Drafting of the Uniform Commercial Code', (1962) *University of Illinois Law Forum* 321 (footnotes omitted).

⁴⁰ A Schwartz and RE Scott, 'Contract Theory and the Limits of Contract Law', (2003) 113 *Yale Law Journal* 541; D Charny, 'The New Formalism in Contract', (1999) 66 *University of Chicago Law Review* 842; RA Hillman, 'The 'New Conservatism' in Contract Law and the Process of Legal Change', (1999)

characteristics associated with the decline of conceptualism in the United States continues to be influential in law and legal thought in that country.

From Holmes onward we can see a clear trend in American legal thought away from the conceptualism of certainty and towards an instrumental form of predictability about the law. American legal realism left its imprint on American commercial law, and American law more generally, even as the legal realist movement receded into history. The school of American legal thought that attempted a middle ground between conceptualism and realism – the legal process school – did nothing to bring back the notion of certainty to prominence. In fact, it perpetuated the decline of the concept in American legal thought with its focus on statutory interpretation that relies on statutory purpose rather than a literal interpretation of the language of statutes and its allowance for moral principles and social aims to inform the law.⁴¹ The familiar refrain in the American legal academy has been that ‘we are all legal realists now,’ which we should not interpret literally but as a way of saying that legal realism has left its influence on American law.⁴² That refrain will be less heard as legal realism becomes recedes to a more distant history for succeeding generations but to the extent that the history of ideas matters the influence of legal realism will persist.

While conceptual analysis still remains important in American law, as it does more or less in any legal system, there is far more of what Joseph Singer calls ‘line drawing’ in the United States than in the search for certain answers grounded in the immanence and internal logic of immutable and abstract legal concepts.⁴³ A lawyer engaged in line drawing must necessarily think of law as an attempt at balancing competing sets of interests along the broader lines of the policies and purposes underlying legal rules, in search of how law might achieve social ends such as those associated with efficiency or fairness. In such an approach, certainty will necessarily have less importance. More generally, the trend of legal thought in the United States moved in the early to mid-twentieth century towards placing high importance on understanding the social ends of

40 *Boston College Law Review* 879; RJ Mooney, ‘The New Conceptualism in Contract Law’, (1995) 74 *Oregon Law Review* 1131.

41 The canonical text in the Legal Process School is HM Hart and AM Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, initially published in mimeo form for use by students but in current form is a casebook published by Foundation Press, and edited by WN Eskridge Jr. and PP Frickey. The latest edition is as of 2006.

42 See J Singer, ‘Legal Realism Now’, (1988) 76 *California Law Review* 465.

Legal realism has fundamentally altered our conceptions of legal reasoning and of the relationship between law and society. The legal realists were remarkably successful both in changing the terms of legal discourse and in undermining the idea of a self-regulating market system. All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.

43 *Ibid.*

law and began to place a lower-order emphasis on the logical features of the law and legal concepts. Doing so-called ‘doctrinal’ analysis has never lost its significance in the United States, but it is just not considered all that high-powered any more as a tool for the development of the law.

In the early to mid-twentieth century, legal thought in England, and Britain more generally, took a different course. The period in the history of legal thought when Holmes wrote the ‘Path of the Law’ in 1897 and in which the legal realists were ascendant in America, from about 1930 to 1955, compare approximately to the period from when John Austin resigned as Professor of Jurisprudence from University College London in 1834 to when H.L.A. Hart began his appointment as Professor of Jurisprudence at Oxford in 1952. Of course, legal thought then was not monolithic and even the realists had influential critics in America.⁴⁴ I can only suggest general trends.⁴⁵ There will be counterexamples. I offer a brief sketch of intellectual history here to show that there has indeed been a divergence in the common law tradition in ways to approach the legal certainty, that this divergence connects more basically to differing ways of thinking about the law generally, and that the divergence remains influential to this day, though, as I explain below, both the English and the American traditions within the common law world have retrenched somewhat in the contemporary period from more extreme positions when legal realism was ascendant.

When the history of legal thought is explored, rarely is anything said about the period between Austin and Hart, except perhaps about Maine’s historical jurisprudence, which seems to have had little lasting influence.⁴⁶ Neil Duxbury offers a critique: ‘It would be wrong to assume that nothing happened in English jurisprudence between Austin’s era and Hart’s. It is just that nothing much happened that would be remembered’ and ‘[i]t seems fair to say . . . that English jurisprudence after Austin lacked imagination and direction’.⁴⁷

English ‘jurisprudes’ of the day did not write jurisprudence as we know it today, though neither did the legal realists.⁴⁸ We can narrow our scope of discussion to a

⁴⁴ Lon Fuller among them. See Fuller, ‘American Legal Realism’.

⁴⁵ My approach is like that of Atiyah and Summers, *Form and Substance in Anglo-American Law*.

⁴⁶ But see Rabban, *Law’s History*, which suggests a reinterpretation.

⁴⁷ N Duxbury, ‘English Jurisprudence Between Austin and Hart’, (2005) 91 *Virginia Law Review* 1, 3 and 15.

⁴⁸ ‘Jurisprudes’ was a term that Llewellyn often used to describe legal realists and others who investigated questions about the role of law and its operation in society. Beyond our scope here are the internecine debates about what constitutes ‘jurisprudence’. Most legal scholars today think of American legal realism as some form of proto-social science about the law. Brian Leiter argues that it is a naturalised version of jurisprudence. B Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism*

grouping of legal scholars on both sides of the Atlantic who asked questions about the law generally and about the preferred methods for inquiring about law, and who pitted themselves against each other in ways that have affected the way that legal certainty is understood in the common law tradition today.

Says Duxbury, ‘Americans who travel the neglected path that is English jurisprudence from the 1830s to the 1950s will soon find themselves in a world very different from their own. . . .’⁴⁹ English jurisprudence focused on the analysis of legal concepts in this period.⁵⁰ Duxbury explains that the English legal scholars of the day that are the focus of our discussion wrote ‘essays about stare decisis, the relationship between law and equity, statutory interpretation, the English court system, the growth of negligence liability, the divisions between the various branches of the law, and other basic legal themes’.⁵¹ The influence of focusing on the analysis of legal concepts remains a stronger influence in England (and Britain more generally) than in the United States. Hart’s analytical jurisprudence did nothing to dispel it and indeed could be said to have promoted the analysis of legal concepts. The analysis of concepts of course occurred in the United States, where its most influential proponent of the time under investigation was probably Wesley Newcomb Hohfeld.⁵² But Hohfeld’s work was not as influential as legal realism (which followed later) or even Pound’s sociological jurisprudence.

One of the more influential figures of the time in Britain was Arthur Goodhart, who held the Chair in Jurisprudence that Hart would eventually hold for twenty years before Hart, from 1932-52.⁵³ Though Goodhart was careful to balance competing considerations in his inaugural lecture in 1932,⁵⁴ Harold Laski, who chaired the lecture, wrote to Holmes that Goodhart ‘thought clearly, that the realists . . . were just wicked’.⁵⁵ Goodhart argued that the common law doctrine of precedent gives the common law its certainty and that ‘when a precedent is created the law becomes rigid’.⁵⁶ In a stunning display of ignorance or naivete (or a combination of the two) of civilian legal methods,

in *Legal Philosophy* (Oxford University Press, 2007).

⁴⁹ Duxbury, ‘English Jurisprudence Between Austin and Hart’ 5.

⁵⁰ Ibid 6.

⁵¹ Ibid 14.

⁵² Ibid 7; WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, Yale University Press, 1919).

⁵³ Ibid 58.

⁵⁴ So says Duxbury, ‘English Jurisprudence Between Austin and Hart’ 58.

⁵⁵ Ibid quoting Letter from Harold J. Laski to Justice Oliver Wendell Holmes Jr. (20 January 1932) in M DeWolfe Howe (ed), 2 *Holmes-Laski Letters* (Harvard University Press 1953) 1358.

⁵⁶ AL Goodhart, ‘Precedent in English and Continental Law’, (1934) 50 *Law Quarterly Review* 40, 64, quoted in Duxbury, ‘English Jurisprudence Between Austin and Hart’ 58-9.

Goodhart argued in his inaugural lecture that '[i]t is in its claim to certainty and rigidity that the English method has a marked advantage over the Continental one. . . .'⁵⁷ Goodhart was also critical of the legal realist focus on uncertainty in the law. He argued that 'the most striking feature of this school is the stress they place upon the uncertainty of law'.⁵⁸ This emphasis, said Goodhart, 'may lead to juristic pessimism on the part of students, and, what is even more dangerous, that it will induce an emotional rather than rational approach to legal problems'.⁵⁹ His criticism of Frank in his inaugural lecture was tautological, relying on an odd analogy to military orders to make the point that '[i]t is of course possible to point to exceptional cases, but we do know that in practice English Courts recognize that they are bound by precedents, and that no attempt is made to escape from them if they are clearly on point'.⁶⁰

CK Allen, Goodhart's colleague at Oxford, described attempts to evaluate law using the social sciences as 'Megalomaniac Jurisprudence.'⁶¹ Says Duxbury, he considered Pound's sociological jurisprudence to be 'inappropriately normative' and that that 'legal realism filled him with feelings approximating disgust'.⁶² Said Allen: 'It was perhaps appropriate that the age of jazz should produce a Jazz Jurisprudence.'⁶³ Others at Oxford and particularly at the London universities of the time were more receptive,⁶⁴ but remember there were few academic law schools at the time in Britain and scholarship from the medieval universities such as Oxford carried great weight, not only in England but in the British sphere of influence in what were to become the Commonwealth family of nations.

One could suggest a number of related reasons for the divergence in the common law tradition between realists and conceptualists. Ultimately the explanation will depend on the discipline in which the person offering it operates. The most compelling is perhaps a sociological explanation.⁶⁵ American legal realism may have been a response to social

⁵⁷ Ibid 59.

⁵⁸ AL Goodhart, 'Some American Interpretations of Law' in I Jennings (ed), *Modern Theories of Law* (London, Wildy, 1933) 11, quoted in Duxbury, 'English Jurisprudence Between Austin and Hart' 58.

⁵⁹ Ibid 20.

⁶⁰ Goodhart, 'Precedent in English and Continental Law' 59.

⁶¹ CK Allen, *Law in the Making*, 3rd edn (Oxford University Press, 1939) 35, quoted in Duxbury, 'English Jurisprudence Between Austin and Hart' 61.

⁶² Duxbury, 'English Jurisprudence Between Austin and Hart' 61.

⁶³ Allen, *Law in the Making* 45, quoted in Duxbury, 'English Jurisprudence Between Austin and Hart' 62.

⁶⁴ Duxbury, 'English Jurisprudence Between Austin and Hart' 63-9.

⁶⁵ See ibid 55-6:

It would be a mistake to expect English jurisprudence to take much from the lessons that were being learned in the United States. American legal realism, after all, was a jurisprudential response to the dominance of Langdellianism in the law schools, the initiatives of the American Law Institute, the perceived and some of the legal problems posed by the New Deal.' (footnote omitted).

and political events in the United States in the early twentieth century, in which classical legal thought was associated with a 'laissez faire' ideology of the United States Supreme Court of the time, which used its powers of judicial review to enforce freedom of contract doctrines that obstructed early attempts at regulating the economy and made difficult the implementation of New Deal policies.⁶⁶ It may also have been an attempt to undue so-called Langdellian approaches to the study of law in American law schools, associated with classical legal thought.⁶⁷ Add to all of this that federalism in a large country that was undergoing significant social change made it impossible to maintain consistency of case law across many jurisdictions and so American versions of the common law necessarily would lead to contradictions in the case law. The Supreme Court in *Erie Railroad Co. v Tompkins*⁶⁸ is widely understood to have settled the point that the common law resided in the states, and this lead eventually to the common law comprising essentially only private law in the United States. Duxbury concludes: 'North American commentators were concluding by the 1960s that English jurisprudence and American jurisprudence were each motivated by different concerns, and that the English had but the flimsiest understanding of realist legal thought. It is difficult to argue that this conclusion is wrong.'⁶⁹

It is difficult to draw clear lines in this divergence of thought in the common law tradition. Legal realism was not a coherent body of thought and legal realists can be said to form different wings or variants.⁷⁰ Many legal realists were 'hard core' lawyers and took legal doctrine seriously. Many American legal scholars and lawyers of the time were not legal realists and were avid critics of legal realism. The folklore around Llewellyn, for example, was that he had an encyclopaedic knowledge of sales law and a review of his challenging Sales Law casebook reveals it.⁷¹ Paradoxically, the study of law in the United States must necessarily be on the concepts of law and their logical form because there is really no way in a large and diverse federal system of many jurisdictions to study 'the' cases for many categories of law, except perhaps for American federal constitutional and administrative law.

The debate about certainty between American and English lawyers transformed into the latter twentieth century into a discussion of the predictability of the law.

⁶⁶ For a summary, see E Chemerinsky, 'Substantive Dues Process', (1999) 15 *Touro Law Review* 1501.

⁶⁷ Duxbury, 'English Jurisprudence Between Austin and Hart' 55-6.

⁶⁸ See n 5 above.

⁶⁹ Duxbury, 'English Jurisprudence Between Austin and Hart' (footnote omitted).

⁷⁰ Leiter, *Naturalizing Jurisprudence*.

⁷¹ KN Llewellyn, *Cases and Materials on the Law of Sales* (Chicago, Callaghan & Co., 1930).

Predictability is the more sensible concept because it allows for the consideration of probabilities and to be able to say with something less than 100% accuracy what the law will be or a court will decide.

If we were to take certainty at its word it would be difficult to find it except for very simple rules that specify simple concepts like durations of time. Lawyers in the common law tradition, English or American, broadly agree that predictability is important, but what predictability means to them depends at least to some extent on how the debate between the conceptualists and the realists played out as outlined above. It is to the divergent meanings of predictability in the common law tradition to which I now turn.

CONCEPTUAL VERSUS INSTRUMENTAL PREDICTABILITY

In his 1988 Memorial Lecture at Monash University, the preeminent English commercial law scholar Sir Roy Goode outlined eight principles for a ‘philosophy and concepts of commercial law’.⁷² The second principle after party autonomy is predictability. Nowhere does Goode identify certainty as a principle. In a footnote to his discussion of predictability, Goode asserts that predictability is ‘also termed ‘certainty’, a term I dislike as nothing in life is certain except uncertainty, and this is particularly true of litigation’.⁷³ Goode continues: ‘A reasonable degree of predictability is needed in the commercial world because so much planning and so many transactions, standardised or high in value, are undertaken on the basis that the courts will continue to follow the rules laid down in preceding cases.’⁷⁴

We can term Goode’s idea of predictability as conceptual predictability. It is predictability about the text of the law itself, a matter of whether the law can be used to plan transactions or other human activity. Conceptual predictability is predictability in the form of the law, grounded in the law’s logical features and the features of the language of the law in offering guidance to business planners and legal professionals.

Conceptual predictability is a value sought in both the English and the American versions of the common law. Legal realism did not change this basic feature about

⁷² R Goode, ‘The Codification of Commercial Law’, (1988) 14 *Monash University Law Review* 135, 148-155. I will not rehash the many arguments about the problems with a prediction theory about law. For extended discussions, see MS Green, ‘Legal Realism as a Theory About Law’, (2005) 46 *William and Mary Law Review* 1915 and select papers in Burton, *The Path of the Law and its Influence*.

⁷³ Ibid 150 at n 36.

⁷⁴ Ibid 150.

American law. For example, the American Revised Uniform Partnership Act, a uniform model law that the Uniform Law Commission in the United States has produced for consideration by state legislatures, contains Section 404, designed to clarify on what precisely are the fiduciary duties of partners to each other.⁷⁵ Section 404(a) specifies that ‘[t]he only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care’ as specified in subsections (b) and (c).⁷⁶ Subsection (b) states that a partner’s duty of loyalty ‘is limited to’ a discrete list of duties.⁷⁷ Subsection (c) does the same for the duty of care.⁷⁸ Other subsections of section 404 provide that while partners owe each other a duty of good faith, ‘[a] partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner’s conduct furthers the partner’s own interest’ and ‘[a] partner may lend money to and transact other business with the partnership, and as to each loan or transaction, the rights and obligations of the partners are the same as those of a person who is not a partner, subject to other applicable law’.⁷⁹ These concrete provisions were meant to clarify open textured statements in the case law on the fiduciary duties of partners. Other examples of conceptual predictability in action are the many ‘safe harbor’ provisions found in American securities regulation and other fields, including in some areas of EU law.⁸⁰ Though the law will differ in some substantial respects, similar techniques are at work in English law.

There is another version of predictability at work, probably more in American law than in English law. I shall call this version of predictability instrumental predictability. The idea of instrumental predictability is this: the law is predictable or ‘certain’ to the extent that it conforms reliably to some criterion independent of or external to the coherence of the legal rules themselves as legal rules. We can develop two versions of instrumental predictability. One is the positive version that the law in fact tends to

⁷⁵ Uniform Partnership Act (1997).

⁷⁶ Ibid §404(a).

⁷⁷ Ibid §404(b).

⁷⁸ Ibid §404(c).

⁷⁹ Ibid §404 (e) and (f).

⁸⁰ The Legal Information Institute at Cornell University defines a “safe harbor” as a “provision granting protection from liability or penalty if certain conditions are met. A safe harbor provision may be included in statutes or regulations to give peace of mind to good-faith actors who might otherwise violate the law on technicalities beyond their reasonable control.” https://www.law.cornell.edu/wex/safe_harbor. An example of a safe harbor can be found in the agreement between the European Commission and the U.S. Government that U.S. companies could self-certify with a set of conditions that ensured compliance with EU data privacy protections. The Court of Justice of the European Union declared the safe harbor invalid under EU law. Case C-362/114 *Maximillian Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650.

comply with the designated external normative criterion. The other is the normative version that the law ought to comply with the designated criterion. The idea here is not to construct legal concepts that reliably produce predictable consequences in a logical or formal sense, but that if we use an external criterion as a guide for making and interpreting legal rules, then predictability will result from the use of this criterion in developing the content of legal rules around it.

In the American context, the most prominent external criterion, at least for commercial and private law, is economic efficiency.⁸¹ So, the positive version of instrumental predictability is that the law does comply with the dictates of economic efficiency, a claim made in the very early law and economics literature about the efficiency of the common law.⁸² The normative version of instrumental predictability is that legal doctrines that fail to comply with standards of economic efficiency should be made to comply, either through evolution of case law or through legislation, though of course any such efforts should be examined with the tools of public choice theory or political economy.⁸³ The positive version may be true or false. The normative version offers a set of prescriptions to promote a form of predictability in the law centred around the substance of the law but not its form.

Instrumental predictability may not be in the minds of lawyers when they read cases or interpret statutes. It is unlikely to be something that practicing lawyers and judges actually reflect on when engaging with the law. With its connections to the social science of economics, it is a theoretical notion independent of what lawyers actually do. It is a theory about how people behave, reducible to economics. An analogy would be that Hank Aaron did not have to know about the physics of hitting a baseball to hit home runs in American baseball. In its positive form, it is a prediction about the law's direction. It is more likely that legal academics take an active approach to implementing instrumental predictability when they critically examine the law and critique it to determine whether it is efficient and argue that it should meet efficiency standards. While it is difficult to generalise about the path of legal thought, it is likely true that such activity by American legal academics is accepted at least partly because their

⁸¹ It seems well accepted in American law schools that economics is the prevalent methodology for private and commercial law while normative political theory maintains some currency at least for the constitutional aspects of public law. These arguments can be seen in the contentious L Kaplow and S Shavell, *Fairness Versus Welfare*, new edn (Cambridge / Mass., Harvard University Press, 2006).

⁸² See GL Priest, 'The Common Law Process and the Selection of Legal Rules', (1977) 6 *The Journal of Legal Studies* 65; PH Rubin, 'Why is the Common Law Efficient?', (1977) 6 *The Journal of Legal Studies* 51.

⁸³ See J Linarelli, 'The Economics of Uniform Laws and Uniform Law Making', (2003) 48 *Wayne Law Review* 1387.

intellectual ancestors, the American legal realists, were among the first legal thinkers to approach law from social science perspectives. To the extent that the idea of instrumental predictability has traction with American legal academics, either consciously or not, it will have crept into American legal scholarship and ultimately into ways of understanding the law from an American point of view more generally.

CONCLUSION

Legal certainty remains one of the more important concepts about the law, yet there has been little serious reflection about it. Its presence tends to be taken for granted in mature legal systems. This chapter has traced the origins of the concept in the common law tradition from its eighteenth century pronouncements by Lord Mansfield on the King's Bench in England to the present day. Along the way, I have tried to show that there are actually two somewhat divergent traditions within the common law tradition itself, which came to a sharp point of departure in the early twentieth century in the differences in approaches to the law as evidenced by English conceptualist and American legal realist traditions. In that divergence, the concept of certainty changed in the common law tradition. English Lawyers and judges still articulate the concept to evaluate the merits of English commercial law. American lawyers and judges do so far less, but the concept of certainty is still important in American law. In both traditions predictability is the more modern and tractable concept. I outlined two versions of predictability, a conceptual version that looks for predictability in the form and structure of the law itself, and instrumental predictability, which looks for predictability in the law's compliance with economic efficiency. Conceptual predictability is important in both the American and the English versions of the common law, though it is more explicitly stressed in English law. Instrumental predictability is probably more important in American than in English law, though English law likely conforms no more or less to it than American law.