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# The Philosophies of the Common Law and Their Implications: Common Law Divergences, Public Authority Liability, and the Future of a Common Law World

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### **Abstract:**

The common law seems to suffer from a countermajoritarian difficulty: in most of the world, it is law made by unelected judges. What could justify it? In this essay I consider the answer to this question through the lens of the question of convergence among common law countries. Common law convergence is the view that different common law jurisdictions should aim to have a (fairly) similar laws of contract, torts, and so on. I identify three different attitudes towards common law convergence. One view seeks universal convergence (one that extends to all legal systems, regardless of their origin), the second limits convergence to common law jurisdictions (explicitly rejecting convergence with non-common law jurisdictions), and the third is uninterested, even hostile, to common law convergence. I consider the philosophical assumptions behind each of these three approaches and explain how they address the common law's seeming lack of democratic legitimacy. I then go on to show that these different views on the legitimacy of the common law have implications on matters that appear unrelated to it, such as the scope of tort liability of public authorities. I conclude the essay with a simple model seeking to explain why, in spite of the historical popularity of the idea of common law convergence (especially within the Commonwealth), common law jurisdictions have been drifting apart.

### **Keywords:**

Common law, comparative law, jurisprudence, legitimacy, tort liability of public authorities

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*The Philosophies of the Common Law and their Implications:  
Common Law Divergences, Public Authority Liability, and the  
Future of a Common Law World*

Dan Priel\*

Forthcoming in *The Common Law of Obligations: Divergence and Unity*  
(Oxford: Hart Publishing, Andrew Robertson & Michael Tilbury eds., 2015)

**Prologue**

Following the economic crisis of the last few years, John Maynard Keynes has once again assumed centre-stage.<sup>1</sup> In this essay I am not going to speak about Keynes's economic ideas, but will attempt to say something about the significance he accorded to ideas. In the concluding paragraphs of his *General Theory of Employment, Interest, and Money* Keynes famously wrote that 'the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist....I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas'.<sup>2</sup> Keynes alludes in these brief remarks to a longstanding debate among historians and philosophers of history on the relative significance of ideas and interests.<sup>3</sup> In this essay I will explore the influence of ideas on the common law. I will attempt to show that different answers to a philosophical question on the authority of the common law have very practical implications to the question of the relevance of convergence and divergence between different legal systems. Even more contentiously, I will argue that these philosophical debates have implications to substantive questions of tort law. In both domains, we cannot make complete sense of the debate and have no basis for choosing one answer over another without attending to underlying ideologies. Even lawyers who believe themselves to be engaged in 'practical' scholarship, seeking to account for the law as found in the case and base whatever normative suggestions they make on nothing more than the idea that like cases be treated alike,<sup>4</sup> should not ignore the significance of these ideas.

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<sup>1</sup> For a comprehensive survey see '2008–09 Keynesian Resurgence' in Wikipedia, available at [http://en.wikipedia.org/wiki/2008%E2%80%9909\\_Keynesian\\_resurgence](http://en.wikipedia.org/wiki/2008%E2%80%9909_Keynesian_resurgence) (visited 2 Dec. 2014).

<sup>2</sup> John Maynard Keynes, *A General Theory of Employment, Interest, and Money* (London: Macmillan, 1936) 383.

<sup>3</sup> See e.g. Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998) 101–08.

<sup>4</sup> See e.g., Andrew Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Oxford: Hart, 1998) 108, 118–19, 127; Andrew Burrows, 'The Influence of Comparative Law on the English Law of Obligations' (this volume) MS at 1, 29. On the question-begging nature of treating like cases alike see Dan Priel,

## I. The Puzzle of the Authority of the Common Law

For all the talk about the decline of the state, the rise of supranational legal regimes, and the growing significance of foreign, transnational, and international law, much law is still tethered to nation states. And many who have thought about the matter have argued that within limits, states have legitimate authority to make laws that apply to the people who live within their boundaries. These days such accounts typically connect the authority to make laws to democracy. How exactly this link is to be drawn is, of course, a contested question, but no matter how one wishes to fill in the details, they do not seem to fit the common law particularly well. First, the principal lawmakers in the common law are judges, who are typically unelected and unrepresentative. If the authority of law depends on its democratic credentials, then the common law seems to flout this requirement. Second and related, the common law seems to transcend state or other political boundaries, while tying together legal systems that sometimes have no political links to each other, and are geographically (and perhaps in other ways) far apart.

This puzzle can be presented in the following, very rough, syllogism:

- (1) The (legitimate) authority of law derives from the authority of the state.
- (2) The (legitimate) authority of the state derives from having democratic institutions.
- (3) The common law is undemocratic.

Hence, (4) the authority of the common law looks suspect.

As presented, this syllogism is not meant to be an air-tight deductive argument, as its premises are very vaguely phrased. Nonetheless, it is helpful for presenting the problem of what I will call the puzzle of the authority of the common law, as well as for outlining possible answers to it. I will distinguish between three positions that can be placed on a spectrum that has complete legal localism at one end and legal universalism at the other. The first approach I will consider answers the puzzle by rejecting premise (3). Thus, this approach solves the puzzle of the common law's authority by explaining it away. It seeks to subsume the authority of the common law within a broader account of democratic authority. The second approach rejects premise (1). This view asserts, in effect, that the error in this argument is the thought that the authority of law derives from the state. On this view, the authority of law derives from its content, from the correspondence of laws to an external standard—say, morality or natural law. So understood, even if the authority of the state is derived from maintaining democratic institutions, the authority of law (or at least the authority of the common law) is independent of those institutions. In fact, even the authority of democratic institutions on this view is derived from deeper moral principles. The third approach focuses on premise (2). At its strongest, this view seeks the authority of the state in the idea of a political tradition, which it sees as more

Review of Lloyd Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, (2008) 57 *Journal of Legal Education* 579, 580–82; Charlie Webb, 'Treating Like Cases Alike: Principle and Classification in Private Law' in Andrew Robertson & Tang Hang Wu (eds), *The Goals of Private Law* (Oxford: Hart Publishing, 2009) 215, 227–28.

foundational than democracy. Though this view can be stated generally, in its legal incarnation, its proponents do not deny that the authority of *some* law is derived from the authority of the state, but they reject the idea that this is true of the authority of *all* law. Specifically, proponents of this typically view draw a sharp distinction between statute law, for which they think something like the syllogism is true, and common law, whose authority, they argue, is grounded in tradition.

What do these debates in political philosophy have to do with the concern of ‘practical lawyers’ about divergences in the common law? As I will try to demonstrate, quite a lot. The first view lends itself to the idea that convergence among common law countries is, if it happens, an interesting empirical finding, but it rejects outright the view that sees convergence as a normative ideal. The second view also rejects the ideal of common law convergence; but it does so in a very different way. The second view implies an ideal of *universal* convergence, one in which divergences among common law jurisdictions are no more problematic than divergence between common law and non-common law jurisdictions. It is only the third approach that fits the view (quite popular in certain circles) that common law jurisdictions, *and only* common law jurisdictions, ought to aim for convergence. To many who study the laws of contract, tort, property, trusts and so on—those areas of law sometimes simply called ‘the common law’—talk of English, Canadian, or Australian common law is in some sense misleading. Ultimately, they will say, there really is just one common law. More than a description of reality, this is thought to be a normative claim: Divergences between (say) English and Australian law are a cause for concern, while divergences between (say) English and French law are not.<sup>5</sup>

In what follows I attempt to further explain the theoretical presuppositions of these competing approaches. I will first try to substantiate my claim that the different attitudes to the question of authority relate to different conceptions of authority. I will then argue that these differences also manifest themselves in different answers to substantive questions within private law. I will demonstrate this claim by looking at a few of the last decisions of the House of Lords and argue that we can make better sense of some divergences among the law lords if we understand them to hold different views on the authority of (common) law. Finally, I will argue that even assuming the view of authority that is most sympathetic to common law convergence, there are practical constraints that make such a convergence difficult to maintain. This explains why we see growing divergences among common law jurisdictions, a trend that I predict will continue.

<sup>5</sup> For example, contrast Robert Stevens’s claim that divergences within the common law are ‘disturbing’, which he makes in ‘Torts’ in Louis Blom-Cooper et al (eds), *The Judicial House of Lords: 1876–2009* (Oxford: Oxford University Press, 2009) 629, 630, with his affirmation of divergences between common law and civil law jurisdictions in *Torts and Rights* (Oxford: Oxford University Press, 2007) 341, 347.

## II. Three Views on the Authority of (Common) Law

In this section I will present three views about the authority of the common law. I will first present these views as ideal-types. As will become clearer towards the end of this section, reality is typically more complex; nevertheless, I believe the ideal-types approach helps to bring to light the issues that are at stake.<sup>6</sup>

### *A. Legal Localism*

No-one finds it odd that Britain's constitutional law is different from Germany's or that France's copyright laws are different from those of the United States. No-one finds it odd that these differences are not confined to details, that they reflect a different 'philosophy' about separation of powers or democracy, about what these areas of law seek to achieve, or what values a legal system should strive to protect or promote through them. Why should tort or contract law be any different? Presenting the question in this way helps articulate a view. On this view, whether law deals with the regulation of air travel, the definition of and punishment for theft, the formation of contracts, or the legal response to cartels, it is the product of state authorities. True, some of the laws are created by the legislature, other laws by other public bodies (administrative tribunals, government bureaucrats, courts), but this fact does not show that the source of authority of laws of the second kind is any different from that of laws of the first kind. The fact that judges make law is thus *in itself* not more problematic than the fact that civil servants make law. (Even legislation, officially enacted by a democratically-elected legislature, is rarely exclusively, or even primarily, the work of the people's democratically-elected representatives; but that is a different matter.) In short, this view subsumes the common law under the general lawmaking power of the state. The way of solving the puzzle of the authority of the common law is not to present the common law as unique—the common law on this view is law just like any other—but rather by explaining how the way it is promulgated can be made to fit our ideas of democratic authority. In the modern state where much law is not created by elected representatives, that does not look like an insurmountable challenge.

If the mere fact that judges make law in those areas we call 'common law' is not a challenge to democratic authority (any more than any other delegated lawmaking is), it does, however, affect the specific contours of its institutions. For in a place in which this is the dominant conception of the authority of the common law we can expect to see its institutions shaped and understood in a way that fits these democratic credentials. Within the common law world, the country whose legal institutions reflect this view more purely than any other is the United States. And indeed, there are certain unique features to American common law that make sense only if one assumes the view that the authority of law derives from its being made by state institutions. I will mention three: Much more than in other common law coun-

<sup>6</sup> The ideas in this section are developed in greater detail in Dan Priel, 'Conceptions of Authority, Common Law Divergences, and the Future of a Common Law World' (unpublished). Unlike the three-fold typology found in this essay, there I present a related, but somewhat different, four-fold typology.

tries the ‘common law’ of the United States—the law of contract, tort, and property of the different states—is nowadays codified. If the common law is not unique, if this area of law is not somehow a unique domain of the judiciary, then like all other law it should be found in statute. A second feature in which American common law now differs from most of the rest of the common law world is its continued commitment to a jury trial in both criminal and civil matters. Part of the justification offered for maintaining the jury trial is that it is a popular lawmaking institution, a means for ‘the people’ to have a say in, or control over, what the law is.<sup>7</sup> Finally, there is the method of appointing judges. What strikes outsiders as one of the oddest features of American law is the prevalence of elected judiciary in state courts. Even with federal judges, who are not elected, their nomination process is openly political in a manner that has no parallel in other common law countries. This practice looks much less odd against the view that the lawmaking activity of judges must satisfy democratic constraints. All this fits a view much more dominant in American politics than elsewhere, which is that the executive and the judiciary (and not just the legislature) are representative of the people.<sup>8</sup>

The answer to the puzzle of the authority of the common law, then, is that there is no puzzle. Judge-made common law is not undemocratic if, first, it is conceived of as a form of democratic lawmaking power; and, second, when there are various institutional mechanisms in place as well as an underlying democratic ethos for the common law, that turn this idea into a reality. When this approach is applied to the question of common law convergence, it implies a relatively unsympathetic view to convergence. Different legal systems will, of course, sometimes converge, but this is, more or less, a happenstance. It is not at all something to aim for. While not universally accepted, this view is very popular in the United States.

### *B. Legal Universalism*

At the other end of the spectrum we find the universalist view according to which underlying the law there are some general principles applicable to all the world. This position has a long and distinguished history under various names, but it is probably best known as ‘natural law’. Stated abstractly, the idea that law should match some pre-existing, universal, standards is very familiar. It is held not just by self-styled natural lawyers, but also by their supposed intellectual opposites, legal positivists.<sup>9</sup> It is also held across the political spectrum, although those on the right tend to call those principles ‘natural rights’ whereas those on the left usually prefer to speak of ‘human rights’.

<sup>7</sup> See Jenny E Carroll, ‘Nullification as Law’ (2014) 102 *Georgetown Law Journal* 579.

<sup>8</sup> See Robert J Pushaw, ‘Justiciability and Separation of Powers: A Neo-Federalist Approach’ (1996) 81 *Cornell Law Review* 393, 420–25.

<sup>9</sup> Even the more specific claim, that law is authoritative to the extent that it matches morality is a nowadays a familiar positivist idea. This is achieved by the fact that most legal positivists these days think of it as a thesis about legal validity rather than a thesis about authority. For more on this see Dan Priel, ‘Toward Classical Legal Positivism’ (2015) 101 *Virginia Law Review* (forthcoming).

Here, however, I prefer to talk about a more specific idea, the view that law *has authority* because, and to the extent that, it matches pre-existing universal morality. Understood as a view about authority, legal universalism is not embarrassed by the obvious reality of divergence between the laws of different countries. A proponent of this view need to accept two propositions: First, that there are universal moral principles that underlie the law; and second, that the authority of positive law derives from its correspondence with natural law.

This view thus attempts to answer the puzzle of the authority of the common law by denying that the authority of law derives from its democratic credentials. If this is so, then the fact that the common law is undemocratic is not, by itself, a reason to question its authority any more than the authority of any other law. Thus, in pure form, this view rejects the uniqueness of the common law, but it does that in the opposite way to legal localism: No law is authoritative because of its democratic credentials. Both common (judge-made) law and statutes ultimately derive their authority from their correspondence to pre-existing moral norms. This view also rejects the uniqueness of the common law in another sense. It denies that there is anything special to common law *jurisdictions*, and therefore it denies that legal convergence should be limited just to these jurisdictions. If the underlying authority of all law is its correspondence with universal morality, it follows that the ideal of convergence of law extends to the whole world.<sup>10</sup>

Thus, in one sense, this view endorses a very strong version of convergence. In another sense, however, this view sees no value in convergence *per se*. There is on this view little or no value in convergence if different legal systems converge on the wrong rules or principles. Even when legal systems converge on the right principles, the fact of convergence does not add to the goodness of the situation. Of course, it is better if more jurisdictions identify the right answers to what the content of their laws should be, but the fact of convergence *itself* adds nothing to the merit of this situation.

A seemingly intractable challenge to this view is the fact that in the modern state much lawmaking is done by democratic institutions and does not pay particular heed to universal morality and is premised on the unique needs of a particular time and place. Even if one accepts that the common law reflects some universal values, the fairly insignificant amount of lawmaking done by judges these days, when compared to the vast amount of lawmaking in the modern regulatory state, would seem to render this position completely untenable as an argument for the authority of all law.

A proponent of legal universalism may respond in three ways. The most radical response asserts that only universal laws—laws that avoid the promotion of particular policies—do not violate the rule of law, and only these laws can ultimately be justified. This was, for example,

<sup>10</sup> For an example of this view see Allan Beever, 'How to Have a Common Private Law: The Presuppositions of Legal Conversation' (this volume). Though at one point he says that 'divergence [between common law jurisdictions] is always problematic' (MS at 10), he is clear that the ideal of convergence he aims for is not limited to the common law world. See *ibid.*, at 25.

Hayek's answer in *The Road to Serfdom*. In the chapter on the rule of law Hayek argued that only general rules that similarly apply to all (all over the world) are consistent with the rule of law.<sup>11</sup> Closer to contemporary debates, this is also the answer offered by Allan Beever. Though he constructs his view somewhat differently, Beever believes that 'there is an objective truth at which the law of the various jurisdictions aims'. He therefore rejects the idea that divergence between jurisdictions is to be explained by different 'respons[es] to local conditions that differ between jurisdictions'; rather, he thinks that what explains those divergences is that different courts are 'trying to do the same thing where reasonable people can reasonably disagree as to what ought to be done'.<sup>12</sup> As presented, this argument is fallacious. It is clearly not true that as a general matter laws cannot differ on the basis of local conditions: if one thinks that laws can be used to promote overall welfare, it is plain that local conditions will matter a great deal for determining the appropriate content for laws. Beever's argument can only go through with the addition of a missing premise, namely that local conditions are *irrelevant* in lawmaking, and this view, in turn, can only be sustained if he assumes (like Hayek) that laws ought not be used to promote welfare.<sup>13</sup>

Others, of less libertarian leanings, have adopted more accommodating strategies. One such approach recognizes the legitimacy of democratic lawmaking but considers it secondary—logically and normatively—to the universal principles enshrined in the common law. Consequently, democratically-adopted laws that conflict with the fundamental principles of the common law lack legitimate authority and may be declared legally invalid by a court, regardless of an enabling constitutional provision.<sup>14</sup> As this accommodating approach is more commonly adopted by Commonwealth public law scholars, I will set it aside here.

<sup>11</sup> F.A. Hayek, *The Road to Serfdom* (London: Routledge, 2001 [1944]) ch 6. Hayek contrasts there a 'permanent framework of laws', which consists of 'rules applying to general types of situations' with 'the direction of economic activity by a central authority'. *Ibid.*, 76, 79. (In later writings he may have been closer to the universal common law approach I will discuss below.)

<sup>12</sup> Beever (n 10) MS at 22, 24.

<sup>13</sup> Elsewhere Beever claims that policy should have no place in *any* law (and not just in 'private law'). See Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007) 71. It is this view, as well as views he expresses elsewhere that warrant treating his position as more radical than Weinrib's and places him very close to Hayek. See Dan Priel, 'Private Law: Commutative or Distributive?' (2014) 77 *Modern Law Review* 308, 328–29. However, in some places Beever accepts something like the distinctions found in Table 1. See Beever, *Rediscovering*, *ibid.*, 13–14, 52–53. In these places Beever accepts the weaker thesis that only the common law should not be used to promote welfare.

<sup>14</sup> See e.g., John Laws, *The Common Law Constitution* (Cambridge: Cambridge University Press, 2014) 3 ('The common law is the interpreter of our statutes, and is the crucible which gives them life...[S]tatute law and government policy alike are delivered to the people through the prism of [common law] principles [such as reason, fairness, and the presumption of liberty]. This is the gift of the common law, the unifying principle of our constitution. It is the means by which legislature and government are allowed efficacy but forbidden oppression.');

see also John Laws, 'Law and Democracy' [1995] *Public Law* 72.

The last response to the challenge from democracy is more often found in the work of Commonwealth private law scholars. Rather than prioritizing between the common law and statute, it sees the two as distinct and largely independent domains. This approach seeks further support for the normative significance of the distinction between common law and statute by tying it to a series of additional, partially overlapping, distinctions:

Common law	Statute
Courts	Legislatures
Private Law	Public law
Morality (and moral philosophy)	Politics (and political philosophy)
Principle	Policy
Corrective justice	Distributive justice
Individual rights	General welfare
Expertise (about morals)	Democracy

**Table 1: The common law–statute divide**

The authority of the common law on this view is still derived from its correspondence to moral truth; by contrast, the authority of statute derives from different societies' adoption of different policies on the basis of their political preferences, as revealed by democratic processes. This view thus abandons common law universalism with regard to subject-matter, but maintains it with regard to geographic scope. The ideal convergence of private law on this view is not limited to common law jurisdictions: Reflecting universal morality, the content of private law should ideally be more or less the same throughout the world; public law, however, is for each political community to develop in accordance to its own values.

It is well beyond the scope of this essay to carefully examine the merits of this view, but I will make three brief critical remarks about it. Beginning with an empirical observation, a fundamental problem with this approach is that it simply does not correspond to reality. The areas of law that are typically classified as 'private law' (contract, tort, and property) are shot through with statutes, which are often clearly motivated by distributive concerns. The divide also breaks down on the other side, since judges quite constantly invoke policy and distributive considerations in their determination and justification of common law rules.

I turn now to more theoretical concerns. Defenders of the view that private law should be free from policy often argue that this should be so, because the introduction of policy considerations into private law will necessarily render that area of law incoherent.<sup>15</sup> But the strategy represented in Table 1 does not avoid the problem of incoherence (assuming it is a problem), it only shoves it out of the private lawyer's sight. So long as private law and public law come into contact, the clashes between principle and policy, between rights and general welfare, between corrective and distributive justice are not avoided, they are moved somewhere else. If anything, the strategy that insists on somehow not talking about these interactions, on

<sup>15</sup> See Ernest J Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, new ed. 2012) 32–44.

engaging in private law as if public law does not exist (and vice versa), only makes the problem worse.

Finally, for this view to be plausible there has to be something about judges that explains *why* they should decide certain questions and not democratic institutions. The typical answer democracies give to this question is that they allocate law-making power to non-democratic bodies when these bodies have special expertise on certain matters. Following this rationale, it makes sense to give this power if there is something about judges that lends credence to the idea that they are experts on identifying true, universal morality. Though such claims are sometimes made, it is entirely unclear what they are based on. Despite the veneration still accorded to appellate judges, most judges have not left a mark on history as particularly original or insightful thinkers, and very few of them would make it to any list of history's greatest moral thinkers. To even make sense, we should believe that there is something in the training or occupation of judges that makes them moral experts, but there is little reason to think that. For myself, I am not sure what would count as moral expertise, but if repeated engagement with moral questions had been shown to sharpen one's moral sensibilities, moral philosophers would have made better candidates for the judiciary than lawyers. At the very least, for this claim to make sense, we would have expected judges to immerse themselves in the writings of moral philosophers (rather than those of lawyers) as a precondition for getting the job.

### *C. Common Law Universalism*

The two positions just outlined correspond, at least roughly, to one understanding of the divide between two familiar legal philosophies: legal positivism and natural law. These two approaches dominate jurisprudential discussions to such an extent that they seem to exhaust the theoretical space. These two views, however, neglect a third position, one that is in fact the most popular within in the common law world (outside the United States). This approach sees a special unity among all common law jurisdictions but not between common law and non-common law jurisdictions. In other words, proponents of this view take a midway position between the two views considered earlier. To many common lawyers this view comes so naturally that they hardly bother to think about the fact that if they write on the law of contract, they may take particular interest in the judicial pronouncements of their own jurisdiction, but they will also closely follow developments in other common law jurisdictions. On the other hand, they will make much less of an effort to keep track with developments in the law of contract of non-common law jurisdictions, even when those non-common law jurisdictions (as is the case in Canada or Britain) belong to their own country! This view is not meant as a mere description of reality: as mentioned, many think that this view implies that common law systems *ought* to converge.

Can we make sense of this view? From the perspective of universalist natural law, this view seems odd. It asks us to assume, in effect, that all legal (or moral) wisdom descended on certain parts of the world and not on others. From the perspective of the localist view, this view is odd in asserting that its laws should aim to be similar to those of several completely

independent countries. The key to understanding the common law convergence view is that it presupposes a distinct view of authority, one that sees the authority of law (or at least the authority of the common law) as grounded in history. On this mode of authority, we *ought* to do certain things in a particular way today, because of the *fact* that we did certain things in a similar way in the past.

This view thus asks us to derive an ought from an is. Could such a view ever be justified? Several arguments have been proposed in defence of this view, but here I will only consider one. This view maintains that we can make of our duties to others only by assuming our membership in a community; they further argue that the content of those obligations is neither a product of some social contract nor derived from reason. Rather, it derives from the history of that community. It is this history that shapes our normative realities and it implies that it is only through an engagement with the community's political past that we can identify our present-day obligations to other members of the community.

A key element to this view is the idea of a tradition, not merely as a description of a certain set of ideas, but as a normative concept.<sup>16</sup> By 'tradition' I mean an amalgamation of prevailing ideas and concepts in a particular community combined with a more-or-less conscious sense of participation in a joint endeavour with past members of that community. Whatever are the normative merits of this view, there are many reasons to think that the common law *tradition* embraces something like this view. Legal rules are often developed by careful attention to past practice rather than by direct appeal to reason.

This idea is in plain sight with the doctrine of precedent. Within a broadly Hartian version of legal positivism precedents create rules (or at least parts of rules). Precedent on this view is simply a different technique of promulgating legal rules. Within the natural law view precedents are understood as an ongoing enterprise seeking to find out what the law is. Different decisions reflect the ongoing enterprise of discovering moral truth, but by themselves precedents have no significance: like the rest of the law, their authority derives from their content, if it corresponds to morality. From this perspective past decisions are merely a repository of attempts at discovering moral truths whose existence and content is entirely independent of legal practice. This is the background that explains why both views find it a real puzzle why we should follow a 'wrong' precedent, a precedent that we now judge to be inconsistent with the requirements of morality. But this problem is entirely the product of the assumption that what we ought to do is fixed outside of our practices. If this assumption is rejected—as it is within this understanding of the authority of the common law—the problem does not arise, or rather arises in a much more attenuated form. So long as we can show that the precedent itself followed on the tradition, it makes little sense to claim that the precedent

<sup>16</sup> For a very strong version of this view, especially in relation to precedent, see Anthony T Kronman, 'Precedent and Tradition' (1990) 99 *Yale Law Journal* 1029; cf Iain Hampsher-Monk, 'Political Languages in Time—The Work of J.G.A. Pocock' (1984) 14 *British Journal of Political Science* 89, 105 ('The notion of tradition which is so essential to an understanding of precedent-based behaviours pervades...[Pocock's] work, and plays a key role in his notion of explanation of history in the history of ideas').

is 'wrong'. On this view precedents can only be seen as wrong when they can be shown to be wrong 'the day they were decided', i.e. when they can be shown to be themselves departures from the requirements *of the tradition*, not of some universal moral standard.<sup>17</sup>

The greatest strength of this account for our purposes is that it provides a ready explanation for the view that finds divergences among common law jurisdictions problematic but is indifferent to divergences between common law systems and other legal systems. To see this, contrast the tradition view with a different view that was once used to explain common law convergence. Around the turn of the twentieth century one finds Anglophone legal scholars speaking of a 'national character' shared by the English-speaking world. Whether such a thing as a national character even exists is suspect,<sup>18</sup> but even if it did, on this view the *fact* of common law convergence (and common law–non-common law divergence) would be explained by the tendency of nations having laws that match their national 'traits'.<sup>19</sup> This view thus strongly suggests that common law convergence would emerge naturally and without conscious attempt at maintaining convergence.

Though not without difficulties, the tradition view can provide a less mysterious basis for both explaining the fact of common law convergence. Since different common law countries share a history, we have an explanation for the fact of convergence. But unlike the national character explanation, the tradition view also provides an argument for maintaining convergence. A tradition, in the way I use it here, involves participation in a joint endeavour and implies that those jurisdictions that belong to a single tradition, will have reason to uphold the tradition, not because it is a tradition and not simply out of respect for the past, but because of their present commitment to the continued existence of the community constituted and epitomized by the tradition. To the extent that the tradition is (seen to be) made up of all jurisdictions that derive from the common law of England, all of them should be committed to maintaining their convergence. Since there is no similar tradition tying common law juris-

<sup>17</sup> For a clear example see *R v R* [1992] 1 AC 599, where the House of Lords repudiated the doctrine that a man cannot rape his wife. Most of the decision was focused on the weak precedential force of the doctrine, with a short discussion on changing moral and social standards with little or no discussion about the timeless wrongness of this view. In fact, the decision stated that it rejected 'reflected the state of affairs in these respects at the time it was enunciated'. *Ibid.*, 616.

<sup>18</sup> For reasons to doubt see A Terracciano et al, 'National Character Does Not Reflect Mean Personality Trait Levels in 49 Cultures' (2005) 310 *Science* 96.

<sup>19</sup> See e.g., AV Dicey, 'A Common Citizenship for the English Race' (1897) 71 *Contemporary Review* 457, 468–69; James Bryce, 'The Influence of National Character and Historical Environment on the Development of the Common Law' (1907) 8 *Journal of the Society of Comparative Legislation* 203, 203–04, 206–08. I do not address here the question of the scope of convergence, but it is interesting to note in this context that those who talk of the importance of convergence in the common law almost always talk of between England, Australia, Canada, New Zealand, and to a lesser extent the United States. Much less is said of the importance of convergence with India, by far the populous common law country; nor, for that matter, with the thirty-odd jurisdictions for which the Privy Council in London is still the court of final appeal.

dictions with civil law jurisdictions, there is no normative requirement for maintaining convergence with them.

In this respect the common law universalism view is the mirror image of legal universalism (this is important to highlight, since both views are sometimes called ‘natural law’): the tradition view limits the scope of convergence, and in this respect it subscribes to a weaker ideal of convergence, but in another sense it endorses a much stronger version of it. Unlike legal universalism (as well as, of course, legal localism) this view sees convergence *by itself*, i.e. convergence regardless of what legal systems converge on, as valuable. Of course, once a tradition settles on a path, then straying from that path is wrong; this is the sense in which a tradition has normative force. But the path itself is not inherently better than other paths: it is just a different one.<sup>20</sup>

The tradition view of the common law also has an answer to the puzzle of authority of the common law. The common law is not democratic in the majoritarian sense, nor is derived from the authority of the state. The common law is justified for its ability to maintain the deep currents of thought of a particular community, one that in the case of the common law (so the argument would go) extends beyond state boundaries. This last point also helps us identify another explanatory advantage of this view over legal universalism, namely that it better fits legal practice and the role judges have in it. To justify the allocation of decision-making power to judges the legal universalist must hold that judges are moral experts, that they are better than others in finding moral truths. The proponent of the common law tradition view maintains the far more plausible view that judges are experts in the common law tradition. It is exactly for this reason that a large part of their training and working life is dedicating to mastering past legal materials (and not in the work of moral philosophers). That is also why in writing their decisions they consult and cite past cases: not just, perhaps not even primarily, in order to economize on their time and effort by not having to think from scratch on legal questions presented to them. From the common law tradition view, the act of consulting past cases and trying to find the answer in them (or perhaps through them) reflects the ongoing commitments derived from being part of a non-universal tradition. This perspective also gives as the means for understanding and explaining how the common law can change, as it is influenced by changing ideas, but also why it changes so slowly. Unlike universalism that assumes that moral constants remain largely unchanged, the common law tradition view can explain how two legal decisions from different era can both be different from each other, without having to hold that either decision was wrong.

Yet another advantage of this view is that it can explain how the common law can be political in one sense—it reflects certain political commitments (for instance, a certain conception of liberty)—while remaining apolitical in another—as its political commitments are dis-

<sup>20</sup> Stevens says so explicitly: ‘Legal systems have their own internal logic. Saying that the common law of torts is rights-based, while other legal systems are not, is not intended to be an implicit reprimand of other ways of doing things’. Stevens, *Torts and Rights* (n 5) 347.

tinct from the everyday politics of majoritarian democracy. Against this background we can make sense of why this view of the authority of the common law is also unsympathetic to policy. It is not because policy reflects an intrusion of politics *per se* into the domain of law; it is rather the intrusion of the *wrong kind* of politics, the kind of everyday politics which is the proper domain of government and majoritarian democracy. This explains why many defenders of ‘blackletter law’ insist on the autonomy of law and legal scholarship: though the law will be influenced by popular views, those can only be relevant to the law to the extent that they are manifested in, or translated into, ‘internal’ legal categories. It is only by insisting on the relative closure of law, by avoiding the ‘intrusion’ of ideas from other disciplines (either directly or through legislation, where such ideas are more likely to have an impact) that the common law tradition can be maintained.

Even though this view provides a more convincing account of certain familiar features of the common law than either localism or universalism, it is surprisingly absent from jurisprudential discussions.<sup>21</sup> This is probably because in present-day moral discourse the usual assumption is that our moral obligations are fixed constants, true regardless of our acceptance or recognition of them. Most jurisprudential debates—and both legal positivists and natural lawyers—assume that the law is on the lookout for those fixed constants, which it aims to match. Much of what one sees in actual common law practice amounts to a rejection of this view.

This view is, of course, not without its difficulties. One set of concerns (at least for some) is that this view tends to be conservative. A different set of concerns has to do with the fuzzy concept of ‘tradition’. Much historical work has been dedicated to showing that how traditions are invented or manufactured.<sup>22</sup> The common law tradition is no exception. English common law is originally in fact the law of the Norman (French) conquerors. In the centuries that followed, English lawyers continued to draw unselfconsciously on Roman law and their civilian contemporaries. As recently as the late nineteenth century, when English (and American) lawyers had to construct a theory for the case-law after the collapse of the writ system, they relied heavily treatises on civil law.

In a way, these historical facts are *on their own* of relatively little significance, because traditions depend on a continued commitment to the perpetuation of a myth. So long as the myth is believed, it can provide the sufficient normative foundation for its continued existence. Of course, traditions can (and often have been) challenged for their inaccuracy; but it is

<sup>21</sup> The most systematic attempt to develop such ideas in the context of the common law has been provided by Postema. See e.g., Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) 63–77. The work of Ronald Dworkin (perhaps unconsciously) bears important similarities (as well as important dissimilarities) with this view, but it is rare to see his work discussed outside the legal positivism/natural law dichotomy. The matter is discussed at length in Dan Priel, ‘Making Some Sense of Nonsense Jurisprudence’ (unpublished manuscript).

<sup>22</sup> See Eric Hobsbawm & Terence Ranger (eds), *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

typically not historians alone that topple a tradition. It is interesting to note, however, that those who wish to create greater convergence among all European legal systems have worked hard on creating an opposite narrative, one that emphasizes the historical links among all those legal systems that are together said to have contributed to—surprise!—a single ‘Western’ or ‘European legal tradition’.<sup>23</sup>

#### *D. Complicating the Picture*

As stated at the beginning of this section, the account provided so far in this section is somewhat simplified. This is because it does not adequately cover all possible answers to the question of the authority of the common law. This simplification was attained by distinguishing between the view that *all* law derives its authority from the state, *all* law derives its authority from correspondence with external moral standards, and the view that draws a sharp divide between the common law and statute with regard to their authority. These three views can thus be presented in the following tables:

	Universal	Common law	Local
Statutes			✓
Common law			✓

**Table 2: The state law conception of authority**

	Universal	Common law	Local
Statutes	✓		
Common law	✓		

**Table 3: The natural law conception of authority**

	Universal	Common law	Local
Statutes		✓	
Common law		✓	

**Table 4: The common law conception of authority<sup>24</sup>**

Tables 2–4 present three distinct and non-overlapping models of authority. The tables are useful also for highlighting other possible configurations of the authority of law. Some of these may not be adopted by anyone, but others are live possibilities. As we have seen, however, proponents of both the natural law and the common law models have attempted to ad-

<sup>23</sup> See, for example, Reinhard Zimmermann, ‘Roman Law and European Culture’ [2007] *New Zealand Law Review* 341, 365–72.

<sup>24</sup> The scholars I focus on tend to write on private law and their views on the authority of statute is not always clear. Many, it seems, favour the kind of division of authority represented by Table 5. If there are adherents to the view represented by Table 4, perhaps they are best represented by some of the proponents of common law constitutionalism. I cannot discuss their views here.

dress the shortcomings of their approach, both positive and normative, by defending a weaker position that typically looks more like this:

	Universal	Common law	Local
Statutes			✓
Common law	(✓)	(✓)	

**Table 5: Mixed conceptions of authority**

There are possibly other ways in which the different basic approaches may intersect. A longer essay might have attempted a more elaborate taxonomy. But since legal taxonomies only serve as useful models of reality, there is a point at which an over-elaborate model obscures more than it illuminates.

There is another important way in which the picture presented so far may seem to be a simplification of reality. I indicated that the view summarized in Table 2 corresponds with American common law, the view summarized in Table 3 is more commonly an academic view, and the view summarized in Table 4 as reflecting English common law. Of course, reality is more complicated than that. One can find examples of people or courts in the United States who express views that are closer to the second or third approach, just as one can find outside the United States people who express views quite similar to the first.<sup>25</sup> Once one goes beyond models more subtle differences arise. For example, even when tradition-based positions are defended in the context of American law, three facts are notable. First, such arguments are more commonly directed at explaining and justifying the common law that engulfs the United States Constitution as well as courts' power of judicial review, rather than the common law of contract and tort. This reflects the fact that at least among legal academics, it is the Constitution, rather than the common law, that is more commonly seen these days as the source of Americans' communal commitments.<sup>26</sup> Traditional common law, decided by state courts by (usually) elected judges and often on the basis of legislation, has less significance in the American polity. Second and related, even Americans sympathetic to the idea of law as a tradition

<sup>25</sup> Even this might be challenged. American law, much more than other common law jurisdictions, is committed to the 'natural law' idea that sees no clear distinction between law and morality and that is willing to infuse moral ideas into the law whether or not they have been formally incorporated by a legislative statement. See P.S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford: Clarendon Press, 1987) 43–46. It is notable, however, that when moral norms are being incorporated, what is often said to be incorporated are norms accepted by the American public, not universal moral criteria.

<sup>26</sup> For a tradition-based justification of judge-made constitutional law see David A Strauss, 'Common Law Constitutional Interpretation' (1996) 63 *University of Chicago Law Review* 877, 891–94, 900–03, 929–30. For a similar answer to the counter-majoritarian difficulty of judicial review of legislation see Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd edn (New Haven: Yale University Press, 1986) 23–33.

now see the ‘American way of law’<sup>27</sup> as a distinct tradition, one that despite its historical roots to English common law, has long since charted its own distinct path founded on distinctly American values. Finally, it seems to me that the American approach is more open to the influence of *contemporary* prevailing values *from without*, rather than to the reasoned elaboration of *past* legal materials in order to derive certain normative commitments *from within*. This, again, is a reflection of the greater role for ideas of self-government in the American version of the common law, rather than the elitist enterprise which is more characteristic of the common law approach elsewhere.<sup>28</sup>

### III. Implications

The last section has already explored some ways in which these ‘philosophical’ differences manifest themselves in differences in legal practice, for instance by providing an explanation to the unique American practice of elected judges. I have also attempted to show that these different ways of thinking about the common law also lead to different attitudes on the question of the significance of convergence. In this section I explore this matter further by looking more concretely into one manifestation of the question of common law convergence, namely the attitude toward reliance on foreign legal materials. Perhaps more intriguingly, I then turn to a substantive question, the scope of negligence liability of public authorities. I will try to show that the divergence in views in recent House of Lords decision on the matter can be explained, at least in part, by drawing on the ideas canvassed in this essay.

#### *A. The Use of Comparative Law in Private Law*

Basil Markesinis has been an indefatigable champion of the value of reliance on foreign law, and while he has been able to find many adherents to the cause in Europe (including England), he has been frustrated and puzzled by most Americans’ lack of interest in foreign law

<sup>27</sup> I borrow this phrase from Robert A Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2001). See also the series of twelve articles exploring ‘commonplace aspects of the American justice system that are virtually unique in the world’, available at [http://topics.nytimes.com/top/news/us/series/american\\_exception/](http://topics.nytimes.com/top/news/us/series/american_exception/) (visited 2 Dec. 2014). For a more partisan argument that American law and society were created in conscious opposition to the legal systems and ideas of the Old World see Steven G Calabresi, “‘A Shining City on a Hill’: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law” (2006) 86 *Boston University Law Review* 1335.

<sup>28</sup> For more on the American case see Priel (n 6) section II.(b)–(c). See also Dan Priel, ‘The Law and Politics of Unjust Enrichment’ (2013) 63 *University of Toronto Law Journal* 533. In the latter essay I exploited these different understandings of law as the basis for explaining Americans’ lack of interest in unjust enrichment. Without using the terminology used in this essay, I argued there that the thriving of unjust enrichment is the product of a need to solve problems with areas of law *within* a tradition-based conception of authority of the common law, which does not allow for radical changes in those areas of law. When those concerns are absent, there is less need for a distinct area of law of unjust enrichment.

and outright resistance to relying on it in developing their law.<sup>29</sup> His attempts at explaining this failure have focused mostly on what he perceived to be tactical errors made by American proponents of the use of foreign law. He admonished them for failing to answer questions like whether foreign law can be used to restrict or enlarge constitutional rights, or their use of ‘strong and emotive language’.<sup>30</sup> These are unconvincing explanations.<sup>31</sup> There is no recognition in any of the opponents’ writing on the matter that it is the incompleteness of the proponents’ arguments that is the basis of their opposition. The language used is also a poor explanation. Opponents of same-sex marriage in the United States have also used strong and emotive language, and yet on that matter their opponents are losing ground fast. What is completely absent from Markesinis’ writings on the matter is any serious attempt to consider the significance of *ideas*.<sup>32</sup>

Though Markesinis’s remarks are general, he expressed particular dismay at Americans’ unwillingness to look at foreign law in the ‘the domains of contract or tort’,<sup>33</sup> stating also that ‘the introvertedness or self-sufficiency of Americans is now spreading to, should I say *infecting*, private law as well as public law where, at least, one can make with greater cogency the argument about democracy being trumped by unelected officials, namely judges’.<sup>34</sup> These remarks reveal Markesinis’s own normative commitments, and his unwillingness to recognize that the source of the resistance is ideological. Markesinis assumes that public law and private law have different sources of authority, which explains why he thinks private law is more readily appropriate for comparative law. This is not a description of what things are in the world; it follows from a particular political position, one that itself sees public law as the product of local politics but private law as something else. But my anecdotal experience is that the idea that there is a fundamental distinction between private and public law is one that many American lawyers reject, and if my explanation above is correct, we can see why.

<sup>29</sup> See Basil Markesinis, ‘National Self-Sufficiency or Intellectual Arrogance: The Current Attitude of American Courts towards Foreign Law’ (2006) 65 *Cambridge Law Journal* 301.

<sup>30</sup> *Ibid.*, 311.

<sup>31</sup> For an illuminating exploration of the strengths and limitations of reliance on foreign law, as well as a valuable critique of Markesinis (albeit rather different from mine) see Jane Stapleton, ‘Benefits of Comparative Tort Reasoning: Lost in Translation’ in Mads Andenas & Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009) 773.

<sup>32</sup> Markesinis is sceptical to the idea of ‘legal culture’ as having much explanatory power in Basil Markesinis, ‘Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law’ (2006) 80 *Tulane Law Review* 1325, 1356 n 89.

<sup>33</sup> Markesinis (n 29) 324.

<sup>34</sup> Basil Markesinis, ‘Understanding American Law by Looking at It through Foreign Eyes: Towards a Wider Theory for the Study and Use of Foreign Law’ (2006) 81 *Tulane Law Review* 123, 171. See also his remark that ‘it does not take much ingenuity but only a minimum amount of disingenuousness to claim that, for instance, even ordinary contract and tort rules can be linked to “values” held dear by some societies in order to preserve the status quo’. Markesinis (n 29) 317.

When the political presuppositions that underlie Marquesinis's views are brought to the fore, what he takes to be obvious—that examining foreign law is conducive to the 'search for truth and justice'<sup>35</sup>—appears much less obvious than he presents it. Marquesinis fails to understand that what *counts* as 'justice' (or at least 'justice according to law') and what *counts* as 'truth' with regard to a proposition of law, depends on an underlying political philosophy. In a political community that sees its legal justice and legal truth as derived from the will of *its* people, the use of foreign law is a subversion of truth and justice, whether or not the law in question is a common law jurisdiction.<sup>36</sup> Of course, not all Americans accept this view, and there are many who see value in reference to foreign law. But if we seek to understand their views, there are often best explained by the presupposition that at least part of the law is grounded in different notions of authority, most notably its correspondence to universal human rights.

### *B. Implications for Substantive Private Law*

In this section, I turn to a more speculative suggestion. I will attempt to show that different views about the authority of the common law and the value of common law convergence correspond in a non-coincidental way to different attitudes to the question of negligence liability of public authorities. To demonstrate this point, I will compare the views of Lords Bingham and Hoffmann, probably Britain's most influential judges of the last two decades.

Bingham and Hoffmann have expressed rather different views on the value of comparative law, especially when it came from European, civil law countries. Bingham was a lifelong champion of 'widening the horizons' of English law.<sup>37</sup> Hoffmann, by contrast, has always been more sceptical of European influences on indigenous English law.<sup>38</sup> Where Bingham thought the European Convention of Human Rights was a document of surpassing signifi-

<sup>35</sup> Marquesinis (n 34) 170.

<sup>36</sup> See *Roper v Simmons*, (2005) 543 US 551, 626–27 (Scalia J, dissenting) ('The [majority's] special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion....It is beyond comprehension why we should look...to a country that has developed, in the century since the Revolutionary War—and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own.'). On the proliferation of statutes across the United States that prohibit judicial reliance on *any* foreign law see Andrea Elliott, 'The Man Behind the Anti-Sharia Movement', *New York Times* (30 July 2011), available at <http://www.nytimes.com/2011/07/31/us/31shariah.html> (visited 2 Dec. 2014).

<sup>37</sup> See Tom Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge: Cambridge University Press, 2010); Tom Bingham, "'There Is a World Elsewhere": The Changing Perspectives of English Law' in *The Business of Judging: Selected Essays and Speeches 1985–1999* (Oxford: Oxford University Press, 2000) 87. See also his remark in *Fairchild v Glenhaven* [2002] 1 AC 32 at [32]: 'In a shrinking world...there must be some virtue to uniformity in outcome whatever the diversity of approach in reaching that outcome'.

<sup>38</sup> See Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 *Modern Law Review* 159; Leonard Hoffmann, 'The Universality of Human Rights' (2009) 125 *Law Quarterly Review* 416.

cance for its affirmation of universal human rights,<sup>39</sup> Hoffmann thought the very idea of universal human rights close to incoherent, and has defended instead ‘the essentially national character of rights’.<sup>40</sup> Where Bingham wrote of ‘our law has been enriched by the injection of international jurisprudence, emanating from [the European Court of Human Rights in] Strasbourg, and binding on the UK in international law’,<sup>41</sup> Hoffmann expressed doubts about the very legitimacy of that court.<sup>42</sup>

This difference also played itself out in Bingham and Hoffmann’s respective judicial opinions. In a case dealing with the legality of indefinite detention of foreign nationals in British prisons, Bingham, relying on extensive analysis of European legal materials, rejected the government’s position and declared some legislation incompatible with the European Convention. Hoffmann reached the same conclusion, but on wholly different grounds. He thought that it is the affirmation of ‘a quintessentially British liberty’ that supports the petitioners, not any European jurisprudence. His speech reads as a textbook statement of the view that sees the common law as a unique political tradition:

I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law....<sup>43</sup>

The “nation” is a social organism, living in its territory (in this case, the United Kingdom) under its own form of government and subject to a system of laws which expresses its own political and moral values. When one speaks of a threat to the “life” of the nation, the word life is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important re-

<sup>39</sup> Bingham, *Widening Horizons* (n 37) 83.

<sup>40</sup> Hoffmann, ‘Universality’ (n 38) 417; Lord Hoffmann, ‘Bentham and Human Rights’ (2001) 54 *Current Legal Problems* 61, 74–76. Curiously, in both these essays Hoffmann invoked the authority of Bentham in support of his views, even though Bentham was a cosmopolitan if there ever was one. See Philip Schofield, ‘The Legal and Political Legacy of Jeremy Bentham’ (2013) 13 *Annual Review of Law and Social Science* 51, 61–62, and sources cited therein.

<sup>41</sup> Bingham, *Widening Horizons* (n 37) 82.

<sup>42</sup> Hoffmann, ‘Universality’ (n 38) 429–30.

<sup>43</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [88]; cf Bryce (n 19) 204–05; Kenneth Minogue, ‘The Elusive Oakeshott’, *The American Conservative* (Oct. 2009) 24, 25 (‘The idea of human rights [Oakeshott] thought a rather second-rate caricature of the inherited Common Law freedoms of English-speaking peoples’). Contrary to Hoffmann (see note 40), Oakeshott recognized Bentham as an enemy of tradition. See Michael Oakeshott, ‘The New Bentham’, in *Rationalism in Politics and Other Essays*, expanded edn (Indianapolis: LibertyPress, 1991) 132, 139. As indeed he was. See Jeremy Bentham, ‘The Book of Fallacies’ in John Bowring (ed), *The Works of Jeremy Bentham*, vol. ii (Edinburgh: William Tait, 1843) 375, 398–400.

spects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War. This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity.<sup>44</sup>

So far, Bingham and Hoffmann's respective views seem to reflect two competing conceptions of authority. I would like to tie these differences now to a substantive question of law on which they expressed widely divergent views, namely the scope of negligence liability of public authority. In an essay entitled 'The Uses of Tort Law' Bingham criticized the majority's view in *Smith v Chief Constable of Sussex Police*,<sup>45</sup> a case in which a majority of the House of Lords (against Bingham's sole dissent) held that police forces owe no duty of care to individuals for failure to prevent them from being attacked, even when the individual provides the police with specific information about the prospect of being subject to a violent attack by a particular, identified, individual. Bingham concluded his essay with these words:

If the virtual immunity now extended by English law to large areas of police activity were removed, there would no doubt be a cost falling, directly or indirectly, on the community who fund the service. If economy were all, the present law has its virtue. But if a member of the public *whom a public service exists to serve* suffers significant injury or loss through the culpable fault or reprehensible failure of that service to act as it should, is it not consistent with ethical and, perhaps, democratic principle that the many, responsible for funding the service, should bear the cost of compensating the victim? I shall leave that as a rhetorical question, confident that my own answer to it is clear.<sup>46</sup>

At almost the same time, Lord Hoffmann delivered the Bar Council Law Reform Lecture, which dealt with the question of negligence liability of public authorities. In his lecture Hoffmann stated:

Some people said that it was illogical that highway authorities should have what they called an immunity from liability for non-repair. But that immunity was exactly the same as everyone else had. No one owed a private law duty to repair the highway. The highway authority owed a pub-

<sup>44</sup> *A* (n 43) [91]. The Human Rights Act, Hoffmann said, allows courts to declare that a statute 'is incompatible with the human rights of persons *in this country*....The declaration of the court enables Parliament to choose with full knowledge that the law does not accord with *our* constitutional traditions'. *Ibid.*, [90] (emphasis added).

<sup>45</sup> [2008] UKHL 50, [2009] AC 225. The case was decided together with the case *Van Colle v Chief Constable of Hertfordshire Police*, by which name the joint case is known.

<sup>46</sup> Lord Bingham, 'The Uses of Tort' (2010) 1 *Journal of European Tort Law* 3, 15 (emphasis added). See also Tom Bingham, 'Who then in the Law Is My Neighbour?' in *The Business of Judging* (n 37) 363, 372-73.

lic law duty to repair, but that, as a matter of ancient policy, was not enforceable in private law.<sup>47</sup>

There is no way the difference between these two statements can be reconciled by context or nuance. What Bingham called ‘virtual immunity’ enjoyed by the police, Hoffmann disparaged as ‘what [some people] called an immunity’. These two statements reflect two divergent philosophies. Bingham’s claim is grounded in a particular view on the obligations a democratic state owes its citizens. By contrast, Hoffmann adopts the libertarian view that treats the state and police officers acting on its behalf as a kind of private actors. It is true that Hoffmann’s concession with regard to the existence of a public law duty complicates the picture, but not by much. By drawing the distinction Hoffmann affirms that members of the public do not have a standing, as citizens, to demand that a public authority perform its duties and then seek compensation when their failure leads to their injury. In this way he keeps the two branches of law (and their underlying authorities) separate. This implies is a fundamentally different view of the relationship between individuals and the state than Bingham’s.

Hoffmann’s suggestion that the state is treated just like any other person has a semblance of neutrality: in the eyes of private law we are all equal. Except that, of course, it does not. Parents are treated differently from others with regard to their children; employers are treated differently from others with regard to their employees; doctors are treated differently from others with regard to their patients. By treating the state in this context as a stranger, Hoffmann equates (for the purposes of tort law) public bodies’ provision of services to a stranger’s act of charity.<sup>48</sup>

Do the differences on the proper place of European and comparative law in English law and their different views on the question of the scope of tort liability of public authorities have anything in common? Though it is difficult to answer this question with certitude, I believe the answer is ‘yes’. At one level, Bingham’s legal cosmopolitanism may have been influenced by the fact that the outcome he favoured was available in other jurisdictions. This is not much of a speculation since Bingham surveyed the law regarding tort liability of public authorities in several common law and civil law jurisdictions and stated that *Van Colle* would

<sup>47</sup> Lord Hoffmann, ‘Reforming the Law of Public Authority Negligence’ (The Bar Council Law Reform Lecture, 17 Nov. 2009) 3, available at [http://www.barcouncil.org.uk/media/100362/lord\\_hoffmann\\_s\\_transcript\\_171109.pdf](http://www.barcouncil.org.uk/media/100362/lord_hoffmann_s_transcript_171109.pdf) (visited 2 Dec. 2014). Hoffmann expressed similar views in his judicial capacity in, among other places, *Stovin v Wise* [1996] AC 923; *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057. However, it is interesting that Hoffmann adopted the exact opposite view when it served *restricting* tort liability against the state. In a nuisance case against public authorities, Hoffmann stated that the question of evaluating the defendant’s reasonableness ‘becomes very different when one is dealing with the capital expenditure of a statutory undertaking providing public utilities on a large scale’. *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42 at [63].

<sup>48</sup> Howarth has pointedly summarized Hoffmann’s view as ‘affirm[ing] the extraordinary rule...that the public rescue services have no duty to rescue anyone’. David Howarth, ‘Public Authority Non-Liability: Spinning Out of Control?’ (2004) 63 *Cambridge Law Journal* 546, 547.

have been decided differently ‘in most of the world’s leading jurisdictions’.<sup>49</sup> Such a finding can influence a judge in two ways. Factually, showing that liability has been imposed on the police in other jurisdictions in similar circumstances provides some assurance that the legal rule he proposed is not crazy and that it is unlikely to have seriously detrimental effects if adopted. This may have been particularly important in the context of liability of public authorities, as a familiar argument for the restricting public authority liability is its potentially deleterious effects.<sup>50</sup> In this respect, legal decisions from other jurisdictions can serve as a source of empirical data that may be more readily accessible to judges than more rigorous empirical studies. Normatively, Bingham’s openness to European law has led him to embrace the view that common law duties should aim to correspond to human rights principles derived from European jurisprudence, thus promoting greater convergence between English and European law.<sup>51</sup>

I think, however, that the link between Bingham’s views on legal convergence and his views on the scope negligence liability of public authorities runs deeper than that. Bingham’s basis for the imposition of liability in *Smith* rests on his conception of what the state owes individuals and his views on European convergence stem from a single intellectual source: universal human rights. In the context of liability of public authorities, it has led him to formulate a liability principle without which, he thought, the law ‘fails to perform the basic function for which such a law exists’.<sup>52</sup> And a fundamental function of that law—tort law—is to protect human rights.<sup>53</sup> As he put it, a democratic state that cares for human rights is obligated to the ‘democratic principle that the many, responsible for funding the service, should bear the cost of compensating the victim’. This duty is very different from the duties that oblige other individuals, and failure to maintain it can amount to a commission of a tort.

Hoffmann’s opposing substantive view is not simply based on the claim that the state is treated the same as individuals. That, as we have seen, is a clearly unsatisfactory argument. Once we acknowledge the significance he accords to the common law tradition, we can see a more plausible explanation for his view. The deep thread Hoffmann finds in the common law tradition—what he calls ‘the quintessentially British liberty’—is the negative liberty of protection from unlawful arrest. What he could not find in that tradition is the kind of relationship between the state and its citizens (he calls them ‘subjects’) that underlies Bingham’s view. What about the possible objection that the existence of an ancient British liberty does not preclude the possibility of creating new duties derived from public law? To this Hoffmann

<sup>49</sup> Bingham (n 46) 13.

<sup>50</sup> See *Hill v Chief Constable of West Yorkshire Police* [1988] AC 53, 63; *Van Colle* (n 45) [74]–[77], [108], [132]–[133].

<sup>51</sup> *Ibid.*, [58]. This suggestion was rejected by some of the other judges on the panel. See *ibid.*, [82], [136].

<sup>52</sup> *Ibid.*, [57]. Bingham reiterated these words in Bingham, ‘The Uses of Tort Law’ (n 46) 270.

<sup>53</sup> *Ibid.*, 269; Tom Bingham, ‘Tort and Human Rights’ in *The Business of Judging* (n 37) 169, 170. Also *ibid.*, 179 (‘the law of tort has the fertility and flexibility to protect nearly all of the most basic human rights’).

replies, once again appealing to tradition, that it is ‘ancient wisdom’ that public law rights cannot be the basis for private law remedies.

#### IV. The Future of a Common Law World

Earlier in this essay I attributed to the common law tradition view the idea that ‘common law jurisdictions ought to converge by appeal to the normative force of commitment to a shared tradition’. A crucial word here is ‘commitment’: a tradition requires a certain normative attitude that seeks its perpetuation. When this commitment is gone, a tradition can disintegrate fairly quickly. Unlike the United States, which broke its ties with Britain from its inception, the Commonwealth nations maintained close political and legal links with Britain, and they also inherited the British political system of parliamentary supremacy and a more modest role for popular sovereignty. In line with that political tradition, the tradition view of the common law remained dominant, a fact that helps explain the continued commitment in these countries to maintaining common law convergence. And yet, in recent years we witness declining convergence even there.<sup>54</sup> In this section I try to explain why this process is taking place and why it is likely to continue apace.

Contrary to Stevens’s view that ‘as common lawyers we are part of the same family whether we like it or not’,<sup>55</sup> my view is that within the tradition view convergence is the product of more-or-less conscious decisions on the part of legal practitioners to maintain commonality. When this effort disappears, two formerly close legal systems will tend *naturally* to drift apart. This point is crucial to understanding the tradition view and for highlighting another important contrast between it and the universalist view. Apart from the differences mentioned earlier, these two views are likely to see the process of convergence as proceeding according to a wholly different pattern. The universal view convergence can emerge ‘naturally’ as a result of two different jurisdictions identifying (possibly completely independently of each other) the requirements of universal morality. After all, according to this view the requirements of morality are accessible to all rational creatures, and so a process of trial and error should eventually lead all legal systems to converge. An imperfect analogy is the biological concept of convergent evolution, where two species develop similar traits independently of each other because of similar evolutionary pressures. This view can see reason as imposing

<sup>54</sup> For statements of the growing legal independence of, respectively, Australia, New Zealand, and Canada, see Peter Finn, ‘Common Law Divergences’ (2013) 37 *Melbourne University Law Review* 509, 510–11, 536; Robin Cooke, ‘The New Zealand National Legal Identity’ (1987) 3 *Canterbury Law Review* 171; Gerard V La Forest, ‘Who Is Listening to Whom? The Discourse Between the Canadian Judiciary and Academics’, in Basil S Markesinis (ed), *Law Making, Law Finding, and Law Shaping: The Diverse Influences* (Oxford: Oxford University Press, 1997) 69, 70–75, 81–82.

<sup>55</sup> Robert Stevens, ‘The Divergence of the Australian and English Law of Torts’ in Simone Degeling et al. (eds), *Torts in Commercial Law* (Sydney: Thomson Reuters, 2011) 37, 40.

similar pressures on all humans, pressures that ultimately should lead their laws to converge. (That this does not happen in reality is reason to doubt the veracity of this picture.)

This process is very different from the tradition view, where history and path dependence are crucial for what counts as a right answer today, and therefore convergence is extremely unlikely to emerge naturally. I will elaborate on this point with the aid of a simple model. This model can be loosely analogized, once again borrowing from evolutionary biology, to speciation, the process (or rather set of processes) by which a single species splits into two. On the tradition view maintaining convergence requires an effort to master the legal materials of more than one jurisdiction and guaranteeing that they proceed relatively in tandem. This is because on this view there are no right answers in the abstract; rather, right answers to outstanding or novel legal questions emerge from past decisions. It follows from this point that maintaining convergence between jurisdictions has costs, the most obvious being that doing so requires attaining and mastering more legal materials that are less accessible. Historically, part of the difficulty may have been simply physical: it was more difficult to have access to all the law reports and academic commentary from another country. These days, when access to legal materials from all over the world is much easier, the problem may be the opposite: the ease of access to legal materials from all over the world results in an overwhelming glut that discourages straying too far beyond one's own jurisdiction. Either way, this cost is enough that without effort small differences will tend to emerge between the two jurisdictions, and those can fairly quickly become larger and therefore increasingly difficult to overcome. Once paths begin to diverge, the costs of using legal materials from another jurisdiction increase, as that jurisdiction begins to use different concepts, use similar words with somewhat different meaning, and develop the common law against a different statutory background. In this way small differences grow bigger until use of materials from that jurisdiction becomes too costly to bother.

At least when divergences are small, the costs of maintaining convergence may not overwhelm, and will be worth incurring when they are outweighed by the benefits of maintaining convergence. There are two typical types of case when this is likely to be the case: First, when one legal system is young or small and as such lacking in sufficient case-law, which is the central building block for the common law tradition; and second, when another legal system is considered superior in terms of its lawmakers' (perceived) expertise. (Obviously, these two scenarios are often, although not always, related.) But as legal systems mature, the benefits of convergence decline while the costs increase. Judges in the formerly 'expert' legal system will no longer seem necessarily superior to the local judiciary, especially when it comes to local conditions, in terms of both facts and values. And with a thicket of local legal materials increasing, keeping up with the materials of another jurisdiction will become more onerous and seem less necessary. (Arguably, there is an optimal amount of cases to master and rationalize, beyond which any effort to articulate a more-or-less coherent single tradition from the cases becomes unwieldy and the tradition approach begins to break down. This may be one reason for the decline of doctrinal scholarship in the United States.) A different cost to convergence

is an inevitable result of the fact that the common law exists in an environment increasingly more saturated with statute, and the common law must often be understood and interpreted in relation to that legislation. Since legislators are much less concerned about maintaining convergence, legislation is more likely to move in different directions in different countries, based on the local needs and political forces. This will push the common law in different jurisdictions in different directions, making maintaining common law convergence more difficult. Doing so may appear elitist when doing so is preferred over solutions that seem to fit the values of the particular community. Even from a more legal point of view, caring for common law convergence may look like an 'academic' self-indulgence compared with maintaining internal coherence within each legal system between its judge-made and statutory law.

Another possible cost of maintaining convergence is that with growing maturity and expertise, the relationship between the two legal systems has to change from largely unidirectional (where one legal system is primarily a law-maker and another is primarily a law-taker) to a reciprocal one. But lawyers in the formerly 'superior' legal system may not acquiesce to their new lower status. This creates a problem, since without *them* agreeing to that, lawyers of the formerly 'receiving' legal system will not see the situation as one of convergence, but rather as one in which they must accept and follow what is imposed from above (or outside). And this will be perceived as an additional, possibly prohibitively hefty, cost. (Could this be the reason why it is mostly English scholars who lament the decline of common law convergence while those from, say, Australia or Canada seem much less concerned about going their own way?)

For these reasons, even within the tradition view, common law convergence will tend to *naturally* decline with time unless it is vigilantly pursued. In fact, the tradition view may actually call for *less* convergence once two legal systems have begun charting their separate ways. Once two legal systems have begun taking two different paths, the tradition view with the premium it places on path dependence may call for keeping them to these paths rather than attempting a precipitous shift toward another approach just for the sake of getting closer to a solution adopted in another jurisdiction. As a result, the tradition view that in some cases supports convergence, beyond a certain point can actually encourage divergence.

At a deeper level, there is, I think, a decline in the appeal of the tradition view itself. This is a crucial point, because maintaining convergence is valuable *only if one accepts the tradition view of the authority of the common law*. With different degrees of intensity, one finds the question 'Why *should* our common law be grounded on the tradition model of authority?' being asked. Of course, the question is not rarely asked in quite this way, but in different formulations, it is asked at increasing frequency. As mentioned earlier, the tradition view of the common law depends on a perception of law as an autonomous discipline, of law as the generator of normative requirements on the basis of careful elaboration of its own past materials, where expertise consists of mastering the contents of countless court decisions. Though not completely obsolete, this idea is on the wane.

One reason for that is that the tradition view is premised on the idea that the authority of the common law derives from judges' ability to discover in legal materials certain values that run deep in a particular community. This view thus could avoid the puzzle of the authority of the common law by assuming both that judges are experts and that their expertise is of value for determining the content of legal rules for a particular community. These days, both assumptions look suspect. The first assumption has been affected by the many detailed studies have suggested that the seemingly neutral, equal, common law has (perhaps completely innocuously) shown greater concern for the interests of certain groups rather than others, unsurprisingly the groups of those who belong to the elite that on the tradition view shape the common law. As a result, even someone sympathetic to tradition as a source of authority might not like the way the common law implements it. In response, the common law has changed in various ways to address this problem, although the extent of its success is, of course, a controversial matter. The second concern is, I think, even more serious, as it touches on the *nature of lawyers', especially judges', alleged expertise*. For the tradition-based approach not only accepts but actually celebrates the common law's separation from external standards. The common law expert is someone who does not know much about the way the law actually works in practice, and who has little ability to assess the potential effects of different rules. Even more simply, the common law expert has relatively little knowledge on the extent to which the common law adequately addresses actual concerns and needs of the population. It is, for example, notable that the idea that sexual harassment or stalking should be treated as a tort (a matter that in terms of numbers is potentially relevant to the lives of millions) did not originate from doctrinal tort scholars, but exactly from those who adopted an 'external' or critical perspective on the law. For what the common law considers expertise—great knowledge of a mass of cases and the ability to work them out to a more-or-less coherent account of 'the law'—can hardly help with addressing developing needs of society. (Could it be that such considerations are judged as 'external' to the evaluation of the common law because they are external to what the common law experts know?) Instead, the tradition-based approach suggests that the decision how certain areas of life should be structured is ideally to be decided on nothing more than the primitive tools of the Talmudic scholar and the scholastic student: mastery of past pronouncements made by people who are equally ignorant of the law's effects, and who focus their attention on the articulation of verbal formulae and 'tests' for identifying whether a new decision adequately follows past decisions or is properly 'distinguishable' from them. When stripped of its mysticism the tradition view can thus be seen as a little more than seventeenth-century policy analysis.

It is this reality that has led to the narrowing down of the scope of decision-making given to this kind of expertise, as is evident from the decreasing significance of the common law. In areas still governed by the common law, there have been various attempts to attempts to change the common law in various ways that will give its decision-makers the tools to make better-informed decisions. This process further weakens the hold of the appeal to the normative force of a historical tradition. Instead, judges are increasingly attempting to make deci-

sions based more on an assessment of the contemporary needs of their particular society, taking also into account local cultural, social, political circumstances. And these, needless to say, are not exactly the same across the common law world.

To be sure, England, Canada, Australia, and New Zealand are all democratic, developed countries; but then so are Denmark and Japan. There might have been a time in the past when, perhaps, one could speak of similarity in values between England and its former colonies (although I suspect that even then this was more an elite concern than something that preoccupied the whole population), but with much immigration from non-English speaking countries and the slow development of more uniquely local ways, it makes little sense to maintain that Australian, Canadian, English (or is it British?), and New Zealand cultures are all the same. These differences, even if not huge, can (and do) have an effect on the outcomes of cases, especially contentious ones. Differences between common law countries are then seen not as a cause for concern, but as a sign of independence.

Against all this, we can return to the questions posed in the beginning of this essay: Why do some lawyers consider it more important that the tort law of England and Australia or the contract law of Canada and New Zealand be similar than their constitutional law, their company law, or their labour law? Why, even though criminal law is (or used to be) part of the 'common law', there are no concerned voices about the fact that the criminal laws of different common law countries may be different? I believe the way I set up the question helps identify the answer. As far as I can see, maintaining common law convergence is important for those who seek to maintain the tradition view of the common law itself (and along the way, validate their own kind of expertise). What better proof could there be for the idea that the common law is a matter of non-political expertise than the fact that politically independent states share the same common law? Common law convergence is thus valued for proponents of the tradition view both for demonstrating the truth of this view, and for perpetuating it.

Common law convergence, however, is a rather weak reed for maintaining a view that is independently unattractive. As we have seen, the common law convergence view is deeply connected to the idea of law as an autonomous discipline, and this is a view held these days by a shrinking minority. We know too much about the world to think that the path to improving the law exclusively, or even primarily, depends on analysing judges' pronouncements. As a result, the decline in commonality is both indicative of, and accelerates, the decline of the theory of authority that values common law convergence and the autonomy of law, a process which in turn weakens the hold of convergence even further.

## V. Concluding Remarks

The last section should not be misunderstood. My claim is not that common lawyers should not consider what happens in other countries; and if they do, it is more likely that they will do so with courts from the rest of the English-speaking world. That is why what I said in this essay should not be understood to mean that in fifty years' time common law judges will no

longer be able to understand each other's judgments. If nothing else, there is no language barrier to overcome, and other non-legal links may keep common law jurisdictions somewhat closer to each other than others. And in law, perhaps more than elsewhere, old habits die hard. It is notable, however, that common lawyers care much less than they used to whether their own legal system adopts the same solutions as other common law countries,<sup>56</sup> and my claim is that this trend will continue and probably intensify. My prediction is thus that most Commonwealth lawyers will care about Commonwealth convergence the same way they feel about maintaining convergence with American law, which means, not much.

More generally, this essay was motivated by an underlying normative claim. It is important to note that those who would like to maintain convergence in the common law are really making a very narrow claim in two senses. They intend common law convergence to be limited to a small list of legal areas, namely contract, tort, and restitution (even property law, let alone criminal law or family, no longer look like obvious candidates for convergence); and they intend it to a small subsection of common law countries, namely England, Canada, Australia, and New Zealand. This convergence is presented as required by nothing more than the *fact* of a shared history (recall Stevens's words: 'as common lawyers we are part of the same family whether we like it or not') and it delivers precisely the kind of convergence that fits the tradition view of common law authority and its supposedly non-political nature. What I have sought to show is that this call for convergence is not free from politics. Indeed, Stevens himself has alluded to a more positive reason for maintaining common law convergence when he said that '[t]he shape and nature of the common law has been determined by its method of creation. Civil codes are the products of the choices of legislators, under the influence of legal scholars, and it is unsurprising that the choice made differ in many respects from those of judges, whose role and concerns are not the same.'<sup>57</sup> This is partly true, but Stevens's mistake, like that of many other proponents of the tradition view, is to think that once a legal system belongs to the common law, it must be understood and justified in terms of the tradition view of authority. As I have attempted to show, this is not the case, and if the common law does not interact with politics anywhere else, its underlying theory of authority is not politically neutral, but one that has real-world, practical, implications.

The concluding section has made what may be understood as another prediction (or perhaps just a bit of wishful thinking), and that is that the decline in convergence is part of a decline of the tradition view itself, and that its decline may bring with it not just the dissolution of the idea of a common law *world*, but also the decline of the idea of the *common law* as a decision procedure. If this is to happen, we will witness a decline in the view that mere mastery of past court decisions, together with some facility with language and informal logic, are a good basis for adequately-regulating any aspect of human behavior. In medieval times this was the method used because this was the only method available; this is no longer the case.

<sup>56</sup> For many examples see Stapleton (n 31) 786–90.

<sup>57</sup> Stevens, *Torts and Rights* (n 5) 342.

That is why, even though the common law is still with us, it is far less important than it used to be. Its marginalization is proof of the mistrust in this method of regulation and its experts. Even where the common law governs a question, it is rarely left to its own devices and is virtually everywhere accompanied by extensive legislative regulation. With regard to those decisions still given to judges, there is growing awareness on part of the judges that they should base their decisions on the scope of the legal rules they adopt on better information on the social effects of their choices. Many proponents of the common law method resist this move making the point that judges do not have the necessary knowledge or ability to assess questions of social policy. But since such considerations are clearly relevant for deciding such questions, if it is indeed the case that judges cannot evaluate them, the sensible solution is not to remove the *considerations* for the decision-making process, but to remove the *judges* from it. The prevalence of regulation is proof that this is in fact the solution that has been adopted in countless of contexts. One implication of the argument in this essay is that this process cannot be separated from the decline in common law convergence.