

## Seduction of a Law Professor

Review of Allan C Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge: Cambridge University Press, 2012), pp 328. ISBN 978-1-107-01726-9

Shauna Van Praagh

---

Volume 59, Number 1, September 2013

URI: <https://id.erudit.org/iderudit/1018989ar>

DOI: <https://doi.org/10.7202/1018989ar>

[See table of contents](#)

---

Publisher(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (print)

1920-6356 (digital)

[Explore this journal](#)

---

Cite this review

Van Praagh, S. (2013). Review of [Seduction of a Law Professor / Review of Allan C Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge: Cambridge University Press, 2012), pp 328. ISBN 978-1-107-01726-9]. *McGill Law Journal / Revue de droit de McGill*, 59(1), 211–224. <https://doi.org/10.7202/1018989ar>

---

Copyright © Shauna Van Praagh, 2013

This document is protected by copyright law. Use of the services of Érudit (including reproduction) is subject to its terms and conditions, which can be viewed online.

<https://apropos.erudit.org/en/users/policy-on-use/>

---

**érudit**

This article is disseminated and preserved by Érudit.

Érudit is a non-profit inter-university consortium of the Université de Montréal, Université Laval, and the Université du Québec à Montréal. Its mission is to promote and disseminate research.

<https://www.erudit.org/en/>

—————SEDUCTION OF A LAW PROFESSOR—————

Review of Allan C Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge: Cambridge University Press, 2012), pp 328. ISBN 978-1-107-01726-9

*Shauna Van Praagh\**

## Introduction

Why do judges receive so much attention—whether in law classrooms, in biographical works, or even in our collective psyche? They are not superhuman; they are not the only or even the principal creators of the rules that structure our lives; and they do not explicitly or freely choose the issues about which they have something to say. Indeed, the people whose stories lead them to court are crucial to the work of judges, as are the jurists who frame those stories and articulate the arguments that connect them to sources in law. And yet, as one of my students recently asserted in class, law professors in particular appear to be “seduced” by judges! That seduction is at the very core of Allan Hutchinson’s book, *Laughing at the Gods: Great Judges and How They Made the Common Law*—a book that showcases a deep fascination with judges and the ways in which they affect law and society.<sup>1</sup>

Hutchinson’s book reflects a double-pronged preoccupation: first, a preoccupation with “choosing” individuals who satisfy the criteria Hutchinson offers for being included on a shortlist of “great judges”, and second, a preoccupation with “musing” as to the contributions of these selected few to the creation and continuity of the common law. This “choosing and musing” project takes very seriously the task of selecting great judges and justifying that selection. At the same time, it promises avenues for ongoing reflection by law students, lawyers, and judges on what it means to participate actively in the content, form, and development of

---

\* Associate Professor, Faculty of Law and Institute of Comparative Law, McGill University. A team research project, entitled “Gouvernance pédagogique dans l’enseignement du droit au Canada”, headed by Pierre Noreau and funded by the Social Sciences and Humanities Research Council of Canada, provided support for the teaching, research, and writing that inform this essay and for the much-appreciated research assistance of McGill law student Miriam Clouthier.

<sup>1</sup> Allan C Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge: Cambridge University Press, 2012).

the common law. The book should provoke critical engagement with the notion of “greatness” and with the power of judicial voice and action—and this review essay underscores the importance of asking hard questions along this vein. But, for most readers, the tangible value of the book will resonate through their enjoyment of finding favourite and familiar faces and stories in the book’s pages, and of imagining responses to Hutchinson’s wide-ranging, immensely readable, and sometimes provocative remarks.

As a long-time law professor and scholar, Hutchinson does appear seduced—by the very idea of greatness, by the judge’s potential to effect change, and by the personal stories and characters of the individuals who make up his “top eight” list of great judges. But he is not alone. In responding to his invitation to “laugh at the gods”, I explore the seriousness with which judges are treated, by Hutchinson himself and by law students, jurists, and law teachers more generally. I do so within a framework structured by three exercises undertaken by law students in the Advanced Common Law Obligations course I teach at McGill.<sup>2</sup> In a course dedicated to examining the form and method of the common law, intertwined with selected substantive private law issues, judges receive careful attention. As illustrated by the exercises, they are named as principal actors in a legal tradition, expected to fulfill the requirements of a complicated job description, and subject to restraint even as they take risks. The students, like the readers of Hutchinson’s book, learn that it is crucial to pay attention to judges’ individual voices, to understand and appreciate the ways in which judges justify their decisions, and, finally, to enjoy themselves as they imagine conversations among judges across cases, courts, and contexts.<sup>3</sup>

## I. Exercise One—“Name Great Judges”

The first session of “Advanced Common Law Obligations” is devoted to a quiz focused on the key historical, structural, and methodological aspects of the common law. Among questions that touch on writs, law French, the Inns of Court, and the case method as form of legal pedagogy, is the following: “Name three ‘great’ judges who have contributed to the development of the common law, making sure to include at least one from England and one from the United States.” The message is that naming judges, discerning their “greatness”, and acknowledging the rich backdrop

---

<sup>2</sup> Special thanks for their ideas and enthusiasm go to law students in my Advanced Common Law Obligations classes of Fall 2011 and Fall 2012.

<sup>3</sup> See Karen Crawley & Shauna Van Praagh, “Academic Concerns’: Caring about Conversation in Canadian Common Law” (2011) 34:2 Dal LJ 405.

offered by both the United Kingdom and the United States for assessing their contributions are all projects central to understanding and participating in the common law. The notion of the “great judge” is uniquely bound up in the nature, content, and form of the common law tradition.

The title of Allan Hutchinson’s book, *Laughing at the Gods*, plays with the notion of tempting the “laughter of the gods”—responsible, according to Francis Bacon, for the ruin of anyone who “undertakes to set himself up as a judge of Truth and Knowledge.”<sup>4</sup> The subtitle of the book, *Great Judges and How They Made the Common Law*, suggests—as does the exercise of naming great judges—that the role of judge is no laughing matter. Indeed, common law judges are treated as if they do and should decide “truth and knowledge”. Rather than tempting the laughter of the gods, great judges are perhaps more commonly compared to the gods themselves. And, if we tend to confuse “great judges” and “gods”, then Hutchinson suggests that we should explore why and how we do so. The title alone signals the author’s enjoyment in creating his book, introduces a tone shaped by the intersection of true respect for greatness and critical, sometimes even irreverent, humour, and situates the act of “laughing at the gods” in the specific context of Anglo-American common law.

Who are the “great judges of the common law” according to Hutchinson? How does he choose? As he points out in the introductory chapter entitled “In Search of Great Judges”, the list will depend on the list maker’s view of law itself. For Hutchinson, common law has an “experimental, catch-as-catch-can, and anything-might-go sense about it,”<sup>5</sup> and so it is not surprising that, in his view, great judges are bold, creative, and even transformative. But, even as he tries to tie the nature of the common law to the notion of judicial greatness, he turns for true inspiration to a list of individuals who he says are recognized as “great people” in history: Mahatma Gandhi, Elizabeth I, Nelson Mandela, Golda Meir, Martin Luther King Jr., and Albert Einstein. Their individual attitudes, abilities, and visions reflect the courage and commitment that Hutchinson identifies in his chosen eight.

From the start, Hutchinson’s list of six great leaders seems more wide-ranging than his collection of eight “great judges”: Lord Mansfield, John Marshall, Oliver Wendell Holmes Jr., Lord Atkin, Lord Denning, Thurgood Marshall, Bertha Wilson, and Albie Sachs. But this is not so surprising given the history, shape, and location of common law. Three of the eight are English, three are American, and the remaining two come from Canada and South Africa, respectively—although Hutchinson could well

---

<sup>4</sup> Quoted by Hutchinson, *supra* note 1 at 3.

<sup>5</sup> *Ibid* at 9.

have included an Australian to round out the principal members of the common law “family”. The Canadian is a woman, whose contributions to gender equality are singled out, and one member of the octet is African-American, celebrated in particular for his impact on racial equality. One of the judges makes his mark in the eighteenth century, another in the early part of the nineteenth, and the others span the twentieth century from beginning to end.

Hutchinson articulates his choice as based primarily on the insistence of his eight judges on “do[ing] things their own way.”<sup>6</sup> This should seem a little strange given the necessary shaping function of the common law itself on these individuals and their decision-making. If, however, we follow Hutchinson’s view of judges as principal social actors with influence over human interactions and the development of communities and states, then it becomes clear that a willingness to question received wisdom in order to pursue social justice is an essential part of greatness. At the same time, Hutchinson’s choice is clearly based on factors going beyond an elusive standard of greatness. The historical and geographical parameters that shape Hutchinson’s selection of judges underscores the particular significance of the past two hundred years of interaction between law and society in the United Kingdom, the United States, and their common law relatives.

There is nothing particularly surprising in the choice of these eight. But neither should we be convinced that Hutchinson’s choice is somehow “right” or inevitable. Instead, it is what Hutchinson does with his eight chapters, each dedicated to one of his great judges, that has to convince us whether his book moves beyond a collection of biographical sketches to a sustained discussion of participation, mechanisms of change, and the roles and responsibilities of judges in the common law.

## II. Exercise Two—“Job Description: ‘Common Law Judge’”

If we imagined posting a job opening for a “common law judge”, what would we look for in the ideal candidate? When my students in Advanced Common Law Obligations do this exercise, the job description includes elements relevant to judging in general and also elements that capture the position’s common law specificity. Candidates for the job of “common law judge”, according to the students, should be thick-skinned and far-sighted, patient and even slightly pompous, courageous and conscientious, good writers and careful thinkers. They should be able to reason by analogy, show respect for tradition and precedent, exercise creativity and recognize

---

<sup>6</sup> *Ibid* at 14.

social reality, and—according to some of the students—display storytelling or even poetic talents. It is not an easy job to fill.

The exercise of trying to articulate elements of a job description for the position of “common law judge” provides the backdrop for evaluating whether someone not only meets expectations but also excels in the role. It pushes us to identify what is key to the role of the common law judge and thus maps nicely onto the elements that connect Hutchinson’s eight central chapters. These eight judges have already had much written about them, whether focused on their judgments, on their personal trajectories, or on their influence on the development of law and their societies. Hutchinson’s contribution is to bring them together and to insist that the intersection of personal character and professional responsibility—offered in eight variations—can produce greatness in meeting and exceeding the job requirements.

The eight judges—from Lord Mansfield to Albie Sachs—are each given a thirty-page chapter. Thirty pages, of course, are not enough to provide even a condensed judicial biography. Instead, each of Hutchinson’s substantive chapters can be characterized as a sketch of, or cameo appearance by, each judge, or—to sustain the job description analogy—a curriculum vitae and post-retirement report rolled into one. The challenges faced by each individual judge, whether personal and family-related or time- and context-specific, are described. Intimately connected to those challenges are the significant contributions made by each judge through articulation of legal concepts, decision-making in cases, interpretation of constitutions, and the development of the common law.

Hutchinson does not pretend to unearth anything new either at the level of personal history or at the level of professional impact; that is, his book is not the result of original primary source research but rather of the reflections that come from a synthetic review of secondary sources on these individual judges. For readers already familiar with some or all of these characters, the freshness of the text emerges in the few pages of each chapter where we can truly hear Hutchinson’s voice and critical commentary. For example, Lord Mansfield’s impacts on commercial law, on the abolition of slavery, and on justice in and through the common law are all described in detail and with appropriate admiration. But it is the line “[t]o be a Scotsman in eighteenth-century England was to court suspicion and often resentment”<sup>7</sup> that gives us insight into the resonance of this judge’s life path with Hutchinson’s own, as a Scots jurist qua vibrant Canadian law professor. Lord Mansfield, we are told, set the bar high for later “great” judges—and his story and example pave the way for those

---

<sup>7</sup> *Ibid* at 50.

who span the late nineteenth to late twentieth centuries in Hutchinson's collection.

Following in the second chapter comes Chief Justice John Marshall of the United States Supreme Court, rightly noted for his leadership on judicial review and constitutional interpretation. Hutchinson characterizes him as "that rare figure who blended principle and pragmatism as well as subtlety and substance into a paradoxical but appealing jurisprudential project that won over his peers and has withstood the test of time."<sup>8</sup> This, and the following chapter devoted to Oliver Wendell Holmes Jr., illustrates Hutchinson's interest in American history, politics, and legal institutions. He reminds us that anyone interested in the common law tradition cannot focus solely on its English origins, but must pay attention to its development and to the principal players on this side of the Atlantic. Holmes, for whom famously "[t]he life of the law has not been logic: it has been experience,"<sup>9</sup> insisted on the deep social grounding of both the structure and the substance of the common law. But Hutchinson calls Holmes "the law's Jekyll and Hyde"<sup>10</sup> and has to confront the difficulty of conferring the label of greatness on a judge whose values and social philosophy he clearly finds distasteful and even dangerous.

The contrast with Lord Atkin—who, in Hutchinson's view, is great because of his modesty and care for the common person—is striking. Lord Atkin's chapter is subtitled "An Ordinary Person", and here Hutchinson provides a very different possibility for the path to greatness in common law judging. Perhaps best known for turning to the Bible in order to articulate the "neighbour principle" in the tort of negligence ("The rule that you are to love your neighbour becomes in law, you must not injure your neighbour"),<sup>11</sup> Lord Atkin is celebrated by Hutchinson as a generous and modest civil servant. It is not clear, however, that Lord Atkin lacked a strong-willed sense of his influence on the direction of the law. Indeed, the implied contrast of a humble Lord Atkin and a forceful Justice Holmes may be exaggerated; both may have been well aware of the scope of their role and ambitious in filling it.

The chapter devoted to Lord Denning confronts head-on the complex coexistence in one person of innovation, self-righteousness, compelling empathy, and objectionable conservatism. Hutchinson tellingly entitles the chapter "Tom Denning – An English Gardener", referring to the judge

---

<sup>8</sup> *Ibid* at 76.

<sup>9</sup> Oliver Wendell Holmes, *The Common Law* (Cambridge, Mass: Harvard University Press, 2009) at 3.

<sup>10</sup> Hutchinson, *supra* note 1 at 82.

<sup>11</sup> *Donoghue v Stevenson*, [1932] AC 562 at 580, [1932] All ER Rep 3.

in a deliberately familiar fashion and thus mirroring the approach to writing of Lord Denning himself, who “made a conscious and concerted effort to shun a cold or clinical technique and, instead, cultivated a more colorful and colloquial style.”<sup>12</sup> Denning’s impact on the common law came partly in the form of particular changes to legal rules, often accompanied with disdain for formalities or even for fixed principle, and partly in the form of his willingness to wade into social policy, often burdened by a striking nostalgia for the way England was or should be.<sup>13</sup>

The metaphorical role of gardener refers to Denning’s penchant for dramatic weeding, directed replanting, and attentive nurturing, all within the pastoral countryside for which he took responsibility. But, as was the case with Denning, dedicated gardeners sometimes forget to look up at the horizon, and aging gardeners sometimes refuse to retire. Hutchinson does not offer an elaborate critical analysis of the racist and sexist views expressed by Lord Denning both pre- and post-retirement, but accepts them as “objectionable elements of his personal philosophy,”<sup>14</sup> “warts ... [that] detract from his attractiveness but not from his influence.”<sup>15</sup> More could be done to probe the reasons for which law students and jurists can combine distaste and even horror at some of Lord Denning’s pronouncements and priorities with admiration, amusement, and even awe. In Hutchinson’s hands, Lord Denning is compared to Star Trek’s Captain Kirk and, a few pages later, to Winston Churchill—bold, imperfect, courageous, distinctive, larger-than-life, and unforgettably great.

The back-and-forth from England to the United States, the all-white, male, and Christian collection of characters, and the explicit scrutiny of decision-making within the confines of Anglo-American common law come to an end as Hutchinson moves to his final three subjects: Thurgood Marshall, Bertha Wilson, and Albie Sachs. The question of the relationship between law and justice, or between judging and social values, runs through all eight chapters. But with these three, the job description noticeably shifts. The greatness of these judges is explicitly located in the links forged between the individual person, the particular social context, the power of judging, and the impetus for change. The focus throughout is on constitutional law, fundamental freedoms, and the administration of justice. Indeed, the only common law private law judgments that receive sustained attention are two judgments of Justice Bertha Wilson while on

---

<sup>12</sup> Hutchinson, *supra* note 1 at 151.

<sup>13</sup> For more on Lord Denning’s nostalgia, see Dennis R Klinck, “‘This Other Eden’: Lord Denning’s Pastoral Vision” (1994) 14:1 Oxford J Legal Stud 25.

<sup>14</sup> Hutchinson, *supra* note 1 at 171.

<sup>15</sup> *Ibid* at 172.



the Ontario Court of Appeal—not coincidentally decisions with influential impact on human rights protection and anti-discrimination (*Bhadauria* and *Becker v. Pettkus*).<sup>16</sup>

These last three chapters feature the first African-American Justice of the United States Supreme Court, the first woman Justice of the Supreme Court of Canada, and the most famous and apartheid-fighting Justice of the South African Constitutional Court. All are leaders well-known for who they were, the institutional barriers that they broke down on a personal and professional level, and the ways in which their voices and visions resonate in their judgments.

The three descriptions of these judges, their courts, and their countries and constitutions are compellingly presented. But, although Hutchinson asks the inevitable questions as to the links between “greatness” and individual identity, he does not turn his discussion into an extended analysis of the sometimes crudely-drawn connections between person and politics; or between race or gender, on the one hand, and substantive positions in law, on the other. In Hutchinson’s words, Justice Marshall’s “standing as a great judge cannot be divorced from, even if it is not reducible to, his status as a black American,”<sup>17</sup> and Justice Wilson “never forgot what it felt like to be a new immigrant [in her case, from Scotland] ... [or] the injustices and indignities that women still had to face in Canadian society.”<sup>18</sup> The title of the chapter on Bertha Wilson, “Making the Difference”, draws from her 1990 lecture in which she asked, “Will women judges make a difference?”<sup>19</sup> Hutchinson takes up the invitation to reflect on the ways in which diversifying the bench may, and should, bring changes to the form, tone, and content of judging, and to societal interactions more broadly. By choosing as his last great judge Justice Albie Sachs—a white, Jewish South African leader instrumental to the collapse of South African apartheid—Hutchinson refutes any simplistic assumption that the impetus and talent to bring about crucial transformation across a society can only be found in individuals belonging to particular identity-defined communities. Indeed, the closing remarks in this final chapter describe Sachs’ tribute to his non-judicial comrades-in-struggle against apartheid—a reminder that the greatness of each member of this

---

<sup>16</sup> *Bhadauria v Board of Governors of Seneca College of Applied Arts and Technology* (1979), 27 OR (2d) 142, 105 DLR (3d) 707 (CA); *Becker v Pettkus* (1978), 20 OR (2d) 105, 87 DLR (3d) 101 (CA), cited in Hutchinson, *supra* note 1 at 222–23.

<sup>17</sup> Hutchinson, *supra* note 1 at 203.

<sup>18</sup> *Ibid* at 220.

<sup>19</sup> Madame Justice Bertha Wilson, “Will Women Judges Really Make a Difference?” (1990) 28:3 Osgoode Hall LJ 507.

octet owes much to the others in the picture and to the support, commitment, and collaboration of the people and communities in the background.

In the end, what are the pieces of the job description for common law judge that stand out for Hutchinson? In his conclusion, he lists background, ideology, timing, longevity, popularity, character, and style—precisely the factors that shape the chapter presentations of each of the octet—as contenders. But then he is forced to acknowledge that he cannot pin down shared characteristics: “What it takes to become and be acknowledged as a great judge defies simple elucidation or formulation.”<sup>20</sup> What he can say is that “great judges make their own place ... [and] clear a space for others to create their own places”;<sup>21</sup> they are “originals who, by example and excellence, reveal a way of being a judge that makes what has gone before no longer quite so obvious, acceptable, or ennobling.”<sup>22</sup> In other words, we can pay attention, like he does, to the factors, but none of them turn out to be decisive in the creation of “greatness”.

The eight chapters on the eight judges are interesting short essays in themselves—partly in their synthesis of what has been said before, and partly in their illustration of Hutchinson’s “do it their way” sense of greatness. They embody the “choosing” and “musing” that shape the project: they capture the reasons for which these judges continue to be recognized as “great figures” in the landscape of British, American, and Commonwealth history, as well as the author’s critical admiration of their characters and contributions. But, in the same way that it is hard to find a common thread through the preoccupations and forms of judicial biographies, or to explain the fascination they hold, it is difficult to figure out the take-away message about the making of the common law and the special roles of judges—whether good or great—in that process.

What Hutchinson does not note in his book is that, for most of its history, the common law did not treat judges as particularly important at all.<sup>23</sup> In old books and reports of the common law, we might find the names of the reporters and commentators and of the king or queen. But it is not until the eighteen hundreds that judges began to become significant in the development of the common law. That coincides with the slow tran-

---

<sup>20</sup> Hutchinson, *supra* note 1 at 275.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* at 267.

<sup>23</sup> For more on the history of common law and its judges, see generally AWB Simpson, *An Invitation to Law* (Oxford: Basil Blackwell, 1988); DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999); H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 4th ed (New York: Oxford University Press, 2010) at 238–47.

sition of the common law from a “law of writs”—all about form, with disputes over facts decided by juries—into what we understand to be the common law content and method today. And it underscores the fact that the job description of the common law judge had changed radically just prior to the time period covered by Hutchinson’s octet, and continued to evolve over the nineteen hundreds, especially through the work of the courts to which these judges belonged.

This reminder of the historical timeline of the common law helps us sharpen the questions we do and should ask with respect to the nature and limits of common law judging. Should the job description for common law judges be somehow tradition-specific, distinct from that of their civil law counterparts? Should it conjure up the historical divide between the common law and equity, such that judges understand their roles and responsibilities differently depending on whether they put on a common law or equity hat as they make a decision? Should the job description be careful to avoid elements shared by the posting for policy-makers or legislators? Understanding what common law judges are expected to be and to do partly depends on knowing what they are not, and what they do not or cannot do on the job.

### III. Exercise Three—“Relationship to Restraint?”

The third and final exercise examines the relationship of common law judges to the restraints they feel within their legal tradition. The Advanced Common Law Obligations students read judgments related to the tort of negligence by both Lord Denning and Justice Cardozo (a “great” common law judge who did not make Hutchinson’s top eight). At the same time, they read critical commentary on Lord Denning’s pastoral vision, Cardozo’s own work on the connections between judge and legislator, and essays on the distinctive history, form, and future of the common law.<sup>24</sup> They notice the ways in which Cardozo and Denning, albeit differently, use their storytelling talents to shape—or force—the law in new directions. And then they are asked whether and how these “great” judges feel restrained in what they do. Where does such restraint come from, and how is it understood?

---

<sup>24</sup> See especially Klinck, *supra* note 13; Benjamin N Cardozo, “Lecture III. The Method of Sociology—The Judge as Legislator” in *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) 98; Cass R Sunstein, “On Analogical Reasoning” (1993) 106:3 Harv L Rev 741; Karl N Llewellyn, “This Case System: Precedent” in *The Bramble Bush: The Classic Lectures on the Law and Law School* (New York: Oxford University Press, 2008) 55; Geoffrey Samuel, *Epistemology and Method in Law* (Aldershot, England: Ashgate, 2003).

Hutchinson never quite asks this question explicitly. His book celebrates resistance, boldness, leadership, energy, and vision. Perhaps, however, these judges are all particularly astute at understanding where the boundaries are, and that is exactly why they can transgress them without destroying the foundations and framework of an entire legal tradition. Those transgressions are transformed into indicators to others of where to place their feet in order not to fall off the path. H. Patrick Glenn captures this notion of bounded, yet still risky, independence of judges in the common law tradition: “[T]hey commit themselves to an ethic of independently administering justice, within the cadre of the law. They are freed to be law-seekers, and not law-appliers. They are self-disciplining loose cannons, dangerous for systems.”<sup>25</sup>

Three obvious boundaries or sources of restraint come out in the class discussion of this third exercise. First, the specificity of common law methodology lies in its demand that judges always pay attention to the past in the form of precedent, and that they proceed in an inductive manner from the ground up. Second, the historical divide between law and equity meant that common law judges were bound to apply rigid rules even in the face of injustice, and that the possibility of correcting such injustice lay in something beyond law. The third boundary is perhaps most succinctly captured in Lord Devlin’s assertion that “[s]ocial justice guides the lawmaker: the law guides the judge.”<sup>26</sup> That is, precedent and principle are the stuff with which the common law works; judges are neither well-suited nor well-prepared to make decisions according to some undefined parameters of social justice.

If these restraints were literally understood or applied, Hutchinson’s eight great judges—and others like them—might be cast as failures or even traitors to their legal tradition! But the fact that great judges test the limits and transgress the boundaries does not necessarily mean that they do not respect restraints. Neither does it mean that those restraints do not continue to influence and shape the common law. The implications of the three restraints for figuring out “greatness” might be the following. First, great judges understand that they have to pay attention to the past. They might be particularly creative with the analogies they use, they may find other ways to hold onto tradition, they may convincingly redefine the ground upon which they build, and they appreciate that resort to open breaking with precedent should be exceedingly rare. Second, great judges take seriously the merger of law and equity, and the ways in which flexibility is woven, even if unevenly, into the common law tradition. Thus,

---

<sup>25</sup> Glenn, *supra* note 23 at 258.

<sup>26</sup> Lord Devlin, “Judges and Lawmakers” (1976) 39:1 Mod L Rev 1 at 7.

correcting injustice becomes part and parcel of the responsible rethinking and resetting of principles core to both private and public law. Third, and perhaps most difficult to articulate, great common law judges do not mistake themselves for legislators and policy-makers. Even when they make an explicit appeal to policy-related considerations in their decision-making, they know that their role is not the same as that of individuals elected to govern or appointed to administer. The line is hard to draw, but great judges know it is there.

Lord Denning divided judges into “timorous souls ... fearful of allowing a new cause of action” and “bold spirits ... ready to allow it if justice so required.”<sup>27</sup> It was clear to which camp he thought he belonged. But the dichotomy is exaggerated. In between fall all the judges ensuring that the common law respects the past at the same time that it moves forward. Cardozo referred to this task as one of “fill[ing] the open spaces in the law”<sup>28</sup>—a far cry from creating law from scratch, but an honest acknowledgement of the judge’s prerogative in finding gaps that need to be filled. One of the fascinating things about common law judges is that they *do* make the law, but they must say that they do not. Indeed, we start to worry when they do not seem restrained. In that sense, Denning might be great, but we could not have more than one of him.

A key strength of the common law tradition, says Lord Goff in a lecture at the turn of the twenty-first century on the future of the common law, is the fact that we “can hear the voice of the individual judge speaking from the page.”<sup>29</sup> Judges author their judgments—majority, concurring, or dissenting—and, in that way, they personalize their contributions to an ongoing conversation. Their judgments have a real impact on people, societies, and lawmakers, but they are tested and evaluated over and over again by lawyers, other judges, academics, and students. Judges are judged on the basis of their judgments—for the expressive quality of their writing, for their ability to compare and contrast, for the clarity of their insights, for the clairvoyance of their perspective, and for their sensibilities vis-à-vis the people whose interests, identities, and integrity are at stake. They participate in the constant transformation of what has gone before—as they restate precedent, articulate principle, and integrate policy—and the constant re-laying of foundations to what will follow.

---

<sup>27</sup> *Candler v Crane, Christmas & Co*, [1951] 2 KB 164 at 178, [1951] 1 All ER 426.

<sup>28</sup> Cardozo, *supra* note 24 at 113.

<sup>29</sup> Lord Goff of Chiveley, “The Future of the Common Law” (1997) 46 ICLQ 745 at 756.

## Conclusion

Hutchinson's book shows us how one law professor—known for being particularly apt at deconstructing the strong and sometimes problematic links between assumptions and structures in society and law—can be transfixed by eight individuals and their imprint on law, its teaching, and its practice. In this sense, perhaps it tells us less about these judges and their lives and legacy than it does about law professors and legal scholars, particularly in the common law. As teachers, researchers, and participants in public policy, professors are also mentors and role models, masters of legal doctrine and commentary, storytellers, and the lead actors in their classrooms. If there is a risk in overstating the importance of judges in the flourishing of law and society,<sup>30</sup> it is matched by the risk of overstating our own importance as the people who judge the judges. For both great judges and great teachers, it can be too easy to forget the tempering effect of humility, grounded in the realization that the power to “make” law or to “shape” lawyers is necessarily partial.

Hutchinson's book is not as lighthearted as the title appears to promise. Readers cannot simply respond with, “Isn't that interesting?” or, “I'll have to slip that anecdote into my teaching or into a conversation at a law school alumni event!” Rather, they are invited to participate in ongoing discussions on the diversity of the bench, the potential tension between furthering social justice and respecting the integrity of legal principles, and the ways in which perceptions and the relevance of “greatness” can change. In other words, the justifications offered by Hutchinson for the choices he makes, whether with respect to the individuals or the highlights of their contributions, turn the book into more than a synthesis of interesting information gleaned from all available sources.

If it cannot be labeled humorous, however, neither is the book as serious as it could be as a discussion of how and why the common law sets the parameters, roles, and responsibilities of its judges. Readers who open the book looking for insight and reflection on the mode of activity, expression, thinking, and contribution represented by common law judging might not feel that the search is over when they reach the end. But they will probably be able to pose their questions more clearly, to see more sharply the complicated connections and overlap among the issues relevant to judges and judging in the common law. They may even ask the hardest question

---

<sup>30</sup> See Roderick A Macdonald & David Sandomierski, “Against Nomopolies” (2006) 57:4 *N Ir Legal Q* 610, for their response to Robert Cover's emphasis on the power and violence of judging (Robert M Cover, “Violence and the Word” (1986) 95 *Yale LJ* 1601), in which they argue for a more limited and nuanced view of the role of “the judge”.

provoked by the book: Why do we care about “great judges” at all? Perhaps the era of “greatness” in common law judging has come to an end.

Finally, Hutchinson knows that this book contravenes restraints often associated with academic legal scholarship. Assertions are often substituted for arguments, stories and even quotations are often left uncited, metaphors (often mixed) abound, and thesis development is sometimes a little murky. Transgressing the boundaries in legal writing, just as with judging, can be a way of insisting on “doing things one’s own way.” It can sometimes even signal true greatness. Rather than achieving that level, the book itself is solid and accessible. But, in writing it, the author celebrates anyone who inspires others to change their own directions, challenge their own assumptions, and strike out on new paths. Those are the people—perhaps like Hutchinson himself—who can confidently laugh out loud at whatever gods are out there.

---