Some Remarks on Michigan's Reception of the Common Law[1]

Vincent A Wellman[2]

Since my project involves the history of the common law I want to begin with a quote from Benjamin Cardozo, a venerable common law judge:

> The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten.[3]

The more I investigated Michigan's reception of the common law, the more my research seemed to bear out the wisdom of Cardozo's warning – half truths of one generation have been passed on to future generations, and important qualifications have been disregarded or forgotten. Since my ambition is to understand the history the common law's reception in Michigan, I think it's important to include the qualifications of that reception that might have been disregarded or forgotten; without them we'll have only half truths, and will risk being misled.

I. Reception?

[1] Wayne State University Law School. These remarks were presented on April 19, 2018 to the meeting of the Michigan Supreme Court Historical Society.. I build here on the ideas that I presented in Vincent A Wellman, "Michigan's Reception of the Common Law: A Study in Legal Development", 62 Wayne L Rev 395 (2017).

[2] I want to thank the Michigan Supreme Court Historical Society for inviting me to undertake this project. I also want to acknowledge the important contributions of Judge Avern Cohn. He had already gathered many of the source materials that were relevant to this project and was generous in sharing them with me; he also read an early draft of my paper and provided insightful and invaluable suggestions.

[3] *Allegheny College v National Chautauqua Bank*, 246 NY 369, 373,153 NE 173, 174 (1927) (Cardozo C.J.)

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My topic is Michigan's reception of the common law. A non-lawyer friend, hearing of the topic and my research, observed that in this context the word "reception" could have two quite different meanings. His observation can help me illuminate the story of that reception. In the first place, there's a technical, lawyerly sense of "reception"-- referring to the process by which the common law was, in Michigan and elsewhere, adopted and incorporated into the rest of the law. In that sense, we can recognize different formal mechanisms to accomplish that adoption. In many states the mechanism was some form of a "reception" statute.[4] The state of Michigan received the common law through its 1850 Constitution, which provides that "The common law, and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature."[5]

But there's another meaning of 'reception' that might apply here. I might go home, for example, and face questions from my family about today's talk, and they might ask about the ***reception*** that I got from this audience. This second sense, in other words, focuses on the audience's reactions – both intellectual and emotional -- to the topic at hand. What I came to understand was that Michigan's reception (in that second sense of the word) included a complicated early set of reactions to the common law, reactions that were already in play before

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[4] See e.g. Virginia's 1776 reception statute, which reads:

> . . . that the common law of England, all statutes and acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the first [i.e. 1607], and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with several ordinances, declarations, and resolutions of the General Convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.

State Statutes Receiving the Common Law of England, INST. FOR U.S. LAW' http://iuslaw.org/reception_statutes.php (last visited March 22, 2017).

[5] MICH CONST of 1850, Schedule, section 1.

Michigan became a state and adopted a constitution. The simple nature of the constitutional provision of 1850, receiving the common law in the first sense, may have obscured Michigan's rather complicated reception, in the second sense, of that law.

To begin with, the Constitution of 1850 was Michigan's second; it replaced an earlier, 1835 adoption. The earlier document made ***no*** reference to the common law. The analogous section of the 1835 Constitution instead read: "All laws now in force in the territory of Michigan, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature."[6] The 1835 Constitution's silence about the common law stands in sharp contrast to other, even earlier, features of Michigan's legal history. In one sense, Michigan had received the common law before becoming a state, and had been incorporating it into its law for several decades. What's now the state of Michigan began of course as part of the much larger Northwest Territory, created by the Northwest Ordinance of 1787. That Territory was subject to a governor, a secretary, and three judges, all appointed by Congress, and at first the governor and the judges were to share legislative authority.[7] That same Ordinance also provided that the judges "shall have a common law jurisdiction," and that the Territory's inhabitants "should always be entitled to the benefits of" writs of habeas corpus, trial by jury, proportionate representation in the Legislature that was to be created, and judicial proceedings "according to the course of the common law."[8] In 1795, exercising their legislative function, the Territorial judges adopted a reception statute that

[6] MICH CONST of 1835, Schedule, section 2

[7] Northwest Ordinance, of 1787, section 5.

[8] Northwest Ordinance, Article II.

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provided that the common law of England would be part of "the rule of decision" for the Territory, and should be considered "as of full force."[9]

In sum, the founding documents that preceded the 1850 Constitution indicate that the common law's reception was complicated. The common law was first incorporated, then it wasn't, and then, in the 1850 Constitution, it was incorporated again. As we might imagine, a complicated history indicates a complicated reaction to the common law and its purported role and status. To understand the important qualifications and reservations of the time about the common law, we therefore need to understand that complicated reaction of that time, lest we have only half truths about its reception. For today's purposes, I will focus on two qualities, often supposed to be true of the common law, in order to reveal those qualifications and reservations. One supposed quality of the common law is the idea that it is a kind of "birthright" of the colonists, by virtue of their historical and political ties to England. Another is the idea that common law provides a comprehensive set of legal doctrines, rooted perhaps in natural law, that should followed wholesale and without alteration. I will examine these in turn.

II. A Birthright?

In *United States v Worral*,[10] a 1798 decision by the United States Supreme Court, the majority opinion states

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[9] To wit

> . . . The common law of England, all statutes or Acts of the British Parliament in aid of the common law, prior to [1607] and which are general in nature, not local to that kingdom, and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered as of full force.

[10] 2 US 384 (1798)

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> When the American Colonies were first settled by our ancestors it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither as a birthright and inheritance so much of the common law as was applicable to their local situation, and change of circumstances.[11]

This idea that the common law was a birthright and inheritance seems to square with the provisions of the Northwest Ordinance that treated judicial proceedings "according to the common law" as a ***right*** of the Territory's inhabitants, in the same vein as rights of habeas corpus, trial by jury and proportionate representation in the Legislature – all to be cherished and promoted.

But if the common law was such a birthright, how did it come to be ignored, or rejected, in the 1835 Constitution? If we dig deeper, we find a more nuanced and interesting picture. I begin with the supposed attitudes and assumptions of English jurists. According the Supreme Court, in its opinion in *Worral*, the "judges and lawyers of England" would regard the common law as a birthright, but that can be seen as much too simple a view. Consider, in this connection, the views of William Blackstone. His famous *Commentaries* are often treated as a wellspring for the common law's force and authority in England, and by extension in the New World. But, on inspection, Blackstone took a much narrower and more reserved approach to the question whether English common law should govern the American colonies. In the *Commentaries*, Blackstone distinguished two situations, depending on whether English colonists were settling in an uninhabited land, or were instead displacing an existing political structure. As Blackstone perceived it:

> Our American plantations are principally of the latter sort, being obtained in the last century either by right of conquest or . . . by treaties. And therefore the common law of

[11] Id at 394.

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> England, as such, has no allowance or authority there; they being no part of the mother country, but distinct, though dependent, dominions. [12]

So, as measured by Blackstone, at least, English common law should have no authority in the American colonies; by this measure, it seems, we can doubt whether English jurists would necessarily have regarded the common law as a birthright of the English colonists, or as the backbone of their law in the New World.

Further inspection indicates that questions about the common law's authority sometimes involved a political basis; the significance of that political basis becomes clearer if we return to Michigan's distinctive history. As I mentioned, the legal structure of the Northwest Territory included a governor and three judges and that foursome shared legislative authority for the Territory. As you can imagine, this structure was fertile ground for disagreements. But, those disagreements exhibited some unexpected contours. The first Territorial governor was Arthur St. Clair, and it was he, not the three judges, who sought prominence for the common law. To make a long story short, St. Clair worried that the territorial judges would exercise too much legislative power, and he hoped to rely on the common law to curtail those tendencies.[13] In his view, the common law would provide an unchanging framework of legal principles that would then limit the scope of judicial legislation. In contrast, a majority of the territorial bench[14] decried the

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[12] 1 *Commentaries on the Laws of England* 106 Oxford ed, 1st ed 1765)

[13] See Richard P. Cole, *Law and Community in the New Nation: Three Visions for Michigan*, 1778-12831, 4 S. CAL. INTERDISC. L J 161. 162 (1995).

[14] In particular, judges Parsons and Varnum.

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common law as undesirably tied to the nation's English origins, including its history of monarchial power exercised at the expense of the needs of the Territory's people.[15]

This pattern repeats itself. When Ohio was carved out as a state, what was left of the Northwest Territory was reconfigured, and part of the remainder was remade in 1805 to become the Michigan Territory, with a new territorial governor and new territorial judges. One of these, Augustus Woodward, sought to craft a law for the new Michigan territory that was rooted in a sense of justice shared by the **whole** territorial community. Since that community included settlers with both English and French origins, Woodward argued against any wholesale incorporation of English common law. In more modern terminology, this seems to be an argument that one person's birthright might look like cultural imperialism to someone else. Put differently, if the common law was an inheritance, then it was an inheritance only of part of the territory's population, and as such it should be balanced against the inheritance of the others. So, Woodward hoped for laws that would be more appropriate to Michigan's distinct circumstances, and that would be more comprehensible to all its populace, and in his view, English common law wouldn't serve.[16]

Woodward's tenure on the bench overlapped substantially with the governorship of Lewis Cass, appointed in 1813 and serving till 1831. Governor Cass, like Governor St. Clair before him, urged the primacy of the common law, because he hoped that its central and stable principles would be insulate the new Territory's laws from the disturbances of momentary popular sentiment. Towards the end of his governorship, Cass wrote;

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[15] Historical Publications of Wayne County, Michigan. Documents Relating to the Erection of Wayne County and Michigan Territory, 3 (1922-23)

[16] Cole, *supra n.* 11 at 200-02.

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> But the great principles, which protect the rights of persons and property in our country, are too firmly established and too well understood to require or even to admit frequent or essential alternation. Their application and observation has been settled for ages, and it is the part of the true wisdom to leave them as we have found them, with such changes only, as may be necessary, to remedy existing evils, or accommodate them to the advancing opinions of the age.[17]

As measured by our current perspectives, the attitudes of the Territorial governors and judges seem upside down. The governors argued for the primacy of the common law, because they hoped it would provide a check on the legislative activities of the Territory's judges, while those same judges favored a more expansive legislative authority, and denigrated the common law as both doctrinally inappropriate to the Territory's needs and too confining for the job of developing a new body of law that would be more appropriate for those needs.

III. A Comprehensive and Unchanging Body of Law?

The divergent perspectives of governors and judges leads to my second half truth – the idea of the common law as a comprehensive and unchanging body of law – and the important qualifications of that idea that seem to have been forgotten. An extreme version of the birthright idea leads easily to the perspective that the common law, once received, requires thereafter a devoted and continuing loyalty to all its rules. I quoted Lewis Cass earlier with his view that the common law embodied "great principles, which protect the rights of persons and property in our country, [and] are too firmly established and too well understood to require or even to admit frequent or essential alternation". This was a common view in the first half of the 19th century, as reflected in an opinion of the Supreme Court of Mississippi :

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[17] *Quoted in id*. at182 (1995).

> Whenever a principle of the common law has been once clearly and unquestionably recognized and established, the courts of this country must follow it, until it be repealed by the legislature, as long as there is a subject-matter for the principle to operate upon, and although the reason in the opinion of the court which induced its original establishment may have ceased to exist. This we conceive to be the established doctrine of the courts of this country in every state where the principles of the common law prevail.[18]

Again, this ringing affirmation needs to be understood in light of important qualifications.

Let me return to Blackstone. One would expect that Blackstone was a primary and hallowed source for this picture of the common law as comprehensive and unquestionable. But, I've already described how Blackstone didn't think that the common law had any applicability to the American colonies. As it turns out, his doubts go deeper. Even in those situations outside of England where common law would apply, Blackstone argued that English laws would be in force **only** "with very many and very great restrictions. Such colonists carry with them only so much of English law as is applicable to their own situation."[19] When I examined the practice of Michigan courts in applying the common law to Michigan cases, I discovered that their practice was rather more like what Blackstone had urged – those courts applied "only so much of English law" as they found applicable to their situation, and with "very many and very great restrictions".

A salient example of this practice can be found in *Moore v Sanborn*,[20] an 1853 case of the Michigan Supreme Court, decided just three years after Michigan's adoption of the 1850 Constitution and its 'reception' of the common law. The Court was called on to determine the "navigability" of the Pine River, a tributary to the St. Claire River. Michigan's geography – bordering on the Great Lakes and carved by a number of substantial rivers – meant that the

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[18] *Powell v Brandon*, 24 Miss 343, 363 (1852).

[191919] Blackstone *supra n*. 12.

[20] 2 Mich 519 (1853).

navigability of its rivers was an important legal issue. Before *Moore*, navigability – both in England and, it appears, in Michigan – had generally been tested by a traditional standard, according to which a river was navigable only upon evidence of actual commercial navigation. In pursuing the question, the *Moore* court observed that the Pine River was effectively divided into two parts: one above, and the other below, the town of Deer Licks. While the downriver portion allowed for regular use by boats, the upriver portion was only sometimes usable to float logs. Although the upriver portion had been used this way for fifteen or sixteen years, the evidence indicated that the upriver portion could only be used that way during "periodical freshets" which would usually last for only two to three weeks. Accordingly, when the logs jammed the river and occasioned delay in somebody else's traffic, the other user complained of injury. The other user's complaint would lie only if all the public had a right to use the river, and that would hold true only if the upriver portion was navigable. In defense, it was argued that the upriver part was not navigable according to the traditional – i.e. common law – standard whether it could be used by boat, and thus to be deemed a public highway under English common law.

The Michigan Supreme Court rejected the rule of English common law, and adopted instead a "log floating" test of navigability.

> The true test, therefore, to be applied in such case is, whether a stream is inherently and in its nature, capable of being used for the purposes of commerce for the floating of vessels, boats, rafts, or logs. Where a stream possesses such a character, then the easement exists, leaving the owners of the bed all other modes of use, not inconsistent with it.[21]

There seems to be an important tension between the Constitution's reception of the common law, on the one hand, and the Supreme Court's roughly contemporaneous rejection, on the other, of a

[21] *Id.* at 524-5.

well-established rule of English common law, replacing it with a new, and different, rule of decision. So, why did the court reject the traditional common law rule? The Court's reasoning on this point is instructive:

> The length and magnitude of many of our rivers, the occasions and necessities for their use, and the nature and character of our internal commerce, all require a liberal adaptation of [the common law's] doctrines to our circumstances and wants, and to a condition of things, both as to capability of our streams for public use, and the occasion for such use, entirely different from, and in many respects altogether new to, those which concurred to establish the common law rule.[22]

The nature of the Court's reasoning, and its corresponding conception of the common law that was received is complex and intriguing question – too involved for the current context, and I have pursued the question, What kind of "law" is meant in the phrase "common law" so that we can think the law, so defined, was received by Michigan?[23]

But, I will close with just a quick summary. The idea that English common law, once received, should be a set of unalterable rules, must be seen as another of the half truths that Cardozo warned us about. Those half truths would hold that the common law was birthright and that accordingly its rules were inviolable, and beyond revising. But, in *Moore v Sanborn*, I would suggest, the Michigan Supreme Court treated the English rule as just the starting point for a decisional process that aimed at providing law that would be well suited to the special characteristics, and needs, of the new state of Michigan. This pattern seems to hold for much of the Court's jurisprudence. In many cases, the Court was prepared to uphold and follow the rules

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[22] *Id.* at 522.

[23] *See* Wellman, *supra n.*1.

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of English common law.[24] But this should not be read to imply that it treated the traditional rules as inviolable; instead it seems that those were cases where the Supreme Court concluded that the norms of English common law served the needs of Michigan, and hence that there was no need to alter them. In other words, the Court perceived that it had the proper authority to review and revise English common law, whenever that was necessary; if no change was made, that was because no change was necessary. But, when the English rules no longer suited the experience of Michigan's early days as a Territory and then a state, Michigan's Supreme Court could, and should, produce rules that would serve its people.

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[24] *Id* at 411-423.