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Heydon, Dyson --- "Judicial Activism and the Death of the Rule of Law" [2004] OtaLawRw 2; (2004) 10 Otago Law Review 493

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Judicial Activism and the Death of the Rule of Law^[*]

The Honourable Justice Dyson Heydon^[]** I am extremely honoured to have been invited to address this Quadrant dinner. I regard the institution as a vernal island which one can periodically visit as an escape from the great polluted oceans of cant washing around it.

The gouty old bullies and the evil old men On 19 February 1941, George Orwell published his celebrated pamphlet *The Lion and the Unicorn*. In analysing the superiority of English life to that of Axis and Communist Europe, he said:

[T]he gentleness of English civilisation is mixed up with barbarities and anachronisms. Our criminal law is as out of date as the muskets in the Tower. Over against the Nazi Storm Trooper you have got to set that typically English figure, the hanging judge, some gouty old bully with his mind rooted in the 19th century, handing out savage sentences People accept them (and Dartmoor, and Borstal) almost as they accept the weather. They are part of "the law" which is assumed to be unalterable.

Here one comes upon an all-important English trait: the respect for institutionalism and legality, the belief in "the law" as something above the State and above the individual, something which is cruel and stupid, of course, but at any rate *incorruptible*.

... The totalitarian idea that there is no such thing as law, there is only power, has never taken root

... The hanging judge, that evil old man in scarlet robe and horse hair wig, whom nothing short of dynamite will ever teach what century he is living in, but who will at any rate interpret the law according to the books and will in no circumstances take a money bribe, is one of the symbolic figures of England. He is a symbol of the strange mixture of

reality and illusion, democracy and privilege, humbug and decency, the subtle network of compromises, by which the nation keeps itself in its familiar shape.^[1]

Those observations of the Old Etonian ex policeman and socialist correspond with a deep tradition of the common law. In the great case of *Entick v Carrington*

(1765) 19 Howell St Tr 1030 the Court of Common Pleas set aside warrants purportedly justifying a forceful seizure of the plaintiff's papers. Lord Camden CJ gave instructions that the notes from which he gave his decision should be burned, but by accident they were preserved. According to them, he said, in rejecting an argument that even if the warrants were otherwise unlawful, they were justified on the ground that they were employed to seize documents which were seditious libels: "If it is law, it will be found in our books. If it is not to be found there, it is not law ... [With] respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions."^[2]

The rule of law George Orwell saw the merit of the English judges as lying in their interpretation of the law according to the books and in their doing so incorruptibly. That is one core element in the "rule of law". Geoffrey Walker's profound work *The Rule of Law*^[3] has demonstrated the range of meanings which that expression has. Under the "rule of law" as the expression is used below, it is not possible, at least without explicit parliamentary legislation to the contrary, for most important material or personal interests of one citizen to be radically damaged against that citizen's wishes by another citizen, a corporation, or an arm of government unless some independent person holds that that is right. The rule of law prevents citizens being exposed to the uncontrolled decisions of others in conflict with them. Powerful citizens are not permitted to use self-help against other citizens so far as their arbitrary might permits. Officers of the State are not permitted to imprison or otherwise deal forcibly with citizens or their property merely because they think it is their duty to do so. Mobs are not able to loot or lynch their enemies at will. Indeed Saint Augustine thought that without a rule of law States themselves were nothing but organised robber bands. The rule of law operates as a bar to untrammelled discretionary power. It does so by introducing a third factor to temper the exposure of particular citizens to the unrestrained sense of self-interest or partisan duty of other citizens or institutions – an independent arbiter not affected by self-interest or partisan duty, applying a set of principles, rules and procedures having objective existence and operating in paramountcy to any other organ of State and to any other source of power, and possessing a measure of independence from the wrath of disgruntled governments or other groups. These independent arbiters are usually judges. The rule of law preserves for citizens an area of liberty in which they can live their lives free from the raw and direct application of power. It creates a framework within which the creative aspects of human life can thrive. The rule of law dilutes power; it diffuses it; and yet it also makes it more efficient. The rule of law prevents police officers trespassing on and seizing private property or holding citizens without trial or other hearing; yet it permits and facilitates the procurement of evidence in a regular way with a view to the convincing demonstration of criminal guilt in due course. It prevents the employees of banks, for example, applying the strict terms of oppressive mortgages ejecting debtors from their houses at will; but it enables the enforcement of whatever contractual rights there are in due course. The rule of law operates on principles which are known or readily discoverable and hence do not change erratically without notice; which are reasonably clear; which apply uniformly and generally, not in a discriminatory

way; which apply prospectively, not retroactively; and which are in force through public trials operating on rational procedural rules before judges who are independent of the State and of all parties. All parties are treated as intrinsically important, however unequal in strength and however lacking in popularity or virtue they may be. The more ineffective a State's laws are against private coercion or anarchy or government power, the less they can be described as representing the rule of law. The purpose of the rule of law is to remove both the reality of injustice and the sense of injustice. It exists not merely because of the actual remedies it provides for damages, injunctions and other specific remedies, and criminal sanctions. It exists also to prevent a damaging release of uncontrollable forces of disorder and primal urges towards private revenge against wrongdoers by assuaging the affront to human dignity experienced by the victims of wrongdoers. Stephen said that the criminal law bears the same relationship to the instinct for revenge as does marriage to the sexual appetite, and the same is true of the civil law. The rule of law channels potentially destructive energies into orderly courses.

Most disputes are settled without the parties ever going to a trial before a judge. However, what happens in the resolution of trials is of vital importance to the rule of law. If a particular dispute is resolved by a speedy and just trial, the chance of the vastly greater numbers of potential disputes being settled before trial rises. If trials are slow and uncertain, and are not seen as objectively just, the chances of peaceful settlement of disputes are reduced and the temptation to violent self help increases.

A key factor in the speedy and just resolution of disputes is the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge. One hundred and fifty years ago, most criminal cases and many civil cases were decided by juries presided over by judges. Now juries are used only in serious criminal cases and to a miniscule extent in civil cases. It is largely judges, not jurors, who now decide disputes. In fulfilling that task, judges need a reasonable minimum of application, balance, civility and intelligence: but they need two things above all. One is a firm grip on the applicable law. The other is total probity.

Judicial activism What is below described as "judicial activism" badly impairs both qualities, and in that way tends to the destruction of the rule of law. Judicial activism in constitutional law and in statutory construction will not be discussed: each field raises real problems but they differ to some extent from those discussed below. The expression "judicial activism" is here used to mean using judicial power for a purpose other than that for which it was granted, namely doing justice according to law in the particular case. It means serving some function other than what is necessary for the decision of the particular dispute between the parties. Often the illegitimate function is the furthering of some political, moral or social programme: the law is seen not as the touchstone by which the case in hand is to be decided, but as a possible starting point or catalyst for developing a new system to solve a range of other cases. Even more commonly the function is a discursive and indecisive meander through various fields of learning for its own sake.

"Judicial activism" may be said to contrast with jury "inactivism". In jury trials in modern urban conditions, at least, the jurors will know nothing of the parties personally. The jurors are told what issue it is they must decide. Their duty is to reach factual conclusions relevant to that issue. They do not give reasons for those conclusions. They have the practical power (though probably not the right) to refuse to enforce particular

laws which they perceive to be unjust and of which they disapprove, and to deny relief to particular unpleasant people whom they dislike. But apart from tempering the system in this way, juries had little interest in issues outside the narrow facts of the case. They had, and have, very little room for activism.

Sir Owen Dixon's legalism A favourite target of activist judges and their defenders, either as a bogeyman or as an object of ridicule, is Sir Owen Dixon. When Sir Owen Dixon was sworn in as Chief Justice of Australia in 1952, he exalted "close adherence to legal reasoning", he proudly admitted being "excessively legalistic", and he expressed faith in "a strict and complete legalism" as the only safe guide to judicial decisions in the solution of great conflicts.^[4] It is common now for these views to be dismissed with *de haut en bas* gestures of depreciatory scorn. Modern commentators sometimes seek to explain these words away by saying that he was only speaking of conflicts arising under the Federal Constitution, not the many other conflicts resolved by courts. They also insinuate that there was something phoney in what he said, because he participated in many decisions which were in a sense highly "activist" in the sense of being antithetical to contemporary political programmes, for example, successively thwarting Mr Chifley's desire to nationalise the banks and Mr Menzies' desire to ban the Communist Party. These observations are captious. Sir Owen Dixon thought that non-constitutional cases should be decided by recourse to legalism as well. Thus in 1942 he told the American Bar Association that the High Court brought to federal constitutional cases "the same forms of reasoning, the same methods of thought and the same outlook as it does to the other cases contained in its list".^[5] In any event almost any piece of litigation is regarded by at least one of the parties as a "great conflict": there would be no point in submitting to the stress and hazards of litigation unless the conflict were thought to be a great one.

In a speech delivered in 1955 at Yale Law School entitled "Concerning Judicial Method", Sir Owen Dixon quoted the following words of Parke B approvingly:

Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.^[6]

Parke B therefore said that the mere fact that the case was new did not justify the judges deciding it on their "own judgment of what is just and expedient". Sir Owen Dixon said that Parke B's words "do not need much extension if they are to serve as a statement of what I have witnessed during my service in the courts as judge and counsel".^[7] He praised the "strict logic and high technique"^[8] of the common law. Sir Owen Dixon's modern critics explain this away by saying that the speech was delivered at Yale Law School, and that he was seeking to simplify and exaggerate for rhetorical effect differences between Australian and American judicial approaches. Alternatively, they suggest that if he was not exaggerating, he must have thought, unrealistically, that the common law was never made by judges, but had existed since 1066 or 1189, merely waiting to be identified or declared as occasion required in the succeeding years. The critics also complain of the lack of definition in the words "strict logic and high technique". They ask: to what premises is the logic applied? What exactly is the

technique? Sir Owen adopted the phrase "strict logic and high technique" from an analysis by F. W. Maitland of why it was that though in the 16th century civil law derived from Roman law spread throughout Europe, it was not received in England. He said it was because the common law has "strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries".^[9] The medieval Year Books setting out the oral arguments in and decisions of cases, on which the law taught in the Inns of Court was based, are highly reminiscent, in their vigour and directness of disputation, to exchanges in our courts now. An element in the strict logic and high technique employed by the medieval common lawyers and their successors was the procedure of isolating the decisive point – it might be quite a narrow point – in debating the outcome of a case. The

"technique" involved some technicality.

So, in litigation, it was common for the judge to identify what the crucial issue was, and reach a decision on that issue *and no other*. It was thought that a collision of material or other interests between two parties, fought out fiercely between their counsel, and resolved by a judicial decision on the crucial issue *and no other*, generated an outcome from which, when considered with many other like outcomes, one could infer some rule or principle for use in the decision of future cases. The precise point of decision in each of numerous cases fought skilfully and hard could permit a graph, as it were, to be drawn establishing a more general rule or principle. The more general rule or principle did not necessarily exactly correspond with what each judge in each particular case said was the rule or principle. What the courts did mattered as much as what they said, and in some ways more. Over time this approach was seen as turning on the distinction between the reasons for a decision, on the one hand, and observations made in the course of arriving at the decision which were not strictly part of its reasons, on the other. Later courts were expected to follow the rules and principles stated by earlier courts. But what was followed was not everything that might be said on the way to a decision – only the reason for the decision. One part of traditional technique turned on the process of "distinguishing" earlier decisions from the case in hand on particular bases. From this distinction between *obiter dicta* and *ratio decidendi* there arose two conclusions. The first was the doctrine of *stare decisis* – a strict doctrine of precedent, but only in relation to the *rationes decidendi* of cases. The decisions of earlier judges had to be followed – but only in what was decided, not in everything that was said. The second conclusion was that it was desirable to avoid uttering too many *dicta*. It was classically expressed in *John Deere Plow Co Ltd v Wharton* [1915] AC 330 at 338-9 by Viscount Haldane LC:

It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided.

Viscount Haldane was no arid reactionary pedant. He had held many offices in the Liberal governments of Campbell-Bannerman and Asquith apart from that of Lord Chancellor; he was to become Lord Chancellor again in Macdonald's first Labour government in 1924. At the time he spoke he was about to be hounded from office for supposedly being pro-German, but he is now seen by all as an exceptionally able equity lawyer, and seen by some as a man whose reorganisation of the British Army prevented the Germans winning the war before Christmas

1914. His explanation accounts for why the common law concentrates on the *ratio decidendi*: the ramifications of a particular problem and of particular solutions to it are perceived most clearly when that actual problem, which is crucial to defeat and victory, has arisen and been argued out.

The mockery to which Sir Owen Dixon's enlightened critics, on and off the bench, have subjected him obscures an essential truth. He did not think that the common law was frozen and immobile, fashionable though it is to attribute this caricature of a view to him. He contemplated change in the law as entirely legitimate. When new cases arose, existing principles could be extended to deal with them, or limited if their application to the new cases was unsatisfactory. As business or technical conditions changed, the law could be moulded to meet them. As inconveniences came to light, they could be overcome by modifications. The changes could be effected by analogical reasoning, or incremental growth in existing rules, or a rational extension of existing rules to new instances not foreseen when the existing rule was first developed. Particular rules might be modified by the detection of more general principles underlying them or a more rigorous reformulation of some traditional concept. In Sir Owen Dixon's lifetime there were numerous judicial changes to private law, particularly the law of tort. He participated in many of them. Though Sir Owen Dixon did not think that the law could never change, he was of the view, which remains the law, that the change could not be generated by a court bound by the earlier decisions of courts superior in the hierarchy – only by a court which, while respecting its own earlier decisions, was free to depart from them. He also thought that even courts free to depart from their earlier decisions or the earlier decisions of lower courts should not lightly overturn established precedents. He was further of the view that the law in general should only be changed by a process of gradual development, not by violent new advances or retreats or revolutions or ruptures.

That approach had one great virtue. It subordinated individual judicial whim to the collective experience of generations of earlier judges out of which could be extracted principles hammered out in numerous struggles. The aggregation of many decisions by individual minds concentrating on a concrete problem over decades or centuries tended to lessen the sharpness of grievances arising from the application of the consequential principles in particular cases. Circumstances might occasion modification of the principles, but there was nothing ignoble in the tradition of beginning with strong *prima facie* respect for inherited wisdom and being cautious in departing from it. But since Sir Owen Dixon's retirement in 1964 and his death in 1972 an entirely different approach has grown up within the legal system.

Changes in the legal system since the time of the Dixon court It is instructive to compare the position of Australian courts in Sir Owen Dixon's day with their present position. Under his Chief Justiceship, from 1952 to 1964, the High Court of Australia had a worldwide reputation, its most celebrated members, apart from himself, being Fullagar J, Kitto J, Menzies J, Taylor J and Windeyer J. Many English and American lawyers thought that Sir Owen Dixon was the greatest common law judge in the world. Some said that the High Court was the greatest appellate court in the world. Modern attempts to suggest that a presumption of continuance has been operating have not proved entirely successful. The apex of the Australian legal system in theory comprised the Privy Council and the High Court, though in practice the House of Lords played a significant role. Australian appeals went from State courts or the High Court to the Privy Council, not the House of Lords. But the judges who sat in the Privy Council were largely the English and Scottish lawyers who sat in appeals to the House of Lords in English or

Scottish cases. Hence the dominant influence on the Australian common law was the English common law. Further, many significant English statutes affecting private law were re-enacted here, producing local uniformity and access to a body of valuable English decisions construing those statutes. The superior courts of England were all bound by strict doctrines of precedent. Though the English Court of Appeal was not bound by its own earlier decisions, it did not lightly depart from them, and the House of Lords was bound by its own earlier decisions until 1966. Australian courts, like English courts, applied principles of *stare decisis* – not only internally, but in relation to English decisions. Thus Australian judges would generally follow a decision of the English Court of Appeal, safe in the knowledge that all other Australian judges would do so; and they all knew that the likelihood of the English Court of Appeal not following itself was slight. This has now changed. In 1963 Sir Owen Dixon himself said the High Court should not prefer House of Lords decisions to its own if it thought the House of Lords to be wrong. By degrees appeals from Australian courts to the Privy Council were abolished between 1968 and 1985. In 1978 the High Court decided it was no longer bound by Privy Council cases. In 1986 it decided that no Australian court was bound by any English court, though the intrinsic persuasive value of English decisions remained. Ever since the United Kingdom entered the European Community in 1972, as part of its drift away from independence, English law is tending increasingly to be influenced by European Union law and European so-called “human rights” law — an outcome Maitland’s 16th century common lawyers managed to prevent. These courts have favoured judicial activism in Australia, but even if Privy Council appeals had not been abolished, there would have been a drive towards judicial activism, since the modern English judge has tended to take on that characteristic in similar fashion to Australian judges. It is right that English cases should no longer bind. But it is regrettable that even their persuasive value will steadily fall. And these developments have greatly favoured judicial activism in Australia. In the years since the Dixon court, jury trial, even then in retreat, has dwindled greatly in significance. Civil cases have lengthened and become more complex

— partly because of the increased complexity of business life; partly because it is now much more fashionable, and as a result of some statutory changes obligatory, to take account of a mass of details about the background of transactions that would not have been permitted in earlier times; partly because remedies tend now to be more discretionary and to call for wider factual analysis; partly because the rules of evidence have been liberalised; and partly because the means of recording and reproducing documents by photocopiers and computers have greatly expanded. To a very significant degree, oral argument and evidence has given way to written argument and evidence, but without compensating gains in brevity or simplicity. One cannot exclude as a factor relevant to the lengthening of litigation the motives for economic gain pressing on those who conduct it. Each year the Commonwealth and State Parliaments enact statutes which are much greater in number, size and complexity than they were thirty years ago. Both the content of and the other materials relating to private law have become more complex: doctrine is subject to more qualifications, many more cases are reported, each case tends to examine all that has gone before, many cases produce judgments which are very long by traditional standards. Even cases that are not reported are often cited. Thirty years ago, a typical civil case would produce an *ex tempore* judgment of three or four pages. Now such judgments are commonly reserved, and are ten or a hundred times longer. Indeed, in all courts, *ex tempore* judgments are rarer, and so are short judgments.

On the part of solicitor, advocate, judge and jurist, a fear of failure through leaving something out has been substituted for a disciplined sense of relevance

— it seems hard to locate what is crucially important, easy to concentrate on what is marginal. The judiciary which operates in these conditions is much larger than it was thirty or forty years ago. In 1967 there were thirty Supreme Court Judges in New South Wales. Since there was no Family Court and no Federal Court, they administered the whole law (excluding industrial law). Now there are over forty permanent Supreme Court judges and almost always some acting judges. There is now a large Family Court – around twenty judges sitting in Sydney. There is now a large Federal Court – another twenty sitting in Sydney. The Federal and State Industrial Courts are large. The District Court has risen both in size and in the importance of its work. So has the magistracy. This rising public addiction to increasingly complex litigation has also tended to facilitate the role of judicial activism in damaging both the probity of the courts and in consequence the capacity of the courts to retain a sound grip on the applicable law in particular cases.

Challenges to probity

Probity, that essential judicial virtue, can be damaged by various pressures. One is corruption by offers of money or advancement. It seems true still that modern Australian judges are financially as incorruptible as George Orwell's gouty old bullies were. No corrupt offers of advancement have been proved. Another pressure on probity is a judicial temptation to see the judicial name in the newspapers. On the whole, that temptation has been successfully resisted. Probity may be affected by conscious bias for or against a particular litigant or class of litigants. The law compels judges who have such a bias or may reasonably be thought to have such a bias to disqualify themselves, and in practice it may be assumed that very few judges are consciously biased.

However, a fundamental change in the judiciary has taken place which has caused two new types of pressure on probity. The fundamental change is that it has a different character from that of a generation ago. There is within its increased ranks a large segment of ambitious, vigorous, energetic and proud judges. Ambition, vigour, energy and pride can each be virtues. But together they can be an explosive compound. Rightly or wrongly, many modern judges think that they can not only right every social wrong, but achieve some form of immortality in doing so. The common law is freely questioned and changed. Legislation is not uncommonly rewritten to conform to the judicial world-view. Judgments tend to cite all the efforts of their author, of their author's colleagues, of other State courts and English courts and American courts and Canadian courts and anything else that comes to hand. Often no cases are followed, though all are referred to. There is much talk of policy and interests and values. Trial judges permit themselves considerable liberties in distinguishing High Court decisions on very narrow grounds. They do not limit themselves to reported cases, but use computers to obtain access to unreported ones. They use huge footnotes (which appear to be regarded as a mark of erudition) containing copious references to articles in Australian and overseas university or professional law reviews (the now-bloated numbers of these being to some extent a by-product of a world-wide explosion in law school numbers, and hence academic numbers, in the last forty years). The citations often in fact do not demonstrate judicial erudition, being associate-generated, or, worse, computer-generated. But however they are generated, they seem more designed to highlight supposed judicial learning than to advance the reasoning in any particular direction relevant to the issues between the

parties. They appear designed to attract academic attention and the stimulation of debate about supposed doctrines associated with the name of the judicial author. Here the delusion of judicial immortality takes its most pathetic form, blind to vanity and vexation of spirit. In all, the words Gladstone used about the annexation of the Transvaal in 1879 might be applied to the new judicial class: "See how powerful and deadly are the fascinations of passion and of pride." John Gava has rightly described the judges so affected as "hero judges".^[10]

How did this new class arise? Because its members misunderstood the circumstances of their formative years. The new class arose partly because almost all modern judges were educated in law schools staffed by professional law teachers as distinct from practitioners teaching part-time, and a critical analysis of the merits of legal rules was a significant aspect of that education. It arose partly because of a wider interest in United States law, where some authority somewhere can usually be found to support any proposition, and where constantly changing majorities in the Supreme Court tend to generate changing jurisprudence in constitutional cases on the Bill of Rights. It arose partly because Law Reform Commissions have in the last forty years become a common feature of life here and elsewhere. And it arose partly because since the early 1960s the fashion has been for legal intellectuals to be *quarante-huitard*, to be dismissive of what they do not fully understand and to think like an editorial in the *Guardian* newspaper. It does not follow, of course, from the fact that rules can be examined critically, or that it is useful to do so, that they should be lightly abandoned or sidestepped. It does not follow from the diversity of opinions in the United States, or from the seesawing of opinions in Bill of Rights cases in the Supreme Court, that particular American jurisdictions do not adhere closely to their own precedents. It does not follow from the recommendations of Law Reform Commissions to parliaments to change the law that the courts ought to do so. Yet invalid conclusions have favoured the growth of judicial activism. There are two types of wholly illegitimate pressure pushing a judge away from probity, and evidencing judicial activism. They must be consciously avoided but they are growing. The first is the desire to litter judicial decisions with the judge's opinions on every subject which may have arisen, however marginal. The second is the desire to state the applicable law in a manner entirely unconstrained by the way in which it has been stated before because of a perception that it ought to be different.

Excessive debate in judgments The first desire may be less blameworthy than the second, but it can be almost as pernicious. For example, a given case can raise five potential points of controversy. Each of those points can raise numerous sub-issues. It is much to the advantage of a party whose position on a central and decisive issue is factually weak to permit as many others to develop and to start as many other hares as possible. The cloud of questions thus arising may obscure one issue on which the party who should lose is doomed. Further, whether the court is an ultimate appellate court or some other court contemplating in some legitimate way a modification of the law in an area where there is no contrary binding precedent, or whether the court is merely seeking to understand precisely what the applicable rules are, it can be useful to survey the whole field and seek to reduce to order everything that lies within that field. But it does not follow that the court should record its journeys through the ages and from China to Peru, its ponderings, its *Bildungsroman*-like accounts of its own shifting sensibility, its speculations on why the law is different elsewhere and whether it should be changed here. To do so carries the risk of generating innumerable somewhat different statements of principle. The parties may feel obliged to call them to the

attention of future courts and may seek to extract some significance from the differences. Writers may carefully analyse the differences in a manner supposedly calling for attention in future courts as well. A clump of rank and tangled vegetation thus accumulates, seeds, and stimulates further growth.

A trial judge is obliged to find the facts in the case before him sufficiently to enable him to decide the case and to permit any appellate court to decide the case however the course of argument on appeal proceeds. Fact finding is not only a primary task. It can be a difficult one. But trial courts ought to be cautious in their exploration of well-settled law. There are relatively few areas where a trial court can legitimately make new law. Hence there is likely to be little justification for extensive debates preparatory to a decision whether a case falls within one rule rather than another. The wider the debates, the more they are likely to harass, confuse and distract hard-pressed District Court judges and magistrates in particular. Apenny-wise executive forces them to operate without transcripts. Their superiors place them under pressure to deliver *ex tempore* judgments as much as possible. Their primary role of applying well-settled law to controversial facts is frustrated by excessive attempts to acquaint them with inconclusive legal analysis in other courts, as they sit in a fog of fatigue with throbbing headaches attempting to grasp and recollect untidily presented and conflicting evidence with a view to reaching immediate factual conclusions and legal results based on them.

In appeals the court's role can be a little wider. A discursive analysis of the law can be appropriate if it is necessary to decide the matter. An intermediate appellate court may be confronted with a conflict of authorities in different trial courts throughout Australia, and may have to choose. The possibilities are wider still in the High Court. But even in these courts it is wrong to deal with issues which, even though they have been raised, are not issues which it is necessary for the specific outcome of the case to deal with. It is even worse to deal with unnecessary issues which have not been raised. A badge of suspicion must attach to a judgment which, after setting out various issues and arguments, says "Though it is not necessary to decide this point, in deference to the careful submissions of the parties, the court will deal with it." Courts are not supposed to decide questions which are merely moot, theoretical, abstract or hypothetical. They are not supposed to offer opinions which are merely advisory, having no foreseeable consequences for the particular parties. Their determinations are supposed to be conclusive or final decisions on concrete controversies, not inconclusive and tentative speculations on controversies which have not yet arisen. Excessive and self-indulgent surveys of the law and debates about the background to and future of particular rules contravene these prohibitions, which are based on good sense.

In short, if a case can be decided on the facts without venturing into controversial legal areas, it should be decided only on the facts. If it can be decided on a distinct point of law without going to any other point of law, it should be so decided. If the point of law on which a case can be decided is clear, while there may be some point in examining the historical background, or the different way the point might be decided in other jurisdictions, or the extent to which the condition of the law on that point has been praised or attacked by earlier judges or writers, there is no point in recording that examination. The duty of a judge is to decide the case. It entails a duty to say what is necessary to explain why it was decided as it was, and a duty to say no more than what is necessary. To breach the latter duty is a form of activism capable of causing insidious harm to the rule of law.

Deliberate alteration of the law by judges The second danger for judicial probity arises where the court deliberately sets out to alter the law. Sir Owen Dixon said the following to his audience at the Yale Law School in

1955:

[I]n our Australian High Court we have had as yet no deliberate innovators bent on express change of acknowledged doctrine. It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change. ... The objection is that in truth the judge wrests the law to his own authority.^[11]

The last forty seven years have changed all that. One key date is 29 February

1972, when Sir Victor Windeyer – after Sir Owen Dixon, probably the greatest of Australian judges – retired. The appointment to the court of Sir Anthony Mason, a highly respected equity lawyer and ex-Solicitor General, on 7 August

1972 was then a cloud not even as big as a man's hand, but in hindsight the appointment can be seen to have been crucial. Significant events took place in

1975, when Mr Lionel Murphy, QC, the Attorney-General, appointed Kirby J, a judge of the Conciliation and Arbitration Commission, to the office of Chairman of the Australian Law Reform Commission which commenced operations in 1975. Another key date is 10 February 1975, when Murphy J went to the High Court. For some time the dominant ethos of the court did not change. Sir Garfield Barwick's general approach to the law while in office from 1964 to 1981 did not differ much from that of his predecessor, and nor did that of Sir Harry Gibbs. The younger justices appeared for some time to be of the same view. Thus in *State Government Insurance Commission v Trigwell* ^[1979] [HCA 40; \(1979\) 142 CLR 617](#) at 633 Mason J

said that because the court was "neither a legislature nor a law reform agency" it should be reluctant to vary or modify settled common law principles merely because they might be thought ill-adapted to modern circumstances. He gave very powerful and trenchantly expressed reasons for that view. But Murphy J delivered a series of addresses contending that the entire judiciary was biased against "women, Aborigines and the weak" and deriding the traditional approach of the court. In particular, he treated judicial work as an act of uncontrolled personal will, and sneered at the doctrine of precedent as one "eminently suitable for a nation overwhelmingly populated by sheep". He said: "As judges make the law ... they are entitled to bring it up to date ... [Judges] should not change it by stealth, they should change it openly and not by small degrees. They should change it as much as they think necessary".^[12] His conduct on the bench matched his words off it. His judgments were almost always brief. While this is certainly no sin in itself, Murphy J practised an exquisite economy in relation to what is conventionally

called legal reasoning. The only content of a typical judgment was usually a series of dogmatic, dirigiste and emotional slogans. For some reason he came to fascinate and influence several of the other judges, very different in approach and experience though they were from him. This influence became most clearly apparent not while he served, but after his premature death in office on 21 October 1986 following an unhappy period of personal controversy and painfully debilitating illness. Soon after Mason J succeeded Sir Harry Gibbs as Chief Justice in 1987, the majority approach radically changed. In 1998, McHugh J rightly said that the whole argument of Sir Owen Dixon to the Yale Law School "sounds nowadays like a voice from another world".^[13] But if Murphy J was the first "deliberate innovator" in the High Court, he has not been the last. Among the greatest innovators of them all, until he retired in 1995, was the once cautious Sir Anthony Mason. And Murphy J has had numerous imitators in lower courts as well. Radical changes to the common law have been made of a kind which would not have been made before the 1980s.

To this form of activism there are numerous objections. Firstly, it rests on a contradiction. As Sir Owen Dixon told his audience at Yale, a court which deliberately changes the law in order to establish a better rule seeks to treat itself as possessed of a paramount authority over the law for the future in virtue of the doctrine of judicial precedent, while simultaneously setting at nought every relevant judicial precedent of the past. "[The] conscious judicial innovator is bound under the doctrine of precedents by no authority except the error he committed yesterday".^[14]

In short, if judicial statements of the law are binding, save where the High Court chooses to overrule one of its own earlier decisions, radical new statements of the law should not be made and prior authority should not be lightly overruled. But if radical new statements are routinely made, and established authority is almost nonchalantly departed from in later cases, then they can be no more binding, and no more likely to survive, than the earlier statements which have

been overthrown. Even in the short life of judicial activism in this country, there have been extraordinary instances of the freaks of fortune and the instability of judicial grandeur, and many brave new developments have already become entombed in the urns and sepulchres of mortality. The Mason court greatly widened the law of negligence. The court over which Gleeson CJ, who is not sympathetic towards judicial activism, presides, is generally, but not always, contracting it. The Mason court recognised an implied constitutional freedom of communication as a means of invalidating legislation: *Nationwide News Pty Ltd v Wills* ^{[1992] HCA 46; (1992) 177 CLR 1}; *Australian Capital Television Pty Ltd v The Commonwealth*

^{(1992) 177 CLR 106}. Then that implied constitutional term was said to create substantive defences in defamation proceedings: *Theophanous v Herald & Weekly Times Ltd* ^{[1994] HCA 46; (1994) 182 CLR 104}; *Stephens v West Australian Newspapers Ltd* (1994)

^{[1994] HCA 45; 182 CLR 211}. But then, for different reasons, Mason CJ and Deane J retired. The absent are always wrong. Hence the law was significantly modified again when the Court, in a unanimous joint judgment, held that the Constitution could not directly affect the private rights of litigants by giving defamation defendants a defence, but the common law had to conform with the Constitution, and that a new defence of qualified privilege should be recognised: *Lange v Australian Broadcasting*

Commission [1997] HCA 25; (1997) 189 CLR 520. This outcome represents a tactical compromise of which a French politician in the Fourth Republic could be proud. But it may be a compromise in the sense of an agreement by seven people to do what at different stages all seven had thought was wrong. What happened is perhaps within the rather loose accepted limits of modern judicial behaviour, but it is astonishing that the court gave leave to reargue the correctness of two decisions only three years old, and then departed from them. Secondly, though the newly created rule may seem more just, the force of the new rule will depend on the capacity of the legal system to command the consent of the governed. Courts inflict great pain and distress on those who lose litigation and on those adversely affected by principles laid down in litigation. The public will put up with pain of that kind which is caused by parliamentary legislation

– not always, but most of the time. The public will also put up with a great deal of the pain caused by litigation if it is seen to be the result of long-established rules which could be, but have not been, changed by parliamentary legislation. It is much less easy for the public to put up with the pain if it is caused by the world view of one judge, or a bare majority of appellate judges; or if the courts are in discord; or if judicial opinions are in a state of constant flux as they swing back and forth or spiral down in sickening fashion. What one court may plausibly see as an immediate gain to justice in the particular case may have unintended consequences of a harmful kind, and one of those consequences may be to erode the ability of the public to place confidence in the law and hence the capacity of the law to command obedience. Thirdly, leaving aside the legitimate role of appellate courts in changing the law by a Dixonian process of development and adaptation, the conscious making of new law by radical judicial destruction of the old rests on a confusion of function. Those who staff courts do not have that function. They lack the experience to perform it; they lack the assistance required to perform it; they can only do it retrospectively; it is not easy for them to do it clearly; it is not easy for them to do it decisively; and it is not possible for them to balance the financial and other effects of the changes against other demands.

(a) *Different functions.* The duty of a court is not to make law, or debate the merits of particular laws, but to do justice according to law. The oath taken by a judge of the Supreme Court of New South Wales includes the words "I will do right to all manner of people after the laws and usages of this State without fear or favour, affection or ill will." Thus judges swear to apply the existing laws and usages, not to unsettle them by critical debates about them and speculations about their future, and certainly not to develop new laws and usages. It is legislatures which create new laws. Judges are appointed to administer the law, not elected to change it or undermine it. Judges are given substantial security of tenure in order to protect them from shifts in the popular will and from the consequences of arousing the displeasure of either the public or the government. The tenure of politicians, on the other hand, is insecure precisely in order to expose them to shifts in the popular will and to enable those shifts to be reflected in parliamentary legislation. Judicial rascals are not to be thrown out. Political rascals can be.

(b) *Different experience.*

Politicians spend much of their lives attending barbeques, tea parties and dinners they do not want to attend, opening exhibitions they do not want to open, delivering speeches they would prefer not to deliver, listening to complaints or ideas from citizens which they would prefer not to hear. From late adolescence they have been organising,

intriguing and debating. They are accustomed to giving up one point for the sake of gaining another, accustomed to compromise, accustomed to attack and to be attacked, and accustomed to shifts and manoeuvres. They are not highly esteemed, the system in which they operate may be imperfect, but they are universally seen as necessary. A judge who dislikes the constraints of membership of the judiciary because it prevents the fulfilment of a particular programme or agenda, should, like Dr Evatt, leave that group, join or start a political party, and seek to enter a legislature. Politicians must run the risks and suffer the burdens of standing for parliament, of having a business or professional income disrupted, of having their views attacked, and of having to persuade preselection committees, the officials of union and other groups, electors, Ministers and other power brokers of their ability and of the sense of their opinions. They have to spend much time trying to remedy their constituents' problems by negotiating with or cajoling representatives of central government and other public and private institutions. That training, rigorous and painful as it is, equips most Australian politicians, acting in groups, with an understanding of how far legislation can be enacted to satisfy particular wishes of particular sections of the community. Just as complete victory for any point of view is unlikely in the federation as a whole because of the division of power between bicameral legislatures and between the central government and the States, so it is unlikely within each polity because of the clashes of interest groups and the necessity to work out practical compromises between them. But the democratic process leaves it open to the citizens as a whole, in periodical elections, to bless or oppose the plans or decisions of particular parties or groups or clans of politicians. Australian politicians collectively have an immense experience of life and of the almost infinitely various points of view within the population. Their whole careers rest on understanding the desires and needs of individual citizens. Judges, on the other hand, are lawyers with a relatively confined experience of life: it may have been intense, it may have involved exposure to many conflicts, it may have given insights into human suffering under acute stress, but it is quite narrow compared to the experience of the members of the legislature.

(c) Different forms of assistance and the avoidance of incongruity and uncertainty.

Legislatures have all the resources of the executive branch of government to assist them, both within departments and in the form of standing or ad hoc commissions of inquiry. Legislatures can hold public hearings if necessary. Their members have staffers who can assess opinion by dealing with lobbyists and the press. They can conduct a wide survey of problems in the context of the entire field of which they are part. They can effect change in a coherent as distinct from a piecemeal way, which is not readily open to a court seeking to effect a significant change. These mechanisms are superior to the fumbling discussions which can take place when judges attempt to reason towards radical legal changes — where they seek to “balance” in a rather windy way “interests” and “policies” and “needs” and “values”, none of them empirically established and few of them clearly articulated.

Judges, unlike politicians, have to decide a particular case, not all possible cases, and have to do so without assistance from the executive, or indeed from anyone except the legal representatives of the parties. A small judicial change in the law to deal with an injustice in a particular case can cause other unchanged parts of the law to rest on contradictory principles. Uncertainty develops as to whether the unchanged parts of the law will be changed in future. Modern High Court justices have often said that any judicially created change in the law must “fit” within the general body of accepted rules and principles (e.g., *Breen v Williams* [1995] HCA 63; (1996) 186 CLR 71 at 115 per

Gaudron and McHugh JJ). But what they have done does not always conform to this salutary precept.

(d) *Retrospectivity*. When a legislature decides to change the law, it usually does so prospectively. Leaving aside the occasional tax measure which operates from the day when a change of policy is announced — itself an understandable but not an uncontroversial practice — most parliamentary legislation takes effect only on or after enactment. This enables those affected by it to adjust to it in advance, to arrange their affairs in relation to the new legal regime. They can be protected by transitional provisions. But judicial legislation can only be retrospective. If conduct takes place in the year 2000 which was lawful in 2000 according to the precedents applicable in 2000, but a court in 2002 overturns those precedents and holds the conduct to be unlawful, it is legislating with retrospective effect. Retrospective legislation is usually regarded as an evil thing, antithetical to the rule of law. One or two flurries apart, our law knows nothing of “prospective overruling”, by which a court changes the law for future cases, but not for the purposes of the particular case in which the change was made.

(e) *Clarity*.

Parliament, when it changes the law, is usually capable of doing so with a degree of clarity because legislation is drafted by persons with considerable training, experience and skill in drafting. They are capable of achieving a much greater degree of precision than a group of judges can, particularly a group of judges speaking in separate judgments.

(f) *Decisiveness*.

Further, if there is to be parliamentary change, it must naturally rest on a reconciliation and elimination of differences — at least to the extent that a majority of one for a Bill is achieved — because without that reconciliation and elimination there will be no legislation. But an appellate court is under no such discipline. The only discipline on an appellate court is to produce a majority for a set of orders. There can be total chaos within, and total contradiction between, the reasoning of each of the judges favouring the majority orders. The case decided by the making of orders which are supported by chaotic or contradictory reasoning is not an authority — it lacks a *ratio decidendi* — but the *obiter dicta* of particular judges may have considerable influence. A radical measure of instability can arise by the repetition of discordant opinions in case after case. Thus in the late 1980s and early 1990s, one school of thought in the High Court considered that the crucial test for identifying a duty of care in the tort of negligence was “proximity”. But not only was this not universally accepted — Brennan J in particular resisted

— what it meant was not agreed upon. There is no case on the law of negligence in this period stating a rule of law about proximity used as the basis for a decision

— the reason why the winner won and the loser lost — yet the proliferation of *dicta* caused endless speculation at all levels of the court system. These *dicta* have now been politely sidelined in cases decided over the last two years, but the harm caused would have been much less likely if parliamentary legislation had been employed. Incidentally, the doctrine of “proximity” was used by the majority in *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13; (1994) 179 CLR 520 as a reason for abolishing an old common law rule about the escape of substances from land: the fading away of

proximity in later times must place a question mark over a decision based on its supposed significance.

(g) *Inconsistency*. When courts effect radical judicial change, whether it comes out of a clear blue sky or not, it is not possible for them to carry out the necessary consequential changes to public institutions or governmental financial arrangements. This must be done by parliament. Thus when *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 recognised native title, the then Labor government, with great difficulty and after divisive debates,

decided that it was necessary to create a legislative regime within which the court's doctrines could operate, in particular so that claimants to lands subject to native title could seek to prove their cases. The result was the [Native Title Act 1993](#). Parliament, relying on what had been explicitly said in the *Mabo* case by Brennan J (Mason CJ and McHugh J concurring) at p. 71, assumed — and explicitly stated in the preamble to the legislation — that it was to operate on the basis that Crown leases, like the Crown grant of a fee simple, extinguished native title. *Wik Peoples v Queensland* (1996) 187 CLR 1 departed from that assumption, over the dissent of Brennan CJ and McHugh J as well as Dawson J, to the consternation of politicians of all parties. As a result massive amendments to the 1993 Act had to be prepared by the Coalition government in 1998 and enacted by Parliament after another period of difficult and divisive debate. It is questionable whether it is the proper role of the courts to introduce radical changes of this kind which parliament had not done, particularly in view of their tendency to cause immense strains not only within the community as a whole, but also within the legislature as it seeks to accommodate society to the new position. It is even more questionable for the court to introduce, in relation to a particular subject, changes which contradict the assumptions on which legislation specifically directed to that subject proceeded. Incidentally, it might also be questioned whether the process of judicial legislation in *Mabo's* case displayed fairness to Aboriginal interests in holding that a fee simple grant destroyed native title when on the facts the case did not concern Aborigines, about whom no facts were proved, but the rather different Meriam people, and Aboriginal interests were not heard. While Parliaments have no duty to give hearings to affected interests, they usually do, and, unlike the High Court, they did in relation to the [Native Title Act](#) both before it was enacted in

1993 and before it was amended in 1998. A more mundane example concerns the financial costs of judicial change. The executive in introducing federal legislation has to make estimates of the financial impact of the legislation. Courts do not. An example of a decision having large financial implications is *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292, permitting (over the dissent of Brennan J) the criminal trial of a person accused of a serious offence to be stayed if that person could not obtain legal representation. The practical effect is to compel governments either to abandon some criminal trials or increase legal aid, yet six of the nine governments, being the primary parties potentially affected by the decision, were not before the court. A recent practical example of the difficulties of radical judge-made changes in the law is *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512. It related to the liability of Councils for defects in roads and footpaths. This is an important field: in New South Wales, for example, claims by pedestrians in relation to tripping on footpaths comprise the majority of claims against Councils and constitute the single most expensive source of public liability claims. Before that case, it was the law that if a defect developed in a

highway by reason of wear and tear, the growth of tree roots, the effluxion of time, or in any way other than the positive act of the local council, it was not liable for damage which the hole caused to road users. The council was only liable if by some positive act it created the defect. This distinction between "non-feasance" and "misfeasance" has been much criticised, was abolished in England by legislation in 1961, but remained in force here. That decision abolished the distinction by a four-three majority. This operated retroactively. Though at the time when the plaintiff was injured on 19 August 1992 because a bridge under the council's control collapsed, it had not committed any tort, the High Court retroactively held that since the immunity for non-feasance did not exist, one might have been committed. The matter was remitted to the lower courts for consideration of whether it had been. If insurance policies were taken out by councils on the basis of the old distinction, so that the policies only covered acts of misfeasance, the decision exposes them to wide past uninsured liabilities in relation to any injury caused by non-feasance in the preceding three years which could now be sued for. Another difficulty is that the case potentially creates huge future liabilities for councils. How great those new liabilities are is not clear, since while the court widened potential liability by abolishing the non-feasance immunity, it also recognised that at least pedestrians faced a quite high hurdle of proving liability. If a change of that type had been effected by parliament, not only would councils have been given prior notice so as to enable insurance adjustments and the effecting of changes in their systems for detecting and repairing faults in roads, but State governments, or the Federal Government, would have been able to make financial arrangements with councils to enable them to meet the new responsibilities created by the widened liability. Yet a further difficulty with the case is that it contemplates an intrusion of courts into the business and administrative decisions of councils. The widening of duties for councils raises the issue of how they are to pay for the work which must be carried out in order to comply with those duties. Gleeson CJ, who, with Hayne J and Callinan J dissented, said at paragraph [16]:

Road maintenance and improvement involves, amongst other things, establishing priorities for the expenditure of scarce resources. Accountability for decisions about such priorities is usually regarded as a matter for the political, rather than the legal, process If such considerations come to depend entirely upon judicial estimation, case by case, of the reasonableness of a council's public works programme, it is at least understandable that governments may think they have cause for concern.

At paragraph [43] he said:

The non-feasance rule is a rule about the accountability of public authorities invested by Parliament with the responsibility of applying public funds to the construction, maintenance and improvement of public roads. The common law principle has been that such an issue is to be determined by the will of Parliament expressed in legislation, and the courts have encouraged Parliament to understand that their legislation will be interpreted and applied in a particular fashion. It is clear that Parliaments have acted upon the faith of such an understanding. If the rule is to be changed, the change should be made by those who have the capacity to modify it in a manner appropriate to the circumstances calling for change, who may be in a position to investigate and fully understand the consequences of change, and who are politically accountable for those consequences.

It is no surprise that the New South Wales government has announced that it proposes to nullify the majority decision by legislation. Decisions like those in *Dietrich v R* and *Brodie's* case have the effect of requiring public expenditure on particular purposes to be increased, to the detriment of expenditure on other purposes. Those are choices conventionally regarded as being for the executive, since it is the executive which must obtain the necessary funds from the legislature and since it is for the executive and the legislature to collaborate in deciding which claims are the most deserving. They are responsible for this to the electors; judges are not. Decisions in which judges pre-empt the choices of other branches of government reveal a tendency to seek to expand the non-responsible power of the courts at the expense of the responsible power of the other branches. One argument sometimes advanced in defence of the High Court's activism is that it is open to Parliaments to abolish the changes, yet legislation of that kind is rare, and the legislative inactivity is evidence of consent to what the courts have done. In "An Over-Mighty Court?",^[15] Mr Ian Callinan QC, as he then was, rebutted this contention by pointing out that legislative abolition was not possible in relation to constitutional developments in the High Court, that the relative recency of the new activism meant that it was too early to draw any conclusions from legislative passivity, and that it would never be easy for Parliaments to abolish by legislation decisions of so august a body as the High Court. To these points can be added the fact that, with a further eight years' experience, one can observe considerable legislative activity. Whether or not the insurance companies are correct in saying and behaving as though there is a public liability crisis, the events of this year amount to an adverse reaction to virtually the whole of the High Court's widening of the law of negligence in the twenty years before the appointment of Gleeson CJ. The Federal government, via the Ipp Report, and the other governments, via their own proposed or already implemented changes in tort law, are revealing an acute dissatisfaction with what the High Court has done. And in the case of New South Wales it is not recent: in 1988, for example, it radically cut down on recovery for negligently caused injuries in motor accidents and in 1999 cut down such recovery even more: *Motor Accidents Act*

1988 and [Motor Accidents Compensation Act 1999](#). Whatever the abstract justice of these measures, they contradict any theory of approval by the other branches of government for the legislation carried out by the judicial branch.

(h) *Indeterminate justifications*. Finally, another undesirable element in some recent judicial changes in the law is that they are based on very indeterminate grounds. Though Sir Owen Dixon was not opposed to gradual and principled change in the law, he certainly did not favour doing so by recourse to ideas which modern High Court judges have stated in expressions like "the contemporary needs and aspirations of society",^[16] or "contemporary values",^[17] or "the relatively permanent values of the Australian community",^[18] or the "view society now takes",^[19] or "enduring values" as distinct from "transient community attitudes",^[20] or "transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group".^[21] Sir Anthony Mason has said:

The ever present danger is that 'strict and complete legalism' will be a cloak for undisclosed and unidentified policy values

As judges who are unaware of the original underlying values subsequently apply that precedent in accordance with the doctrine of stare decisis, those hidden values are

reproduced in the new judgment even though the community values may have changed.
[22]

Sir Owen Dixon might have asked the following questions. How are contemporary "community values" to be discovered? How are "community values" in former times to be discovered? Do applicable "community values" exist when the community is pluralist and divided on many questions? How can searchers for community values distinguish between their personal values and the values of the community which are distinct from their own? Kitto J, in *Rootes v Shelton*, [23] saw "changing social needs", the "designing" of rules and recourse to "social expediency" as introducing "deleterious foreign matter into the water of the common law — in which, after all, we have no more than riparian rights". Mason CJ disagreed with this, [24] but Sir Owen Dixon would not have. And he would not have agreed with the idea that the law should be changed by judges because of "current social conditions, standards and demands". [25]

Nor would he have found much profit in another source of law to which advocates of judicially changed laws increasingly look — international law or international expectations. In *Mabo v Queensland (No 2)*, Brennan J (Mason CJ and McHugh J concurring) relied on the "expectations of the international community". [26] Kirby P has relied on "international conventions", whether or not Australia is a party and even though they have not been enacted into Australian law, "particularly where they state universal principles of international law relating to fundamental human rights". [27]

When judges detect particular community values, whether in the Australian community or the "international community", as supporting their reasoning, they may sometimes become confused between the values which they think the community *actually holds* and the values which they think the community *should hold*. It is highly questionable whether many people in the community see the failure to prosecute persons charged with a serious crime unless the grant of legal aid is made to those persons, as conforming to their own personal values. [28] This suggests that the soigné, fastidious, civilised, cultured and cultivated patricians of the progressive judiciary — our new philosopher-kings and enlightened despots

— are in truth applying the values which they hold, and which they think the poor simpletons of the vile multitude — the great beast, as Alexander Hamilton called it — ought to hold even though they do not. The trouble is that persons adhering to different values or different perceptions of need or different aspirations tend to be at risk of being ruthlessly waved out of all decent society as enemies of the people. In short, radical legal change is best effected by professional politicians who have a lifetime's experience of assessing the popular will, who have been seasoned by much robust public debate and private haggling, who have all the resources of the executive and the legislature to assist, who can deal with mischiefs on a general and planned basis prospectively, not a sporadic and fortuitous basis retrospectively, and who can ensure that any changes made are consistent with overall public policy and public institutions. Professional politicians may not be an ideal class, but they are better fitted than the courts to make radical legal changes. It is curious that the Mason court, whose members individually have tended to stress that the Constitution was made by the people of Australia, and who collectively implied into the Constitution a provision requiring freedom of political communication on the basis that the Constitution provided for representative

democracy, whereby parliamentary legislators are chosen directly by the people, tended to treat itself as another legislature even though it was not chosen by the people.

[29]Footnote 3 on that page contains the enigmatic observation: "It should be noted that the notion of representative government leaves out of account the judicial branch of government." The perception that "all powers of government ultimately belong to, and are derived from, the governed", and that the governed elect legislatures but not courts, has not led the High Court to the conclusion that the courts should assume a very different role from that of parliamentary legislatures.

Conclusion For these reasons a court faced with the choice of doing justice according to the existing law and seeking to overcome injustice by effecting a significant change in the law should, apart from cases where no conflict with the legislature or the general legal and political order may arise, and no financial problem is likely to be created for public bodies, generally apply the existing law and leave it to parliament to make a new and more just law if it desires. If judicial law making does conflict with legislative policy, or the general legal and political order, or creates financial problems which the judicial branch cannot solve but must leave to others to grapple with, it intrudes into the true role of other arms of government. It conflicts with the separation of powers. In the words of Lord Devlin: "It is essential to the stability of society that those whom change hurts should be able to count on even-handed justice calmly dispensed, not driven forward by the agents of change."^[30] Loyalty to precedent is important because it increases the chance of obtaining some certainty. The common law is not always clear, but in most fields it is reasonably ascertainable. It would have much less certainty if it were thought to be readily open to change. If courts are disloyal to precedent, in the words of Lord Camden, "each judge would have a distinct tribunal in his own breast, the decisions of which would be as irregular and uncertain and various as the minds and tempers of mankind."^[31] Disloyalty to precedent in effect gives judges uncontrolled discretionary power. Lord Camden said in *Hindson v Kersey*: "The discretion of a Judge is the law of tyrants: It is always unknown: It is different in different men: It is casual, and depends upon constitution, temper, passion. – In the best it is often times caprice: In the worse it is every vice, folly and passion, to which human nature is liable."^[32] The doctrine of precedent is a safeguard against arbitrary, whimsical, capricious, unpredictable and autocratic decision making. It is of vital constitutional importance. It prevents the citizen from being at the mercy of an individual mind uncontrolled by due process of law. It is not surprising that George Orwell, though not sympathetic to the gouty old bullies and evil old men, was prepared to praise them on the ground that they interpreted the law according to the books and not otherwise. The more the courts freely change the law, the more the public will come to view their function as political; the more they would rightly be open to vigorous and direct public attack on political grounds; and the greater will be the demand for public hearings into the politics of judicial candidates before appointment and greater control over judicial behaviour after appointment. So far as these demands were met, judicial independence would decline, and such attraction as judicial office presently has would be diminished. None of these outcomes would be desirable. All would multiply the threats to the rule of law which judicial activism has created. Our present state is much less bad than that of the United States, Canada and New Zealand. But the former condition of things needs to be restored.

Endnotes

[*] This article first appeared in the January-February 2003 edition of *Quadrant Magazine*. Here it appears fully footnoted.

[**] Justice of the High Court of Australia.

[1] George Orwell, *The Lion and the Unicorn: Socialism and the English Genius* (London, Secker and Warburg, 1941) pp. 22-25 (italics in the original).

[2] At p. 1066 and p. 1073.

[3] Geoffrey de Q. Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988).

[4] (1951-52) 85 CLR xiv.

[5] Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (Law Book Company,

1965), p. 104 (hereinafter "*Jesting Pilate*").

[6] *Mirehouse v Rennell* [1833] EngR 276; (1833) 1 Cl & F 527 at 546; [1833] EngR 276; 6 ER 1015 at 1023.

[7] *Jesting Pilate*, p. 159.

[8] *Jesting Pilate*, p. 153.

[9] Introduction, *Selden Society Year Book Series*, (Vol. I), p. xviii.

[10] See "The Rise of the Hero Judge" [2001] UNSWLawJl 60; (2001) 24 UNSWLJ 747.

[11] *Jesting Pilate*, p. 158.

[12] Lionel Murphy, "The Responsibility of Judges" in Gareth Evans (ed.) *Law, Politics and the Labor Movement*, (Legal Services Bulletin, 1980), pp. 5-6.

[13] The Honourable Justice M. H. McHugh, "The Judicial Method" (1999) 73 ALJ 37 at 38.

[14] *Jesting Pilate*, pp. 158-159.

[15] Ian Callinan, "An Over-Mighty Court?" *Proceedings of the Fourth Conference of the Samuel Griffith Society* (1994), pp. 107-108.

[16] *McKinney v R* [1991] HCA 6; (1991) 171 CLR 468 at 485.

[17] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 at 42.

[18] *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292 at 319.

[19] *R v L* [1991] HCA 48; (1991) 174 CLR 379 at 390.

[20] Sir Anthony Mason, "The Judge as Law-Maker" (1996) 3 *James Cook Uni L Rev* 1 at 12.

[21] *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292 at 319.

[22] Sir Anthony Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience" (1986) 16 *Fed L Rev* 1 p. 5.

[23] [1967] HCA 39; (1967) 116 CLR 383 at 386-7.

[24] See Sir Anthony Mason, "The Contract" in Paul Finn (ed.) *Essays in Contract* (Law Book Co., 1987), p. 30.

[25] *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292 at 329.

[26] [1992] HCA 23; (1992) 175 CLR 1 at 42.

[27] *Young v Registrar, Court of Appeal (No 3)* (1993) 32 NSWLR 262 at 276.

[28] Cf. *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292.

[29] *Australian Capital Territory Television Pty Ltd v The Commonwealth* (1992) 177 CLR

106 at 137 per Mason J.

[30] Patrick Devlin, *The Judge* (Oxford University Press, 1979), p. 9.

[31] *Donaldson v Beckett* (1774) 2 Brown 129.

[32] See a note to *R v Thompson* (1680) 8 Cobbett's St Tr 1 at 57.

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