IVORY TOWERS AND CONCRETE CASTLES: A HUNDRED YEARS WAR

BY FRANK MAHER*

[The author examines the complementary roles of academics, practitioners and judges in law. Tracing the history of rivalry between these groups, the author concludes such conflict has diminished, resulting in a co-operation beneficial to all parties.]

A. THE OLD FEUD

'Why are the dons so rude to the judges
The judges so hard on the dons?'

This doggerel couplet used to go the rounds many years ago. It has now been almost disused. It did express then a curious 'schism' in the legal community — a Hundred Years War — that began only with the establishment of Law Schools staffed by very able scholars, who started to question some older attitudes of the Judiciary and the professionals over the last century or so.

The couplet had a surprising 'creator'. He was Lord Tomlin. His Lordship was making a speech in praise of Sir Frederick Pollock's editorship of the Law Quarterly Review[1] in 1935. He delivered a delightful, humorous and charming address, in which he spoke of a certain degree of hostility between the academics and the practitioners. He referred to an old poem about those people who were 'clever' and those who were 'good' and the mutual antagonism between them. The last two lines ran:

> For the good are so hard on the clever,
> And the clever so rude to the good.[2]

He recalled that, some years ago, the classes of lawyers did not work as well together as they should have done. He went on:

> It would not be going too far to say that there was a marked absence of sympathetic understanding between the academic lawyer and the practising lawyer. Indeed, the two last of the lines which I have quoted might perhaps have been adapted and might have run:—
>
> 'For the Dons are so hard on the judges
> And the judges so rude to the Dons'.[3]

He concluded that,

> [h]appily all that is a thing of the past and now each recognizes that the one is the complement of the other and appreciates and values the company and the work of the other.[4]

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[1] 'In Memoria — Lord Tomlin of Ash' (1935) 51 *Law Quarterly Review* 567.
[2] *Ibid.* 568.
[3] *Ibid.*
[4] *Ibid.*

The Law Quarterly Review had deserved great credit for that new unity, having reduced earlier kinds of open friction to manageable proportions by 1935.

Lord Tomlin was one of the few members of the House of Lords who, when he was appointed in 1919, had done the course in Jurisprudence at Oxford from which he emerged with First Class Honours.[5] He was both a first-class scholar and a fine judge. Was he too optimistic? My doubts arose when, recently, I came across an excellent, succinct panegyric of the late Sir David Derham. It summed up accurately the fine achievements of that great Australian whom I knew well as a colleague and friend for so long.

Strangely, one antique, hackneyed phrase cropped up. The learned writer referred to Sir David as 'no mere academic'. The offending word is 'mere'. Doubtless the writer only meant to say that Sir David's many activities extended beyond teaching and writing. This is fair and correct. But the hoary jibe, a 'mere academic', in itself revives an ancient contest that ought now really to be left to die in peace. We older lawyers remember the unhappy exchange of taunts of only a few decades ago. In those days practitioners spoke with open contempt of academics as 'dreamers with no idea of what worked in real life'. Dwelling in Ivory Towers, they were blithely unaware of the turmoil on the ground below and outside. The teachers in turn equally scorned the mass of 'narrow-minded, legal plumbers', 'dull mechanics', 'shrewd operators with shallow minds', who did the routine jobs on the top floors of lofty city castles. The origin of the term Ivory Tower is unclear. Many Christians will recall that, in the Medieval Litany of Loreto in praise of Christ's Mother, she is called Tower of Ivory: a tribute to her goodness of integrity and courage in her sorrows. The Oxford Dictionary says that the term was used lately by the French literary critic, Saint Beuve, in a jesting reference to the French poet, de Vigny, who dwelt in a lofty turret, whence he threw forth his poems to the world outside. Early on, it was part of The Song of Solomon; there it was a term of praise and joy for his beloved.

When the scholars in the Universities entered the field of legal training in about the 1870s, lines of battle were drawn and the term became one of scorn for those who dodged life and over simplified the law for that reason.[6]

This was recognised by Professir Gower who, over a decade ago, observed, concerning the appointment of two Canadian Professors to high Appeal Courts there and the protests that followed, that:

> The allegation that academics are remote or unworldly runs through many of the practitioners' statements. In 1941, Lord Chancellor Simon said, in reply to a House of Commons Select

[5] *Ibid.* 567.

[6] Indeed, the scornful use of the term 'ivory tower' has not been restricted to the legal field. For example, in a recent newspaper article one finds a prominent union official attacking a former secretary to the Treasury on the grounds that industrial relations reform has consistently failed to 'permeate the ivory clad walls' of the latter's office. In yet another newspaper article, one reads a complaint that large organizations are foolish in placing all their Chief Executives in one high-rise city palace where, as in an 'ivory tower' they get entirely out of touch with their own subordinates in the field.

> Committee which inquired about judicial appointments: 'I do not want to see the judicial Bench filled with people who are no doubt terrifically learned but are living in complete seclusion and have no contact with the world.'
>
> By contrast, practitioners often seem to the academic to be obsessed with the details of conflicts of fact in the law courts. It is these details which are the basis of so many of those highly personalised facetious anecdotes which are so entrancingly funny when told in after-dinner speeches at legal gatherings and so exceedingly boring to everybody else. H.G. Wells (not a teacher but an academic if ever there was one) once described legal conversation as consisting mainly of '[t]hose classical anecdotes of crushing cross-examinations, blighting snubs, and scandalous miscarriages of justice so dear to the forensic mind.'[7]

The same mutual reproaches are common among engineers, medics, business directors and 'experts' in most disciplines. The 'Ivory Tower' and the 'Concrete Tower' inhabitants are universally favourite targets, symbols in the fray. Until recently, judges would not allow the works of living writers to be treated as helpful 'authorities'. Professors, in reply, deplored the lack of logic, the diffuse reasoning and the vague principles. They criticised the lack of social values and moral rights that they saw in many judicial decisions. This rivalry was endemic even forty years ago. Now, in many 'hard cases' these factors are openly employed by judges trained in jurisprudence or community needs.

Australians have not the respect for scholarship evident elsewhere. Only in October 1986, our own Vice-Chancellor, Professor Caro, in his Report, publicly regretted the shortage of funds to run a University today. He added:

> In a recent address the Minister for Science, Mr. Barry Jones, said: 'Australia is one of the few countries in the Western World in which the words 'academic' and 'intellectual' are used as terms of abuse.' He is right, and I often wonder how long we can afford that.[8]

When I speak of 'practitioners' I here include both judges and non-judges, counsel and solicitors. Some solicitors were sceptical of academics on the ground that they are not aware of the techniques of running an office, pleading, looking at financial considerations, or understanding the business of taking a risk with giving advice that may be harmful to the client. The judges, on the other hand, protest often that critical academics do not understand their decisions. They feel that commentators are too remote from the business of 'making a decision' that may affect a large class of persons or of pleading a claim in the appropriate form and that such commentators also criticize decisions unfairly.

Therefore, each type of practitioner has a different reason to find fault with the dons; at the same time there is war between the Bar and the Solicitors in many areas.

For the purpose of this essay I will refer *mainly* to the judicial criticism, although a few comments of the practitioners will form part of the theme.

In Melbourne, one very competent solicitor in his field, Mr. Piesse, contended that the Law School in Melbourne was far too theoretical in its training in property. He claimed it must be made more *pragmatic*, especially

[7] Heuston, R.F.V., 'Judges and Teachers' (1978) 9 *Federal Law Review* 135, 137.
[8] University Gazette Vol. 42 (3) September, 1986

as to drawing up documents. He kept up a fierce campaign for years. A non-legal poet, Vice-Chancellor Medley, put this complaint in verse long remembered:

> My name is Piesse, but I wage war
> Against the Faculty of Law.
> For nothing my excitement stirs
> Like sliding down the Barristers.[9]

The Law School began quite early in Victoria![10]

When appointed to a new School in England one hundred years ago, that great public lawyer, John James Park, the first Professor of English Law and Jurisprudence at King's College, London, disclosed in his Inaugural Lecture, in memorable words, the Bar's scorn of his accepting that post. R.W. Blackburn recently recorded his comments:

> When, in the summer of last year, I mentioned, among some individuals of my circle, my intention of sending in testimonials for this chair, I found a general disposition among professional men (and, among them, men of the most superior understandings) to dissuade me from so doing, on one or the other of the following grounds:
> 1. That the office of a Law Professor was undesirable for a practising lawyer; for anyone, in short, but there who had nothing else to do.
> 2. That it was one of doubtful utility to the public![11]

Blackburn fears that '[a] measure of the same scepticism and philistine attitude towards academic law remains today'[12]. He points out that whereas in Europe the great authority is that of the Professor, to whom the judges seem 'second-class', we alone have always exalted the 'practical man of affairs' above the 'theorist' when seeking the 'last word' on a topic![13]

The position is very different from that on the Continent. I remember, when teaching the Common Law in Rome some years ago, that when I asked the students whether they would be worried if the Supreme Courts of two different regions had come to quite opposite conclusions on the same facts, they replied contemptuously: 'Why should it worry us? They are only judges!'

The Professor's Note on the article of the Code is what carries weight in Europe![14] So it is interesting that the common lawyers *alone* have put the Professor well 'down the scale'. Their prestige is now being given a higher degree of equality and mutual respect, which can only profit all. It is realised we need 'open-minded' leaders, not mere technicians both on the Bench and in the class room.

Perhaps it was the 'intellectuals' who fired the first shots. Bentham's scathing attacks on Blackstone's idealised picture of the common law as 'the perfection of reason' was really an unprecedented diatribe against the

[9] Campbell, R., *A History of the Melbourne Law School 1857-1973* (1977) 15.
[10] *Ibid.* 15. The author 'notes' how remarkable it was that the University of Melbourne should have set up a Law School so soon after the University began (namely, in 1857).
[11] Blackburn, R.W., 'Dicey and the Teaching of Public Law' (1985) *Public Law* 679, 694.
[12] *Ibid.*
[13] *Ibid.*
[14] Barzini, L., *The Europeans* (1984). He points out how distrustful the English are of wide generalisations.

muddled, aniquated, incoherent system of the common law in his day.[15] Judges gave no better reasons for their decisions than that earlier decisions, perhaps made centuries ago, decided similar cases in the same way. Blackstone had been forced to confess that the law was a 'mysterious science' — and Bentham agreed. Only Parliament, he said, could solve the absurd 'mysteries' by legislation and codes; reform was beyond the Judge's capacities, with their passion for the strictest reliance on precedents.As Bentham thundered:

> Should there be a Judge who enlightened by genius, stimulated by honest zeal to the work of reformation, sick of the delays, the caprice, the prejudices, the ignorance, the malice, the fickleness, the suspicions, the ingratitude of popular assemblies, should seek with his sole hand to expunge the effusions of traditionary imbecility, and write down in their room the dicates of pure and native Justice — Ah! let him but reflect that I . . . I and that amendment from the Judgment Seat is confusion, that partial amentment bought at the expense of universal certainty is but . . . that partial good thus purchased is univeral evil![16]

Nor could the judges have been happy once the major Reviews came into existence in 1885. One example will suffice.

Concerning the House of Lords decision on what amounted to 'fraud' as held in *Derry v. Peek*, by Sir Frederick Pollock declared in 1889:

> The purpose of this paper is to show that the grounds assigned in *Derry v. Peek* . . . are erroneous in law, and ought to be disregarded by every tribunal which is at liberty to disregard them![17]

He concluded:

> It seems to me that the decision of the House of Lords has dangerously relaxed the legal concept of honesty in the Statement of Facts, and will do no good, to say the least, to commercial morality![18]

This can hardly have pleased their Lordships — coming from a Pollock! They had permitted too low a standard for proper commercial behaviour — as later cases showed.

Every lawyer is a philosopher and has theories of his or her own (sound or not) on the purposes of law and how they are best to be carried out. Judges themselves quite cheerfully admit that it would be a defect if they all thought the same way. This diversity of theories leads often to a true *unity*, not a dull *uniformity*. The task of the academic is, by abstraction and analysis, to increase the sense of unity; to provide *general ideas* which the courts may look at and which practitioners may consider when organizing their own activities. Judges often admit the value of such later efforts to explain their differences. Judges are not all of one mould. Some are conventional, others 'individualistic'. This individualism was praised by Sir Owen Dixon when he observed:

[15] Bentham, J., *A Comment on the Commentaries* (1928).
[16] *Ibid.* para 7202. For a full discussion of Blackstone's confession of the mysteries of the law which he nevertheless venerated, see Boorstein, D., *Mysterious Science of the Law* (1941).
[17] Pollock, Sir Frederick, *'Derry v Peek* in The House of Lords' (1889) 5 *Law Quarterly Review* 410.
[18] *Ibid.* 412

> It is no doubt unsafe to generalize about judicial process. For after all it is a generalisation about the work of individual men. In no field of special knowledge does one man pursue its technique or exercise its art precisely in the same way as another . . . There is no place where the inequalities and variations of men can be seen more clearly than when the men are upon a Bench![19]

The great judges have never been narrow-minded. Lord Macmillan admitted, concerning the confusion at the time about the limits of the law concerning the *Rylands v. Fletcher Rule* regarding strict liability in torts:

> Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalize the law of England. That attractive if perilous field may well be left to other hands to cultivate.[20]

That appears to invite a valuable *rationalizing* role for the academic mind. A clear, though rare, suggestion to the scholars that they put the cases *in order* under some principle, so as to help all lawyers to see the cases *as a whole.* 'Perilous', because one makes errors — but necessary because in today's massive volume of specific (and often unrelated) rules a theory must be put forward, even if it is incomplete, in order to make a start!

One remembers that foolish phrase: 'It's alright in theory, but it won't work in practice'. Obviously, if it won't work there's something wrong in the theory! Back to the drawing board! Its counterpart is the truth that mere *facts* have no meaning in themselves. Only when they are brought together in 'classes' and 'categories' do they make sense. Here the academic has more time and knowledge than the men of affairs in Hard Cases, where confusion often reigns in the Reports.

In reply, sometimes the Federation of Lawyers 'strikes back'. Thus Professors Abel-Smith and Robert Stevens, in their survey of English Law in 1966 (from 1750 on) comment adversely on the majestic disregard of judicial realities — a fault usually attributed to academics — by the late 19th Century Judges, who often produced chaos in a mass of unrelated decisions:

> The *lack of analysis of role or function was perhaps nowhere more obvious than among the judges* . . .
>
> In general the High Court judges *lived by certain self-evident truths.* They remained as *blissfully ignorant of developments in the psychology of decision-making as they did of other aspects* of the social sciences. Despite the advent of democracy they still accepted the mythology of Coke and regarded themselves as protectors of civil liberties, especially those relating to personal property. They still saw themselves as men of power and independence, curbing in their wisdom the excesses of an ignorant Parliament and over-efficient Civil Service — preserving a democratic state by occasionally defying its intentions. For this reason they were deeply jealous of their political position. *It was not easy to suggest that they might handle new issues since it was revealed to the judges alone which issues were judicial and which were not.* To suggest they might deal with this or that area of government power, or to suggest that many of the decisions they took were very similar to those taken by relatively humble civil servants, who had no security of tenure or independence, were major heresies. [Emphasis added][21]

[19] Dixon, Sir Owen, 'Concerning Judicial Method' in Woinarski (ed.) *Jesting Pilate* (1965) 157.
[20] *Read v. J. Lyons & Co. Ltd* [1947] A.C. 156, 175.
[21] Abel-Smith, B. & Stevens, R., *Lawyers and the Courts: A Sociological Study of the English Legal System 1750 - 1965* (1967) 464.

Courts often went on adding new cases to old ones piecemeal. Academics were left to provide explanations, not always favourable. Senator G. Evans, when a member of Melbourne Law School Staff, devoted much of his energy and time to discussing the role of the High Court in interpreting the Constitution. His attacks on the vagaries of its judicial techniques in this area were summed up in an Address headed, significantly, 'The Most Dangerous Branch?'. The Courts were then the part of government to be watched most carefully, lest they defeat the general need for progress, social justice and unity of approach. He wrote:

> The High Court's record in adjusting the Constitution to the centripetal pressures of social and economic change has been a *patchwork* of successes and failures.[22]

This is not an unfair comment in certain areas of constitutional and administrative law in this age. He did admit that in several areas the Court had done good work and that constitutional analysis is full of pitfalls — and easily attacked by partisan observers.

The same charges have long been levelled many times by radicals against the House of Lords for their narrow background. For years Professor Griffith condemned their Lordships for their rigid caution in relating the law to modern society and for their ultra-conservative approach, lest they be accused of interfering in politics. For this reason they often declined to remedy the law's obvious defects.[23]

The judges' reply is that their prestige will suffer if they are seen as interfering with government, especially where the community is divided. That has always been the High Court's fear, too, as Sir Owen Dixon stressed in his address to lawyers in Sydney. Yet in his Melbourne speech the following week he also strongly affirmed his belief that the law was a 'living instrument' — not a machine — a remark usually overlooked.[24]

British scholars have been cautious in making wide generalisations about the law, as have our judges. They have all, as we know, proceeded far more cautiously, step by step, towards a fairly wide doctrine rather than *starting* with a general philosophical theory, too difficult to apply in practice. The caution of our High Court in its efforts to expound the meaning of vague terms in the Commonwealth Constitution is an example. They are not keen to be slavishly 'in the current fashion of the age'. On the whole, to the dislike

[22] Evans, G., 'The Most Dangerous Branch? The High Court and the Constitution in a Changing Society' in Hambly, A.D. & Goldrings, J.L. (eds) *Australian Lawyers and Social Change* 71. Also see Howard, C., *Australian Federal Constitutional Law* (3rd ed. 1985) 63.

[23] Griffith, J.A.G., especially in *The Politics of the Judiciary* (3rd ed. 1985) *passim.*

[24] Dixon, Sir Owen, address upon the occasion of first presiding as Chief Justice at Melbourne in Woinarski (ed.), *Jesting Pilate* (1965) 251. Maher F.K.H., *Common Sense and the Law* 8 M.U.L.R. 587, 595, explains some of the differences between Theory (the well thoughtout idea) and the 'habitual' common sense. The theorist can give 'reasons' for his actions, the common sense person cannot: he follows the habit of his kind. ' "Hard" Cases, Floodgates and the New Rhetoric' (1986) *University of Tasmania Law Review* 96.

of some social reformers and ideologues, they have followed the technique of advancing gradually, preferring to be a 'little behind the times', rather than to accept perhaps only temporary fashions of thought. This is wise, but sometimes leaves the law in confusion.

Both writers and judges share in this proper fear of excessive generalisation. They have adopted, unknowingly, the maxim of Goethe: 'one must think in order to act and act in order to think'. Acting and thinking must go together — or both are futile. To keep that balance requires judicial acrobatics in a process of a moving dynamic equilibrium in our Age.

One supposed virtue, quite contrary to being academic, is to 'possess common sense'. This is another half-truth. Common sense is admirable, but not sufficient. A 'good tradesman' will have it, also a 'good lawyer', but, though it is sufficient for the day-by-day tasks, it falls short when one is confronted by a *novel* problem. Then one needs a Theory. When the plant breaks down hopelessly, the management has to drag some 'absent-minded professor' from his cell to fix it, because he alone knows *why* it has failed and how to fix it. So, too, with lawyers.

Common sense, to use a simple term, is' what everyone knows'. It is what 'we have always done and it usually works. We don't quite know the reason but we know how to operate it'. That is an incomplete method.[25] It has been remarked that:

> It may be proved or disproved, correct or silly. But its essential quality is that it is knowledge sucked in, accepted uncritically, not reflected on, received without analysis. 'What everybody knows' is an amalgam of sound knowledge, inherited wisdom, inaccurate data, popular instincts and stupid prejudices, plus the legacy of current sagacity and the experience of the tricks of the trade. . .
>
> It may work as the stuff of one's primary axioms and assumptions — or the method of one's logic — or in the assumed facts from which one draws conclusions. But essentially it is unorganized, rigid, passive.[26]

Dicey said much the same:

> There exists at any given time a body of beliefs, convictions, sentiments, accepted principles, or firmly-rooted prejudices, which, taken together, make up the public opinion of a particular era, or what we may call the reigning or predominant current of opinion, and, as regards at any rate the last three or four centuries, and especially the nineteenth century, the influence of this dominant current of opinion has, in England, if we look at the matter broadly, determined, directly or indirectly, the course of legislation.[27]

Common sense is not lacking, even in armchairs. Some things we all know by rote; for others, we have to form a theory, and then use it to solve the apparently insoluble.

[25] Evans, R. & Maher, F.K.H., give a full account of the 'development' of the more courageous ideas on the new look at the floodgate objections: the product in part of an academic campaign of a saner theory over recent decades.

[26] Maher (1972) *op. cit.* 595.

[27] *Ibid.* 595. The author of the recent biography of Lord Goddard recalls that he never became 'a shade too much of an academic' as some other judges have been . . . He never assumed or supported an *ivory tower ignorance* of common life on the part of the Bench': Bresler, F., *Lord Goddard* (1977)

B. TYPES OF ACADEMIC THINKING

There are several constructions of the word 'academic'.

First, lawyers realize, as experts, that in some areas the 'more they know the more there is still to know' — and the more cautious one must be in making general statements about things. One construction is that the answer is academic where it may *at present* be beyond our grasp; therefore the experts may have to discuss it in order, by a creative constructive 'dialectic', to come a 'little nearer' to a theory, although they cannot yet grasp one, or *act* on it. The debate raises 'academic questions' and is vital as a means of sharpening our perceptions of possible answers.

Another good construction of the word 'academic' is a 'puzzle', which only theorists are concerned with seriously at present. Discussions help a few experts to think more clearly and accurately. However, often, they do deal with petty points, following varied possible deductions from First Principles, which lead to futile controversy. This kind of 'academic stuff' often properly evokes scorn, as happens in the later period of all ages of thought (Greek, Roman, Medieval, or even Modern Philosophy). Yet, as with the Royal Society, or Think Tanks, new ideas of great value emerge from time to time which transform society (for better or worse).

Third, in law, where a court says: 'That question here is academic', that does not mean that it is not *important* or fit only for seminars for those with time to spare. Rather, it declares that, in this case, the facts do not demand that the court give full attention to that point *now*: 'If it should arise later then we would have to consider it fully; but it is irrelevant to this claim'. This theoretical wisdom is evident in many famous *dicta*, later the basis of fine developments. Sir Owen Dixon made several such pregnant remarks — later taken up as 'accepted doctrine'. At the time, however, they were simply expressions of possible ideas, which might (or might not) come alive for later practical use — an academic exercise of potential value. Admittedly these asides can be dangerous — yet valuable and creative speculations — as are many dissenting opinions.

Then come those academics who the fall into the class of arrogant philosophers called (by the French) 'The Great Simplifiers'. These are the One-Eyed Monsters, who insist on reducing everything to a *single idea or formula* and then deducing *all* activities from it. Nineteenth century thinking lent itself to this kind of excessive logical pushing to extremes, when 'Schools' arose which fought one another on contradictory ideas. There is here no possible compromise, because each is so absolutely sure that its view alone is correct. They ignore the virtues of the true *paradoxes*, which lead to a 'dialectic' in a friendly form, whereby, after discussion, the truth emerges. One of the great strengths of the English Common Law has been, as judges remind us, the use of *oral* debate before the courts themselves. By these rather informal discussions, the opposing claims are combined in a sound synthesis. These debates are partly academic, such as 'what would you say if X were to happen?'

We can also point to many academic judges who themselves were Simplifiers and relied on reductionary prejudices, especially in the last century or so. One could foretell pretty clearly what each would decide in most cases, even when 'the law' seemed to others quite different. Rigid 'technical legalists' (like Baron Parke or Viscount Simonds) exemplified this type of judge.[28] On the other hand, wise 'generalists', such as Lord Mansfield, Lord Birkenhead, Sir George Jessell — and later Lord Denning and Lord Reid — advanced ideas without setting out the exceptions to be made to them later in detail. 'Pettifogging lawyers' are wrongly academic in practice. Dickens described them from his own experience in the courts of his day. Lord Eldon would leave a judgment he had written in his desk drawer — taking it out, looking at it, putting it back, for two (or twenty) years — before deciding it. There are stories of suits in Chancery which took more than twenty years to settle, and in which all of the original parties had died before the decision was finally given. Here the over-cautious Ideologues caused disasters in practice, ignoring realities in their Judical Ivory Towers, and niggling about minute examination of tiny points of procedure or jurisdiction which reduced Equity to a formal system.

Next, in modern court rooms, the practical/academic dichotomy has been applied across professions. No wonder experts from all fields hate going as witnesses to court where their special skills are to be treated as mere 'academic guessing' — as though laboratories too, are Ivory Towers.

Also, some scholars do talk utter rubbish, driven by an ideological urge to *compress everything* into one simplistic, all-embracing idea. They were trained in the 'scientific spirit' of the last century, from Austin to Bentham, hoping to 'tidy up the common law'. Professor Simpson has reminded us often that the common law is, and always has been, essentially rather 'untidy' and unsystematic.[29] That is one of its virtues, if not carried too far. How often we have seen unhappy 'scientific' attempts to codify, or put into a statute, an area of common law where the result is greater confusion that ever — and the common law creeping back into the statutes. This has happened to the Theft Act and following the effort to systematise the old Larceny Rules. The Sale of Goods Act and the Statute of Frauds often cause more trouble than benefit, after many judgments and exceptions made by later courts.

Then as G.K. Chesterton brightly said: 'Statements are made that are so absurd that they could only be made by a very learned man'. Yet, some court decisions, also looked back at, are equally absurd and pedantic. Lord Ellenborough dealt with a case where the captain of a ship which was sinking

[28] Baron Parke's love of subtlety for its own sake, and his application of some rules with terrifying rigidity, led to the conclusion of two distinguished Australian writers that, if others follow this line, then 'the future is dark': Paton, Sir G. & Derham, Sir D., *A Textbook of Jurisprudence* (3rd ed. 1967). Yet Sir Owen Dixon described him as the 'great James Parke' in respect of his readiness to modify principles where he had an opening to do so ('Concerning Judicial Method' in Woinerski (ed.) *Jesting Pilate* (1965) 159.

[29] For example, 'The Common Law and Legal Theory' in Simpson, A.W.B. (ed.) *Oxford Essays in Jurisprudence* (1973 2nd series) 76.

promised extra wages to the crew if they would work hard to save it. They did so — and it was saved. Then they found that Lord Ellenborough refused to enforce the agreement. He said that they were 'only doing their duty', and that he could imagine a situation in which a crew would rather let the ship sink than do extra work unless they were paid for it.[30] Such judicial nonsense was accepted as *valid*, because it fitted the *theory*. Many dicta exceed the most unreal utterance of the most complete recluse in his study even though he/she knows little about human beings in their daily lives.

In *Hedley Byrne & Co. Ltd v. Helter & Partners Ltd*[31] Lord Devlin tersely anninhilated, on sound practical grounds, a similar argument that a major difference existed between an action for the loss of *physical* safety by a negligent act, and one for the loss of *financial* gain by negligent advice.[32]

After 1900 there arose academics of such eminence that judges could *not* ignore them. In England they watched carefully what Professor Goodhart and Sir Frederick Pollock said in their Notes in the Law Quarterly Review. Lord Diplock (in a tribute to Goodhart)[33] attributed the relaxation of the non-citation rule of living authors very largely to the latter's influence. He observed that he possessed two attributes which are vital to one who wishes to alter the judicial role: *community acceptance* and *endurance*. He commented somewhat ironically that:

> [H]e who sets out to alter the habits of minds of judges must be possessed of stamina and patience and, if he hopes to see some positive results, blessed with longevity.[34]

Again often a dilemma arises for the well-informed judge about which Theory he should adopt.

Lord McNair illustrated this dilemma:

> Whereas I may have thought, as a teacher or as the author of a book or an article, that I had adequately examined some particular rule of law, I constantly found that, when I have been confronted with the same rule of law in the course of writing a professional opinion or of contributing to a judgment, I have been struck by the different appearance that the rule of law may assume when it has been examined for the purpose of its application in practise to a set of ascertained facts.[35]

Law in reality is neither a set of routine tasks in applying rules nor of vague juristic theories *alone*. Lord McNair's statement above brings general agreement. Academics cheerfully, and often, make the same criticism of poor work by other academics. The difficulty is that, in writing, one cannot anticipate all the unexpected facts that may arise later on. But nor can the highest court, which often has to modify over-expansive precedents:

> As stated in a textbook it may sound the quintessence of wisdom, but when you come to apply it many necessary qualifications and modifications are apt to arise in your mind.[36]

[30] *Stilk v. Myrick (1809)* 2 Camp. 317; 170 E.R. 1168.
[31] [1964] A.C. 465.
[32] *Ibid.* 516.
[33] (1975) 91 *Law Quarterly Review* 457.
[34] *Ibid.* 461.
[35] Heuston, *op.cit.* 145.
[36] *Ibid.*

Teachers accept without demur these risks and constantly remind their students of them. Moreover, one must agree that the Article, or Casenote, often results in unfair academic criticism, because of the writer's over-refinement, subtlety or even plain rudeness.

Judges have complained rightly about some academic analyses of their decisions. They have to write their judgments under great stress of time. A series of disputes, each in quite different areas, come before them constantly. The more 'knowledgeable' academic who teaches the same subject every year has plenty of time to write criticisms. Often, therefore, the academic can be helpful to the courts, but can forget that judges are not so fortunate. Some judges are perhaps over-touchy. Yet, as Lord Wilberforce remarked of Lord Denning: 'He has never minded criticism, indeed he thrives on it'.[37] Generally now, we all (except a few eccentrics) realise that the law is both a Whole and Parts, where opposing 'competing' views and conclusions can be brought together in a 'high-level *pattern*' of the law as a Unity, by joint efforts of courts and teachers.

Sometimes practical convenience and tradition do make difficult the desire to organise the law better despite academic urgings. A famous example is the claim where Mr. Justice Diplock was faced with the argument that the elephant which caused the damage was a 'tame Burmese female', and that these species were notoriously harmless. He agreed, but said he was bound by a previous decision which said that all elephants are 'dangerous'. Therefore, even in this case he could only follow precedent.[38] Sensible if odd!

And it should also be remembered that 'intellectuals' themselves vary in their attitude to the law's role in matters of social justice, morals, economics and a duty to look at the general effects of their decisions. Lord Devlin commented on the absence of *popular* and uniform criticism of the judiciary.

Generally today, *all* lawyers are more in touch with 'real life'. These days few are 'too remote' from the community at large. Many judges and academics are close friends, constantly meet socially, and discuss everything that normal persons chat about.[39]

To sum up, 'academic' is a *weasel word.* Practitioners can be just as 'remote' as professors if the term is used in a derogatory sense. But it need not be. The principal who advises his articled clerk: 'Don't get lost in principles; look at the Act', is behaving sensibly. That must be the *starting point.* But both are foolish if they leave out the issues of statutory interpretation by courts: the whole context (from the Title to the Schedules), the meaning of particularly

[37] Lord Wilberforce, 'The Academics and Lord Denning' (1985) 5 *Oxford Journal of Legal Studies* 439, when commenting on a recent book, Jowell, J.L. & McAuslan, J.P.W.B. (eds) *Lord Denning: The Judge and the Law* (1984).

[38] *Behrens v. Bertram Mills Circus Ltd* (1957) 2 Q.B. 1.

[39] *In Dante*: *The Purgatio* (1982), Dorothy Sayers comments on what Dante regarded as the most inhuman kind of 'ivory tower person', one whom deliberately cuts himself (or herself) off from the world for quite selfish reasons and deprives the community of his (or her) abilities.

woolly words in that situation, the history of the Act, common law restraints, the policy of that superior court in this area, the possible inconsistency with other Acts. In other words, the whole picture of the area. The *totality*, as well as the Parts of that issue must not be left out.

C. CAUSES OF CONFLICT

It is not surprising that Judges — often overworked — find little time to go through treatises. Moreover, they are often too tired, or too bored, to do more than rely on counsel only. Critics forget that some points are not raised by counsel. Further they are not all of one kind of temperament. Mr. Justice Kirby reminds us that on the Bench, one endures:

> The mixture of drama and boredom, a question or two, a touch of humour and kindliness and a refreshing glass of cold water when things get really tedious, are the ways by which good Judges get through their day. No Australian Judge seems to have followed the example of the Scottish Law Lord, Thankerton, who is reported to have practised his hobby of knitting while on the Bench. Of course, their are exceptions. There are vain Judges. It was said of Chief Justice Warren of the United States that vanity was his greatest vice. Perhaps a man of humility would have found it hard to flourish in that job. There are rude and intemperate Judges, intellectually proud and spiteful Judges: also a few foolish and dim Judges. But even critics of the judiciary salute the general independence and integrity of the office-holders. Independence, integrity and devotion to duty were the qualities singled out by the present Chief Justice of Australia, Sir Harry Gibbs, in his first speech on the judicature. Courage and independence, both of Parliament and of the Executive Government, were what Justice Nagle emphasised most in his recent retirement speech.[40]

Professor Paterson interviewed, informally, several English Law Lords and presented their private comments.[41] He found that, speaking informally to them, many of the English Law Lords (off the cuff) were not unwilling to listen to scholarly advice. One indicated that he 'seldom found the law journals of any assistance in their comments or criticisms *because they were not critical enough*'.[42] He then made a surprising, but sensible comment:

> I'd much sooner have a much more detailed criticism than what one gets — the sort of notes which are couched in very respectful language, are not particularly helpful, to us at any rate. I would much sooner have a more robust thing of much greater length.[43]

Paterson found in the end, that '[s]ome Law Lords indicated that they did not pay much attention to academic comment in any event', for various reasons.[44]

This is not surprising in the case of those of their Lordships who never read the Journals. Others, who did read them, also voiced similar opinions. Lord Kilbrandon reflected

> I think that sometimes in a jocular way you'll say 'I don't think Professor X will like that very much'. . . but it might not influence you very much in your judgement.[45]

[40] Kirby, J., 'The Judges', Boyer Lectures (1983) 15.
[41] Patterson, *op. cit.* Chapter 2.
[42] *Ibid.* 15.
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.* 15.

Paterson concludes that some academics 'can lay claim to the accolade of being a reference group to the Law Lords in their role as decision makers', the aim being to challenge the now mythic conservatism of the Bench.[46]

The Australian judiciary has been described as follows:

> [T]he typical High Court Justice is a male, white Protestant, raised in Sydney or Melbourne (or much less frequently, Brisbane) and of British ethnic origins. He is from the upper middle rather than upper class background, though is perhaps, more than his American counterpart, from lower middle class environment. He usually goes to a high status High School (usually private) and then to Sydney or Melbourne University where he has a brilliant academic record. If from a monied family, he immediately goes to the Bar, whereas if from humbler background he usually spends a period working for a solicitor or a government service first . . . His legal career is often supplemented, in some cases interrupted, by a political career and he sometimes has prior judicial experience . . . Even if apolitical . . . High Court Justices have conservative inclinations.[47]

This is no longer true, as is shown by Sir Ninian Stephen's comments about his own background,in his speech on receiving his Honorary Doctorate of Laws, in December 1985.

Yet that is overstated. A division between 'conservative' and 'progressive' judges is highly misleading, as the studies of Professor Blackshield have demonstrated.

Judges, some contend, still tend to have relatively little contact, except in court, with the 'disadvantaged' in society. They tend to favour the *status quo*, whether by reason of their 'unadventurous lives' or because they have done well out of the present system, whatever their origins. Some rejoice in a perceived duty to promote stability in a changing world. Many solicitors also hold this view; but it is less prevelent then it was formerly.

In Australia, the exclusion of children of the poorer groups from the judiciary is much less true than in England. One's theories are naturally affected by the traditions in which one is trained. Many of our judges had to do the course the hard way.

Lawyers had the same difficulty until recently about the value of history in understanding the law. It was once see as 'too remote from practice'. There had arrived great historians who put together the fragments of historical work previously set out in isolated judgments and collections. The brilliant, lucid Maitland sat at the feet of Sir George Jessel, one of the finest of our judges, and he sought to put the old cases into organised, readable form. He believed that to tear a doctrine from its setting was a capital crime, but to give or withhold judgment was a mattter of individual discretion. Thus one had to interpret the present in terms of the past and the past in terms of the present. Some courts overdid their antiquarian approach; others ignored the past despite the new picture of legal development.

The vast contributions made to our system by the notable scholars of past and present is obvious. Could we *understand* the law as it is today without

[46] *Ibid.* 20.
[47] Kirby, *op. cit.* 16.

the enormous historical labours of Holdsworth, the brilliant insights of Maitland, and the solid studies of Pollock, Cheshire, Dicey, Goodhart and Fifoot? In Australia, Geoffrey Sawer, Harold Ford, Colin Howard, Julius Stone and Harold Luntz among many, have thrown light in many dark caverns. Scholars have often had considerable influence, partly because of their books and partly because of their influence on their *students*, who are now judges, or senior partners in large firms. Blackstone was all-powerful for generations in America, as well as in England. He combined scholarship and reality in such a marked degree that Courts could not ignore him.

The common law is hailed as 'the work of the judges'. Few realize that they were, as a class, also scholars. In the Middle Ages all would have been trained in Church Colleges in philosophy, logic and theology before they tackled the law. Later they came from studies at the Universities in logic, philosophy (of the new era or of the Greeks), and mathematics. Being not so busy in court as modern judges, they had time to read widely, mix with scholars, read their Shakespeare, Mill, Austin and Burke, and also be 'prudent men of affairs'. It was legal *theory* that many lacked; so later on (at the bar) because they had learned their *law* only in bits and pieces, they had to listen to court proceedings and strive to master the intricacies of procedure with no help. The 'best' survived; many others abandoned the law in despair. Even in the early sixties of this century, virtually no member of a splendid House of Lords had studied Law at the Universities. That has changed. The scholars and the judges are increasingly one and the same in their training.

Many Judges now, before going on to the Bench, have themselves been teachers or have written excellent textbooks. Sir Victor Windeyer, Lord Justice Scrutton, Byles (on Bills), Mr. Justice Else-Mitchell and Mr. Justice Kirby are some well-known examples. 'Academic' then has become a term of respect amongst those who really know their law, though not by many whose tasks are largely rule-governed. So 'Academic' and 'Ivory Tower' are now meaningless terms in themselves except for a few extremists on either side.

D. LEGAL PARADOXES

The Law, like all systems of thought, is permeated with paradoxes — that is, in nearly every aspect, its operators find themselves faced with two *sound* possibilities of action: two propositions, two concepts that are *both valid*, and which 'compete' in the instant case. The skills required to resolve disputes depend on estimating correctly the *relative weights* of the ideas or propositions: which one carries the *greater force* in that particular situation? This creates tensions among judges.[48]

[48] There is a full account of the large number of dissents in the House of Lords between 1952 and 1968 in 'Blom-Cooper, L. & Drewry, G., *Final Appeal* (1972) especially Chs 11 and 12: 'Overrulings of lower courts occur in about one of every three appeals'.

A 'choice' has to be made — and this creates paradoxes. Oddly, the two ideas may be *apparently inconsistent at one level*, so that the problem is insoluble by formal logic alone. In seeking a solution opinions will vary. As we see — in cases in the highest courts — judges' opinions differ. So do those of academics, who are trying to 'organise the cases' to make the solution more rational — both legally and socially. The judge, whose major task is to decide the case before him in accordance with the existing rules presented to him, cannot look too far ahead. Sometimes an intelligent article or section in a text-book offers the best answer. At other times the judge's own insights, experiences and sense of 'rightness' will prevail. This leads to controversy. Sometimes the scholar's views are adopted (quietly); at other times he has to cede the field to the decision-maker, who understands better the whole human and legal ambience of what he has to do, at that period in time.

Often there is tension (or even conflict) between the two types of law making. The great Cardozo pointed out this dilemma 60 years ago in his book, 'The Paradoxes of Legal Science' (1928). Julius Stone, forty years ago, showed how these paradoxes arise, and how they are resolved by courts and lead the law into 'creative developments' by the combination of academic and judicial responses.

It is a modern paradox that so many constitutional lawyers who have derided the role of Judges in interpreting principles of justice are the most enthusiastic in pressing for Bills of Rights, which those same Judges will have to interpret.

In every field, at any time, that type of writer exists of whom Oscar Wilde remarked (concerning and author of a book on Italian literature) that he shows 'a lack of knowledge that must be the result of years of study'. In courts too, one discovers two sorts of lawyer: that are quite different in their techniques. They were well described by Tom Gerety[49]. He began by quoting Sir Isaiah Berlin and went on to apply the idea to U.S. Judges.

Sir Isaiah wrote that '[t]he fox knows many things, but the hedgehog knows the big thing.' The moral is that the fox is shrewd and can find many (disconnected) ways of escaping from a tough situation. The hedgehog, on the other hand, 'knows only one thing', and that is to curl up and stay fixed underneath his prickles. Consequently, the hedgehog is reluctant to move or alter things; the fox, on the other hand, wants to make many moves to improve his position. Together they make a sound balance. The hedgehog is likely to *wish* to improve the law, but stiffly leaves change to the legislator. In our society, he is sometimes wise to do so. Sometimes, by using his ingenuity, the 'Fox Judge' will get rid of or modify obnoxious, antiquated precedents by using ingenious devices. Recall the distinctions between the bold spirits and the timorous souls in *Candler v. Crane Christmas & Co.*[50]

[49] Gerety, T., 'Hedgehog and Fox in Constituional Law' (1980) 42 *University of Pittsburgh Law Review* 35.
[50] [1951] 2 K.B. 164, 178.

Lord Buckmaster was renowned for his good common sense — 'when he sat on his arse in the House of Lords' — and rightly so. But this often led to a tunnel vision, as when he tried to hold up the splendid development of negligence in tort in *Donoghue v. Stevenson*[51]. He lacked the wider vision of 'neighbourliness' evident in the common law. His over-simplistic view of the past, based on a practical view of consistency, nearly destroyed one of the finest legal achievements of our Age. He was a true hedgehog in *this* matter.

Parliament, despite judicial pleas, often declines to make the needed reforms (for political reasons). 'Fox jurists' will find — some judges also — many ways of preserving sane basic principles, even from the plain words of bad statutes. It is interesting to see the devices that Upper Courts will resort to so as not to blindly interpret ambiguious or vaguely-worded terms which they can see will have unhappy results. Academics will try to do the same but lack the *direct authority*, as do counsel. The 'timid' person in both branches dislikes that ingenuity which some academics excel in. He/she accuses the 'bold' of 'debasing the currency' by technical subterfuges, which have no theoretical basis. Many jurists and academics have applauded Lord Denning's decisions and Parliament often confirmed them later (despite the House of Lords). Other critics say that he threw parts of the law into utter disorder. There is truth here too, because he did not restrain himself from inventing strong reasons where he might have achieved the same results by more devious methods. To the 'hedgehogs' of all kinds he was a heretic. To the 'foxes' he was a forerunner in the art of escaping from past nonsense to reach sensible results in this Age. Lord Reid achieved the same effect less openly.

We now see Hamlet's dilemma more vividly in the law, whenever 'tough decisions' have to be made: Are the difficult problems to be solved by long and quiet reflection, or by action? 'Ideas of the study' may weaken our ability to act if one reflects too long and becomes mentally paralysed:

> Thus conscience doth make cowards of us all
> And thus the native hue of resolution
> Is sicklied o'er by the pale cast of thought

On the other hand 'Fools rush in where angels fear to tread'. One needs to look ahead far enough to survey the possible consequences. Academics perceive such perils more clearly than law-makers. They have more time to reflect on and anticipate these dangers to society and the parties.

Mr. Justice Brennan has stressed the difficulties of courts being obliged in future to intepret a Bill of Rights. He rightly warned:

> If a Bill of Rights were to work a redistribution of powers between the courts and the political branches of government in this nation, it would be necessary to encourage our judges to give consideration to issues which *they have been trained largely to ignore*. That is a fairly radical change. But the more radical change would need to be not in the judges but in the public understanding of the way in which judges do their work. [Emphasis added][52]

[51] [1932] A.C. 562.

[52] Brennan, J., 'Judical Qualities of a Different Kind' (1986) 60 *Law Institute Journal* 654, 655. Sir Reginald Smithers at his farewell function put judicial differences in a novel light: 'As Mr. Justice Lowe told me many years ago, it is the nature of judges to disagree. He said they were like nudists: they insist on airing their differences in public': (1986) 60 *Law Institute Journal* 1180.

E. THE CLOSE OF THE COMBAT

We can conclude that, in all branches of the profession, one finds 'academics' — even among those who pride themselves on their 'down to earth' policy. They are to be found in Concrete Castles just as often as in Ivory Towers — so described. One finds 'tunnel-vision' everywhere. These people are those of One Idea: the 'one-eyed', the Reductionists — 'It's all a matter of X . . '; 'There is one simple explanation for all these issues . . ' On the other hand Judges often criticize one another (or their predecessors).

The former reluctance of the English and Australian upper courts to overturn a fairly old principle is shown in the case of *Radcliffe v. Ribble Motor Service Ltd.*[53] in 1939. The Court was asked to overrule the 1837 case of *Priestly v. Fowler* about the denial to a servant of the right to sue his master for the tort of a fellow servant. One century later, the House felt it could still not overrule it, much as it disapproved now of the principle formerly stated. Lord Atkin stated:

> At the present time this doctrine is looked at askance by judges and textbook writers. There are none to priase and very few to love[54].

Similarly, after discussing the ground on which this doctrine was originally based, Lord Macmillan continued:

> Whatever validity these grounds may have possessed a hundred years ago, it is manifest that in these present days of large scale industry they have no foundation whatever in fact.[55]

As a Scot he was anxious to disclaim all responsibility for this untenable doctrine.

> It is one of the ironies of the law; that the decisions in the *'Bartonshill Coal Co.'s* cases', 3 Macq. 266, 300, which affirmed the doctrine of common employment as part of the common law of England, should have been pronounced in appeals from Scotland, thereby fastening upon the law of Scotland a principle as distasteful as it was alien to Scottish jurisprudence.[56]

Lord Wright, after discussing the supposed grounds of public policy on which the doctrine is said to be based, remarked with some warmth:

> If the public policy which Shaw C.J. had in mind was that the welfare of the community was best promoted by reducing the charges on industry, or saving the master's pocket in particular in respect of compensation to workmen injured or killed, he might at least have considered the other side of the picture, the crippled workman deprived by the injury of the means of earning his living, the widow and orphans bereaved of their breadwinner.[57]

Their Lordships did not, however, feel that they were free to overrule this doctrine, as it was too well established to be overthrown by judicial decision.

There will always be a creative healthy tension. Academics and non-academics must continue their 'dialetic'. In this Age of enormous and rapid

[53] [1939] A.C. 215.
[54] *Ibid.* 223.
[55] *Ibid.* 234.
[56] *Ibid.* 235.
[57] *Ibid.* 241.

change, former routines and beliefs are constantly being upset by massive technological inventions, drastic social contests and incredibly complex regulations calling for lawyers' advice. Co-operation is happily replacing conflicts. Paradoxes will have to be recognised and hard cases settled by original techniques; yet the continuity and coherence of rules need not be destroyed. Law Schools and text books have proved invaluable here.

The method of teaching in modern Law Schools is also a vast improvement on the old days. When I was a student we were lectured by eminent barristers, many of whom later became competent judges. But they addressed us as though we were the Full Court, instead of beardless youths, who needed guidance and much more help than we were getting from formal talk or dictated notes. Now the whole method of learning has altered. The emphasis is on *actual* cases, procedures, rules of evidence, interpretation devices, with much discussion on difficult areas in legal practice and courts' reasoning and the learning of the skills of reasoning and persuasion. Fewer lawyers still live in the past in their view of mere academics.

One wonders sometimes whether, with the more arrogant and limited types, there is not a feeling (never acknowledged) that the armchair jurists cannot 'be much good', because they earn so much less than the partners in many firms and leading counsel. An air of 'effortless superiority', based on modern material values, is quietly assumed.

The situation of the training of lawyers until the last 30 or 40 years had been a disgrace to the profession in England. It was largely the profession's conservatism which caused this. Back in 1871, when Dicey was appointed to teach law at Oxford, his biographer declares that he:

> thought the training of barristers so poor as to be embarrassing; though many voices proclaimed that the common law should be studied scientifically, no professors of law ever explained its principles in logical fashion. As a result, the barrister received an education that was *fragmentary and incomplete;* no man reading for the bar obtained a carefully planned course of legal study. Reading in chambers he thought especially useless, an expensive sham practised on the apprentice. This method of instruction imposed an immense burden of useless work upon the student, for the aspiring lawyer had at the outset to *extract principles of law from a mass of detail with which he was not familiar.* Further, it destroyed the value of watching the law in action, because the student had no prior background against which to judge the different activities he viewed. Finally, the education at the Inns of Court was far too narrow, and subsequent practice, rather than expanding the lawyer's horizons, usually caused him to *specialize even more.* The law as an integral part of liberal education gained no support from this educational system. (Emphasis added)[58]

This is Cosgrove's summing up of Dicey's frequent lamentations, which other legal biographies have reinforced.

The Inns fought every attempt to set up schools for half a century.

Ever since the 16th century the English Bar had shamefully disregarded its duty to train young men by means of lectures, and Moots in the Inns. Of course, the best practitioners, the brightest young men, especially if they had been taught to think and write at the University, did manage to overcome these obstacles and reach a high degree of skill, but the vast mass either gave

[58] Cosgrove, R.A., *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (1980) 51.

it up in despair, or remained incompetent counsel. The position here in Australia was always better[59] because from the begining there was provision made in all States for competent regular, well-planned, courses of instruction in the basic ideas, organised in a coherent fashion by experts'. Such provision was also made in the rules by the full-time staff.

Therefore, the positive contribution of the teacher in many ways has improved relations between the teachers and the men of action. The latter used to give their lecture and disappear down town. There was no chance of talking with them and asking for their aid in difficult areas. Now a full-time teacher can sit down and chat with a bewildered youngster, go into his difficulties, advise him on his techniques of study and check his progress by assignments during the year. This enables more friendly informal relationships to be built up. The former student recalls the help given in this way and is grateful later on for this support when it was needed.[60]

A comment on this article by a senior partner in a medium-sized established firm, emphatically supports my opinion:

> You refer to law schools as having grown more efficient. I completely agree. This growth is quite obvious from the calibre of Articled Clerks whom we are now able to engage. The applications we receive are outstanding. Certainly Articled Clerks of 1986 are immeasurably better than those of my vintage of 1961. This shows that law schools and the academics who control them have reacted to the technical requirements of modern legal practice with great efficiency and skill. It is the academics who have shown the ability to move with the times and to face the task of teaching law with reality. . .
>
> I cannot miss the opportunity of giving you the modern merchant banker paraphrase namely: 'analysis paralysis'. On page 41, you refer to modern teaching methods in law schools. I am sure that both in the subjects taught and in the manner of their teaching, the law schools will require of them. As I said earlier, I am constantly amazed at the very high standard Articled Clerks demonstrate when they come to work for us. They seem to me to have what is still the first essential, namely a good technical training, but secondly, an ability to deal with practical problems in a realistic way. Of course, I have nothing to do with the modern law school, but I would be surprised if it would have developed with the same success if its development had been in the hands of or contributed to, by the Judges.

So there is less name-calling. The former catch-cries are ready to be thrown into the dustbin of legal history after a century of absurd rivalry. Academics, solicitors, judges and barristers today all work together in many committees for Law Reform. Experts sit on joint tribunals where they have special qualifications. Academic views are sought by Parliamentary Bodies, e.g. those concerned with Bills of Rights Reform. Distinguished lawyers of all kinds give seminars on difficult new areas of law and their social effects. Lecturers

[59] In Australia, especially in Melbourne, there were formal legal education at University long before the English lawyer supported regular courses of teaching in this fashion. Sir Redmond Barry deserves the main credit. It was he who moved in Council in December, 1856 on the desirability of lectures on 'Law and Medicine', and he and Dr. Brownless were asked to draw up plans (Campbell, *op. cit.* 5). Yet the Chancellor must have had a good deal of support to introduce such an innovation, so contrary to English tradition of those times.

[60] Many eminent Judges, Vice-Chancellors, silks, partners in large firms — as well as professors — have acknowledged how strongly they found (sometimes to their surprise) the importance of the jurisprudential ideas they learned from such teachers as the late Professor Julius Stone and Sir George Paton, in assisting them to make impartial decisions 20 — 30 years after their student days.

value practical experience at the Bar, as far as the University rules permit them to do so.

There is one advantage in having sound, thorough academic writing on particular topics: if academics are criticised from outside, *they are even more vehemently assailed within their own ranks.* One only has to read the Book Reviews in many Journals to see that a writer who turns out a poor performance is torn to pieces by his fellows, although often in a polite fashion. The book, or the article, becomes known (if defective), as a 'pretty poor piece of work' and is ignored. Therefore we are not likely to get too far away from reality.

The Ivory Tower and the Concrete Castle are not tight hostile fortresses now. Judges combine scholarly ideas with highly practical applications. In an Address to the Public Teachers of Law in England, which set out the joint task in a way that all must applaud, Lord Reid roundly declared:

> We should, I think, have regard to *common sense, legal principle and public policy in that order.* We are here to serve the public, the common ordinary reasonable man. He has no great faith in theories and he is quite right. What he wants and will appreciate is an explanation in simple terms which he can understand. Technicalities and jargon are all very well among ourselves — a system of shorthand — but in the end if you cannot explain your result in simple English there is probably something wrong with it.
>
> Sometimes the law has got *out of step with common sense.* We do not want to have people saying: 'if the law says that the law is an ass'. If they say that about a statute our withers are unwrung.' [Emphasis added].[61]

Sir David Derham himself illustrated the ability of a highly competent administrator and organiser who at the same time as a distinguished scholar, was always concerned with the theoretical teaching of principles. He deeply regretted the fact that Jurisprudence is no longer a *compulsory* subject in Victorian Universities. He put great efforts into that fine textbook on Jurisprudence (together with Sir George Paton) and the two texts in which he co-operated for first year students.[62]

Many opinions of counsel before the highest courts are also works of high scholarship.

Modern judges, even those still talking openly in the language of utter submission to Parliament, have realized that, in many practical issues today, it is necessary to ensure that arbitrary hastily-drafted legislation does not take away the principal rights of a citizen. In this approach they do not *openly defy* Parliament; but they find ways of reaching a sane conclusion despite the apparent meaning of certain words. Thus Lord Wilberforce, after his retirement, in an address to an Australian audience recently, said that he was confident that modern judges, at a high level, would not forget the weight

[61] Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 25. He was right. The Declaratory Theory held up the proper growth of the law for decades. It became 'Fairy Tales' (in Lord Reid's words) 'and we no longer believe in Fairy Tales'.
[62] Paton, Sir G. & Derham, Sir D., *A Textbook of Jurisprudence* (4th ed. 1967); Derham, D.P., Maher, F.K.H. & Pose, K.S., *Cases and Materials on the Legal Process* (4th ed. 1984).

the great common law principles attached to basic freedoms. He attacked the sceptics who say the courts are not prepared to stand up against excessive attacks on justice:

> I do not believe that they have anything to fear. After all judges have been able to stand up for these values over the years in the face of sometimes most explicit statutory language: think of the way in which they have been able to get around language — tighter and tighter language — saying that such and such action may not be challenged in any court, or is to be final and conclusive. Think how they have worked and sharpened the old prerogative writs, which we now call judicial review, to preserve liberty and other fundamental rights. Think how by the use of the word 'absurdity . . .' they have been able, with what are . . . frankly subjective views as to prophecy, to get round, or out of, the legislatures clear language . . . there will always . . . be a kind of tension — a *healthy tension between Parliament and the judges.*[63] [Emphasis added]

Academics applaud those views. It is the *ideas* that matter. The judges have found their own ways of bringing about justice, except in those rare cases where the language admits of no doubt. This new flexibility is a feature of the alliance between those who are concerned with what the law *is* (or deemed to be) and what it *ought* to be.[64] Practitioners and writers especially agree about needed reforms, as do more Judges today.

This sort of approach is foreign to the despairing plaint of Bowen L.J. in 1886, when he confessed:

> feeling no confidence at all myself that this presumption, when applied in this particular case, may not be absolutely leading us away from the true wish of the testator, yet it seems to me that it would be wrong to break through precedent, and I record my judgment accordingly in favour of the appeal as a sacrifice made upon the altar of authority.[65]

Their Lordships as late as *Ainsworth*[66] made the same complaint. Fortunately Parliament took the hint about how unfair the law was.

Sir Ninian Stephen pointed out this new emphasis on Principles and full co-operation in his outstanding address when he received the Degree of Doctor of Laws here. While acknowledging the need for fixed procedures regarding skills, and a sound knowledge of the 'rules', he proclaimed also his strong faith in 'principles'.[67] One could quote many modern English judges, especially in their speeches 'out of court' — Lord Reid, Lord Wilberforce, Lord Denning, Lord Devlin to the same effect. If both teachers and writers are now more restrained in their criticisms of judgments (with some immature or acid exceptions) Australian judges, too, off the Beach publicly encourage sane academic comment on their decisions — even though they still rarely refer openly to them in their judgments.

[63] The address was delivered in January, 1983 at a conference in Canberra on the use of extrinsic materials.

[64] As Lord Devlin in *The Judge* (1979) stated, acknowledging this new flexibility: '. . . the judge cannot openly dispense. But he can stealthily stretch or mould . . . the inflow mixes with what is there already, and it is out of the mixture that the shape grows . . . I do not mean a censuous bias. Once a judge has formed a view of the justice of the case, the facts which agree with it will seem to them to be more significant than those which do not!'

[65] *Montagu v. Earl of Sandwich* (1886) 32 Ch. 544.

[66] *National Provincial Bank Ltd v. Ainsworth* [1965] A.C. 1175.

[67] (1986) 15 M.U.L.R. 746-748

The current tendency of academics to act as consultants to large solicitors' firms also helps the progress of the law because of the fact that there are *periods of fluctuation*: of 'conservatism' and 'radicalism' in most courts. It is very obvious to most observers; and the academic *who knows well* a particular *field* can teach practitioners 'new trends in the law' — and how to cope with them.

There has been wide recent criticism of the attitudes of the House of Lords in the last two decades with regard to homicide and other areas of criminal law. Here the academics in the long run, have sometimes persuaded English judges to make alterations to previous attitudes, because plainly they were not logical or helpful.[68]

The latest example of academic success was seen in the 1986 decision of the House of Lords in which they acknowledged, through Lord Bridge, (following a bitter criticism of a previous decision by Glanville Williams) that they had made a mistake, and that they would now rectify their former decision only one year old.[69] Lord Bridge stated:

> I cannot conclude this opinion without disclosing that I have had the advantage, since the conclusion of the argument in this appeal, of reading an article by Professor Glanville Williams entitled 'The Lords and Impossible Attempts, or Quis Custodiet Ipsos Custodes?' [1986] C.L.J. 33. The language in which he criticises the decision in Anderton v. Ryan is not conspicuous for its moderation, but it would be foolish, on that account, not to recognise the force of the criticism and churlish not to acknowledge the assistance I have derived from it.[70]

It is not often that such a declaration is made openly. Rather there is more talk of 'scholarly and professional dislike' as justifying a change in a 'bad case'. There are many recent examples.

Lord Justice Templeman was right when he confessed that judges are of a varied group:

> I think you can divide [them] into three categories; there are the *philosophers, the scientists and the advocates.* The present Lord Chancellor, Lord Hailsham, I would put in the category of philosopher, Lord Wilberforce and Lord Diplock I would put into the scientific vein and Lord Denning is one of the advocates, and in common with those other judges whose judgments are feats of advocacy you can see some traces of the eloquence in the advocacy which they used when they were at the Bar, and these three elements are all there in Lord Denning's judgments. [Emphasis added][71]

There are still 'men of ideas' who make the great positive decisions on the Bench.

Indirectly, probably unconsciously, both Australian and English Judges are influenced by new attitudes in *general philosphy.* In the early part of this

[68] The most notorious examples followed the decision of the House of Lords in *D.P.P. v. Smith* [1961] A.C. 290. Even the High Court of Australia joined in refusing to accept that view of the law. Those familiar with criminal law will know of numerous attacks on recent cases in the literature.

[69] *R. v. Shivpuri* [1986] 2 W.L.R. 988. The issue was whether a crime had been committed by the accused when although he strongly suspected he was attempting to deal with heroin, in fact the substance in his possession was a harmless vegetable material.

[70] *Ibid.* 1002.

[71] Kirby, *op. cit.* 41.

century, the prevailing attitudes were that all judgments should be 'value-free', that there was no way of *demonstrating* truths and that if confusion was to be avoided, law and morals were to be kept 'rigidly separate'. Improvements and changes were the tasks of politicians, after advice by academics and administrators, but not by judges. Now there is a new faith in 'reason', a greater emphasis on compassion for victims, a belief that law 'must make sense' as well as be orthodox. Values are part of justice.

It helps that we are all now more ready to accept that law *is not a straightforward scientific discipline*, to be regulated by rigid logic, or by legalist desire to conform. The judge's insight, *his* understanding of life in his own time, *his* sense of potential importance of his judgment for the future, is now much more enlightened. The task in the Law Schools is to expound and explain those insights and reconcile the paradoxes.

The following comment, in an area of former rigidity now treated much more freely, shows that the younger judges are far more willing, perhaps partly as a result of their teaching, to take risks in practice. Lord Roskill repudiated the timidity of the past in extending doctrines for fear of 'awful consequences' in a recent case. He asserted boldly:

> The floodgates argument is very familiar. It still may on occasion have its proper place but if principle suggests that the law should develop along a particular route and if the adoption of that particular route will accord a remedy where that remedy has hitherto been denied, *I see no reason why, if it be just* that the law should henceforth accord that remedy, that remedy should be denied simply because it will, in consequence of this particular development, become available to many rather than to few. (Emphasis added)[72]

'Policy', 'balancing interests' and 'consequences' are now common phrases in decisions. One rarely saw them in earlier times when judges maintained that they only 'found' or declared' the law.

Judges and all lawyers would agree with Sir Garfield Barwick's unexpected disclosure to Tasmanian law students at the end of his career. Coming from such a highly competent, experienced judge one reads it with a keen sense of its profound truth. He confessed (paraphrased):

> We are practised in what is, in very truth, an *ancient mystery*. The common man who thinks the law is commonsense might be right if he watched the consummate lawyer at work in all his deep simplicity, and with that ease which conceals the great learning behind the apparent simplicity. But none the less *the law is a mystery*; and those who have mastered its intricacy have indeed great power in their hands and great responsibility. [Emphasis added][73]

That the law is 'mysterious' means that the older confidence that the law was *generally certain* and was fairly easy to find and apply, is gone. Scholars and practitioners are forced to admit that there are vast areas in which no one knows more than the outlines as yet.

My thoughts should not be taken as a petulant defence of academics against external forces. They represent an attempt to describe briefly one episode in

[72] *Junior Books Ltd v. Veitchi Co. Ltd* [1983] A.C. 520, 539. Roskill J.'s opinion typifies the new wider judicial theories on the real conditions of doing justice to the parties before the courts by extending a principle.

[73] Barwick, Sir Garfield, cited in Marr, D., *Barwick* (1980) Frontispiece.

the history of our law — one in which the more extreme antagonists both went too far. Now it seems that co-operation and mutual respect hold the field in place of 'old unhappy things and battles long ago'.

I have only given a light-hearted account of that conflict now fast declining. Plainly the new outlook for the future is well on the way. It only needs more support in the 'marriage' of the three types of 'practitioners': judges, solicitors and academics. Unless such a 'family arrangement' comes about, the law will not be able to cope with the enormous problems of the New Age—including the application of legislation, the wide scope for discretion among courts on vital points, the growth of corporate crime, euthanasia, trade practices and international trade and finance.

So this antiquated 'family feud' has no place in the modern City of the Law — and ought to be allowed to remain in a 'legal limbo'. Lord Scarman, too, has appealed to the profession *as a whole* to support the judges in a new look at the common law principles stretching over a much wider spectrum. If the common lawyers are not able to do that, he declared, it will be in the position that Holdsworth spoke of, that 'the common law will join the collection of interesting antiquities', the appropriate resting place for which is the British museum and not the living world.[74] That would be the greatest disaster that could befall our system. Lord Wilberforce sums up, in two sentences, all I have been trying to say at such length:

> The fact is that no single strand in the tapestry of the law, however brilliant, can do without the support of others. Lord Denning would be the first to recognize this.[75]

This echoes Maitland's picture of the law as a 'seamless web'. That the term 'mere' should 'no longer be heard among us'.

Maitland's warning about the 'Forms of Action ruling us from the grave' is a reminder of the need for employing flexibility and the steady modifications of existing doctrines of an age unprecedented in legal history. All types of law are involved.

Only a thorough going co-operation, now well on the way between all branches of this learned profession, will enable us to meet the challenge of such a novel society. Let us end our 'Hundred Years War', in which, like its earlier predecessor, all lost so much and no one gained anything.

[74] Lord Scarman, 'Ninth Wilfred Fullagar Memorial Lecture: The Common Law Judge and the Twentieth Century — Happy Marriage or Irretrievable Breakdown?' (1980) 7 *Monash University Law Review* 1, 16.

[75] Lord Wilberforce, 'The Academics and Lord Denning' (1985) 5 *Oxford Journal of Legal Studies* 439, 445.