

# HEYDON' SEEK: LOOKING FOR LAW IN ALL THE WRONG PLACES

ALLAN C HUTCHINSON\*

*What judges think they are doing has considerable effect on what they actually do. Accordingly, the appointment of Dyson Heydon to the High Court of Australia is a useful occasion on which to examine the connection between one judge's thought and his actions. Heydon's extra-judicial writings call for a nostalgic return to the formalist virtues of an earlier era. However, his early judicial opinions on the High Court not only demonstrate the intellectual shortcomings of such a formalist approach, but also emphasise that adjudication is an inescapably political and contested activity - judicial conservatism is no less ideological than its activist counterpart.*

## I INTRODUCTION

Efforts to understand the development and operation of the common law are ten-a-penny. The library shelves are crammed with competing and often contradictory accounts of what it is that judges actually do and probably should do when they are fulfilling their official functions as guardians of the common law. Despite massive disagreement within their ranks, most commentators agree that it is important to have regard to what judges think it is that they are doing when they engage in common law decision-making. Unlike with various empirical disciplines, jurisprudence has to acknowledge that what judges think that they are doing will likely have some impact on what it is that they actually do. While few would accept that judges should have the last word on what it is that judges do, judicial opinions are an important source of insight about the way in which judges undertake their institutional responsibilities. In particular, such offerings might well make some welcome contribution to solving or, at least, clarifying the mystery that pervades common law adjudication - how does the common law manage to remain stable as well as respond to changing social circumstances? Moreover, in shining their analytical light into this shadowy world, judges are usually solicitous of the need to demonstrate that this crucial balancing act can be achieved by reference to something other than the personal predilections of the judges themselves. After all, the legitimacy and prestige of the common law is claimed to lie in its own capacity to guide and discipline judges, not in judges' willingness to lead rather than follow the common law. If traditional accounts of the common law are to be persuasive, it is imperative that the common law is taken to be more than the substantive leanings and methodological preferences of its extant judges. Whatever it may be, the

\* Osgoode Hall Law School, Toronto, Canada. This is an edited and expanded version of a talk that was given in the Faculty of Law at Monash University, in March 2003.

common law is claimed to be not only the collected wisdom of its present judicial incumbents.

As already should be clear, I am sceptical about the possibility of there being a definitive and cogent account of the common law's operation in line with traditional claims and ambitions. Nevertheless, I was excited to be told on my arrival in Australia that there was a recent paper that attempted to do just that. I eagerly obtained this essay by a former academic and now Justice of the Australian High Court, Dyson Heydon. The title of his paper, *Judicial Activism and The Death of The Rule of Law*, should have immediately tipped me off to what was to follow.<sup>1</sup> Still, knowing little of Heydon personally or professionally and knowing almost as little about Australian recent judicial history, I set to reading the written version of his speech to the Quadrant Dinner in October 2002. The author was clearly a polished and sophisticated fellow who peppered his talk with witty asides and sprightly anecdotes. Yet, beneath the gloss and erudition, the paper offered a very radical and almost anachronistic account of the common law. Indeed, my first reaction was to think that the date on the paper must be wrong as it read like something from 1902 rather than 2002. Heydon offered a rendition of the Rule of Law and the common law that was as fundamentalist in its formalism as any I could remember reading in any century, let alone the 21st century. For Heydon, judges can only fulfill their judicial duties by scrupulously attending to the law's formal structure alone: almost any consideration of the law's moral or political content is anathema. While I would normally recommend that such an audacious and frankly improbable proposal be ignored, the fact that it is espoused by the most recent appointee to the High Court means that it warrants serious debunking and outright rejection.

Accordingly, in this short paper, I will offer a critical examination of Heydon's views and demonstrate how they are not only unachievable as a descriptive account of the Rule of Law and common law adjudication, but they are also disingenuous as a prescriptive recommendation. After exploring his stance and its justificatory apparel, I will illustrate their weakness and preposterousness by reference to a case that Heydon holds up as an example of the demise of acceptable judicial performance. To round out my remarks, I will adumbrate an alternative account of the Rule of Law and the common law which can claim much greater validity in terms of historical accuracy, philosophical integrity, moral cogency, and political desirability. It is my claim that the common law can only be grasped and practised as work-in-progress which is thoroughly political in form and substance. Although many will find my criticism and language intemperate and inappropriate, I will show that it is Heydon himself who has made such candour acceptable and who has opened himself to such vigorous denunciation. If you ride the back of the tiger, you will likely find your way sooner or later into the belly of the beast. Of course, this is a piece of advice that I would do well to heed myself.

<sup>1</sup> Dyson Heydon, 'Judicial Activism and The Death of The Rule of Law', *Quadrant*, January-February 2003, 9.

## II HIGH TECHNIQUE

While debate is intense and hostile over the nature of the common law as a source of institutional norms, most jurists do not think about the common law as only a body of rules or principles. There is considerable agreement that the common law tradition is as much a process as anything else. How judges deal with rules is considered as vital to the political legitimacy of the legal performance as the resulting content of the rules and actual decisions made. Understood as much as an intellectual mind-set to law-making as a technical practice, common lawyers have transformed a natural tendency to utilise past performance as a guide to future conduct into an institutional imperative. By way of the doctrine of *stare decisis et non quieta movere* (let the decision stand and do not disturb settled things), the common law method insists that past decisions are not only to be considered by future decision-makers, but are to be followed as binding. For most of the 20th century, jurists have sought to explain how it is possible to respect the past through formal analysis and, at the same time, to ensure that it remains substantively relevant to the present. As such, the challenge for jurists has been to demonstrate not only that the common law can accommodate stability and change, but that it can balance its formal and substantive dimensions. The ambition has been to show how the common law can deal with political substance in a way that does not reduce law to only politics. So energised, judges and jurists have sought to move beyond a discredited formalism to a more sophisticated account of adjudication as a creative and disciplined practice, without turning it into an open-ended ideological exercise.

In his incendiary jurisprudential intervention, Dyson Heydon makes it clear from the outset that the whole project of modern jurisprudence is mistaken and a betrayal of the common law tradition. Identifying proudly and explicitly with 'hanging judges' of yore, he idolises '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 ... 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'.<sup>2</sup> This is stirring and disturbing stuff. Heydon leaves no doubt that '[interpretation of] the law according to the books'<sup>3</sup> must be scrupulously adhered to by judges as this is the most effective 'bar to untrammelled discretionary power'.<sup>4</sup> Depicting judges as wild ideological animals who, if left unharnessed, will wreak political mayhem on an unsuspecting public, he offers an ideal judge who is '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'.<sup>5</sup> This means that so powerful

<sup>2</sup> Ibid 9, quoting George Orwell, *The Lion and the Unicorn* (1941).

<sup>3</sup> Ibid.

<sup>4</sup> Ibid 10.

<sup>5</sup> Ibid.

and reliable is 'the disinterested application ... of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge'<sup>6</sup> that it can hold in check herds of rogue officials. Moreover, so tamed and tethered, these institutional pets can be trusted to have supreme power in the polity.

For Heydon, therefore, the effort to introduce almost any substantive dimension - 'talk of policy and interests and values'<sup>7</sup> - into the common law equation is to be discouraged. With admirable bluntness, he leaves no doubt that the judges' functions are exhausted in the formal endeavour to apply existing law to new facts. Concern with the substantive desirability of that law or its application to particular facts is simply not part of the judicial mandate or responsibility: '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 ... generally apply the existing law and leave it to parliament to make a new and more just law if it desires'.<sup>8</sup> On this view, good judging is about technical proficiency and the best judges are those that not only exercise and hone their craft-skills with professional excellence, but also resist any temptation to bring substantive vision and imagination to the fulfilment of their judicial role. For Heydon, therefore, justice is a purely formal quality in that, while judges might (or might not) happen to do justice in their individual decisions, the substantive health of the common law ought to be a matter of judicial indifference. However, as I will demonstrate, this is a mockery of the common law tradition as both a descriptive claim and a prescriptive proposal. It is simply not the case that a reasonable assessment of the judicial craft can be restricted to whether legal cupboards and doctrinal joints are well-constructed. It matters whether the judicial artefacts serve some useful or even noble purpose - there is a crucial difference between constructing well-crafted torture racks and hospital beds.

For Heydon, the recent history of Australian common law is a morality play in which the dark hordes of judicial activism have begun to eclipse the established forces of legal enlightenment. Rallying the judicial troops around a battle-cry of 'Back To The Future', he urges that time is well past to repel such interlopers and to return the common law to its traditional grandeur. Unless swift action is taken, the common law is destined to be sullied by those 'using judicial power for a purpose other than that for which it was granted, namely doing justice according to law in the particular case'.<sup>9</sup> In this scenario, the initial assault of the dark activists forces can be traced back to the 1970s and the villains of the piece are Anthony Mason and Lionel Murphy. Inveigling their way in to high judicial office, these usurpers professed allegiance to the common law, but only better to hijack it for their own political purposes.<sup>10</sup> With some wit and savvy, these ne'er-do-wells began to abandon the orthodoxies of the common law and replace it with

<sup>6</sup> Ibid.

<sup>7</sup> Ibid 14.

<sup>8</sup> Ibid 22.

<sup>9</sup> Ibid 10.

<sup>10</sup> See, eg, Sir Anthony Mason, 'The Judge as Law-maker' (1996) 3 *James Cook University Law Review* 1, 12.

new credos of their own design: '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 ... ought to hold even though they do not'.<sup>11</sup> Presumably aided by a duped band of other High Court judges, the terrible two set about abandoning old tried-and-true rules and replacing them with newfangled and controversial doctrines which were little more than rough distillations of their own political agendas. Indeed, if Heydon is to be believed, Australian common law is quickly going to political hell in a judicial handcart. It is only with a return to traditional legal values and judicial methods that such an ignominious fate can be avoided.

And Heydon considers himself to be the man for this epochal job. But he does not embark upon this restorative crusade for the soul of the common law single-handedly. As befits someone who celebrates tradition for its own sake, Heydon calls in aid an iconic Australian judge who is reputed to embody all the ascetic virtues of an ideal common law judge. If Mason and Murphy are the villains of the piece, then former Chief Justice of Australia Sir Owen Dixon is undoubtedly the saint and saviour of Heydon's campaign to restore the rightful majesty of the common law tradition. Heydon champions Dixon's aspiration to be 'excessively legalistic' and places his faith in 'a strict and complete legalism' as the only safe guide to judicial decisions in the solution of great conflicts.<sup>12</sup> Heydon and Dixon both maintain that this can be achieved by resort to 'strict logic and high technique'<sup>13</sup> which are revealed to those who work long and hard in the common law trenches. Citing Dixon's words as if they were scriptural in example and authority, Heydon offers Dixon's legalistic approach as the holy grail of exemplary adjudicative method:

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.<sup>14</sup>

And that is it. Heydon believes that it is only by returning to the simple decency of the common law tradition that it will be possible to redeem the judicial function as well as, presumably, to save the Australian society from rogue judges. For Heydon, 'the threats to the rule of law which judicial activism has created' are very real and, while 'our present [Australian] state is much less bad than that of

<sup>11</sup> Heydon, above n 1, 21.

<sup>12</sup> Ibid 11, quoting Sir Owen Dixon, 'Swearing in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xiv.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid, quoting Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate*, (2nd ed, 1997), 152, 159, citing Parke B in *Mirehouse v Rennell* (1833) 6 ER 1015, 1023.

the United States, Canada and New Zealand ... the former condition of things needs to be restored'.<sup>15</sup> It is a monumental undertaking and, for some, will be a truly noble and necessary adventure. Yet, for most (including myself), Heydon's moral call-to-arms will be heard for what it is - a desperate and dangerous rearguard action to restore the substantive values and political mind-set of a bygone era by reference to an allegedly formal, but actually ideological methodology. The main problem is not so much the ideology, as reactionary and unappealing as it is, but the lack of candour and the surfeit of disingenuity in proffering such an ideology. In both its timing and its ambitions, Heydon's lecture seems to be part of, rather than apart from, the political process. Despite the formal trappings and cultivated references, his efforts are directed at re-orienting the substantive (and, therefore, political) agenda of the Court. In short, he is in exactly the same political game as those he reviles. And it is my insistence that there can be no other way because the common law is an unavoidably and thoroughly political enterprise. Yet, unlike Heydon, the objects of his wrath at least can claim institutional integrity and intellectual honesty for their stances.

There is so much wrong and misleading with Heydon's account of common law adjudication that it is difficult to know where to begin. One place to start is with Heydon's characterisation of the problem to be addressed and resolved. As he sees it, the difficulty is that judges are ideologues always chaffing at the bit to run wild and to legislate their own personal preferences under cover of the common law. Without some restraining *modus operandi*, there will exist only 'arbitrary, whimsical, capricious, unpredictable and autocratic decision-making'.<sup>16</sup> This seems not only far-fetched as an empirical assumption, but is insulting to most judges who, even if they fall short of Heydon's elevated standards, are making a good faith effort to do law, not politics. Heydon is entirely mistaken to suggest that, if judges are not engaged in the '[interpretation of] the law according to the books'<sup>17</sup> they must be trading in 'arbitrary, whimsical, capricious, unpredictable and autocratic decision-making'.<sup>18</sup> It is simply not the case that Heydon's 'strict logic and high technique' is the only way to judge legitimately and all else is chaotically irrational, politically tainted, and institutionally illegitimate. Being the product of human beings, law is untidy, diverse, complex and contingent; it is a flawed enterprise, noble and ignoble in proportion to its judicial expositors. It is only by abstracting the human element and therefore misrepresenting law that Heydon and similar formalist jurists are able to claim any cogency for their accounts. In other words, I am claiming that law's adjudicative game develops and changes less in line with some subtle philosophical logic and more in response to the political intimations of its judicial players as they shift from one playing context to another.<sup>19</sup> Any theory that attempts to shoehorn the whirligig

<sup>15</sup> *Ibid* 22.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* 9.

<sup>18</sup> *Ibid* 22.

<sup>19</sup> See Allan Hutchinson, *It's All in The Game: A Non-Foundationalist Account of Law and Adjudication* (2000).

of law-making into one simplistic formula and smooth down its rough edges robs law of its rich and distinguishing character as a human process. Invention finds its source in a contingent and shifting mix of the essential and the accidental; there is always room in law's structure for judicial ingenuity or institutional fortuity. Law is a site at which judges work through and against law.

Even assuming that judges were such capricious and arbitrary autocrats and that there was some legal method to rein them in (which there is not), it is not at all clear why this would be a desirable state of affairs. While this prospect might have some appeal in an ideal world and 'radical legal change is best effected by professional politicians',<sup>20</sup> Heydon's stark separation of powers doctrine has little to offer in the real world of 21st century Australia. Even in a perfectly functioning constitutional democracy in which the legislature truly represented the genuine public interest, it is far from obvious why citizens would want courts to apply the rules of yesteryear to the problems of today. Assuming that the rules of the common law did not simply drop out of the sky, there has to be a theoretical justification of why the rules of the late 19th century or early 20th century are apposite to early 21st century life. Notwithstanding this, it would still remain a problem to know what the rules are and what it means to apply them; this is a theoretical controversy that cannot be finessed or ignored. Moreover, it seems a flat rejection of political reality to maintain, as Heydon does, that all common law rules that are not directly overruled by a hobbled and over-stretched legislature are thereby approved. If anything, courts and legislatures operate on an informal understanding that courts should develop and adapt the law in line with changing social circumstances and, if the legislature is offended by the direction in which the common law is moving, it will enact legislation to remedy the situation. Furthermore, it is a conceit of lawyers and judges to believe that citizens prize certainty and predictability above all else, as Heydon claims. It may suit the business corporations and public authorities, but most people would prefer uncertain justice over certain injustice. It is the luxury of those who are content with the substantive content and cut of the common law to laud the virtues of stability and to conclude, as Heydon does, that it is always better to choose 'doing justice according to the existing law' rather than seek 'to overcome injustice by effecting a significant change in the law'.<sup>21</sup> The discontented are left to accept their fate, wait for another election day, and accept a government that has other issues on its agenda.

Of course, much will hinge upon whether Heydon's 'strict logic and high technique' can do the considerable work that he demands of it. While Heydon's ambition is not so different to most judges and jurists in striving to isolate a restraining judicial method, it is ludicrous to imagine that there can be such a purely formal craft that will be able not only to apply the law in a predictable and certain manner, but also to determine what changes need to be made to the law. After all, Heydon concedes that the common law has and must change if it is to meet its own ideals: 'the conscious making of new law by radical judicial

<sup>20</sup> Heydon, above n 1, 22.

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

destruction of the old rests on a confusion of function'.<sup>22</sup> However, it is not surprising that he proposes that such renovative work can and must only be done 'by a Dixonian process of development and adaptation' in which the principled extension and categorical refinement of established legal doctrine is effected by 'an enlightened application of modes of reasoning traditionally respected in the courts'.<sup>23</sup> In this struggle between application and amendment, Heydon emphasises that 'loyalty to precedent' must always be paramount and, again citing Dixon, that it is wrong for a judge to 'abandon ... principle in the name of justice or of social necessity or of social convenience'.<sup>24</sup> Nevertheless, he maintains that 'it is ... by the repeated use of [strict logic and high technique] ... the law is developed, is adapted to new conditions, and is improved in content'.<sup>25</sup> This would indeed be a miraculous achievement - to improve and adapt substantively the law's content through entirely formal and substantively indifferent procedures. Of course, no such miracle is possible. Heydon must abandon one claim or the other. Either the law develops formally and the content takes care of itself or, as is more likely, formal method is revealed as having more of a substantive dimension that its proponents concede. Rather than pursue this line of critique generally, I will focus on a practical example of Heydon's choosing to explain how his 'strict logic and high technique' is more a formal cover for substantive initiatives than an insulation against them. In short, I will show how 'law is politics'.

### III IRONIC JUDGMENTS

In highlighting 'the difficulties of radical judge-made changes in the law',<sup>26</sup> Heydon selects the recent decision in *Brodie v Singleton Shire Council*<sup>27</sup> ('*Brodie*'). This was not an obviously political case, but it did involve two important matters of negligence law - liability for omissions or non-feasance and the duties owed by public authorities. A driver had been injured when his truck fell through an old timber bridge because the wooden beams were in poor condition: this should have been detected by the Council who had care and control of the bridge. The key legal questions were whether the Council's negligence was a matter of misfeasance or non-feasance and whether, if it was non-feasance, there was any liability. It was conceded that, under Australian common law, councils had traditionally benefited from a narrow non-feasance immunity in such circumstances, ironically in a decision by Dixon J in *Buckle v Bayswater Road Board*<sup>28</sup> ('*Buckle*'). It was decided in a series of very lengthy judgments by a narrow majority (Gaudron, McHugh, Gummow and Kirby JJ, with Gleeson CJ, Hayne and Callinan JJ dissenting) that the test for determining

<sup>22</sup> Ibid 17.

<sup>23</sup> Ibid 16.

<sup>24</sup> Ibid, quoting Dixon, above n 14, 158.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 20.

<sup>27</sup> (2001) 206 CLR 512.

<sup>28</sup> (1936) 57 CLR 259. See also *Gorringe v The Transport Commission (Tas)* (1950) 80 CLR 357.



the Council's liability did not require a distinction between misfeasance and non-feasance. Instead, it depended on the ordinary test of liability in negligence as to whether the Council had lived up to a general duty of care.

For Heydon, the *Brodie* decision epitomes the parlous state of Australian law and adjudication. In particular, the majority's judgments are said to display the cavalier disregard for established common law principles and the enthusiastic willingness to trespass on the policy-making terrain of legislatures which are typical of the activist malaise. Aligning himself with the minority, Heydon is adamant that it was incumbent on the High Court to stand by established precedent and to leave it to the legislature to correct any perceived shortcomings in the common law. However, on closer inspection of the various judgments, it becomes apparent that there is a profound and disconcerting irony at work. Whereas the majority opinions go to great lengths to justify their decision as an effort at ensuring that the common law is principled and rational, the minority opinions engage in an elaborate series of policy-arguments as to why the traditional position should be upheld. Indeed, in railing against the *Brodie* decision, Heydon himself marshals a powerful array of substantive policy considerations in favour of not extending liability for non-feasance to public authorities. Surprisingly for one so attached to a formal judicial role, he is very long on substantive argumentation, but very short on formal method: there is no effort to demonstrate how 'strict logic and high technique' warrant such a position. From my vantage point, it does not seem too strong to suggest that, in critiquing *Brodie*, Heydon shows his true colours - his formalist campaign to save the common law is a cloak for a more substantive political agenda. To drive this point home, it is appropriate to refer extensively to the High Court's judgments in *Brodie*.

In his dissenting judgment, Gleeson CJ held firm to the previous rule that a council's liability was dependant on misfeasance, but not non-feasance. He agreed that '[t]he distinction between acts and omissions, which is critical to the practical operation of the rule, is, without doubt, productive of uncertainty, and of anomalous differences in the outcomes of particular cases'<sup>29</sup> but he felt that it should not be changed. This was not only because it was well-established, but, in an argument expressly approved by Heydon, that:

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.<sup>30</sup>

<sup>29</sup> (2001) 206 CLR 512, 528.

<sup>30</sup> Ibid 528-9.

Indeed, in determining the appropriate judicial response to various criticisms made, Gleeson CJ was clear that 'it is necessary to take into account, not only the policy underlying the rule, but also the legal basis of the rule'.<sup>31</sup> He framed the choice for the court as being a principled one whichever way it went - 'as the rule may be regarded as an exception or qualification to a more general principle, the general principle would then be left to apply to highway authorities, without any such exception or qualification'.<sup>32</sup> In declining to make any change, Gleeson CJ stated that such reform was the legislature's responsibility. Ironically, he quoted Mason J of all judges as the basis for his reluctance to 'vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances'.<sup>33</sup> Accordingly, Gleeson CJ did not merely rely on formal analysis, but depended substantially on policies and values.

In their joint opinion, Gaudron, McHugh and Gummow JJ held that the Council's liability did not turn upon the application of an 'immunity' provided by the 'highway rule'. Declining to follow *Buckle*, they insisted that the general tort of negligence should apply. They did this as much as a matter of principle as policy. Noting how significantly the law of torts had developed in the past 50 years or so, they recognised the imperative of 'placing the common law of Australia on a principled basis'.<sup>34</sup> Accordingly, they decided that general tort principles should apply with due regard to the fact that the defendant was a public authority. Indeed, they went so far as to describe the traditional position as being 'dictated by ... unprincipled exceptions and qualifications'.<sup>35</sup> They saw their judgment as remedial rather than revolutionary. Canvassing a broad range of factors, including comparative jurisprudence, precedent, and conceptual clarity, but not open-ended policy factors, they reached the conclusion that *Buckle* was 'silently choking the development of the common law in Australia'<sup>36</sup> and needed to be discarded. Contrary to Heydon's insinuations, this was not a rampant exercise in crass politicking, but a reasoned attempt to make the common law more principled and logical. Indeed, this judgment looks a lot more like the formal analysis that Heydon celebrates than Gleeson CJ's judgment does.

In his concurring judgment, Kirby J does not pull his punches when he declares that there presently exists 'a body of law that can only be described as unprincipled, unacceptably uncertain and anomalous, resting on an incongruous doctrine and obscure and inexplicable concepts and giving rise to disputable escape mechanisms utilised by judges struggling to avoid conclusions so apparently unjust and repugnant to the normal policy of the law'.<sup>37</sup> Emphasising that the common law's capacity to change is one of its greatest strengths, he nevertheless recommends cautious change and warns against 'large and rapid

<sup>31</sup> Ibid 529.

<sup>32</sup> Ibid 532.

<sup>33</sup> Ibid 535, quoting *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 633 per Mason J, with whom Gibbs, Stephen and Aickin JJ agreed.

<sup>34</sup> Ibid 542.

<sup>35</sup> Ibid 544.

<sup>36</sup> Ibid 562.

<sup>37</sup> Ibid 590-1.

leaps'.<sup>38</sup> Although 'the legislature has the primary role, and responsibility, in reforming the common law ... that fact does not relieve this Court of its own responsibilities to repair clearly demonstrated defects of judge-made law .... [and] [w]here legislatures have failed to act, despite having weaknesses and injustices in the common law drawn to their notice, it cannot be expected that the courts will indefinitely ignore such weaknesses and injustices'.<sup>39</sup> Ironically, he changes the law not because the existing rule has been overtaken by social change, but because it is necessary 'to abandon discredited authority so as to place the law on a footing that is more principled and just'.<sup>40</sup> For a judge who clearly follows in the activist footsteps of Murphy J and Mason CJ and, as such, is a target for Heydon's formalist fervour, Kirby J takes a very principled, careful and restrained approach to his judicial responsibilities.

While both Hayne and Callinan JJ gave separate dissenting judgments, they add little to Gleeson CJ's views. Indeed, if anything, they offer an entirely sterile account of the common law which should offend even the traditional Heydon. Whereas Heydon recognises that the common law can and must change, albeit by the mysterious facility of 'strict logic and high technique', Hayne and Callinan JJ seem to cling to a vision of the common law as an almost inert and static body of rules which the judges are powerless to improve. After an exhaustive and exhausting historical survey of tort doctrine, Hayne J concedes that 'the search for some unifying principle or principles ... has so far proved unsuccessful'.<sup>41</sup> Nonetheless, he maintains that an extension of liability on councils for non-feasance as well as misfeasance would be an unwarranted incursion into legislative prerogative and, therefore, has to be avoided. For him, any change seems illegitimate whether it be principled or otherwise. In a similar vein, Callinan J also accepts that existing law is open to considerable criticism, but holds that, as it is of such long-standing authority, the 'immunity' must remain law until the legislature chooses to abolish or change it. By almost all modern standards for appellate judging, both judgments read more as abdications of the judicial function rather than exercises of it. Left to Hayne and Callinan JJ, the common law is a relic and to be celebrated as such. Indeed, even Heydon might recommend that, if judges determine that the law is so bereft of principled justification, their duty is to remedy it so as to accord better to the dictates of 'strict logic and high technique'.

Exactly how Heydon would have constructed his own judgment is, of course, impossible to know. However, if true to his vaunted method of formal common law adjudication, he would have confined himself to identifying the strict *ratio decidendi* of *Buckle* and following it closely. Heydon talks as if this were a relatively simple and uncontested task when it is the received opinion of almost all contemporary jurists that such a task is fraught with imprecision and contestation.<sup>42</sup> Nevertheless, even assuming there was some consensus on what

<sup>38</sup> Ibid 595.

<sup>39</sup> Ibid 594.

<sup>40</sup> Ibid 597.

<sup>41</sup> Ibid 631.

<sup>42</sup> See, eg, Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985).

*Buckle* decided (as there appeared to be), the Heydonian judge's task is not done. A reliance on 'strict logic and high technique' does not mean that the common law should remain 'frozen and immobile', only that change should be incremental, rational and principled: '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'.<sup>43</sup> While this involves having 'respect for inherited wisdom and being cautious in departing from it',<sup>44</sup> it most certainly does not mean that such change is to be informed by 'the contemporary needs and aspirations of society', 'contemporary values', 'the relatively permanent values of the Australian community', the 'view society now takes', 'enduring values' as distinct from 'transient community attitudes', or 'transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group'.<sup>45</sup> All in all, the good judge should answer to the universal dictates of principled coherence, not the local preferences of substantive policies.

If 'strict logic and high technique' is the hallmark of legitimate adjudication, then it is the majority in *Brodie* who hold the upper hand and most exemplify those qualities, not the minority or Heydon's support for those judges. Whether one disagrees with them or not, the four majority judges struggled to bring the law in line with some more acceptable standard of principled consistency. They reckoned that to keep the common law in its previously lamentable state would have been a betrayal of that traditional and Heydon-sanctioned ambition. In contrast, Heydon's criticisms are all about the bad policy reasons for changing the law: he offers a substantive case for preserving the old rule, not a formal defence of the need for preservation. He is all talk about why the *Brodie* decision is wrong as a matter of politics, not law - exposure to past uninsured liabilities, huge future and uncertain liabilities, intrusion of courts into administrative process of councils, etc. While I might well agree with Heydon's substantive defence of the older *Buckle* rule, this is entirely beside the point. While Heydon's only test of whether to retain or change the existing doctrine is that any stance must be defensible in terms of being 'gradual and principled',<sup>46</sup> his own position is almost entirely policy-based. As the *Brodie* judgments evidence, there is more than one way to be principled: there is nothing more (or less) principled about changing the law as opposed to keeping it the same. And this conclusion suggests another implication that is even broader in import. As Heydon's own policy arguments attest, the assessment whether to retain or change existing law is itself always a matter of political substance. Once it is conceded, as it must be and as Heydon does, that change is always possible, a judge's decision not to change the law is as political as one that changes the law: each needs to be justified in terms of substantive policy arguments. In short, law is always and pervasively political in both its formal (ie, what counts as principled consistency) and its substantive (ie, when should change take place) dimensions. Properly understood, Heydon's views support the critical claim that 'law is politics'.

<sup>43</sup> Heydon, above n 1, 12.

<sup>44</sup> *Ibid* 13.

<sup>45</sup> *Ibid* 21.

<sup>46</sup> *Ibid*.

#### IV ON THE MOVE

When it comes to thinking about the adjudicative role, most jurists still exist in a semi-conscious state in which the illusions of noble dreams and ignoble nightmares still hold sway.<sup>47</sup> The overriding problem though is that it is not entirely clear which is the dream and which is the nightmare: Heydon's dream is Hutchinson's nightmare. The choice between a vision in which judges admit to making law and one in which they claim to be simply applying it is itself dependent on two separate considerations - whether it is really possible to apply law without also making it and whether the law to be applied is substantively superior to what judges might decide for themselves. Indeed, it is my view that the courts cannot do one without also doing the other. Applying the law involves choice as much as that choice involves reference to existing law; it is a constant and organic interaction between choice and constraint, between amendment and application, and between direction and discretion. In a manner of speaking, judges will never get a good night's sleep (nor should they) as they are destined to struggle with the heavy responsibilities of doing justice. The best that they can hope for is that they will do enough good in their waking hours that they can get sufficient sleep to refresh themselves for the next day's travails. Judges who sleep without dreams and/or nightmares are either so smugly confident as to question their ability to do justice in a world in which what justice demands is always changing or so anxiously overwrought as to undermine their capacity to make difficult decisions in difficult circumstances. Doing 'justice through law', if that is not oxymoronic, requires judges to concern themselves more with the bracing light of concrete day than the confusing shadows of abstract night. In this regard, good judging is about much more than getting the grand theory, 'strict logic' or 'high technique' right.

The basic thrust of the jurisprudential challenge is to explain the tension between 'stability' and 'change'. Whereas even the most reactionary theorist admits to some need for change, the most radical critic concedes that a degree of stability is desirable. However, despite the often robust disputes over the appropriate balance of these forces, there seems to be a shared commitment to the underlying idea that there is some elusive, but enduring method or measure by which to locate a workable proportion between stability and change or between tradition and transformation. Moreover, this algorithm must not only achieve such an equilibrium, but also must ensure that any changes or transformations are always in the direction of normative improvement. In short, jurists and judges must be assured that, in spite of the occasional set-back or wrong turning, things are getting better and better by dint of the common law's own social discipline and historical development. This is a very tall order because the search for fixed foundations or constant equations to guarantee the common law's progress is as mistaken as it is unrealisable. The best that can be hoped for is that the common law remains supple, experimental, and pragmatic. While judges and jurists must

<sup>47</sup> See Herbert Hart, 'American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream' (1977) 11 *Georgia Law Review* 969, 989.

forego the quest for a formal method to direct and sanction universal change, they must not abandon the pursuit of substantive solutions that might contribute to local justice. Nevertheless, in being alive to the possibilities of change, it is important for lawyers to resist the temptation to essentialise or deify change. There is no lasting or greater normative appeal to perpetual change as opposed to perennial stasis: the balance between the two will be local, variable and tentative. As the history of the common law amply demonstrates, it is often possible for there to be change without improvement, but it is rarely possible for there to be improvement without change - change might be constant, but progress is contingent.<sup>48</sup>

In contrast to traditional accounts, I maintain that the common law is simply moving on largely in response to the demands and opportunities of its changing socio-political situation. Neither always getting better (or worse) nor advancing in any particular direction, it is simply changing. Moreover, when change is contemplated, it is not so much that the developed doctrine will have run into internal difficulties in the sense of being found to possess latent illogicality or incoherence (although it well might). Rather, the doctrine will be seen to have outlived its substantive usefulness and be discarded for a more immediately well-adapted set of rules and principles. It is less that the doctrine has been found to be professionally-wanting from an internal standpoint and more that it has lost its political salience from an external perspective. In short, law and its particular doctrines are seen to be thoroughly political in their rise, elaboration and demise; legal tradition demands political transformation. The common law is only as good or bad as its informing context: no legal rule is intrinsically good or bad in some global and eternal sense. The history of the common law suggests that all value-judgments about doctrinal merit must be contingent and conditional. Moreover, because there is a movement away from some particular legal doctrine toward a different one, it does not mean that the common law is becoming more pure or more close to its supreme form. Any particular doctrine must be assessed in local as opposed to universal terms. As one commentator has astutely observed, the common law can only be understood if it is seen for what it is - 'not a romantic ideal or a divine gift or the acme of judicial genius or even the legal aspect, naturally superior, of the most politically wise and refined race, but an interesting human construct, the creature of times and places, of economic forces and class interests, of battles for power between political factions and trials of wits between lawyers of great skill and inventiveness'.<sup>49</sup> Whatever else it is, the common law is a work-in-progress which is always on the move and which is moved along by historical, social, political and moral forces, themselves beyond any simple or fixed elucidation.

The history of the common law is as much one of discontinuity and contingency as anything else: lawyers struggle to deal with the socio-political forces which impinge on their lives and to which they contribute to their activities. 'Progress'

<sup>48</sup> See Allan C Hutchinson, *Work-in-Progress: Evolution and the Common Law* (forthcoming 2003).

<sup>49</sup> Derek Roebuck, *The Background of the Common Law: A Historical Sketch* (1983), 10.

is an entirely practical and temporal matter as opposed to some abstruse and metaphysical measure: it is simply about solving problems by closing the gap between present aspirations and existing actuality so that the world can become a locally better place.<sup>50</sup> Not only will those problems change over time, but those aspirations will also change. Indeed, there is no epistemology that operates as something above rhetoric and there is no metaphysics that is something above rhetoric. Like debates about substance, there is nothing beyond persuasion among real people in real situations. The demand for integrity or consistency falls down because, at a suitable level of analysis, sometimes high and sometimes low, most things can be made to look more or less coherent. The practices of law, 'strict logic and high technique' are no more (and no less) than a human pursuit - situated, fragmentary, and flawed. Like all histories, the development of the common law is best understood as a way of coping that is more or less successful in direct proportion to its capacity to achieve substantive justice in the contextual circumstances. Judges who make 'bad' decisions do so largely because of their substantive political leanings, not because of the weak or incorrect judicial method that they deploy. The decisions in cases like *Brodie* are not right or wrong because of the formal merit of their judicial techniques, but because of the lasting appeal of their substantive politics. Settled or fixed principles are simply those that have acquired and still manage to retain sufficient support in the political scheme of things; basic principles do not so much obviate the need for politics as provide a marker for them.<sup>51</sup> Contrary to what Heydon and other ultra-formalist jurists believe, formal method(s) cannot save the law and judges from themselves. Judgment is a substantive instinct that can never be applied in any easy, sweeping or uncontroversial way.

The only solid injunction that Heydon law seems to offer is 'go slowly'. The claim is made that the common law is not only a formal process of argumentive growth, but that it is also a substantive framework which places real constraints on the content and direction of common law development. Yet the history of the common law is that 'anything might go' provided that others can be persuaded that such a doctrinal change is substantively desirable. Of course, if it is possible to persuade an already institutionally-predisposed audience of lawyers that such a change is more a continuation of a doctrinal tradition than a radical break with it, then so much the better. However, as the incidence and importance of so-called great cases illustrates, even a doctrinal and abrupt revolution will be accepted and the 'go slowly' injunction ignored, if the proposed change is sufficiently palatable to the substantive political appetites of the legal and, on occasion, public establishment. Even the Dixonian Heydon concedes that change is demanded where existing law is 'plainly unreasonable and inconvenient' which, of course, is a political and substantive assessment.<sup>52</sup> The legitimacy of the common law is more dependent on the rate and style of doctrinal development than its substantive content and direction. Legal feathers are much more ruffled

<sup>50</sup> Richard Rorty, *Achieving our Country: Leftist Thought in Twentieth Century America* (1998), 28.

<sup>51</sup> See Stanley Fish, *The Trouble with Principle* (1999).

<sup>52</sup> See Allan C Hutchinson, 'In Praise of Leading Cases' in E O'Dell (ed), *Leading Cases of the Twentieth Century* (2000), 1.

by sudden switches in direction than slow accretions over time: the snail is the chosen symbol of the common law, not the hare. Yet, such a traditional 'go slowly' account of the common law (even when its injunctions are actually being heeded) has nothing to say about what is 'the best thing to do', where to go slowly, or whether there are any substantive limits on change - it is all about the pace, not the direction of movement. Again, the common law is a work-in-progress whose progress is not channelled by the law's own logic, structure or extant values. On the contrary, the common law simply works itself in line with mediated pressures of its informing social, historical and political situation.

Heydon's nostalgic sentiments for a simpler and more stable world are regularly and wistfully echoed throughout the legal community. However, the claim that 'uncertainty' is a modern phenomenon is entirely belied by even the most rudimentary grasp of the common law's past: the Victorian age, as illustrated in Dickens' *Bleak House*, is hardly the fabled stuff of clarity and simplicity. The yearning for certainty is a thinly-veiled plea for more homogeneity and uniformity in the legal profession; the trend towards a more diverse demographic in terms of gender, race, class and sexuality is to be halted (or at least to be limited to altered appearances than changed values). Law is a site where the facts are intimately connected to the approved way of looking at them: what counts as a 'valid contract' is hardly conceivable outside a particular legal ideology. Lawyers are as much a product of the social environment as everyone else, albeit with a privilege and position to affect to some extent how that social environment changes; lawyers are what they are because of the society in which they live and which they contribute to creating and changing. However, rather than view recent changes in personnel and values as harmful and discomfiting, common lawyers would do better to recognise that such developments are not at all inimical to the proper understanding of the common law as a work-in-progress. If the common law is a professional and political tradition, it is one of change and transformation - *shift happens*. And this ought to be a cause for reassurance, not regret.

By understanding the common law as an organic process as much as a collection of fixed rules and technical methods, it becomes possible to appreciate that good judging is about local usefulness as much as global coherence. Being a work-in-progress, the judicial job is never done and must console itself by accepting that this is for the best, not the worst. Because contingency is the order of the day, it has to be grasped that the quirky as much as the quotidian is the measure of development and change; yesterday's peculiar is today's prosaic and tomorrow's passé. In such a world, the common law's fabled injunction of *stare decisis et non quieta movere* (ie, let the decision stand and do not disturb things that have been settled) seems to be entirely the wrong sentiment or mandate. By relying too heavily on the past to resolve present disputes, common lawyers are likely destined to get the future wrong. It is necessary to cultivate an attitude that holds the push of tradition and the pull of transformation in some sort of balance. But that balance will itself be political and substantive, not legal and formal. Any balance between stability and change or between tradition and transformation



will have to be constantly achieved and re-achieved in the maelstrom of history's changes. Mindful that no change is not always for the better, it will occasionally be the case that doing nothing will be the best way to *do what is best*. However, it is entirely another thing to suggest that doing nothing will always (or more likely than not) be the best way to do what is best.

Heydon and other formalists, of course, contend that a bias in favour of the status quo is a natural feature of the common law: judges are required to give added weight to existing precedents and institutional allegiance in their decisions about how to *do what is best*. Lawyers and judges do not (or are not supposed to) design doctrinal renovations off the top of their heads: they engage in a mode of bricolage or cobbling together over time of whatever is at hand to make the best contrivance that is possible. As such, it is about situational optimisation, not absolute perfection. Moreover, even if judges do wipe the doctrinal slate clean and treat it as if it were a legal *tabula rosa* (which is a task that most courts claim to shun in favour of legislative intervention), it must still be conceded that judges operate within a particular historical context which not only frames the problem to be addressed, provides the 'fittest way to practice law', and recommends the utility of any proposed solutions, but also helps to shape the values and commitments that they bring to those adjudicative chores.<sup>53</sup> Accordingly, understanding the common law as a work-in-progress leads to the appreciation that adjudication is a subtle combination of freedom (ie, judges can cobble together the broad range of available doctrinal materials into the artefacts of their choosing) and constraint (ie, judges are historical creatures whose imagination and craft are bounded by their communal affiliations and personal abilities). In this way, 'anything might go' and the common law will be understood as political through and through.

John Donne's celebration of change as 'the nursery of music, joy, life and eternity' captures the kind of attitude which common lawyers should take (and the very best among them have) to their judicial duties.<sup>54</sup> Rather than resist or resent change, they should recognise that the main attraction and strength of the common law is its invigorating willingness to keep itself open to change and to adapt as and when the circumstances require. Of course, when it is best to change and in what direction change should occur will be a matter of normative judgment because 'law is politics'. Because the common law is a work-in-progress through and through, there is no manual or guidebook to follow in determining when to change or whether such change will be progressive. However, contrary to its formalists critics, the common law has shown that its capacity to adapt to

<sup>53</sup> In laying blame for the 'death of the Rule of Law', Heydon contends that the academe must take responsibility for breeding this new class of judges and lawyers because legal education is provided 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', Heydon, above n 1, 14. This charge of incompetence for offering a legal education that has a critical component reflects the deep conservative roots of Heydon's stance. Presumably, given his preference, legal education would be exhausted in rote learning of extant rules and inculcation in traditional values.

<sup>54</sup> John Donne, 'Elegy & Change' in AJ Smith (ed), *The Complete English Poems* (1971) 97, 98.

changing circumstances is a vital feature of its historical struggle for both survival and success. Indeed, the common law seems to have been energised by recognising the force of the old adage that 'when you are finished changing, you are finished'. It is a compliment to the political wit and institutional savvy of common law judges that, whatever they or their theoretical apologists might say, they have largely taken a pragmatic approach to their adjudicative responsibilities; they tend not to let abstract considerations get in the way of practical solutions. This is not to suggest that the solutions they choose or the changes they make are always the best or even the better ones; this is a matter for social evaluation and political contestation. Accordingly, while they might mouth certain traditional platitudes about the need for predictability and stability in the common law, the judges tend to act on a quite different basis. As the iconoclastic William Douglas put it, 'the search for static security, in the law and elsewhere, is misguided ... [because] the fact is security can only be achieved through constant change, adapting old ideas that have outlived their usefulness to current facts'.<sup>55</sup> Indeed, the success of the common law has been this ability to be flexible, open, experimental and adaptable. The knack is to intervene in such a way so as not to establish rigidities and ossification, but to maintain the capacity for change and alteration in the immediate interventions made. To the extent that it can do this, the common law will have redeemed its performance and potential as a work-in-progress.

## V CONCLUSION

Heydon's lament for the death of Rule of Law and the bastardised birth of judicial activism is little more than a personal hankering after a putative, yet tarnished, golden era in the common law. However, being thoroughly organic and pragmatic, the common law has no one essential essence or enduring technique. If there is a common law tradition, it is one that recognises the need to engage in continuing acts of transformation in both its content and methodology. In many ways, the common law is like a plant whose leaves and branches are constantly dying and being replaced by fresh growths. To respect the common law, therefore, is to respect that organic and self-transforming aspect. It might well be that a Dixonian legalism had its benefits over a half century ago (and I sincerely doubt that), but its time has passed: it is now time to give it its due and let it rest in peace. What counts as good judging will itself always be a contingent feature of law and politics, not a universal characteristic of legal reasoning. Indeed, the acid test of Heydon's dedication to the Rule of Law and the common law will come when he is faced with cases like *Brodie* where he must decide what to do - will he follow the new rule?; will he revert back to the old *Buckle* rule?; or will he offer some novel alternative? By his own lights, he should surely apply the new rules simply as part of his 'loyalty to precedent'. However, I have a sneaking suspicion that, holding true to his conclusion that 'the former condition of things

<sup>55</sup> William Douglas, 'Stare Decisis' (1949) 49 *Columbia Law Review* 735, 735.

need to be restored',<sup>56</sup> he will follow the lead of Gleeson CJ who 'is generally, but not always, contracting [the law of negligence]'.<sup>57</sup> Of course, such a retrenchment is defensible less as a matter of formal technique and more as a matter of substantive and contested politics. Whatever he chooses to do, Heydon would be well advised to remember that judgeliness is not next to godliness and that false modesty is its own form of hubris. 'Strict logic and high technique' are not the elusive keys to the legal kingdom, but a limited set of tools to construct many different common laws, each of which has to be defended in substantive political terms.

<sup>56</sup> Heydon, above n 1, 22.

<sup>57</sup> Ibid 17.