THE LEGITIMACY AND AUTHORITY OF JUDGES

A.R. BLACKSHIELD*

An annual series of memorial lectures plays an important symbolic role in the life of a university. On the one hand such lectures are one small way in which universities can demonstrate their capacity for topical "relevance", for public contribution to the fabric of community life.

On the other hand, such lectures also remind us of the values of tradition and continuity in university life. The continuity and community that we celebrate on such occasions link our generation of academics with all the earlier generations of individual men and women whose dedication to the stream of knowledge — to maintaining it, transmitting it, and if possible extending its boundaries — has defined the meaning of universities since they first came into existence. And all this reminds us even more deeply that when we, in our own generation, pursue the goals just mentioned — the goals of maintaining, transmitting and extending the stream of knowledge — we can do so only through dialogue; and that this is a dialogue not only between the men and women of our own generation but between our generation and all the generations before us.

This dialogue between the generations, and the duty we owe to our predecessors in transmitting the stream of knowledge, have a personal significance for me as I deliver this paper on the judicial process. My own teacher and mentor, Professor Julius Stone, died in Sydney on 3 September 1985 at the age of seventy-eight, after almost sixty years of teaching and writing on law and justice. The illusions and the realities of the process of judgment in common law countries — the hidden puzzles that lie behind our orthodox theories of precedent — were always among his most persistent and most rewarding themes. His first exploration of these themes was in 1933, in

*LL.M. (Syd.), Professor of Legal Studies, La Trobe University. This article is based on the Meredith Memorial Lecture given by the author on 6 November 1985. The Meredith Lectures are an annual series commemorating the contribution of Mr Ben Meredith, O.B.E., to the development of La Trobe University.

an article on the rule of exclusion of evidence of similar facts.[1] His last major restatement of them was published posthumously in a book entitled *Precedent and Law: Dynamics of Common law Growth.*[2] The book touches on many areas of current controversy — political controversy over "activism" and "restraint" in our highest courts, and the wisdom of "political" appointments to those courts; philosophical controversy over the role of "principles" in so-called "hard cases"; and judicial controversy over the role of "proximity" in the tort of negligence.[3] In all these areas Stone reminds us that the apparent controversy is often only a pseudo-controversy, which would always be radically transformed, and sometimes simply dissolved, if only we took the trouble at the outset to analyse what a judge is really doing when he decides a case. Specifically, we need to be aware — as Julius Stone first spelled out clearly forty years ago now[4] — that judicial decision *never is* a simple mechanical application of existing legal materials; and that this is so not because wilful judges refuse to apply "the law", but because, if a judge is truly faithful to the legal materials, their inherent ambiguities, indeterminacies and profusion of diverse resources will *compel* him to reach his decision on the basis of a personal value choice. If judges fail, as they sometimes do, their failure lies in an inability to recognise and exploit the choices available.

All the difficulties that nowadays press on universities in the search for knowledge are equally frustrating for the hierarchy of courts in the search for law. Judges, even more than academics, are faced with a seemingly endless stream of immediate problems that need immediate answers. Indeed, on this side of the equation, judges have to cope with practical pressures from which, most of the time, we academics are blessedly immune. I sometimes think that the most important part of academic equipment is the "too hard" basket; problems that are too intractable for easy solution can be shelved, and reopened, and shelved again, and ultimately handed on still unresolved to the next generation of scholars. Judges do not have that option. Always the starting point for their work is a practical question about the rights and liabilities of real human beings that has to be answered *now:* and if the state of human knowledge, or the stubborn opacity of the facts, or the contradictions and ambiguities of the legal materials, make it humanly impossible to arrive at a *confident* answer, the judge must still give *some* answer — the best working answer that he can. Moreover, however uncertain the basis may be for the judge's answer, he has to ensure that the answer he gives is acceptable to the litigants, and also to the wider community, as legitimate and authoritative.

1 J. Stone, "The Rule of Exclusion of Similar Fact Evidence: England" (1933) 46 *Harv L Rev* 954. See also his similarly-titled analysis for America in (1938) 51 *Harv L Rev* 988.

2 (1985); see especially ch. 4.

3 *Id.,* 7-13, 236-262, 263-268.

4 J. Stone, *The Province and Function of Law* (1946) ch. 7; restated in J. Stone, *Legal System and Lawyers' Reasonings* (1964) ch. 7.

How you achieve these qualities of "legitimacy" and "authority", in a context of human uncertainty, has always been the most difficult tactical problem facing the courts; and the public relations aspects of that problem in the 1980s are my ultimate concern. For the moment I pause only to note the fact that immediate relevance to the here-and-now, which presents itself for an academic as an exciting opportunity, presents itself for a judge as a genuinely awesome responsibility, none the less awesome for the fact that he has to face it every day. And however much the judge may try to shift the responsibility onto the abstract impersonal workings of the legal system, in the end the responsibility is always a personal one, borne by him alone.

On the other hand, what judicial work and scholarly work have in common is the location of immediate problem-solving in an overriding perspective of continuity and tradition. Especially in the judge-oriented British and American common law systems, each exercise in practical problem-solving can only make sense in the context of previous efforts of generations of earlier judges extending back over the centuries; and this historic continuity gives meaning and direction to today's decisions in many ways. Great individual judges of the past are a living presence, reinforced by accretions of anecdote and parable and cultural folklore which give us a sense of working with them in a vast continuous enterprise. They provide a fund of living examples to be followed, or sometimes avoided. Their actual decisions — their actual words — come down to us not merely as history, but as the embodiment of legal insights, approaches and understandings, out of which our own solutions to our own problems must be fashioned today. And these new solutions in turn become part of this ongoing heritage, significant not only for their concrete results for litigants A and B, but also for the ways in which they reinforce, or expand, or explain, or transform, the whole fund of inherited meanings which we in turn will hand on to the next generation.

In emphasising the importance of continuity and tradition in the work of judges, I am of course thinking mainly of our system of common law, in which the so-called "rules" of law are themselves laid down by earlier judges, and refashioned by each generation of judges to be handed on for a fresh renovation by the next generation. I am leaving aside for the moment the exponential modern increase in statutory law — where the detailed regulation of human affairs arises not through the slow evolution of judicial wisdom, but through the essentially ahistorical process of parliamentary enactment on a specific occasion, often reflecting nothing more venerable than last week's political crisis. But even in the area of specific "rules", modern statutory inputs are still interwoven in an intricate jigsaw-puzzle with the heritage of common law "rules", and the common law "rules" still provide the context within which modern parliamentary enactments must be construed.

In any event, the common law heritage includes much more than "rules". It includes the whole intangible armoury of intellectual concepts and doctrines, fundamental general principles and evaluative or intuitive "standards", which we use to organize, understand and apply the specific

"rules".[5] It includes what the great American jurist Roscoe Pound described as "the technique element in law"[6] — including the doctrine of precedent itself, but also all the interpretative and analytical strategies, all the procedures and practices and evidentiary premises, that we use in thinking our way towards a concrete solution. Ultimately it makes sense to say that a solution consists of an application of "the law" to "the facts". But in reducing "the facts" to a version that can meaningfully be resolved by that particular handful of law, and equally in reducing "the law" to a version that can meaningfully be applied to that particular handful of facts, we apply traditional legal techniques. These techniques, said Pound, "are not legal precepts; they are modes of looking at and handling and shaping legal precepts. They are mental habits governing judicial and juristic craftsmanship".[7] These habits derive their legitimacy from history and tradition; and judicial operations are controlled by these habits, whether the "rules" to be applied come from statute or common law.

For academics and judges alike, I have used the notion of "dialogue" with earlier generations. I hope that I have made it sufficiently clear that the dialogue I have in mind is not an uncritical one. Some judges, indeed, seek legitimacy by asserting the value of continuity with the past in an extreme form. In 1798 Lord Kenyon remarked: "[i]t is my wish and my comfort to stand super antiquas vias (upon the ancient ways): I cannot legislate, but by my industry I can discover what our predecessors have done, and I will servilely tread in their footsteps."[8] Obviously I am not advocating that sort of servility. The starting point must be the traditional body of ideas and practices — "rules" and "principles", concepts and standards, techniques and habits of thought — but the relevance of all this to modern problems must constantly be reappraised. The notion of dialogue across generations must work for judges as Julius Stone has described it as working for scholars: our duty is to understand "the meanings that we have inherited, but also and above all the *meaning of those meanings for ourselves in our own days*".[9] To understand the inherited meanings we need to go back into history, to see the practical point of the strategies used by "men of past times and places in

5 Although some of these labels have been the focus for recent jurisprudential debates, the fullest and most illuminating account of these "elements of law" is still to be found in the careful taxonomy of Roscoe Pound, developed in a series of articles including "Juristic Science and Law" (1918) 31 *Harv L Rev* 1047; "The Administrative Application of Legal Standards" (1919) 44 *Rep American Bar Ass'n* 445; "The Theory of Judicial Decision" (1923) 36 *Harv L Rev* 641; Introduction to National Consumers' League (eds), *The Supreme Court and Minimum Wage Legislation* (1925); "The Ideal Element in American Judicial Decision" (1932) 45 *Harv L Rev* 136; "Hierarchy of Sources and Forms in Different Systems of Law" (1933) 7 *Tul L Rev* 475; "A Comparison of Ideals of Law" (1933) 47 *Harv L Rev* 1; and "What is Law?" (1940) 47 *West Virg L Rev* 1. For a summary and synthesis see A.R. Blackshield, "The Law" in *Power in Australia: Directions of Change* (1981) 171, 174-178.

6 See especially "The Theory of Judicial Decision" (1923) 36 *Harv L Rev* 641.

7 *Id.*, 648.

8 *Bauerman* v. *Radenius* (1798) 7 TR 663, 688; 101 ER 1186, 1189.

9 J. Stone, *Human Law and Human Justice* (1965) 352.

meeting the perplexities of their situations". We need to understand our legal material in its original context. But ultimately we need to understand it in our own context as well. What we really want to extract is a strategy for our own current perplexities; and in order to satisfy this need, the inherited meanings need reinterpretation, correction and transformation.

Even then, the most we can hope to achieve is a workable solution *for the time being.* Judicial declarations of "law", like scholarly declarations of "knowledge", can never be settled or final. They represent working approximations along an endless road; and, like any fallible human performance, they must always be incomplete and imperfect.

The trouble with all this is that it is profoundly unfashionable. For those of us inside the tradition of scholarship, or inside the tradition of common law judgment, continuity with the past and a sense of tradition may themselves endow our efforts with an apparent legitimacy; but in a world soon to be poised on the threshold of the twenty-first century, this kind of legitimacy cuts no ice. Ours is the age of the instant sensation, and therefore of "the quick fix". The fact that courts and universities have an institutional dedication to continuity with the past may represent, for both of them, a source of internal pride, but for both of them it also represents a public relations problem. And the fact that I am able to speak of it as a "public relations" problem is itself symptomatic of our age.

It is, of course, by no means surprising that tradition and continuity are unfashionable values today. We are reminded every day that ours is an age in which social and technological change have attained a speed and complexity without precedent in human history; and in such a time one would hardly expect the legitimating force of tradition to carry a great deal of weight. I do not even want to argue that it should. The American judge Oliver Wendell Holmes, said in 1897: "[i]t is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV."[10] And it would indeed be revolting. But it does seem to me that it is also revolting to *change* a rule for no better reason than that it was laid down in the time of Henry IV; and that, if not revolting, it is at least unwise to tackle our problems as if they have no historical background at all. And it seems to me it is these latter fallacies — the fallacy of change for the sake of change, or novelty for the sake of novelty, and the ahistorical fallacy of reinventing the wheel — that are most in fashion today. The question I want to raise is how, when the up-to-the-minute trend is one of frenetic preoccupation with the up-to-the minute trend, essentially traditional institutions can best find public acceptance.

My own solution — perhaps itself an unfashionable one — is that such institutions should try to foster a greater public awareness of what it is that they are really doing: of the special values, and the special problems, that the

10 O.W. Holmes, "The Path of the Law" (1897) 10 *Harv L Rev* 457, 469.

work of such institutions involves. The universities nowadays try to achieve this awareness through "Open Days": but that answer will hardly work for the courts. In theory, every day in a court of law is an "Open Day": the idea that the business of the courts is open to the public was traditionally important both as a vital constitutional safeguard, and as an essential social device through which the judicial declaration and application of law was accepted and understood as an integral part of community life. But increasingly nowadays open courtrooms are also empty courtrooms. A hundred years ago the work of the courts was a major source of free and popular public entertainment; the attractions in Her Majesty's courts rivalled those in Her Majesty's Theatre. But those days are long gone. Even a hundred years ago, the more sensational criminal trials, or scandalous divorce or libel cases, were the highlights of the variety program offered by the courts; but today it is only the sensational cases — and only those that fall obviously into standard conceptions of what makes "news" — that reach public awareness at all. A hundred years ago the major newspapers regarded themselves as "papers of record", and treated it as a normal part of their work to set out, admittedly at tedious length, a daily record of everything that happened in the courts. If one undertakes scholarly research today into litigation at the turn of the century, the daily newspapers of the time are a more comprehensive source of information than the Law Reports.[11] But for litigation in the 1980s no such source of information exists for the benefit either of future historians, or of the present public. The work of the courts today is shrouded in general public ignorance, broken only by occasional stories about sensational cases that fall under such fashionable headings as rape in marriage, tax avoidance, organized crime, or conspiracy theories based on our pervasive post-Watergate fear and distrust of corruption in high places. Even when such cases are accurately and fully reported — as they often are not — the fact that the public image of the courts rests *only* on such cases is itself a distorting factor.

Even American television no longer helps. Back in the days of "Perry Mason", Australian television viewers had at least a familiarity with *American* courtroom procedure, no matter how simplified and bizarre their view of it may have been. Once we graduated to "Kojak", and now to "Miami Vice", the underlying ideology changed. Even the work of American courts now impinges on public awareness only to the extent that it constitutes a remote and frustrating interference with the valiant efforts of the police to combat organized crime.

Indeed, the special tragedy may be that it is precisely the best elements in our judicial tradition that are currently most unfashionable. The law, when it works best, is essentially committed to *human* values; in a popular culture

11 For some illustrations see Appendix B to A.R. Blackshield, "The Last of England: Farewell to their Lordships Forever" (1982) 56 *Law Inst J* 779, 792-793.

where our mass entertainment places less emphasis on human interest than it does on special effects, that commitment seems out of place. The law, when it works best, protects the rights of the individual; in a corporate economy where organized structures of labour and capital alike are increasingly integrated into the corporate state, those rights seem obsolete. The law, when it works best, symbolizes a human reliance on "reason" in the disposition of human affairs; in a civilization whose dominant model of rationality is "economic rationality" — the efficient coordination of means for the maximum attainment of ends — the essentially *inefficient* values of analysis, reflection and prudent judgment, that made up our older understanding of "reason", seem simply to be squeezed out.[12]

Of course, all these features of modern society embody precisely the kind of economic and social challenge and change to which, on an idealized view, our judges should be adapting the law, finding new and effective protections for the values that seem under threat. The danger is that, when popular consciousness is shaped by forces like these, the result may be to delegitimate judicial adaptation itself. At an International Congress on Criminal Law the former Chief Justice of South Australia, Dr John Bray, summed up the discussion in a way that seems worth quoting at length. Through it all, he said, ran "two thin black threads":

> a tendency to advocate authoritarian changes to the law, and an alarming cynicism about the integrity of the legal process. Suggestions are made, and some of them have already come into effect, for the extension of police powers in their dealing with suspects. The return of capital punishment in aggravated cases has been suggested. The traditional rights of the accused are to be attenuated; it's suggested that he should be no longer permitted to remain silent, at least without adverse comment ... Proposals are made for extended powers of seizure and search, and for the institution of a sort of commercial Inquisition, which I would think would turn out as great a terror in the economic sphere as its predecessor was in the religious. Then it's said the criminals are winning; that drugs and tax evasion are making crime, particularly corporate crime, a profitable undertaking for the respectable classes. And with distressing cynicism it's even said that the quality of the judiciary and the legal profession has declined, is declining and presumably may be expected to go on declining ... There seems to be a general feeling in some quarters that it's all getting too hard, and that a pragmatic, rough-and-ready approach is what the times demand, and that fine distinctions, differentiations and adjustments to suit the merits of each case are luxuries that will have to be qualified or abandoned.

Dr Bray expressed characteristic confidence that the law "will be as vigilant and effective a guardian for the liberty of the citizen ... as it has been in the past".[13]

These modern conditions seem to me to pose special threats to the legitimacy of judicial institutions; but I certainly do not want to suggest that legitimacy of judges is a uniquely modern problem. Lord Kenyon, whose wish and whose comfort it was to stand "super antiquas vias", would not

12 For a striking early example see Paul Diesing, *Reason in Society* (1962), purporting to analyze "five types of decisions" including "legal rationality", but in fact reducing all of them to economic terms.

13 Closing address, International Criminal Law Congress, Adelaide, 11 October 1985.

have dreamed for a moment that he, in 1798, was faced with a public relations problem; and yet he undoubtedly was. Even his brother judges complained of his bad Latin, his shabby clothes, and his general parsimoniousness.[14] Moreover, the age of Kenyon was also the age of Jeremy Bentham; and in a remarkable series of pamphlets Bentham scourged the judges of his time — "Judge & Co.", as he called them — with a stream of vituperation that has never again been approached.[15] He accused them not only of every form of tyranny and rampant corruption, but of "jargon, nonsense, absurdity, surplusage, needless complication, falsehood — every kind of intellectual nuisance, in every imaginable form". He spoke of "this mystery of iniquity"; of "base and sordid injustice"; of "that which Judge & Co. have never forgotten, profit to their own *firm*". "In the situation of judge", he said,

> a man is continually exposed to the action of sinister interest, and delusive passion, acting in directions opposite to the interest of the public, in respect of *the ends of justice:* to sinister interest and passion, casually on his own individual account, much more frequently on account of other individuals or classes of men, whose interests or passions ... it may happen to him to espouse.

He thought that "if mendacity and rapacity be vices", the Bench is "the very sink of vice". He spoke of the law as "a sort of *black lottery*", in which every player wins a prize, but all the prizes are losses. And so on, for page after page.

Now, the eighteenth century judges who attracted this torrent of contumely did in fact have their own elaborate system of public relations, with their own legitimacy and authority as its consistent theme. Obviously it did nothing to mollify Jeremy Bentham; indeed, it was probably one of the causes of his consuming hostility. But for the popular audience in the eighteenth century courtroom, it seems to have had considerable effect. The system has been analysed in vivid detail by twentieth century historians like E.P. Thompson and Douglas Hay, most graphically by Hay in the now famous book *Albion's Fatal Tree*.[16] In Hay's account, the judicial performance involved an elaborate play on the rhetoric of majesty, justice and mercy. "The aim was to move the court, to impress the onlookers by word and gesture, to fuse terror and argument into the amalgam of legitimate power in their minds."[17] Sententious paternalism was mixed with "the power and passion of righteous vengeance".[18] The ultimate judicial instrument was

14 See A.W.B. Simpson, *Biographical Dictionary of the Common Law* (1984) 295.

15 All of the quotations which follow are taken from Part I of *The Elements of the Art of Packing* [*Juries*] (1821). See J. Bowring (ed.), *The Works of Jeremy Bentham* (1962) vol. 5, 75 ("jargon, nonsense..."); 77 ("this mystery of iniquity"); 82 ("base and sordid injustice"); 84 ("profit to their own *firm*"); 89 ("sinister interest and passion"); 92 ("the very sink of vice"); 99 ("a sort of black lottery").

16 Douglas Hay, "Property, Authority and the Criminal Law" in D. Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (1975) 17-63.

17 *Id.*, 29.

18 *Id.*, 28.

always that of terror, with the frequent use of the death sentence as its most awful manifestation. But terror was often softened by an elaborate display of pity. Hay quotes from the diary entry of an eighteenth century judge after he had imposed a sentence of death:

> [b]efore I pronounced the sentence, I made a very proper speech ex tempore and pronounced it with dignity, in which I was so affected that the tears were gushing out several times against my will. It was discerned by all the company — which was large — and a lady gave me her handkerchief dipped in lavender water to help me.[19]

For Hay, this kind of judicial performance was "a powerful ideological weapon"[20] in maintaining the supremacy of the eighteenth century ruling class — to which, as Bentham well knew, the judges of the time themselves belonged. But running through Hay's analysis is a grudging admiration for the sheer adroitness, and the obvious effectiveness, of the performance. He concludes that the judges were able to exploit a "powerful psychic configuration" which Bentham just never understood.[21]

This kind of twentieth century history often has a Marxist orientation; and one trouble with Marxist history, as perhaps with Marx himself, is that while it exposes trenchantly the conditions of ruling class hegemony in eighteenth century England, it tends to assume too easily that a similar analysis can be transposed into our own different world. Certainly no judge today could convincingly carry off the overbearing authoritarian style of Hay's eighteenth century judges; and when judges today are occasionally tempted into essaying a similar style, the results are in my view unfortunate. "Legitimacy" and "authority" can no longer be established by mere righteous self-assertion. Judges today no longer belong to the natural aristocracy of the eighteenth century propertied classes; any authority they can claim today must depend on their personal attributes. Nor can they even claim convincingly to speak for the moral outrage of the community as a whole. When modern judges do effect their own blustering self-righteous version of the eighteenth century style, they do so mostly in two kinds of context. One is the pronouncing of sentence at the end of a criminal trial; in this context, some judges still seem to believe that the community expects a display of severity. The other kind of context, significantly, is that in which a judge feels that his own authority and importance is under threat, for instance in the face of an apparent contempt of court. But it is especially in this kind of context that self-proclaimed legitimacy is in my view self-defeating. I sometimes think that judges would have more authority if they were less authoritarian; that they would preserve more dignity if they displayed less indignation. As I suggested some years ago,[22] judicial effectiveness nowadays must depend on communication with litigants, not on *ex cathedra* or *in terrorem* posturing *at* them.

---

19 *Id.*, 29.
20 *Id.*, 37.
21 *Id.*, 39.
22 A.R. Blackshield, "Judges and the Court System" in G. Evans (ed.), *Labor and the Constitution 1972-1975* (1977) 105, 106.

It is not in the eighteenth century but in the nineteenth that we find the real key to the twentieth century problem of judicial authority. The effect of the Benthamite critique of eighteenth century judge-made law was a fundamental renovation of our political system, symbolised by the great Reform Bill of 1832. It involved a radical change in our very idea of legitimacy.[23] The Benthamite reformers who in 1832 began to redraw the United Kingdom's parliamentary map had two overriding objectives in mind. One was to replace the English tradition of judge-made common law — in which legal change (as Bentham saw it) was achieved by indirection, by fiction, and sometimes even by accident — with a rational program of legal reform by conscious enactment through Parliament. The other, not altogether consistent with Bentham's own inclinations, was to ensure that the parliamentary legislative program would no longer be dominated by the interests of the propertied classes — including "Judge & Co." — but would represent instead the will and the interests of the whole people. To this end the 1832 Reform Bill took the first limited steps towards a universal franchise. The implementation was limited; the ideology was real. Before 1832, the effective "legitimacy" of English law had depended upon public acceptance of the enlightened paternalism of a natural ruling class, inspired by a sense of *noblesse oblige* and by an intuitive natural sense of what was good for the people. Judges, as part of that ruling class, were able to nurture the common law in the confident belief that whatever they did would itself be "legitimate". They *knew* where the public good lay. After 1832, whatever the economic realities, that kind of "legitimacy" could no longer be reconciled with political theory. The new ideology was one of *democratic* "legitimacy": laws were legitimate because they were enacted by an elected Parliament which represented the people and which could be controlled by the people through the ballot box. How could the legitimacy and authority of judges be reconciled with this political theory?

The most widely accepted solution involved a new kind of legal fiction. The problem of "authority" was resolved by appealing to expertise: the interpretation and application of laws was a skilled and specialised craft, involving all the elements of technique and tradition of which I have spoken earlier; and like any area of expertise it had to be left to the experts. The claim was by no means a novel one in times of political crisis. In 1608, James I had argued that since the king was the "fountain of justice" and the courts were His Majesty's courts, His Majesty had the right to go into those courts and deliver justice in person. The Chief Justice, Sir Edward Coke, resisted that claim precisely on the ground of expertise. As Coke reported the argument, no doubt giving himself the better of it:

23 The following summary spells out a pervasive theme of Robert Stevens, *Law and Politics; the House of Lords as a Judicial Body 1800-1976* (1979).

> [t]he King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England. [Remember that James I was a Scot.][24]

In any event, Coke went on:

> [c]auses which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it.

Elsewhere, Coke made the same point. The common law was the embodiment of reason; but this was not "every man's natural reason", but "an artificial perfection of reason, gotten by long study, observation, and experience".[25]

Nevertheless, the nineteenth century version of this argument was different. Coke, as I understand him, was saying that the marshalling of legal arguments is essentially an art, or a craft; and there is a great deal of truth in that. In the nineteenth century the dominant model of intellectual activity was that of the sciences;[26] and to tailor the claim of legal expertise to prevailing fashions, it had to be argued that law is essentially a *scientific* object of knowledge: that "the law" exists as a comprehensive and rational *system* of ideas, such that somewhere within this body of knowledge there lies a single correct solution to every legal problem, simply waiting to be found. Given sufficient expertise, this single correct solution can be found with as much mathematical certainty as the proof of a geometric theorem.

If we accept this kind of solution to the problem of legal "authority", the problem of judicial "legitimacy" is solved as well. The problem of "legitimacy" arises because judges are *making law;* and to *make* the law entails a judgment of what the law *ought* to be. But that means a judgment of "policy"; and in a democracy judgments of policy ought to be made exclusively by an elected government responsible to the people. Judges are not elected, democratically or otherwise; we insist, through the strongest possible safeguards of judicial independence, that they should be responsible to no one, and answerable to no one. How can "policy-making" by such men be reconciled with democracy?

There is, of course, a certain naivety, and even a hidden contradiction, in this way of stating the problem. If the work of judges really had no "policy" implications — if judicial decision was really a matter of simple mechanical application of existing law — there would be no particular reason for insisting on judicial independence. The independence of judges, and their security of tenure in office, are important precisely because their decisions *may* have an

24 *Prohibitions Del Roy* (1608) 12 Co Rep 63, 64-65; 77 ER 1342, 1343. But see W. Holdsworth, 5 *History of English Law* (1924) 431n.

25 1 Co Litt 97b.

26 *Cf.* D. Lloyd, *The Idea of Law* (1985) 105-107.

impact which governments are likely to find unwelcome. "Democracy", as we understand it, is not simply a matter of government through elected representatives, but also a matter of "checks and balances", of countervailing systems of power and simple division of labour; and judges can only be an effective source of countervailing power if their work *does* have a policy content. In particular, the idea that judges protect individual rights — always another major plank in the ideological justification for the work of the courts — can only make sense if judges *can* protect individuals against the power of elected governments, and even against the majority will. Nevertheless, the nineteenth century solution to the problem of democratic "legitimacy" was simply to avoid the whole problem by denying that the work of judges has any policy content at all. The elected Parliament *makes* the law; the judges merely *apply* it.

By the end of the nineteenth century these components had come together in a rigid judicial ideology of "strict and complete legalism",[27] bolstered by a whole series of institutional and practical innovations. The hierarchy of courts was simplified, streamlined and rationalised. The doctrine of precedent was formalised on a strict hierarchical model: each court was absolutely bound by the decisions of higher courts, and at the high point of the doctrine — at least in the United Kingdom — the highest appellate court of all, the judicial House of Lords, was said to be absolutely bound by its own previous decisions. That particular refinement was only abandoned in 1966.[28] The system of precedent was formalized, too, by the notion that every judicial decision is authority for one correct "rule" — what lawyers call "the ratio decidendi of the case" — and that, in every case, the correct analytical procedure will enable us to identify with certainty and clarity this one correct "rule". Moreover, to give the system a kind of Euclidean completeness — to ensure that the finding of "law" would itself depend on nothing but "law" — it was said that this procedure for finding "rules" could itself be reduced to "rules"; and to this day great intellectual effort is devoted to the attempt to formulate what those "rules" might be. Finally, the whole system was enforced by a new and more rational appeal procedure, through which, it was said, the higher courts could "correct" the decisions of the lower courts when those courts fell into "error".

Many of these organizational changes were, indeed, more rational. The problem is in the underlying "legalist" ideology, which legitimizes the

27 The phrase is of course Sir Owen Dixon's, in his Sydney speech on being sworn in as Chief Justice. See (1952) 85 CLR xi, xiv; Sir Owen Dixon, *Jesting Pilate* (1965) 245, 247. But it needs to be contrasted with his Melbourne speech delivered two weeks later: see *Jesting Pilate* 250-251. Perhaps Sir Owen thought he was administering to each of the High Court's major bars the corrective it needed most!

28 For the "rule" see *London Tramways* v. *London County Council* [1898] AC 735 (the *London Street Tramways* case); for its abandonment see Practice Statement [1966] 1 WLR 1234. On the status of the "practice statement" see J. Stone, "1966 And All That! Loosening the Chains of Precedent" (1969) 69 *Col L Rev* 1162; A.R. Blackshield, "'Practical Reason' and 'Conventional Wisdom'", in L. Goldstein (ed.), *Precedent in Law* (1987) 107.

judicial role by denying its most important component. The fact is that judges are constantly making what we call "policy" choices, for the simple reason that interpretation and application of legal materials is impossible without such choices.

I referred at the beginning of this paper to Julius Stone's detailed demonstration of how this comes about: of how it is that the legal materials are in fact *never* conclusive, but through ambiguities, indeterminate terms, logical circularities and contradictions, and above all through the constant presentation of alternative starting points, the judge is *required* to make personal choices in order to apply "the law". The central point is that wherever a judge is driven to make a choice between two versions of "the law", that choice itself cannot be controlled or determined by "the law", but must ultimately depend on the judge's own sense of what "the law" *ought* to be. The analysis applies to statutory "rules" as well as to common law "rules", if only for the reason that *all* our rules are necessarily packaged in *language;* but it operates with particular force upon the system of precedent, because it goes to show that the lynchpin of the orthodox doctrine of precedent — the single correct "ratio decidendi of the case" — is a myth.[29] The diversity of judgments in appellate courts, the diversity of methods of finding the ratio decidendi, the diversity of legitimate judgments as to what constitute the "significant" or "material" *facts* of the case — all these and other factors mean that it is always possible to understand a precedent decision *in more than one way:* that is, as having *more than one* possible ratio decidendi. I do not want to elaborate the analysis here; but I do want to speculate for a moment on how far reaching it is.

Most lawyers over the last forty years have come to acknowledge that this kind of analysis has *some* degree of validity; that it is not possible to maintain the belief in a self-contained body of legal rules by which *every* judicial decision is predetermined in advance. But attempts have been made in various ways to limit the supposed ideological damage, by insisting that *most of the time* the orthodox model of "legalism" works, and that it is only in exceptional cases that we have to admit that judges play a "policy-making" or "law-making" role. For example, one main field of debate in contemporary legal philosophy is centred on the discussion of how judges decide "hard cases"[30] — the implication being that the "hard cases" are the exceptional ones, and that most of the time the judge's decision is a more or less self-evident application of clearly settled law. Another common escape route depends upon the hierarchy of courts. It is said that, in any judicial system, the judges at the highest appellate level have freedom to shape the directions

29 In addition to the citations in notes 2 and 4 *supra*, see especially J. Stone, "The *Ratio* of the *Ratio Decidendi*" (1959) 22 *Mod L Rev* 597.

30 This is the focus of the huge Dworkinian literature beginning with Ronald Dworkin's article "The Model of Rules" (1967) 35 *U Chic L Rev* 14, reprinted inter alia as ch. 2 of his *Taking Rights Seriously* (1977). For a promising critique (though still not wholly abandoning Dworkin's "hard case" terminology) see John S. Bell, *Policy Arguments in Judicial Decisions* (1983) esp. ch. 8.

and policies of overall legal development; but that, as we work our way down the ladder, this freedom disappears. On this model, in Australia, Stone's analysis would be true for the seven judges who constitute the High Court of Australia, the very pinnacle of the legal system; it would still be true, but only to a much more limited extent, for "intermediate" courts of appeal (for instance, a three judge Full Bench of the Supreme Court of Victoria); and it would hardly be true at all for the single judge, with or without a jury, who sits to determine a case at the original trial level. These trial judges, on this analysis, would either be working most of the time with clearly settled rules of law as to which, for practical purposes, no ambiguities arise; or, in areas of potential dispute, they would clearly be bound by the precedents established in the higher courts.

This model has at least a superficial attractiveness. In cases at the highest appellate level — for us, the High Court of Australia — the absence of a single correct predetermined legal answer is usually rendered quite obvious by simple external factors. Where High Court judges themselves disagree — three against two, or four against three — it is obvious that both the competing views must at least be legally tenable: that each of them represents a conclusion which can legitimately be derived from authoritative legal materials. The mere fact of an appeal to the High Court at all may indicate this: obviously the decision appealed from represents *one* possible view of the law, and obviously the party appealing has been advised that a contrary view is at least sufficiently possible to warrant the cost of appeal. At the three judge intermediate level, these arguments become much weaker; at the single judge trial level, they tend to disappear altogether. My own view has always been that if ambiguities and competing rules are *inherent* in legal materials, they must be at least potentially present, even at the initial trial level, in *every* case; but it certainly seems to be true that, in many day-to-day working areas, the potential ambiguities and competing rules do not, at least for the time being, present any serious practical problem. A working version of "the law" in such areas has been arrived at; its working is sufficiently satisfactory to give rise to no serious questions; and the fact situations which *might* require us to question the scope of the working "rule" have not, for the time being, arisen. Most of the time, therefore, trial judges can work *as if* the orthodox theory of "legalism" were true; indeed, their lives would probably be intolerable if they could not.

Stone himself, in his earlier statements was generally content to acquiesce in the "hierarchical" view; or, at least, to beg the question by stressing that he was only talking about the higher appellate courts. In his latest book, however, he looks at the problem more closely.[31] He now insists that there is at least one class of case in which the leeways for open judicial choice must be present even at the trial level: namely, those cases which do in fact reach the

31 Stone, note 2 *supra*, 33-40.

highest courts on appeal. If the problems giving rise to the appeal are inherent in the relevant legal materials, they must be there from the outset; and if the effect of those problems is to *compel* the judge to make a choice as to what the law *ought* to be, even the initial trial judge must presumably make such a choice.

But, apart from this, Stone also reports a fascinating correspondence with the New South Wales Chief Justice, Sir Laurence Street,[32] which presents the "hierarchical" model in a very different light. For Street, the "hierarchical" model assumes an hour-glass shape — open at the top and bottom, but narrowly confined in between: with the trial judge "having a broad field to operate at the foot of the hour-glass, the intermediate appellate court having a confined field, and the ultimate appellate court having a broad field within which to manoeuvre".

The broad field of choice which his Honour ascribes to the highest appellate court is nowadays relatively uncontroversial. What is interesting here is his argument that "by gently pushing out the boundary lines", even the trial judge can "modernize" the "working application of the law". In that sense the trial judge can, and should, be "modestly and moderately adventurous". It is only at the intermediate level — that is, at the level where Sir Laurence Street himself mostly sits — that he sees the room for judicial initiative as narrowly limited: essentially confined to coordinating, and if necessary correcting, the initiatives of trial judges. Because its primary responsibility is one of coordination, he argues that the intermediate court "cannot afford to indulge itself in the process of experimentation and challenge to anything like the same extent as a first instance judge".

Sir Laurence Street's very modest assessment of the role of intermediate courts may only reflect a tendency, quite common among modern judges, to acknowledge the breadth of judicial choice for judges other than themselves. But it may reflect a significant trend in the institutional politics of the Australian judiciary over the past twenty years. The broad responsibility of the High Court for developing and modernizing Australian law, and in that sense for judicial "legislation", is nowadays widely acknowledged; and one might have expected that this greater acceptance of High Court "legislation" would have a flow-on effect in the various State Supreme Courts as well. Instead, many judges in those courts have tended to argue that, if judicial innovation is the function of the High Court, it should be *left* to the High Court: that High Court leadership will be most effective if the Full Supreme Court Benches abstain from their own experimentation, but confine themselves to strict obedience to the system of precedent. A "choice" determined by grounds like these would still, of course, be a choice; and it illustrates the far more general point that, when judges make "policy choices", the decisive policies may include institutional policies about the

32 *Id.*, 34.

functioning of the courts themselves, as well as substantive policies about the particular issues involved. For my own part, in precisely these terms of "institutional" policy, I would have thought that the tendency of the State Supreme Courts to deny themselves the freedom of "experimentation and challenge" is an unfortunate one. If the State Supreme Courts now see themselves as essentially supportive of the High Court's role in determining the law for Australia, they should in my view offer support *not only* by giving effect to the High Court's pronouncements once they are made, *but also* by facilitating in advance the deliberations of the High Court. And this involves not merely the settling of facts and the sharpening of issues, but meticulous preliminary exploration of alternative social and legal solutions to be tested, sifted and sieved.[33] If Sir Laurence Street is right in saying that trial judges can play a constructive experimental and challenging role in relation to intermediate courts, I can see no reason why those courts, in turn, should not be playing a similar role in relation to the High Court.

This question of the distribution of judicial freedom of choice across the hierarchy of courts has a final aspect which seems to me of fundamental importance. Earlier in this paper I tried to encapsulate the gist of judicial decision by saying that it involves application of "the law" to "the facts"; and that this in turn involves reducing "the facts" to a version that can be resolved by that particular handful of law, and reducing "the law" to a version that can be applied to that particular handful of facts. What I have been emphasising here, as the basic source of what Stone calls "leeways for choice", is that the applicable "law" is not the self-evident unambiguous entity that "legalism" as an ideology tends to suggest, but must itself be formulated afresh for each case by a process of interpretive judgment. What needs to be added is that "the facts" are not a self-evident entity either, but must also be arrived at by a process of interpretive judgment.[34] Moreover, these two interpretive judgments, by which the court constructs usable versions of "the law" and "the facts", have a symbiotic relationship. The selection of the *relevant* facts, the significance attached to particular aspects of the fact situation, and the implications of particular uncertainties or gaps in the facts, depend always on what the judge considers to be the relevant law; yet, conversely, the choice to be made among alternative legal rules, or the different possible forms of those rules, must depend on a view of the facts. Perhaps the most frequent source of the need for deliberate modification of the previously settled law is the situation in which a judge perceives a particular aspect of the facts as "significant" or "material" — as making a difference to the substantial justice of the case — but in which the previously settled law does not allow that part of the facts to be taken into account (or, at least, does not *explicitly* allow it to be taken into account). Judicial uneasiness

33 See A.R. Blackshield, "*Viresne Ex Virone Virent an Virus?* Some Thoughts on *Viro* v. *R.*" (1978) 2 *UNSWLJ* 277, 301-302.

34 For the classic analysis see Jerome Frank, *Courts on Trial* (1950).

of this kind is itself a "leeway for choice"; and in any case where we say that the law is clear at the trial level, we must mean not only that a well-established unambiguous rule is available, but that the application of that well-established rule to *this* case gives no grounds for uneasiness. So that, even in the simplest case, the judge must at least form an independent judgment that the application of "the law" to "the facts" is acceptable and satisfactory — though, of course, in the simplest case, this judgment will itself be a simple one.

Now, this balance between the ascertainment of "facts" and the ascertainment of "law" is certainly very different as we move up and down among different levels of the hierarchy of courts. In the words of the American judge, Jerome Frank,[35] the difficulties of judicial decision may be generated either by "fact-uncertainty" or by "rule-uncertainty". At the highest appellate level, in virtually every case, the role of "fact-uncertainty" is negligible or non-existent. This is not because the facts were self-evident to begin with, but because, by the time a case has reached the highest appellate level, a definitive version of "the facts" has usually been frozen by the findings of the courts below. The appellate judge is *not* required to form his own independent view of "the facts"; his job is to accept "the facts" as found by the courts below, and to formulate the appropriate law by which to dispose of *those facts*.[36]

As we move down the hierarchy from the ultimate appellate level, it may be true that the difficulties of what Frank calls "rule-uncertainty" are progressively less important. But, if so, it is equally true that the problems of "fact-uncertainty" are progressively more important. One way or another, the work of the judge involves a difficult independent judgment at *every* level.

At the same time, the freedom of choice that is involved in the need for independent interpretative judgment is never a *limitless* freedom. In findings of fact, the limits are obvious. The judge may make his own interpretative choices in establishing the primary facts, and especially in selecting the "material" facts; he may be able to shape and colour and emphasise aspects of evidence; he may exercise substantive judgment in accepting or rejecting possible inferences from the secondary facts; but he cannot make up his own facts. In the end he is bound by the evidence. The same is true for findings of law. If our legal material is as rich in ambiguities and alternative starting points as I have suggested it is, an ingenious judge may be able to shape it to support almost any conclusion; but what he cannot do with the legal material is to ignore it. Whatever view of the law he arrives at must be defensible as a legitimate response to the relevant legal materials and to *all* those materials. The intellectual integrity of legal argument, and of legal doctrine itself, is always an overriding constraint on judicial freedom to choose.[37]

35 *Id.*, 14-16 et *passim*.

36 See K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) 28-29.

37 See M. Coper, "Interpreting the Constitution: A Handbook for Judges and Commentators" in A.R. Blackshield (ed.), *Legal Change* (1983) 52, esp. 54-55, 63.

Where does all this leave us? However precisely we try to delimit judicial leeways for choice, it is clear that they are pervasive enough to negate the "legalist" argument as a basis for the legitimacy and authority of judges. Judges cannot securely find for themselves, or believably extend to the public, the "comfort" that Lord Kenyon once sought in the simple affirmation that he could not legislate. Judges can, and do, make law; and the general public acceptance of this unavoidable fact of life must depend, as I suggested earlier, on a public understanding of the uncertainties of judicial decision, including all the problems that I have touched upon here. This leaves the hierarchy of courts, as Sir Ninian Stephen poignantly observed in 1981, as "a very vulnerable institution, a fragile bastion indeed".[38]

Yet this may be too pessimistic. Like most recurrent fallacies, the fallacy of "legalism" has its underlying motive in fear: a fear that the public will not accept a judicial law-making role. It may be that this underestimates both public understanding, and public equanimity before the inevitable facts of life. For my own part, while I have often found it difficult to persuade *lawyers* of the widespread pervasive reality of judicial legislation, I have never found it difficult to persuade non-lawyers of this. The difficulty with non-lawyers is to convey to them the real constraints on judicial freedom imposed by the intellectual integrity of legal interpretation. The truth, I suspect, is rather that the public at large *expects* its judges to legislate, and is much more likely to criticize them for their failure to change and adapt the law than for their efforts to do so.

One thing that is clear is that "legitimacy" cannot be reserved for any one model of judicial performance. The issues that I have dealt with here are difficult and controversial. They are matters of anxious and constant concern to every contemporary judge; and no two judges reconcile the conflicting arguments in quite the same way. Some judges still adhere very closely to the orthodox "legalist" model; others are cautiously venturesome; a few throw caution to the winds. Within very broad limits, all these positions, and all the shadings in between, must be accepted as legitimate responses to the challenge of judgment. The differences among judges as to the most acceptable strategy may lead them to very sharp disagreements amongst themselves; but they are the kind of disagreements that presuppose an overall context of mutual respect. Those of us with the easier task of merely observing judicial labours may respond to particular judicial styles with similar sharp disagreement; but all of us should also respond with similar respect.

38 Sir Ninian Stephen, "Judicial Independence — A Fragile Bastion" (1983) 13 *MULR* 334; reprinted in S. Shetreet & J. Deschenes (eds), *Judicial Independence: The Contemporary Debate* (1985) 529.