LAW AND IMAGES OF HISTORY
A REMINISCENCE

*W. L. MORISON**

In Eric Linklater's *Juan in America*, a girl encourages the hero to follow his inclinations towards her by saying that she believes in being natural. The notion that one is called upon to make a conscious effort to fit in with the natural course of events strikes Juan as strange, the more so when he discovers that she has been making notes of the natural course of events which followed her invitation. The achievement of naturalness is not, in his view, necessarily in any case attended with consequences which are desirable. In this particular instance the consequence was that the girl's father, a gangster, gave vent to his natural feelings by throwing Juan into a natural swamp from which he barely escaped with his natural life after adventures with natural fauna such as cottonmouth snakes.

Urgings to make efforts to follow the course of nature are nevertheless perennial. We are urged in commercial advertisements to eat butter because that, for reasons which are left obscure, is more natural than eating margarine, and to eat sugar because, contrary to allegations from some quarters to the contrary, that is natural too. So is dying. On a very general level, one is constantly confronted with pictures of the alleged natural course of history, into which one is expected to fit one's self. The justifications for treating the course in question as more natural than another, or for calling upon one to fit into it in any case, are often left as obscure as in more particular manifestations of this way of thinking. George Orwell referred to the puzzlement of the denizens of *Animal Farm* about these matters. And while Linklater laughed at this frame of thinking in 1931, Orwell was not in the least disposed to laugh about it in the early forties, seeing its function in the context with which he was concerned as part of a process of social intimidation.

During the period from one's earliest recollections to at least the end of the 1939-1945 war, the general theme of the modern history taught in New South Wales was that natural processes of democratisation within a country and processes of liberation of nation states from older empires proceeded together, and the mutual relations of the states which emerged were regulated by a natural balance of power between them. Nevertheless, these natural developments were represented as requiring intelligent, powerful, and courageous monitoring. For these functions their special qualities had naturally selected, to a large extent, the British.

This was propagated in school texts, the leading ones of which were written in New South Wales by Sir Stephen Roberts, Challis Professor of History in the University of Sydney and a post-war Vice Chancellor,

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* D. Phil. Oxon, B.A., LL.B., Challis Professor of Law, University of Sydney. Retired Dec. 31 1985.

and C. H. Currey, who taught both in the department of history and at the law school. The theme was reinforced by its exposition in G. M. Trevelyan's *History of England*, a text placed in the forefront of the history department's opening course. Nor was the theme peculiar to New South Wales. The major work of the doyen of Australian historians, Sir W. Keith Hancock, was his two volume *Survey of British Commonwealth Affairs* (1937 and 1940). Its themes were supplemented by his popular *Argument of Empire* (1943), elaborating the proposition that the Commonwealth enterprise represented a development of internal freedom and external independence for its component parts which could be expected to accelerate and flourish in the post-war world.

Education at the law school from its inception with the appointment of the first Challis Professor of Law in 1890, the Englishman Pitt Cobbett, until 1942, was fitted into this picture. The pattern of the curriculum was that of a turn-of-the-century front-ranking English law school, carried on faithfully by Sir John Peden, the second Challis Professor, from 1910 onwards. The broad text for Peden's first-year course was A. V. Dicey's *Law of the Constitution*, emanating in the first edition from Oxford well before the 1914-18 war. Allowing for its concentration on constitutional rather than historical matters, it pursued the theme of the growth of freedom in England in the way that Trevelyan's book did. This account was supplemented by extensive local law school duplicated notes on the constitutional structure in Australia and New South Wales. Dicey's approach was reinforced in the school by the use of his *Law and Opinion in England in the Nineteenth Century* as the basis of Currey's course in Political Science. Currey also conducted the course in Legal History which, following Sir Victor Windeyer's text, consisted largely in English legal history, despite Currey's expertise in Australian history.

The only full time academics on the law school staff at the outbreak of the 1939-45 war were the two Challis professors. Peden was the dominant and controlling figure in the school and taught Property and Private International Law in addition to Constitutional Law. A. H. Charteris taught International Law and Jurisprudence, the title of his chair. For the rest, what were classed as professional subjects were taught by visiting senior members of the profession, and, apart from Legal History and Political Science, so were what were classed as academic subjects, conspicuously Roman law. The course in Roman Law served something of a double object, since the study of the *Institutes of Justinian* was supplemented by a study of Maine's *Ancient Law* with notes by Sir Frederick Pollock, a comparative study mainly serving the object of placing the development of English legal conceptions in a broader setting.

Importance was attached to having professional subjects taught by senior professional men, unless they were taught by professors. Sometimes the notes issued reflected a high capacity to see whole subjects in a connected pattern, especially in the case of the printed materials supplied by sometime Chief Justice Sir Frederick Jordan, which are still regarded as of value. In other cases, however, they stimulated rote learning and this unhappily extended to Roman law. The students generally reconciled themselves to the conditions, having learned in legal history that "taught law is tough law"—an explanation given of the survival of the English common law against the Roman law upsurge in medieval times. Never-

theless, this narrowly indoctrinative aspect of law school education rendered it vulnerable to academic criticism, gained academic support elsewhere in the University for change, and aligned thoughtful students with those demands.

For all this the typed notes system facilitated the law school's adjustment to the outbreak of war in September, 1939. The school expected to play its part in defending the freedom it saw as its raison d'être on the side of the United Kingdom against the dictators. Those students and graduates who did what was expected of them by going into the forces were supported assiduously by the law school comforts fund under the direction of Margaret Dalrymple Hay, the Clerk to the Faculty. Moreover, arrangements were made for students to continue in their courses while on service. For this purpose a future professor in the faculty, D. G. Benjafield, made his notes of lectures available to supplement the regular notes circulated. At later stages of the war and beyond he acted as tutor.

The further development of the existing pattern, and the continuance of assumptions on which the school was based, were rudely disturbed by events of 1941. By this time Charteris was dead and Peden had resigned. The professorial board recommended James Williams as Peden's successor and Julius Stone as Charteris' successor. The Senate accepted the recommendations, then rescinded its decision, and finally confirmed the recommendations in November. The confirmation led immediately to the resignation from the Senate of the Chancellor, who was a Supreme Court judge, other judges, and Sir John Peden. The reason given for the resignations was the unavailability for interview of candidates for the chairs who were on war service.

In the light of the context outlined above, there seems little reason to doubt that the explanation given by those who resigned was genuine. However, Julius Stone attributed the opposition of these figures to himself to racialism, similar allegations were made in Parliament and by the Students' Representative Council, and they have lately been revived by Michael Blakeney in his article, "The Julius Stone Affair, 1940-4: A Tang of Racialism" in *Quadrant* of May, 1985. Blakeney's general approach is not, however, either forthright in its claims or satisfactory in its form of argument. He says that "this controversy is not only a useful touchstone of the conservative attitudes towards Jews held by some influential sections of Australian society, but it also illustrates the complexity of these attitudes". He continues that "in genteel circles, overt expressions of anti-Semitism were considered not to be proper" and concludes that "other less objectionable motives for behaviour were not entirely absent, rendering ambiguous otherwise racist attitudes".

On this basis, Blakeney can hardly fail to make out his case. To the extent that other than racial motives are demonstrated, they only show complexity, to the extent that racial motives do not emerge, this only shows concealment. But Blakeney's current re-interpretation of events of forty years ago, however ill supported, is nevertheless significant in itself. Modern progressive thought in Australia likes to represent Australia as having emerged into the light of multi-culturalism from a twilight of earlier times. We are being presented with new images of history.

The course of events at the law school for perhaps two decades after

1940 was, however, more immediately determined by competing images of law school history and development than by images of the general history of the country. During this period Stone was particularly oriented towards Harvard, the patterns of which, with varying degrees of friction, were superimposed in some degree on the older pattern in Sydney.

Immediately upon his arrival at the beginning of 1942, some months in advance of Williams, Stone introduced the Harvard mooting system as part of the curriculum for student credit, while making it clear that its continuance depended on Williams' co-operation when he arrived. Williams declined to give his approval, so that an immediate overt clash was precipitated. Further conflict developed over the respective positions of the two professors in the school and Williams resigned at the beginning of 1946.

After an interregnum in which the professional lecturers continued in conflict with Stone, K.O. Shatwell was appointed Challis Professor of Law in 1947. Stone and Shatwell then agreed, with the Vice Chancellor's somewhat informal approval, to divide the school into two departments: Law, and International Law and Jurisprudence. This was later formalised and continued to be the position until after Stone's retirement at the end of 1972. After that the new professor of Jurisprudence, Alice Ehr-Soon Tay, later Challis Professor of Jurisprudence, retained Jurisprudence as a separate department, while the new professor of International Law, D. H. N. Johnson, preferred his chair to be within the department of Law.

In addition to his activities in his own areas, Stone instituted a move towards patterning Sydney on the Harvard model by founding the *Sydney Law Review*, along *Harvard Law Review* lines, in 1952. Stone envisaged that the *Review* would develop into a student publication on the Harvard model, but himself took the position of general editor for what was to be a developmental period. He relinquished the position in 1960, after which it passed to other members of staff until the students assumed the editorial responsibilities in the early seventies.

The publication of the *Sydney Law Review* was one of the factors which interested Harvard itself in the development of legal education in Australia along Harvard lines, though there were also other Australians interested in developing links, for example, Sir Zelman Cowen. One result was what became a continuing series of visits by Willard H. Pedrick, an outstanding exponent, in the eyes especially of Dean Erwin N. Griswold of Harvard, of the case method of teaching. From the mid-fifties there was a proliferation of casebooks in different subjects in Australia to join Geoffrey Sawer's pioneering casebook in constitutional law.

The case method of teaching, in which the students accept the responsibility for preparing, and taking the main burden of discussion of, the cases in a casebook, and whatever supplementary cases it is necessary to add, has not up to the present readily taken root in Sydney when very large classes have been involved. In Harvard, what has been done in such contexts is often the mapping of students in permanent places in the lecture room. However, the attempt to number the seats when the new law school was built in Sydney led to effective student objections.

Apart from problems of securing student participation, the case method does not achieve the coverage of the ancient lecture system or necessarily impose the obligation of systematic coverage on the instructor.

Its use in Harvard itself has lacked comprehensiveness. A Harvard law school saying runs: "In the first year they frighten you to death, in the second year they work you to death, in the third year they bore you to death." Professor R. W. Parsons of this law school once attended Dean Griswold's later year class in Conflict of Laws to see the case method in the hands of one of its progenitors in Australia. But what he heard was a lecture, a situation which Griswold explained to him afterwards by saying that it was near the beginning of the course. I later had the same experience, except that Griswold gave the explanation that it was towards the end of the course.

There are indications that Harvard in the fifties was also falling short of Stone's expectations of it as a source of missionary inspiration for Australia from the aspect of development of general substantive theory. In the later fifties Harvard still kept the ageing Roscoe Pound, whose sociological jurisprudence was Stone's jumping off point for his own jurisprudence, in a glass case of an office in front of the law school while he was finishing his multi-volume *Jurisprudence*. But its star in the main work of teaching jurisprudence was by now Lon L. Fuller. Stone was Visiting Bemis Professor at Harvard in 1956-57. Fuller maintained, however, that he found it easier to raise issues in which he was interested with Oxford's H. L. A. Hart than he did with Stone, and the result was the famous debate between Fuller and Hart in the pages of the *Harvard Law Review*.

Fuller's approach was in the natural law tradition, concentrating on the importance of the reason of humankind, applied to human nature itself, for the development of the common law. For Fuller, stating what the law "is" from time to time constantly involves the incorporation of notions of what it "ought to be", just because reason is all the time being applied to what man has made of himself at a given time. There is, on this basis, no point in sorting out the "is" from the "ought" for the development is treated as a continuous improving re-telling of the story in, and of, the authorities. Fuller's theory is open to the objection that it oversimplifies at the outset the factors which are treated as important in the development of the law and then tries to catch up additional ones by such notions as what man has made of himself—bringing images of history into the account—and what environment he finds himself in.

Hart, in his debate with Fuller, maintained that most of the operation of the common law was capable of explanation as application of authoritative legal prescriptions in the core meanings of their terms. However, Fuller was able to demonstrate by illustration that there appears to be more than this in the application even of apparently simple prescriptions. What perhaps he did not demonstrate was that this involves that there is an irreducible ethical minimum—a minimum of application of human reason—in law, which is his fundamental tenet.

In practice, in his lectures about that time, Stone approached this kind of matter by reference to the three divisions of jurisprudence which he distinguished in the *Province and Function of Law* (1946), each of which was to form the basis of one of the successor books to that work.

For Stone, legal decisions ordinarily involve a combination of the application of logic to legal rules, considerations of justice, and social observation. To this extent his position resembled Fuller's. But he was not content to treat confusion of these elements as necessary or beneficial,

to that extent resembling Hart. For Stone, it was important in legal decision to recognise explicitly the considerations of justice involved and to approach them on the basis of a much broader basis of social observation than judges were commonly prepared to envisage conducting.

In expounding the manner in which social investigations assisted the determination of the justice in a case, Stone made extensive use of Pound's presentations. Speaking very generally, one detects in Pound elements of evolutionary ethics which Pound derived from German sources and called "civilisation" theories of justice. Society and law were supposed by Pound to go through different phases with different basic assumptions of their thinking. But, since Pound supposed that the presupposition of the present age is to make resources go round with the least possible friction and waste, this meant that in making its contribution to the present age, Pound supposed that the function of law was to achieve something along the lines of utility—a very old fashioned ethical notion representing the object of moral effort as the achievement of the greatest happiness of the greatest number.

At the time Pound was writing, the philosophical objections to utilitarianism—principally that demands can only be weighed up in the market of some individual's scale of values or that of some group of interacting persons and that this is impossible for society as a whole—had been reinforced by the practical adoption of the lessons of this point in the making over of economic theory from earlier utilitarian bases adopted by early writers such as David Ricardo and James Mill. But theories like Pound's were rescued from exposure by the fact that economics, like other social theory, proceeded to unlearn these lessons in the course of attempts to set its house in order in the face of criticisms of its own presuppositions.

At the time when Stone wrote the *Province and Function of Law* in the mid-forties, economic theory was re-examining the assumptions of its older versions. A typical general course in economics of that period would develop the theme that the supposition of classical economics, that market forces would achieve optimum benefits for all in society with a minimum of governmental action in maintaining the ring, was only justified under conditions which had to be engineered rather than expected to occur naturally. Once again there was the theme, as in so many other fields, of the natural course of events which nevertheless had to be assisted by appropriate skilled intervention. Economic experts had to tell governments how to bring them into existence.

At that time the most important false assumption of the classical economists was believed to be the premise that the economy could not reach equilibrium except when it was working at full stretch, though without being over-strained. This was supposed to be capable of correction, most importantly by removing key financial decisions affecting the economy from the play of market forces and placing them under government control: so that financial stimulation and restriction could be applied.

More recently, there has been a reaction against the notion that the optimum economic situation for all was necessarily importantly served by government control of key financial markets, though not against the more general features of the notion of an engineered optimum equilibrium. Disagreement developed among economists themselves, some accusing

those advocating financial deregulation of being false to their economic training, while the financial deregulators accused those opposing them of being incapable of learning anything by experience. But the disagreements about this particular facet made little difference to the claims of economic planning to regulate market forces in what was supposed to be the interests of all, a concept into which a theory like Pound's naturally fitted. The emphasis in modern legal theory upon the importance of wide powers for the central government as an instrument of economic regulation, increasingly reflected in court decisions, is testimony to the persistent power at the present time of this kind of thinking.

Other aspects in which the immediate post-war economists considered market forces to require government regulation, in order to bring about the optimum economic condition of the community, generally provided a prop in practice for the kind of thinking under discussion. One tenet of the more modern economics has been that extensive government activity is required to achieve the competitive conditions in production and distribution in the economy which the classical economics assumed to exist naturally. The trade practices legislation has given rise to extensive legal activity despite its obvious deficiencies in restricting growth towards monopoly in areas which come most immediately before the consciousness of the general public.

Another tenet of the more modern economics related to the classical economic theorists' supposition that there is a correspondence between effective demand in the market and consumers' and producers' wants and needs. Certainly, this assumption scarcely needed to be more than detected in order for its falsity to be exposed. Therefore, there was seen to be a very large field for government action in moving to equate effective demand, particularly of consumers, with their actual wants and needs. A flood of activity by governments in recent years has been directed towards this end. And, while there have been constant storms of criticism of the clumsiness and inequity of the ways in which governments have sought to redistribute purchasing power among consumers in recent years, there is a general assumption that there is *some* redistribution which is optimal, even if this is largely reflected in the attempts of particular groups to argue for greater shares for themselves on the ground that this will somehow contribute to the good of all.

A further contribution of post-war economic theory to the propagation of the vague meliorist notions which a theory like Pound's propagates, was its failure to grapple with a further false assumption which it detected in classical economic theory: the notion that society consists in economic persons who act, so far as their actions influence the economy, to maximize their material values. This was not an assumption which modern economics in any case proposed to correct generally in the sense it did other false assumptions, by taking steps to produce human beings who would fit the assumption—though there have been suggestions that if only tycoons would stick to maximising their profits and avoid involvement in public affairs we would all be better off. Some economists drew the inference that there are social fields beyond economics of which the economist may have to take account insofar as other than economic values may influence the workings of the money economy. Other economists, however, defining economics simply as the adjustment of means to any kind of end, material or otherwise, and supposing that there were markets

involved in relation to all of them, were able to avoid seeing the falsity of the assumption of classical economics under discussion as raising any problem. J. A. Schumpeter, for example, in his *Capitalism, Socialism and Democracy*, interpreted democracy as a system of marketing of ideas, and supposed that, insofar as socialism dispensed with markets, it could achieve the optimal results which markets are supposed to achieve by artificially imitating them through governmental action.

These trends in post-war economics appeared to give substance to a "sociological" approach to jurisprudence by restoring the ancient utilitarian notion that there was sense in talking of the greatest happiness of the greatest number. It could be achieved by governmental husbandry regulating a system of markets which would properly settle what was generally wanted and achieve it as far as possible at the same time.

Faith in the soundness of this kind of picture of society was buttressed by the evolutionary strain which overlays Pound's utilitarianism, and has continued to be prominent in modern sociological approaches to law and other things. The Darwinian notion that organisms survive by improving their adaptation to their environment was applied to society, without much effort to demonstrate the appropriateness of the analogy, or even to make much examination of what an organism itself is in fact like. Instead the sociological ethical theories fell quickly into the pattern of older evolutionary ethical theories which hypothesized the existence of fundamental life forces such as spirit, in the case of Hegelian evolutionary ethics, or matter, in the case of classical Marxism, which gave an ethical value to what were regarded as the adaptive forces. These notions had no place in Darwinianism itself.

Between them, the utilitarian and evolutionary strains in sociological jurisprudential thinking helped to provide justifications for increasingly authoritarian attitudes to the functioning of law in society. From a primitive utilitarian point of view, if an individual opposes measures which contribute to the greatest happiness of the greatest number, he is disloyal to that ideal and also stupid—for if he worked matters out properly he would realize that his own greatest happiness lay in the sharing of the greatest happiness of the whole. Similarly, from an evolutionary standpoint, if the individual opposes measures which contribute to the healthy growth of the social organism and thus threatens its and his survival on this basis, he is equally stupid and disloyal at the same time.

The growth to dominance of the influence of these ideas has been associated with a shift in the form which political and social morality take. In communities with a British historical background the direction of historical evolution has for centuries been supposed to be the growth of political freedom. This, as already indicated, is what Australians were assiduously taught in the period before the 1939-1945 war. However, freedom at that stage was largely conceived to involve freedom from governmental interference, or freedom from interference by others secured by government. From the point of view of the sort of theory we have been considering, this is "abstract" freedom. It is seen often to lack reality, because of the unequal economic power of subjects in their dealings with one another. One person, in the "concrete", actually oppresses another because of his ability to exploit his "abstract" freedom through his superior economic power without interference from government.

Although, therefore, the pre-war and post-war political moralities

both emphasized one side of the coin of right-duty relationships, the rights of the individual, the post-war stress on the importance of economic rights meant that rights generally came to be conceived as requiring more positive action by government. It was no longer largely a matter of securing rights against interference nor of just conferring them by legislation, but of somehow assembling the wherewithal to make them "real".

The finding of the wherewithal to make them real frequently involves the finding of large sums of government money, but equally often the costs of rights in the modern conception are to be seen more directly in the costly duties which are imposed on others to secure the rights. This may be rationalized on the basis that those on whom the obligations are imposed are better able to bear them than the generality of those upon whom the rights are conferred, or that the former are undeserving, or that the costs can be spread.

But frequently the costs of rights of the modern kind, in the way of duties and obligations, are simply left obscure by the political presentation—an important way in which the image of progress in the evolution of rights is maintained while the other side of the picture is de-emphasized. A startling example is the then Senator Murphy's human rights bill in the era of the Whitlam government. Human rights including the right to procedural justice were conferred generally by the bill. But what was apparent when one looked closely at the provisions of the proposed legislation was that the person who was held to have infringed human rights thereby lost his human rights to procedural justice and became thereafter subject to the vagaries of an indefinite law of contempt for any repetition of his offence—vagaries of which, as Mr. Justice Murphy, the author of the bill has often subsequently complained.

Sometimes the position is obscured by the complex ways in which benefits are conferred and obligations imposed even on the same person. In modern jargon, it is progressive to provide appropriate rewards to the individual for his productiveness, but retrogressive to let him keep them. The rewards are niggled away by differential prices for services dependent upon his income. A prime example is medical services, and the New South Wales Law Reform Commission has said that it is "retrogressive" not to apply an analogous principle to third party insurance premiums in motor accident cases.

The process of overt conferring of rights—thereby maintaining a progressive betterment front—and more surreptitious detracting from them, sometimes occurs through a combination of actions by the judiciary and the legislature. In the field of compensation for injured persons, the judiciary has relatively recently expanded damages awards in tort actions by allowing to the injured person an amount for the services of persons voluntarily assisting him, by developing generous principles for the exercise of courts' discretions in awarding interest on items of damage for the period between the happening of the accident and the time of award of damages, and by adopting a low discount rate in capitalising the weekly sums a person will require over a period when he is ill—thus allowing for income tax to be anticipated on unspent capital from time to time, and anticipated inflation of the currency. But when the Motor Vehicles (Third Party Insurance) Amendment Act, 1984 was passed—presented by the government as conferring benefits on the community by reducing third

party premiums—sections of the Act relating to motor accident cases placed a ceiling on the amount to be awarded in respect of voluntary assistance to an injured person, removed the court's discretion to award interest for delay in payment of certain items of damages, and raised the discount rate to be used to capitalize what was awarded to an injured person for periodical maintenance and disbursements, thus reducing the capital sum to be awarded itself.

Occasionally what is happening in the above respect shows its head in overt conflict between the legislature and the judiciary. When the federal legislature was forced recently by cost considerations to reduce the ease with which ex-service personnel could make out a case for compensation for war injuries, in the light of previous judicial interpretations of the legislation generous to the recipients, Mr. Justice Philip Evatt approached the Governor-General in respect of the adverse effects upon the proposed recommendations of his own official inquiry into part of the field involved.

The effects upon the presentation of right-duty relationships, of the currently popular combination of evolutionary and utilitarian ethics have been more plainly seen in the field of private law than in the field of public law. This is especially because, whereas in the field of public law the policy of the law was administered by the judiciary always emphasized the rights of the individual in the manner we have indicated, in some areas of private law the policy of the law was to reinforce the private morality of the time. Formerly private morality—what is still called "conventional" morality though it corresponds little with what is currently presented as acceptable—was a morality of duty. This was especially so when religion was a greater factor in its formation than now. The catechism which I learned as a child was all about my duties, and contained nothing I can remember about my rights. The same was true of academic presentations of morality between person and person. Lon L. Fuller's presentation of private morality distinguished between a morality of duty and a morality of aspiration. But the morality of aspiration was a morality of service beyond the call of duty. The emphasis was all on the duty side of the morality picture rather than on the rights side.

The result was that the reinforcement of private morality, which was a large segment of the policies dominating private law, involved the law itself in emphasising the duty aspects of the human relations upon which it operated. Until 1975, the law of divorce was based on the policy that the granting of a matrimonial remedy depended upon the commission of a matrimonial offence. The law of contracts formerly emphasized the general importance of promissory obligations made for consideration, even if it recognized a limited number of overriding factors. The law of torts in the central field of negligence, as well as in some other areas, emphasized the general importance of duties of neighbourliness. The law of property emphasized the duties of respect for what had been acquired by others, even if its language was more that of rights than duties.

In the last decade, the radical changes to the system of matrimonial law have been the most spectacular in signalling the change of emphasis towards the presentation of the law as something which grants rights to the individual in preference to setting out to enforce his moral obligations. The direction of evolution is supposed to be granting him progressively greater benefits. In the first place, the law is supposed to grant the

individual benefits by letting him off the traditional moral chain. Divorce is obtainable at will after a period of withdrawal from cohabitation, and blameworthiness of a party is in no way relevant to the cutting of the matrimonial knot. In the second place, the disposition of property and the custody of the children is generally made equally independently of blameworthiness and is supposed to be settled on the basis of the expertise of specialized personnel directed to the benefit of all concerned. If the kind of theory of the functioning of law of which we have been speaking almost throughout this article were true, these problems would be capable of solution along those lines—at least when the expertise is sufficiently developed and sufficiently deployed in the progressive evolution of the court itself. But the likely success of the court in the future working along its present lines does seem to be bound up with the validity of that kind of theory. On other kinds of theory, there might be no answer to the problems to the solution of which the experts are expected to direct themselves and the enterprise itself might have to be regarded as misconceived.

In the common law fields of contract and tort, what developments have been consummated or projected to date have been somewhat more in the direction of transferring the tasks of dealing with matters which have traditionally been the subject of common law solution into the jurisdiction of more specialized bodies dominated by currently fashionable notions than in the direction of making over the law of contract and tort itself to fit those notions. But this has only been a matter of degree. Contracts review legislation enables the ordinary courts to disturb the sanctity of contractual promises in accordance with modern social ideas, and revision of the traditional operations of public policy upon the sanctity of contractual promises provides another field for the introduction of up-to-date notions. But specialized tribunals with the carriage of consumer claims against the providers of goods and services, or regulating consumer credit, or imposing equal conditions for different groups in employment and elsewhere, offered opportunities for more radical assaults on the sanctity of contract than what was going on in the law of contract itself, even with the assistance from England of dedicated common law reformers like Lord Denning.

In the area of torts, the impact of modern progressive-utilitarian notions upon the development of the law has been complex, confused and anomaly-producing. There has been a great deal of pressure for transfer of tort topics from the ordinary courts to specialized bodies which would eliminate fault considerations and concentrate on conferring benefits upon accident victims. The Woodhouse-Meares report at the Commonwealth level recommended a comprehensive personal injury insurance scheme, and the recent report of the New South Wales Law Reform Commission recommended a similar scheme in motor accident cases. But little progress has been made in this direction—less in New South Wales than in some other States. Of course, something substantial could happen very suddenly if either the Commonwealth or New South Wales government were to make up its mind to move.

In the common law of torts itself, the overt crusader for replacing notions of liability dependent on fault with notions reflecting modern policies has been Lord Denning in England and, in a rather spasmodic

fashion, Mr. Justice Murphy in Australia. But even Lord Denning has been tentative on occasions. Lord Denning has used notions that enterprises such as motoring should compensate their victims as a matter of course, so as to raise the standards of care required in negligence cases in those fields to the point where the expression "negligence" begins to lose reality. But his Lordship has not been prepared to take the same approach in professional negligence cases, because of the effect which such an approach would have on the reputations of individual professional people, and inferentially on the attractiveness of the profession itself. He continues careful dissection of fault in such contexts.

In a number of other contexts, what Lord Denning's notions of policy are remain unclear, so that he has even been accused of deciding cases *ad hoc* without reference to any general principles—policy or otherwise. This is especially true of his approach in cases where damage to some public utility has caused disruption of the business of commercial enterprises. Again, at times he forgets altogether that he has said that the Atkinian duty approach to negligence should be abandoned in favour of a policy approach and he simply adopts the Atkinian approach without comment. This is especially so in cases where the liability is sought to be imposed on the basis of some fault in office work, rather than fault in physical actions, causing financial harm. In Mr. Justice Murphy's hands, policy often means no more than a general humanitarianism towards plaintiffs.

The official impacts of the evolutionary-utilitarian approach to law, of which we have been giving examples, came to be felt increasingly in the period after their espousal by Julius Stone and colleagues in the department of jurisprudence, came to an end. Stone himself retired from Sydney in 1972. His main assistants became professors in other universities—Dr. Ilmar Tammelo in Salzburg, Dr. Upendra Baxi in Delhi, and Anthony Blackshield at Latrobe. Meanwhile, over the twenty-five years between the accommodation between Shatwell—who himself retired in 1973—and Stone's retirement, the Department of Law continued to work largely along the traditional lines of the school. The part time teachers, who in the earlier part of the period continued to dominate the teaching, continued in their professional preoccupations, though some of them were people with a reforming vision of a different kind from the current one. This applied particularly to Sir Kenneth Manning, a leading figure in the teaching and administration of the school until his appointment to the Supreme Court.

The part time teachers gradually diminished in the general professional busy times of post-war legal expansion and full time teachers moved in to fill the vacuum, though for a long time they were a scarce commodity and appointments were difficult. With the increase in full time teachers at all levels, there was gradual broadening of the coverage of the Department of Law in fields which necessarily called for more interest in the directions of development of the law than the traditional fields were seen to require. Shatwell's interest in criminology resulted in the setting up within the school of the Institute of Criminology as well as broadening of the scope, and increases in the number, of subjects offered in the criminal area. Parsons' concentration upon the field of taxation within the area of his responsibilities for commercial law generally not only meant the establishment and growth of taxation subjects but also increased

interest in questions of taxation policy, with additional stimulation from Parsons' period of secondment from the school to participate in the Asprey inquiry. Benjafield developed the same kind of pattern in the field of administrative law, especially in conjunction with his secondment from the law school over two biennial periods to the New South Wales Law Reform Commission. Meanwhile P. E. Nygh was building up the family law and conflict of laws areas and, though he departed to become Foundation Professor of Law at Macquarie and later a justice of the Family Court of Australia, the building up process in those areas was to continue.

For all this, the division between the two departments contributed to an atmosphere in which the department of law was seen to be devoted to the more professional and pedestrian tasks of the law, while the department of jurisprudence and international law was seen to be more broadly concerned with law's functions in relation to the general community, and in a developmental rather than routine-task fashion. Although the department of jurisprudence and international law ostensibly disapproved of a department of law of that character, Stone at times confessed that he appreciated the situation which resulted, from the point of view of his own department. Jurisprudence could be presented as "the light at the end of the tunnel", and the picture of law as his department presented it built up by criticisms of the deficiencies of the approach of the law department. When I suggested at the time of Stone's departure that it would serve the interests of both departments if their functions were amalgamated, this idea caused great anger in the department of jurisprudence until it was effectively squashed by the new Professor Tay's commitment to continuing division. This commitment was apparently on a basis not altogether different from Stone's, at least to the extent that the department of jurisprudence was particularly concerned with aspects of law responding to societal development.

Nevertheless, the importance of the departmental division between law and jurisprudence has obviously diminished since Stone's departure. On the one hand, there has not been the same tight commitment within the department of jurisprudence itself to the evolutionary-utilitarian approach to law and society which Stone espoused and to which other major members of the department were committed in his time. Stone's set-up might have had considerable difficulty in accommodating the determined criticisms of current social "progress" made by Chipman and, on a special topic, by Moens. On the other side of the picture, the recent increasing impact of the evolutionary-utilitarian approach to law upon specific subject matters of the law itself, has led both to increasing emphasis in some existing subjects in the department of law upon aspects responding to societal development. It has also led to pressure for new subjects within the department, the existence of which is a product of this kind of philosophy and whose teaching can be expected to reflect it. Examples are anti-discrimination law and environmental law. Both of these are currently "sacred issues", in the philosopher John Searle's sense, in the Australian community generally, and now the fields of operation of two major specialized legal bodies in the State as well as the subjects of federal developments. The expansion of the teaching in fields such as these is creating pressure for diminution in emphasis upon traditional subjects.

During my own period in the school, I have remained sceptical throughout of the pretensions of the evolutionary-utilitarian approach to law and society. This was in the first instance due to the training I received in philosophy as an Arts student in the nineteen thirties. At that time, the single department of philosophy in the University of Sydney was dominated by the notions of the Challis professor, John Anderson, just as effectively as the department of jurisprudence and international law was dominated by Stone's notions in the period during which he was Challis professor.

Anderson was a supporter of Stone in the disputes about his appointment, but the two men had very different philosophies. Anderson's was that the academic function was in its nature confined to criticism of the activities of those in power while Stone's was that the academic function included telling those in power what to do. Donald Horne gives a sidelight on the type of conflict involved in *The Education of Young Donald.* The Stone approach was represented for Donald when he was a student by Alfred Conlon, one of the two people to whom Stone dedicated *The Province and Function of Law.* Being caught between the claims of Anderson that his province was to criticize the coming post-war world and Conlon's that he should spend his time moulding it, Donald temporarily resolved the matter for himself by coming to the convenient conclusion that Anderson was right in the lecture room while Conlon was right in the pub.

Anderson's moral and political philosophy was developed from his general philosophy—his view of the nature of things. For him, it was the nature of everything to be a pattern of happenings. These included people's mental patterns but mental patterns were considered only a category of the physical ones—some neural processes were mental—rather than as being in some fundamentally distinct philosophical categories in the manner represented by theories which Anderson condemned as idealist. He represented mental processes as "feeling" processes, emphasising their emotional characteristics, and this applied to knowing by the mind among emotional reactions to things generally.

It is especially because of *what* Anderson regarded the mind as feeling, in the way of knowing, that J. A. Passmore, at one time Anderson's student and later his teaching colleague, describes Anderson's theory as the most thoroughgoing of empirical theories, in Passmore's book *A Hundred Years of Philosophy.* The adjective "empirical" has tended to become attached to theories which regard the mind as observing only simple individual external objects, which then supply the raw material for complex processes of building up the initial impressions—"conceptualising" them—which go on somehow within the mind itself. Anderson, on the other hand, regarded the observation of simple objects as impossible. The mind can only comprehend what makes sense—what is articulate—and it is only complex patterns which make sense. These, therefore, are always what are the objects of observation.

It was these considerations which were specially relevant to a feature of Anderson's theory which Passmore, in his introduction to Anderson's *Studies in Empirical Philosophy*, finds a remarkable feature of any philosophy developed in the twentieth century—Anderson's adherence to the traditional logic stemming from Aristotle. For Anderson, all objects

of observation are propositional in form—articulate in that sense. The logical features of objects of observation are just the most general characteristics they are observed to have, and must have to be observable. The virtue of the Aristotelian system of logic from Anderson's point of view was that it was apt to accommodate a view of this sort because it dealt only in "is" propositions purporting to represent the existent. It did not deal in "ought" propositions or imperatives of any kind in the manner of modern deontic logic.

Anderson's thoroughgoing empiricism detected in imperative propositions, at least as they function in the hands of many people, the vice of relativism. He defined relativism as the presentation of a relation as if it could have an existence divorced from its terms. To Anderson, at the very least an imperative statement "you ought" or "you must" or "you are obligated", in each case to do something, was at the very best an incomplete proposition, presenting a demand which must be coming from some source without disclosing the source. If the source were disclosed, the imperative would reveal itself as an ordinary indicative proposition, simply describing a pattern of mental events relating to what someone wanted done, whether the someone was the speaker or whoever. On the other hand, if it were insisted that the statement was complete without being representable as a demand coming from some describable source, Anderson would claim that it was relativistic.

In this particular example of relativism, Anderson detected a sinister significance. It commonly represented a moralism which was both fraudulent and intimidatory especially in the hands of those wielding political power or claiming to have political or moral authority. It became a mode of indoctrination, where a speaker, instead of acknowledging that something he wants is nothing more than his own demand, claims to be only a vehicle for some set of principles, which, somehow, have their own force and entitlement to respect from the addressee of the statement.

All the considerations we have mentioned had their cumulative effect on Anderson's approach to ethics and politics. Anderson defined the subject matter of ethics by going through the kind of exercise advocated by John Stuart Mill in his *System of Logic* for arriving at any definition. This approach recognizes that when we are called upon to define any word for scientific purposes, which for Anderson meant the purposes of enlightenment generally, we are confronted with a variety of meanings in popular usage, the adoption of some of which are likely to contribute to enlightenment since they contribute satisfactorily to ordering the field in relation to others, while other meanings in popular usage may contribute to obfuscation. For Anderson, moralistic approaches to ethics setting out a set of rules to be followed on the basis of some fundamental principle which somehow justified all the rules without requiring itself to be justified—were what was obfuscating, an obfuscation which served the interests of intimidation and coercion. For Anderson, it was necessary on his general view of the nature of things to discover a goodness which empirically occurred.

Anderson then went on to discover what empirical meanings of goodness did occur in common usage, and found one at least as ancient as that put forward by Socrates in Book 1 of Plato's *Republic*. In that book Socrates distinguishes good and evil activities by reference to the

contrast between those human motivations which have the quality of spontaneous co-operation with motivations of a like kind, on the one hand, and, on the other hand, those motivations which co-operate with other motivations, even of a like kind, only on a forced basis and are as frequently aggressive towards motivations whether of like or different kinds. The characteristic mode of operation of goodness is to make common cause with good and fight evil, whereas evil characteristically is aggressive towards good and evil alike. For Anderson, on this basis, goodness was a naturally productive and sharing force while evil was naturally destructive and appropriative.

Since Anderson distinguished qualitatively between good and evil motives on this basis, he rejected the claims of utilitarianism to produce an optimum condition of humanity by satisfying as many demands as possible without distinguishing between what kinds of demands they were. Anderson did not accept the utilitarian Jeremy Bentham's proposition that "Pushpin is as good as poetry, quantity of pleasure being equal". In any case, accepting the proposition that the degree of satisfaction of wants can only be settled in a market, and that society in general is not a market, he denied the practicality of the objectives of utilitarianism by way of satisfying society to the greatest possible extent. Any view which claimed to be able to measure the demands of society as a whole he condemned as "solidarist".

He equally rejected the claims of evolutionary ethics. Its image of history was unlike the one he presented on the basis of his empirical theory of goodness coming down from Socrates. For his part, he accepted the account of the Italian philosopher Benedetto Croce, that history is the history of freedom. Anderson considered this view to be justified on the basis that the truly coherent forces in a society—the spontaneously co-operative productive forces—are not measured by the success of adaptation of the society to its environment from the point of view of survival. There is no virtue in success as such where what is successful may be evil. The fact that a "culture" survives entitles it to no respect for that reason—the co-operation of the "cultural" forces which enable it to survive may be of a forced kind, moralistic or even physically coercive, in contrast to the truly cultural or civilized forces which are the enterprizes of goodness within it.

Holding these views, Anderson naturally looked forward to the future in our society with some pessimism, and some further developments since his death have not been encouraging to an adherent of his views like myself. At the political level, our statesmen appear to treat society in its current direction as sacred. The Prime Minister is telling us as I write that the government did not suffer a defeat in its proposals for taxation reform because it was always integral to those proposals that they must have the support of society. When, therefore, the summit demonstrated to him that major features of them did not have that societal approval this was the end of them in accordance with the government's objectives from the outset.

Local politics did not always adopt this version of democracy, particularly as they were represented on the staff of this law school. For long the lecturer in Criminal Law was V. H. Treatt, the predecessor, as leader of the State opposition, of R. W. Askin who later obtained, and

for long retained, power. I once asked Treatt whether he accepted Schumpeter's proposition that democracy was a matter of marketing to the public the notions that it was guessed were accepted by the public. He replied that he did not, because it was inconsistent with his ideas of the personal responsibility which politicians bear for the policies which they put forward. One had to have the integrity to advocate what one believed in. If that was acceptable, one obtained, and continued in, power. If it was not, one accepted the consequences. This seems to represent an idealism which currently threatens to be lacking, in contrast to the prevailing notion that one's own ideals properly consist in doing what the survivors around us happen to want.

It is one's good fortune, however, that one can always continue to find those who are swimming against the tide somewhere. In my own case this happened in the years I spent at Yale between 1957 and 1965 with Harold D. Lasswell and Myres S. McDougal, senior professors on its law faculty. Lasswell is recently dead, but the extraordinary capacity of McDougal to work with present and former colleagues in organizing common projects continues. I have been able to participate in his publication projects right down to the present time in the same way as substantial numbers of others all over the world, as well as in independent projects of those who have been influenced by the Lasswell-McDougal approach to law and society. Conspicuous among these people is Ronald Macdonald, currently president of the World Academy of Art and Science and a justice of the European Court of Human Rights, in whose projects I have more than once participated.

Lasswell and McDougal make a particular point of their empirical approach, and their empiricism sufficiently resembles that of Anderson for Anderson's adherents easily to be accommodated within their general projects. Their main difference with Anderson is in their very much broader view of the function of academic lawyers, social scientists and scientists generally: what they call the intelligence function. The intelligence function, on their approach, properly operates in association with the recommending, prescribing, terminating, and appraising functions in societal decision making.

This is not to say that they do not attach great importance to theoretical criticisms, from an empirical point of view, of the pretences of those in power, and their adherents, to base their decision making upon theories, like the evolutionary-utilitarian approach currently dominant, which on close examination turn out not only to be unsound but have the potentiality to be vehicles of evil. Lasswell and McDougal are especially concerned to expose those approaches which pretend to base themselves upon principles which by their nature are regarded as having an absolute authority for everyone: which evolutionary and utilitarian ethical theories commonly claim to have.

In their constructive, as distinct from critical, notions of the scope of the intelligence function, Lasswell and McDougal do not attempt to proceed to what "ought to be done" from any absolute principles from which the proper or "just" decision can be derived. They do not believe that the just decision can be discovered in all cases by way of derivation from any principle which commands the allegiance of all. The only weight that principles concerning what ought to be done in social decision making

can have is that they are recommendations from some source. They may be acceptable to the addressees if they have a direct appeal to their own objectives or because the objectives of the addressee include a respect for the source as such. There is never any absolute entitlement of either a source, or the content of a recommendation, to respect in the nature of things. But, for Lasswell and McDougal, the recognition of all this does not prevent the academic from attempting to systematise in an intelligible way what his own recommendations are for what appeal they have to the like-minded and using honest means of persuasion for their adoption.

To provide a working framework for the systematization of their own recommendations, Lasswell and McDougal first categorize the institutions of society into political institutions specialized to the pursuit and use of power, economic institutions specialized in the same way to the pursuit of wealth, medical and other institutions specialized to the value of physical well-being, educational institutions specialized to enlightenment, craft institutions specialized to values associated with skills, domestic institutions specialized to affectionate associations, religious and civil institutions specialized to the values of rectitude, and institutions specialized to honours. They therefore see society as interacting institutions in which a variety of values are pursued and disposed of, rejecting any notion of the primacy of economic values.

Within this framework Lasswell and McDougal seek to pursue, for themselves and with their associates, what they regard as the appropriate tasks of the academic. They call them the "intellectual" tasks since they determine the scope of the intelligence function. The first task they see is the clarification of their own values, which generally they state to be the achievement of the "shaping"—or building—and sharing of values on the widest possible basis within the community. They do not put these values forward on the basis that they have any claim to acceptance beyond that they are believed to represent something prominent in the common man's approach to these matters. So, on the Anderson approach, they do. We all have productive tendencies which naturally seek to find common ground with others in the pursuit of constructive enterprises along with tendencies of an opposite kind in our complex make-up. The connection with the Andersonian approach to ethics is confirmed by Lasswell's and McDougal's insistence that they seek to communicate their values—to propagate their recommendations—by appeal and persuasion in terms of what in the addressees' attitudes may be responsive to the recommendations. There is a rejection of physical or mental coercion of any kind, including the degree of mental coercion which is ordinarily associated with moralistic approaches. A further connection with Andersonian views is to be found in that Lasswell and McDougal do not pretend that their general recommendations can be logically applied to solve all problems about what is to be done in all circumstances. An approach in a particular spirit is not a cure-all of the kind moralism pretends to be. Much is left to specification in individual circumstances.

The second intellectual task which Lasswell and McDougal propose for themselves and recommend to the like-minded (though perhaps it would be more accurate to say the like-hearted since the appeal is even more to particular kinds of human motivations than to particular kinds of perception of truth) is the observation of past and current trends in decision

making in the various social institutions—though ultimately the lawyer may come to focus particularly upon legal institutions within the general category of political institutions. On the basis of observations of these trends, one may proceed to the third task of analyzing the causes behind them, then to the prediction of future trends of decision if one makes no effort to intervene, and finally to the policy task of intervening as far as practical in the pursuit of one's own goals.

My own initial reaction to exposure to this approach was that, for a lawyer, it provided an excellent framework for systematic and well-directed law reform, but was perhaps less relevant to one's own everyday activities. What I did not realize at that stage was how many people were about to become importantly engaged in law reform in Australia, how quickly, and how important it would be to have an efficient recipe for proceeding with dispatch in this respect. Some people have expressed astonishment to me that my governmental report on the reform of the law of privacy—the size of a young book—was largely produced in one summer vaction. But there is nothing like having a highly efficient recipe with which to proceed, and moreover a recipe which ultimately calls on one to make one's recommendations on the basis of what one believes in oneself. On the other hand, attempting to proceed on the basis of societal values to be researched and collated is an excellent recipe for getting bogged down, as I believe much recent law reform activity demonstrates. Nor does it seem to provide any greater guarantee of acceptance when a report is produced. My report on privacy was implemented almost in terms by the Privacy Committee Act, 1975 and my working paper on defamation for the Law Reform Commission was largely implemented by the Commission's report itself and by the Defamation Act, 1974 following it. These Acts are both still law in New South Wales despite the vast amount of energy expended by the Australian Law Reform Commission on both topics in the intervening years, working to recipes more in line with the evolutionary-utilitarian approach.

At the purely political level, complaints are beginning to be heard about the indecisiveness in government to which attempts to chase the wishes of society and to discern the directions of societal development lead. Moreover, the current legal set-up is becoming increasingly an enemy of the efficient dispatch of legal business, in considerable measure because of the increasing explicit encouragement to decide matters by resort to social principles of some kind rather than by adherence to traditional rules. It was always one of the strong points of Stone's jurisprudence that he painstakingly and perceptively demonstrated that a legal system always has a degree of looseness, so that the judge has a good deal more personal responsibility for his own decisions than the way in which he resorts to authoritative rules in his judgment indicates on the surface. The New South Wales Solicitor General, one of Stone's most distinguished students, remarked to me recently that it was this part of Stone's jurisprudence which had the greatest impact on her. Since Stone's time at the school, the grip of rules has been deliberately loosened by legislatures in pursuit of encouraging decisions on social or economic principles.

But, to the extent that "social statements" become the principles on which cases purport to be decided, a premium is placed on the objectives involved having the necessary degree of specificity to be applied to dispose

of the cases before the courts in orderly fashion. This is the great weakness of the evolutionary-utilitarian approach. Although, when a jury makes a decision—which is often one which involves resort to values—the jury is expected in some way to represent the community because it is hopefully a cross-section of the community, the jury is generally expected also to apply its own values rather than to speculate upon what the values of the community may be. When a judge is expected to do what the jury is not expected to do and interpret community values his decisions are, paradoxically, often the subject of fierce complaint, and are often the most difficult to reach, and the least likely to be accepted by other judges. This is what one would expect if he is in pursuit of a chimera.

Inevitably, a judicial decision is very often the judge's own and can only satisfactorily represent his own values. The spirit of the common law, using that expression in its broadest sense to include its traditions concerning the ways in which the law is developed, is, as Fuller points out, one of continuous building in which the judge's own contributions are necessarily fed into the existing structure. The rules are continually revised, especially in the law of torts, described to me once by Justice Fox of the Federal Court as the de luxe common law subject. The rules on the central topic of negligence are always tentative in any particular area, being continually referred back to what may be called a principle but is rather a sentiment—that of neighbourliness. Not only is this sentiment part of human goodness as understood through the ages, but the way of working from it we have described is surely typical working of goodness, which does not rigidify into principles of justice understood in the way of moralism but continually adapts them. A learned Queen's Counsel recently remarked to me that, though a judge may come to his office with disruptive motivations he adapts in the course of time to making his distinctive contribution in accordance with the ways of working of the common law. To the extent those ways of working survive, this offers grounds for optimism.