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**LECTURES**

Thirty-ninth series

**Pragmatism  
and Theory in  
English Law**

P. S. Atiyah



STEVENS

# Pragmatism and Theory in English Law

by

P. S. Atiyah

The English legal system is traditionally regarded as being highly pragmatic in its style and in its approach to the resolution of disputes. In contrast to those working within continental legal systems, English judges are seen, for instance, as basing their decisions on practical experience and precedent rather than on logical or rational principles.

In this stimulating series of Hamlyn Lectures, Professor Atiyah re-appraises these assumptions. In the first three lectures, he demonstrates that the English tradition is indeed pragmatic and points to examples both of the considerable strengths and of the serious weaknesses which flow from this. However, in the final lecture, the author argues that there is nevertheless a great deal of *implicit* theory within the English legal system and that the work of academics has had a far greater influence on the development of the law than is often acknowledged. This has been seen in, for example, the development of contract law in the nineteenth century and, more recently, the House of Lords decision in *R. v. Shivpuri*.

This lively and thought-provoking examination of some of the most widely held assumptions underlying the English legal system by a leading academic lawyer will be of great interest to teachers, students and practitioners—indeed, anyone interested in the English legal system.

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IN  
ENGLISH LAW

by

P. S. ATIYAH

*Professor of English Law in the University of Oxford*

*Published under the auspices of*

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## THE HAMLYN TRUST

The Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941 at the age of eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of strong character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She inherited a taste for law and studied the subject. She also travelled frequently to the Continent and about the Mediterranean, and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

“The object of the charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges

may recognise the responsibilities and obligations attaching to them.”

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From the first the Trustees decided to organise courses of lectures of outstanding interest and quality by persons of eminence, under the auspices of co-operating Universities or other bodies, with a view to the lectures being made available in book form to a wide public.

The thirty-ninth series of Hamlyn Lectures was delivered at the University of Leeds in February 1987 by Professor Patrick Atiyah.

*February 1987*

AUBREY L. DIAMOND

*Chairman of the Trustees*



## *1. Pragmatism and Theory in English Law*

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Miss Emma Warburton Hamlyn, who founded the Hamlyn Trust, travelled frequently to the Continent, and, we are told, “gathered impressions of comparative jurisprudence and ethnology.” As a result the Hamlyn lecturer is bid to impart some knowledge of comparative jurisprudence and ethnology “to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples . . . ” So the Hamlyn lecturer seems to be under some sort of obligation to be a comparative lawyer, at least for the duration of his lectures. That is not an easy injunction to fulfil for one who has never studied comparative law and has no pretensions to being a comparative scholar. However, I shall try to render due loyalty to the spirit, at least, of the terms of the Trust by selecting for my topic an aspect, or a dimension of English law in respect of which there may well be important differences between us and our Continental colleagues. And I speak deliberately of English

law, rather than, as the Hamlyn Trust speaks, of the United Kingdom, because on the subject matter of my lectures, Scotland must sometimes be classed with continental Europe.

It used at one time to be widely thought that the English was a much more pragmatic legal system than that of most Continental countries which derived their law from that of Rome. Continentals were, it was often thought, and sometimes said by English lawyers, to be much more theoretical in their approach to the law. They went in for outlandish things like codes, they drew much of their inspiration from the rarefied atmosphere of universities and the theoreticians and jurists who worked there, rather than exclusively from judges. Indeed, jurists, rather than judges, were often thought to be the authorities, the oracles of the law. They went so far as to believe in reason and principle rather than in precedent. Even their moral theories seemed more theoretical and less down to earth than traditional English utilitarianism, which was "for long regarded as the sober, workmanlike English manifestation of the European enlightenment."<sup>1</sup> The distinguished Scots law lord, Lord Macmillan, suggested in a lecture in 1937 that there was indeed a fundamental distinction between the way people think in civil law and common law countries, and that this distinction lies at the root of differences between England and Scotland, not only in law, but also in matters of religion, philosophy and economics.<sup>2</sup>

Today it seems that modern comparative lawyers are more doubtful of the validity of some of these generalisations.<sup>3</sup> Precedent, for instance, we now know, does play a

<sup>1</sup> H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, (Oxford, 1983), p. 48.

<sup>2</sup> "Two Ways of Thinking," in *Law and Other Things* (1937), pp. 76-101.

<sup>3</sup> See, e.g. Lawson, *A Common Lawyer Looks at the Civil Law* (1953).

significant role in the German legal system, and even in France precedents have much more weight than was perhaps at one time thought by English lawyers. Codes are less all embracing in practice than they may be in theory,<sup>4</sup> and even the ideal of a perfect and totally complete code (preferably in a single volume) is increasingly seen by civil lawyers as an unattainable utopian dream.<sup>5</sup> And so on. But despite the doubts, there is still widespread acceptance of the view that there are significant differences of approach to law and legal reasoning, as between common lawyers and civil lawyers.<sup>6</sup> What I propose to do in these lectures is to look at the English side of this question, with an occasional side glance abroad. If this is not a comparative method in its own right, I hope at least to provide some of the material for a comparative study by those who can then approach the same questions from the other side.

I will start with the fairly uncontroversial suggestion that English lawyers are not only more inclined to the pragmatic and somewhat hostile to the theoretical approach, but positively glory in this preference. Perhaps there are not many

<sup>4</sup> See Tunc, "It is Wise not to Take the Civil Code too Seriously," pp. 71–85 in *Essays in Memory of Professor F. H. Lawson*, (Wallington and Merkin ed. 1986).

<sup>5</sup> Csaba Varga, "Utopias of Rationality in the Development of the Idea of Codification," in *Law and the Future of Society*, (Hutley et al. ed. A.R.S.P., 1977), pp. 27–41.

<sup>6</sup> See, e.g. Nicholas, *French Law of Contract*, (1982) pp. 4–5; Markesinis, "Conceptualism, Pragmatism and Courage," pp. 57–70 in *Essays in Memory of Professor F. H. Lawson, supra*, suggesting (at p. 68) that German judgments are "abstract, conceptual and difficult to follow . . . Logic is often taken to extremes . . ." But note also the remark (*ibid.*) that German judges may be "much less theoretical and more pragmatic than the general image would have it." See also Markesinis, "Tort Damages in English and German Law: A Comparison," (1985) *Studi Senesi* XCVII (III Series, XXXIV) 7, at pp. 8–9, commenting on the tendency of German law "to be ruthlessly systematic and logical."

judges today who (as one of their predecessors is said to have done) would still openly thank God that the law of England was not a science,<sup>7</sup> but the sentiment, I believe, lives on. It has been said that the very word “jurisprudence” is offensive to the nostrils of the English lawyer,<sup>8</sup> and though this too is rather more strongly put than is customary today, it would be a bold person who would deny the underlying thought. There is the traditional English preference for “muddling through” which Englishmen still take pride in.<sup>9</sup> Lord Macmillan, in the lecture I have already referred to, suggests that the English genius “has always had a strong aversion for and distrust of theory and principle.”<sup>10</sup>

I do not think anyone can doubt this general aversion to theory among English lawyers and judges. It is hardly too much to say, as Professor Nigel Walker has done, that “‘theory’ is a word which makes Anglo-American judges push back their safety-catches in contrast to the more reflective approach of their European colleagues,”<sup>11</sup> although I think Professor Walker is not wholly correct in linking English and American judges in this way. Indeed, it may be said that it is perfectly obvious why the law should lean in favour of a practical approach because law is *prima facie* a practical subject, while it may even be questioned whether there is any point in studying it theoretically.<sup>12</sup>

<sup>7</sup> Morris R. Cohen, “Law and Scientific Method,” reprinted in Ames, Cardozo *et al.*, *Jurisprudence in Action* (1953), p. 115.

<sup>8</sup> *Ibid.*

<sup>9</sup> Particularly prominent perhaps in matters of sentencing, see, *e.g.* Andrew Ashworth, *Sentencing and Penal Policy* (1983), p. 448.

<sup>10</sup> *Op. cit.* at p. 80.

<sup>11</sup> *Punishment, Danger and Stigma* (1980), Preface (p. viii).

<sup>12</sup> See Jolowicz, “Utility and Elegance in Civil Law Studies,” (1949) 65 L.Q.R. 322, at p. 322.

You will notice that in trying to identify the spirit of English law I have already slipped into the way of assuming that the true representative of our legal system is the judge or the practitioner. To some degree this means that I am begging the very question I want to discuss; I dare say England is not the only country in which judges and legal practitioners are more interested in practicalities and less interested in theory than academic lawyers. And if academics study and write about the law from a more theoretical perspective, why do we not think of them in this context as “lawyers”? This is of course a part of the very picture that I want to look at and I shall return in my last lecture to look in more detail at the relationship between academic lawyers and the practising profession. For the moment it is enough to say that I don’t think it would occur to anyone in England to think that English law has a theoretical perspective merely because a number of academics study its theoretical implications. It is very hard to avoid question begging formulations here. Even to say, as I have just said, that academic lawyers study the theoretical implications of the law implies that the law is something which exists outside the academic community, and that the function of the academic is to study something in which he does not truly participate. And I have no doubt that that is exactly how most people—lawyers in and out of the academic world, as well as non-lawyers—do perceive the role of the academic legal profession. But this way of looking at things is itself part of the very story that I want to examine, so I return to my main theme.

The general aversion to theory, the inclination to the pragmatic turns out, on examination, to have a number of different dimensions, although many of them overlap in various ways, and they cannot be cleanly disentangled from

each other. But it is worth the effort to do this because we shall find, I think, a number of distinct sub-questions wrapped up in the broader contrast. I will begin by noticing a variety of pairs of contrasting words or concepts or approaches. Apart from the general contrast between theory and practice, or pragmatism, we find constant references in legal literature to the contrast between logic and experience, as well as references to the distinction between deductive or a priori thinking and inductive or empirical reasoning. More generally, we often find the concepts of reason or rationality or philosophical inquiry being contrasted with the pragmatic, the practical. Sometimes here too we find the idea of compromise being oddly contrasted with rationality, or with "strict logic," (about which I shall have something more to say later) apparently with the implication that practical men can muddle their way through to workable solutions when rationality leads nowhere. I shall refer to this first set of contrasts as the logic and experience distinction.

My second set of contrasts is often expressed in terms of the distinction between systems of law based on rights and systems based on remedies. Here too we find duties, sometimes nestling alongside rights as theoretical constructs of little practical importance compared with sanctions, which have a solid and real air to them, but sometimes separated out from rights and thought of as somewhat weightier and more pragmatic. I shall call this the rights and remedies contrast.

Then we have a third set of contrasting words or concepts. There is principle on the one hand, and precedent on the other, and it is of course for its system of precedent that the common law is best known. This too may seem to epitomise an anti-theoretical or anti-rational bias in the com-

mon law world, because to insist on following precedent may seem to be to shut one's eyes to reasoned arguments.<sup>13</sup> Indeed, I have heard it said by a Professor of the Harvard Law School (not himself a lawyer) that the reason why there is no Nobel Prize for lawyers is that common lawyers have no respect for original thought. The system of precedent, urged this Professor, means that in a common law court you can destroy your opponent's arguments by showing that nobody has ever thought of them before. This is no doubt an exaggeration, but he definitely has a point. The principle and precedent contrast is not totally unconnected to the distinction between legislation and case law. This is often related also to the contrast between the abstract and the concrete, the airy and the down-to-earth. It is also closely involved in the whole contrast between law and equity, between law according to rule, and doing justice in the circumstances of the particular case. So too, there is the contrast between the orderly, the systematic, the scientific (if I dare use that word in connection with the law) and the disorderly, the unscientific and the muddled. I shall call this the principle and precedent contrast.

A fourth set of contrasts relates especially to the personnel of the law, as I foreshadowed a moment ago, but follows the general lines of the contrast between theory and pragmatism. Here we have the distinction between the academic and the practical, closely related to the distinction between the academic and the practitioner. Tagging along with this, we notice the contrast between book-learning and commonsense, book-learning of course usually being academic and commonsense usually being practical or sound or even "sturdy." Somewhere here also we encounter the contrast

<sup>13</sup> See the views of Bentham on this point, cited in lecture 3.

between two styles of learning or education, on the one hand, the method of formal instruction where (of course) academics teach, and book-learning is acquired, and on the other hand, the informal method of the apprenticeship system, where learning comes with trial and experience. I shall call this the academic and the practical contrast.

Let me now try to develop these four different ways in which the basic contrast manifests itself.

### *Logic and Experience*

The first heading under which I should like to develop the difference between practice and theory is the one I have referred to as that of logic and experience. As every common lawyer knows, the preference for experience was summed up by Oliver Wendell Holmes in his famous phrase, "The life of the law has not been logic: it has been experience."<sup>14</sup> This phrase, by the way, does not come from one of Holmes's judgments, but from the first page of his book, *The Common Law*, which was originally given as a course of lectures on the strength of which Holmes was invited to become a Professor at the Harvard Law School. It has, I think, become almost symbolic of the common lawyer's distrust of theory, because after all what could be more theoretical than pure logic?

Many English judges have quoted Holmes's remark, and many others have echoed the sentiment. Lord Halsbury's comment on the principle of *stare decisis* is a well known example:

"A case is only authority for what it actually decides. I

<sup>14</sup> *The Common Law* (1881), p. 1.



entirely deny that it can be quoted for a proposition that may seem to follow logically from it . . . [T]he law is not always logical at all.”<sup>15</sup>

Rather surprisingly, even Lord Macmillan, whose views I have referred to above, cited Holmes’s famous remark in his speech in *Read v. Lyons*<sup>16</sup> in 1947, and added for good measure, “Your Lordships are not called upon to rationalize the law of England.”<sup>17</sup> Presumably Lord Macmillan was here wearing his hat as a law lord hearing an English appeal, and therefore loyally adopting the English approach in preference to his native Scots. In that capacity he might have quoted his own words from his lecture on “Two Ways of Thinking” which I have already referred to:

“[I]t is the tolerance, the magnanimity, the readiness to compromise and to assimilate, the very illogicality, if you will, that are so typical of the English mind which have always been the secret of England’s influence and power.”<sup>18</sup>

Presumably if *Read v. Lyons* had been a Scots appeal Lord Macmillan would not have embraced the irrationality of the law quite so enthusiastically.

The present Regius Professor of Public Law at Edinburgh seems to agree with Lord Macmillan:

“By and large, [he says] English lawyers and writers have tended to think of it as almost a virtue to be illogical, and have ascribed that virtue freely to their law;

<sup>15</sup> *Quinn v. Leatham* [1901] A.C. 459, at p. 506. See the discussion in Cross, *Precedent in English Law* 3rd ed. (1977), pp. 59–60.

<sup>16</sup> [1947] A.C. 156.

<sup>17</sup> At p. 175.

<sup>18</sup> *Op. cit.* at p. 100.

‘being logical’ is an eccentric continental practice, in which commonsensical Englishmen indulge at their peril.’<sup>19</sup>

On the other hand, here and there a dissenting voice has occasionally been heard. For instance, Lord Devlin, in the *Hedley Byrne* case<sup>20</sup> had this to say:

“The common law is tolerant of much illogicality, especially on the surface, but no system of law can be workable if it has not got logic at the root of it.”

Unfortunately, this part of Lord Devlin’s speech in *Hedley Byrne* was devoted to showing that the law should not distinguish between liability for physical injury and liability for financial loss; and whatever else *Hedley Byrne* may have decided, it is now pretty clear that it did not abolish that distinction.<sup>21</sup> Furthermore, it is on very practical or pragmatic grounds that the distinction seems to have survived, particularly because of the problems which would arise of creating what is virtually an indefinite species of liability for an indefinite number of plaintiffs. So this attempt to call in aid logic seems to have misfired, and perhaps demonstrates how wise the common law is to stick to experience.

Another similar failure of the appeal to logic is to be found in the fate of some remarks of Lord Hailsham in *D.P.P. v. Morgan*.<sup>22</sup> Dealing with the problem of *mens rea* in rape, Lord Hailsham insisted that once it is accepted that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to

<sup>19</sup> MacCormick, *Legal Reasoning and Legal Theory* (1978), p. 40.

<sup>20</sup> [1964] A.C. 464, at p. 516.

<sup>21</sup> See, e.g. *Candlewood Navigation Ltd. v. Mitsui Lines Ltd.* [1986] A.C. 1.

<sup>22</sup> [1976] A.C. 182.

commit it, it follows "as a matter of inexorable logic"<sup>23</sup> that the prosecution must prove that the accused had the requisite intent. So if he thought the victim was consenting, even though she was not, it is immaterial that his mistake was not one which a reasonable man would have made. Lord Hailsham also added that he could not reconcile it with his conscience to sanction as part of the law of England a logical impossibility, and that even authority could not properly lead to such a result, and should not be followed if it seemed to do so.<sup>24</sup> But only a year later the House of Lords resolutely refused to be swayed by this appeal to logic in the very similar problem which arose in *D.P.P. v. Majewski*.<sup>25</sup> No matter that a person does not have the intent to commit a crime, if the reason why he does not have that intent is that he is so drunk as to have formed no intent at all, he will be guilty, proclaims the *Majewski* ruling. Several members of the House of Lords acknowledged that they were departing from strict logic in reaching this decision, but as on so many other occasions, they were not dismayed. The law accords with "justice, ethics and commonsense" said Lord Salmon, even if not with strict logic.<sup>26</sup>

The aversion of English judges to "strict logic" seems to be even greater than their aversion to ordinary logic. A cursory look through the English case law for the last ten years, which was made possible by the wonders of Lexis, has

<sup>23</sup> [1976] A.C. 182 at p. 214.

<sup>24</sup> [1976] A.C. 182 at p. 213.

<sup>25</sup> [1977] A.C. 443.

<sup>26</sup> [1977] A.C. 443 at p. 484. The decision was seen by many (including perhaps most of the law lords themselves) as being not merely "anti-logical" but also "anti-academic" because so many academic criminal lawyers had taken a different view of the legal issues involved in *Majewski*. But not all academics took this view, see, e.g. Ashworth, "Reason, Logic and Criminal Liability" (1975), 91 L.Q.R. 102.

revealed that on every occasion on which the judges referred to “strict logic” it was to reject its conclusions. So it seems almost safe to say that “strict logic” is definitely not part of the law of England. Ordinary, or less strict logic, however, is not quite so frowned upon, and is actually relied upon by judges from time to time. Indeed it was relied upon in one of the most celebrated judgments of the twentieth century, namely that of Lord Atkin in *Donoghue v. Stevenson*,<sup>27</sup> where he says that the various instances of liability for negligence already recognised by the courts must logically be based upon a broader principle. Another, more recent instance of “ordinary” logic being used by the judges while at the same time “strict” logic is rejected is to be found in the *Brinkibon*<sup>28</sup> case dealing with the rules of offer and acceptance. Because the general rule is that a contract is formed *when* the acceptance is received, it “appears logical” says Lord Wilberforce, that a contract should also be held to have been made *where* the acceptance has been received.<sup>29</sup> Again, because a postal acceptance is completed when it is put into the mail, it seems logical, says Lord Wilberforce, to hold that the postal acceptance is also completed where it is mailed.<sup>30</sup> On the other hand Lord Fraser points out that “in strict logic” there would be much to be said for applying the postal rule to telex communications and holding them to be effective on transmission.<sup>31</sup> This, however, he rejected on a variety of more pragmatic

<sup>27</sup> [1932] A.C. 562, at p. 580.

<sup>28</sup> [1983] 2 A.C. 34.

<sup>29</sup> [1983] 2 A.C. 34 at p. 41. Though to avoid any suggestion that this was a mechanistic conclusion Lord Wilberforce also indicates some dissatisfaction with the fact that it should be material for legal purposes *where* a contract is formed.

<sup>30</sup> *Ibid.* at p. 41.

<sup>31</sup> *Ibid.* at p. 43.

grounds, in favour of the *Entores*<sup>32</sup> ruling that a telexed acceptance is only effective on receipt, principally because this rule seem to have worked without serious difficulty or complaint. So if "logic" is occasionally alright, it seems that "strict logic" is beyond the pale.<sup>33</sup>

So where does all this leave us? Well, we must first recognise—as has often been pointed out before—that when English lawyers and judges reject the use of logic in the law, they are usually, perhaps always, using the word "logic" in a somewhat imprecise and perhaps incorrect sense. What they usually have in mind is the syllogism, the principle of deductive logic, whereby given a major and a minor premise, a valid conclusion can be drawn. In the *Morgan* case it is clear that Lord Hailsham's unwillingness to sanction a departure from logic was based on a more correct use of the term "logic." Given, he insists, that the prohibited act in rape is non-consensual intercourse, and given secondly, that the guilty state of mind is an intention to commit it, then it would, as he says, follow inexorably that an honest though unreasonable mistake negatives the necessary intention and should lead to an acquittal. All that this comes down to in the end is that if the law requires that an intention of a certain kind must be shown before a person can be convicted of a particular type of offence, then indeed, that intention must be shown to exist. It would be a remarkably perverse judge who denied that this conclusion followed from the premises, and it would be a still more remarkable judge perhaps, who accepted the premises but directed the jury to convict the accused.

<sup>32</sup> [1955] 2 Q.B. 327.

<sup>33</sup> For another example, see the House of Lords decision in the important patent case, *Beecham Group Ltd., v. Bristol Laboratories Ltd.* [1978] R.P.C. 153, esp. at p. 204 *per* Lord Simon.

Indeed, in *this*, philosophical sense of the term, it is surely clear that “strict logic” is and must be part of the law of England. As Professor MacCormick has demonstrated at some length judges do habitually use the methods of deductive logic in the process of legal reasoning.<sup>34</sup> They do try to identify rules of law applicable to the case in hand, they do try to find the facts of the case in hand, and they do then subsume the facts under the law they have found to arrive at their conclusions. This is a perfectly regular and everyday use of the processes of deductive logic. In this sense the laws of logic are no different from the laws of mathematics of which the judges also make regular use, for example, in the assessment of damages. Not only do judges regularly use such elementary arithmetic techniques as adding up items of damages, and reducing them by specified percentages where they find contributory negligence, they also perform more sophisticated mathematical exercises such as discounting a sum of money which would have been payable in the future in order to arrive at its present day value. And in the process they have had to learn about relatively complex matters such as the inter-relationship between interest rates, inflation rates and the appropriate discount rates to use for this purpose. I shall give some examples of this kind of thing in my next lecture.

So it is not simply a matter of recognising that the word “logic” is often used in different senses by judges and lawyers; it is also necessary to appreciate that even the strictest of strict logic can be “used” in two different senses. It can be and is very regularly “used” in the sense of being *applied*, as in the many examples which Professor MacCormick gives in his discussion of this question. But in these cases the real

<sup>34</sup> *Op. cit.* pp. 19–32.

arguments are never about the logical deductions themselves: they are always about the premises. Once the premises have been finally determined or agreed, the conclusions do follow inexorably, of course, and are usually seen to follow inexorably. So judges often apply logic, but they rarely “use” logic in the sense of reasoning their way to a conclusion which is not otherwise obvious by a process of logic. Indeed, when they do try to do that, they often fall into fairly elementary logical mistakes. Lord Radcliffe once suggested that a professor of logic would find some sad howlers even in famous judgments—“the undistributed middle, transference of meaning in the use of the same word, questions begged until they are in rags,”<sup>35</sup> and so on.

A remarkable illustration of such a failure in logic, here the logic of contradictions rather than syllogistic logic, is to be found in a recent opinion of Lord Scarman dealing with economic duress. In *Pao On v. Lau Yiu*<sup>36</sup> the Privy Council sanctioned the new concept of economic duress, but in delimiting its scope they ran into trouble. Traditionally, duress has been said to require such an overbearing of the will of the person coerced that he had no choice to act except as he did,<sup>37</sup> and Lord Scarman repeated this traditional formula. Duress only operates, he says, where the party coerced “has no alternative course open to him.”<sup>38</sup> But later in his judgment, Lord Scarman attempts to apply the older learning on duress to the newer idea that economic pressure may amount to duress, and here he says that in order to decide

<sup>35</sup> *Not in Feather Beds*, (1968) p. 73.

<sup>36</sup> [1980] A.C. 614.

<sup>37</sup> See my Note, “Economic Duress and the Overborne Will” (1982) 98 L.Q.R. 197; cf. Tiplady, (1983) 99 L.Q.R. 188, and my reply, *ibid.*, at p. 353.

<sup>38</sup> At p. 636.

whether economic duress has been made out, it is necessary to examine "the effectiveness of alternative remedies open" to the party coerced.<sup>39</sup> So here at one and the same time we seem to have a doctrine that requires the plaintiff to show that he had no alternative course open to him, and that also requires examination of the effectiveness of the alternatives open to him. Clearly, something has gone badly wrong with the logic here, and Lord Scarman must and doubtless will be interpreted to mean that the plaintiff has to show that he had no practical or effective alternative course open to him, not that he literally had no alternative.

Of course, as others have often demonstrated, when judges and lawyers talk of logic, and especially when they reject logical reasoning, they are often not using the word in the strict sense of syllogistic logic. Professor MacCormick has suggested that English lawyers often speak of a proposition as logical when they simply mean that it makes sense, or that it is consistent with other propositions,<sup>40</sup> and equally they say something is illogical when they reject arguments of consistency or analogy in favour of different arguments. Scores of illustrations could no doubt be found of this sort of usage, many of which would scarcely attract attention unless one happened particularly to be looking for examples of the judicial use of logic. Here is just one such case. In *Gravesham B.C. v. British Railways Board*<sup>41</sup> the question before the court concerned the obligations of British Rail as owners of a common law ferry. Now a common law ferry is a monopoly granted by the Crown to someone to operate a ferry where a highway crosses a river, in return for which the ferryman accepts an obligation to carry any member of

<sup>39</sup> *Ibid.*

<sup>40</sup> *Op. cit.* at pp. 38–39.

<sup>41</sup> [1978] Ch. 379.



the public at reasonable rates. But the question here was whether the ferry has to be operated at all times or only at reasonable times, and whether the volume of traffic, and the costs of keeping the ferry running, are relevant factors in deciding what is reasonable. From one point of view the ferry was just a part of the highway, and it seemed a "logically attractive proposition" that it should therefore be kept open at all times just as the highway itself has to be kept open at all times. But this was a bit too logical even for counsel, who tempered it by having regard to practical realities, and it was not seriously entertained by the judge. In a case like this the issue is really as to the validity of an analogy. Clearly the analogy between a ferry and other parts of the highway may be strong for some purposes, but it was very weak for the particular purpose in hand. Logic contributed nothing to this sort of decision.

If logic after all plays a relatively small role in legal reasoning, as now seems to be widely agreed, what about reason, rationality in the broadest sense? English lawyers and judges are perhaps, less inclined to embrace irrationality than they are to be scornful of logic, though I have already quoted Lord Macmillan's remark that it is not the function of the House of Lords to rationalize the law of England. And in modern times when so much of the law is being reduced to "reasonableness" it may seem odd to suggest that English law is nevertheless in some sense profoundly hostile to reason. I do not mean merely that—by comparison say with French law<sup>42</sup>—the principles of English law often seem qualified and limited by considerations of practical convenience, nor that English law perhaps lacks overall rational coherence. What I have in mind rather is

<sup>42</sup> See *e.g.* Nicholas, *op. cit.* at pp. 19–22.

that the underlying justification for many of our cases, the classifications and concepts we use, the rationalisations which lawyers give—and they do give them, even when they disclaim the job of rationalising the law—are often unsatisfying and inadequate. Even when the practical and pragmatic approaches adopted by English lawyers lead to perfectly acceptable results, the explanations which lawyers give for those results often fail to satisfy. If I may quote Holmes again, and this time in a mood less hostile to theory, after he had read the whole of the 181 page report in *Allen v. Flood*<sup>43</sup> his comment to Pollock was that the case betrayed a “lack of articulate theory and fundamental analysis.”<sup>44</sup> I will, however, now leave my comments on logic and experience because to develop my criticisms at this point would trespass on the critique I want to offer later of this weakness in English law.

### *Rights and Remedies*

I turn now to say something about my second heading, namely the rights-remedies distinction. Let me take this in two stages. The first is that English law has, I think, been more prone to start with duties, and to treat rights as the incidental flow-on from duties, rather than to start with rights and impose duties to protect those rights. Certainly this was the consequence of the positive theory of law from the days of Bentham and Austin. And here too we see the leaning towards the practical and the pragmatic, because duties are things that can be enforced by sanctions, by physical force. That indeed was precisely why the traditional English positivists thought that duties were the

<sup>43</sup> [1898] A.C. 1.

<sup>44</sup> *Pollock-Holmes Letters*, (ed. Howe, 1941), vol. 1, p. 200.

primary material of the law: it was the command of the sovereign which imposed duties, backed by sanctions. When Holmes dipped rights into his cynical acid he found that they disappeared altogether, but duties retained a more solid sort of existence as a summary of the unpleasant things that would happen to those who failed to perform them. With the more modern versions of positivism we have grown to appreciate that law can confer powers as well as impose duties, and rights may be created by the law without necessarily doing so via the imposition of duties, but traditionally I do not think there is much doubt that English law has been in tune with the theories of the older positivists.

One striking example of the practical results of this tendency of English law is to be found in the problems surrounding the legality of many forms of industrial action in modern labour law. It is, of course, well known that a strike—that is to say a collective decision to withdraw labour—nearly always involves activities in restraint of trade, breaches of contract, and inducements to break contracts. The result is that although the “right to strike” is regarded as in principle acceptable in modern political and democratic thought—though subject certainly to various restrictions and conditions—the law finds great difficulty in recognising this right. In law the “right” generally takes the form merely of a series of immunities from actions which would otherwise be illegal as being in restraint of trade, breaches of contract, torts or crimes. The trouble—or anyhow one trouble—with this approach is that every time the legislature grants such an immunity it tends to do so by saying that strike action shall not be unlawful “only on the ground” that such and such has happened in the course of it; but this, of course, does not stop a court from saying that

the activity remains unlawful on some other ground.<sup>45</sup> Exactly the same thing happens with such activities as picketing. Again, within proper limits, picketing is generally felt to be a political and industrial right, but English law has great difficulty in understanding the nature of that right. Ever since the Trade Disputes Act 1906 the legislation on this subject has included a provision cast in right-conferring form—"It shall be lawful" to do thus and thus, but even these provisions have all been interpreted in the negative form, that is to say, as provisions which pronounce that picketing is not to be unlawful on the ground only that there has been some infringement of this or that legal rule.<sup>46</sup> Of course this means that it is always open to prosecutors and courts to find that the right to picket does not exist in some particular case because there has been some infringement of some other law or provision which nobody had previously thought of in that context. Now I want to make it quite clear that I am taking absolutely no stand on how far the law should restrain, or permit strikes and picketing. I am not even taking any stand on the question whether English law ought to shift over to what is said to be the more continental structure of recognising positive rights on such matters as strikes and picketing.<sup>47</sup> All that I am saying is that, for good or ill, English law is so remedy- and duty-oriented that it has had, and still has great difficulties in creating a

<sup>45</sup> The full story of this is well known, and fully documented in such writings as Wedderburn, "Intimidation and the Right to Strike," (1964) M.L.R. 257. It is enough here to cite cases such as *Rookes v. Barnard* [1964] A.C. 1129 and *Stratford v. Lindley* [1965] A.C. 269.

<sup>46</sup> See e.g. *Broome v. D.P.P.* [1974] A.C. 587; *British Airports Authority v. Ashton* [1983] 3 All E.R. 6.

<sup>47</sup> See, for instance, Wedderburn, "Industrial Relations and the Courts" (1980) 9 I.L.J. 65; Forde, "Bills of Rights and Trade Union Immunities: Some French Lessons," (1984) 13 I.L.J. 40.

legal structure which recognises these basic industrial rights. And I must add that the same problem arises for many other civil liberties issues, such as the right to demonstrate, even the ordinary right to come and go as we will, which turns out not to exist at all, but to be merely the correlative of the policeman's duty not to stop us unless he has legal cause.<sup>48</sup>

I turn now to the second stage of the rights-remedies distinction. Not only has English law generally been much happier in dealing with duties than with rights, it has also, I think, clearly been happier in dealing with remedies than with rights. Indeed, English law has for long prided itself in being strong on remedies, even if it is less interested in rights.<sup>49</sup> There is a long tradition, made up of many different strands which have gone into this particular bias in English law; and I use the word without any pejorative connotation. One such strand, for instance, is the role of equity in the history of English law. Equity, as we all know, operates *in personam*. It is, or certainly was in origins, largely a system of remedies, based upon the ultimate power of the injunction. The power to order a particular defendant to do a particular thing, and to threaten him with imprisonment if he failed, was a pretty potent weapon with which to deal with recalcitrant and powerful magnates at a time when the enforcement of the law was a good deal more difficult than it is today. Rights and duties after all, may exist on paper, but those who are unimpressed by pieces of paper may still have a healthy respect for threats of imprisonment. In one

<sup>48</sup> See *Moss v. McLachlan* [1985] I.R.L.R. 76; see further, Wallington, "Policing the Miners' Strike" (1985) 14 I.L.J. 145, at pp. 154-156.

<sup>49</sup> "[T]ypically, English law fastens not on principles but on remedies," *per* Lord Wilberforce in *Davy v. Spelthorne B.C.* [1983] 3 All E.R. 278, at p. 285.

of his more cynical moments Holmes went so far as to suggest that the lawyer needed to look at law as a "bad man" might look at it.<sup>50</sup> The "bad man," he suggested, was scornful of theories of right and justice: what mattered to him was what would actually happen as a result of court decisions. And there is no doubt that the contribution of equity has been to give real teeth to much of our law in practice. I shall have something to say in my next lecture about some modern illustrations of the very real effectiveness of this pragmatic aspect of equitable power.

Another strand in the development of the English tradition that remedies are ultimately what matter is a legacy of the constitutional struggles of the seventeenth century, and the settlement of 1688. One outcome of these struggles was the profoundly English belief that an independent judiciary, and a judiciary with the power to issue practical orders, was more important than any number of grand theoretical declarations about the Rights of Man. Similarly, the jury's practical power of acquittal, in the teeth of the law and of judicial directions to convict, came to be seen as a more important protector of the rights of the citizen than theoretical constitutional guarantees, however grandiloquent. These beliefs gained redoubled force after the French Revolution when a series of constitutions proclaiming the Rights of Man were seen by the pragmatic Englishman as so much useless theoretical clutter which had no practical results. The independent judiciary, the writ of habeas corpus and the jury's power both to acquit those persecuted by the government, and to award damages against servants of the government who transgressed their powers, came to be seen as glories of English law.

<sup>50</sup> "The Path of the Law," 10 Harv. L. Rev. at pp. 459-461.

In the late nineteenth century Dicey canonised this remedy-based approach of English law by arguing that the rule of law on which the fundamental rights of Englishmen depended, derived in part from the very fact that these fundamental rights were all based on remedies obtainable in ordinary litigation. It was not merely chauvinism which led Dicey to be so contemptuous of the practice adopted by so many foreign constitutions of granting fundamental rights to their citizens.<sup>51</sup> "Foreign constitutionalists," he insisted, had given insufficient weight to the practical remedies by which constitutional rights needed to be enforced.<sup>52</sup> England, by contrast, protected fundamental civil rights more effectively even in the "absence of those declarations or definitions of rights so dear to foreign constitutionalists."<sup>53</sup> "The Habeas Corpus Acts," he went on, "declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."<sup>54</sup>

Dicey was supported in all this by Sir Henry Maine who pointed out in his essays on *Popular Government*, first published in 1885,<sup>55</sup> that out of some 350 constitutions said to have been adopted since 1800, the worst and the least successful had been those "which announce[d] their character by beginning with a Declaration of the Rights of Man."<sup>56</sup> So Dicey's scepticism about constitutions which contained mere paper declarations of rights may have been fully justi-

<sup>51</sup> Dicey, *Law of the Constitution* (9th ed.), p. 195–196 (first published 1885).

<sup>52</sup> *Ibid.* at p. 198.

<sup>53</sup> *Ibid.* at p. 197.

<sup>54</sup> *Ibid.* at p. 199.

<sup>55</sup> The first edition in book form appeared in 1885, but the essays had previously appeared in the *Quarterly Review* so they were presumably available to Dicey when he was writing *The Law of the Constitution*.

<sup>56</sup> (2nd ed., 1890), p. 175.

fied by the nineteenth century experience of England in comparison with most continental countries, but Dicey drew some very remarkable conclusions from these comparisons. He seems to have come close to concluding that not only were grand Declarations of Rights useless if there were no effective remedies to enforce them, but also that fundamental rights were actually more vulnerable if they were based on such declarations of rights. If fundamental rights were simply the creation of a constitutional declaration, he suggested, it was just as easy to suspend or abrogate them as it was to grant them. On the other hand if fundamental rights were simply a result of ordinary litigation, then they could hardly be abrogated without a "thorough revolution in the institutions and manners of the nation."<sup>57</sup> Now if Dicey meant only that basic civil rights are more likely to be respected and effectively enforced in a country which has a deep-rooted respect for such rights, and that mere paper rights are no evidence of such a deep-rooted respect, then he was clearly right. Modern reality continues to confirm the experience of the eighteenth and nineteenth centuries on which Dicey drew. But insofar as Dicey may have thought that fundamental rights are actually likely to be *better* respected and effectively enforced for *not* being enshrined in some Declaration of Rights, he was surely quite wrong. The American experience and our own experience with the Strasbourg Convention on Human Rights have both demonstrated that an express grant of rights can be backed by effective enforcement mechanisms. It is true that Dicey did not wholly overlook the United States Constitution, and he conceded, perhaps grudgingly that the American experience demonstrated that it was possible to have both express

<sup>57</sup> Dicey, *Law of the Constitution*, p. 201.



declarations of constitutional rights, and effective means of enforcement as well.<sup>58</sup> But he was at pains to insist that the American Bill of Rights had little in common with European declarations of rights, and was in truth more on a par with the English Petition of Right; the English and the American "rights" were not in truth "declarations of rights" in the "foreign" sense of the term, but rather judicial condemnation of claims and practices on the part of the Crown thereby declared to be illegal.<sup>59</sup>

The answer to this apparent counter-example to Dicey's views may also have come from Sir Henry Maine. In his *Popular Government*, Maine had demonstrated to his own satisfaction, and perhaps also to Dicey's, that the American Constitution was in truth founded on the principles of the British Constitution of the late eighteenth century. It could thus be exempted from the criticisms directed against European constitutions, notwithstanding its Bill of Rights. In any event, it is fair to say that the American experience was not much known or studied in England until after the Second World War, and it is, of course, also true that the American Bill of Rights was not in practice such a potent source of practical and effective rights until quite recent times. So it is hardly surprising if in the nineteenth and early twentieth centuries English lawyers should have taken some satisfaction in the apparently greater ability of their own legal system to provide some effective guarantees for civil rights in comparison with European countries. For my purposes, it is really quite immaterial whether this view of English law was a grossly exaggerated picture of political reality, seen through rosy coloured Whiggish eyes, as some

<sup>58</sup> *Ibid.* at pp. 199–200.

<sup>59</sup> *Ibid.* at p. 200, n. 1.

modern historians would have it.<sup>60</sup> My purpose here is to try to explain the origins of the English lawyer's stress on a remedy-oriented legal process, and for that purpose it was the perception of the way the legal system operated rather than the reality which mattered. So here, at any rate, seems to be another clear strand in the story which helps explain why English law has been so remedy-oriented, as well as showing how this orientation was related to the English lawyer's belief in the pragmatic and his aversion to matters of theory. And there is no doubt that in the constitutional and public law sphere, the tendency of the law is still highly remedy-oriented. To take just one modern example, consider, for instance, how the very far reaching changes in the legal regime for controlling administrative action were introduced by modifications in the Rules of Procedure of the Supreme Court in 1977.

### *Precedent and Principles*

My third contrast is that between precedent and principles, but as I have already said, this distinction really spills over into a number of others, including even the distinction between case law and legislation, between the concrete and the abstract, and perhaps even between justice according to rules, and justice in the particular circumstances of the case. You will see, easily enough, how this set of contrasts also relates to my basic point that English law prefers the practical and pragmatic to the theoretical and rational. Principles are necessarily more general, more abstract, than precedents. Precedents arise from particular cases, particu-

<sup>60</sup> See, e.g. Hay *et al.*, *Albion's Fatal Tree* (1975) and E.P. Thompson, *Whigs and Hunters* (1975). But compare John Brewer "The Wilkites and the Law," in *An Ungovernable People* (Brewer and Styles ed. 1980) and John H. Langbein, "Albion's Fatal Flaws," (1983) 98 *Past and Present* 96.

lar sets of concrete facts, which can be related to the case at hand, but the whole point of principles is that they attempt to generalise, to get away from the details of the facts of particular cases. In the process of generalisation, principles also attempt to give some overall structure or rational shape to the law, not just in the interests of elegance, but in the interests of consistency, of the desire to ensure that like is treated alike.

Now I do not claim, and it would be absurd to claim, that English law does not deal in principles or abstract generalisations or that English lawyers have no regard for overall consistency in the structure of the law. Indeed, I doubt if any legal system could do this and still claim to be a legal system as we understand that concept. But at the same time, every legal system has to handle individual particular cases. At the end of the day, or anyhow at the end of every trial, and at the end of every practical legal problem, there are real people of real flesh and blood with real problems, and the law must attempt to answer these problems. Our legislation may make it an offence for "any person" to do so and so, but it is not "any person" who gets fined or jailed for breach of the law. It is Jones or Smith or Green. Hypothetical problems, dreamt up by examiners, deal with A and B and X and Y, but the law has to award damages to White or Black. Examination questions deal with Blackacre, but the law has to decide what to do with No. 19, Acacia Avenue when Mr. and Mrs. Brown, who used to live there, decide that they cannot bear each other's company any more. The problem of reconciling the needs of generalisation with the needs of the particular case is one of the most difficult and delicate problems faced by every legal system. All that I claim is that in meeting this problem, English law and lawyers today incline towards the particu-

lar case, the concrete, the precedent rather than the principle. I do not claim that this has always been true of English law, but I do suggest that it is true today, and it may well be that the common law methodology tends to encourage this approach. It is, for instance, rather difficult to imagine a French lawyer concurring with Holmes's famous remark that "general propositions do not decide concrete cases."<sup>61</sup> Even Lord Goff, who has spoken perceptively of the importance of principle in the law, also insists that in any conflict between the academic and the practical, it is the latter which must be respected because "pragmatism must be the watchword."<sup>62</sup>

Let me now try to justify my assertion that English law favours precedent over principle. I start by comparing case law with legislation. Now legislation is clearly law-making in the abstract, law-making by generalisation. There was a time, it is true, when much legislation consisted of private or personal Acts which were designed (for example) to divorce particular parties, or make property adjustments between particular people; but that sort of legislation was in truth much nearer to adjudication and indeed special procedures were developed by Parliament to deal with it, which were of a semi-adjudicative character. But this kind of legislation is rare today. Statutes today are mostly public general Acts which are designed to operate in general. Legislation is always cast in terms of broad classes of events or people. "Where any person" does so and so, or "Where such and such a state of affairs exists" is the usual way of

<sup>61</sup> *Lochner v. New York*, 198 U.S. 45, at p. 76. But for some inconsistencies in Holmes's approach on this question, see my Holmes Lecture, "The Legacy of Holmes Through English Eyes," 63 B.U. Law Rev. 341, at pp. 354-355 (1983).

<sup>62</sup> "The Search for Principle," LXIX *Proc. British Academy* 169, at p. 180.

commencing a legislative enactment these days. Case law, on the other hand, is, as we all know, derived from particular cases decided in connection with specific problems brought to the courts by individual people. With rare exceptions, statute law always operates prospectively, while the law of a case is always declared retrospectively after the facts have occurred, and in the light of those facts. Now it can hardly be doubted, I think, which of these two methods of making law is more characteristic of English law. Of course it is perfectly true that vast quantities of legislation are today churned out by Parliament and government departments as well, and in many areas of modern law, such as social security law, or housing law, or planning law, legislation is more characteristic of our times than is case law. But despite this quantitative superiority of modern legislation, it remains, in many ways, true to say that case law reflects the spirit of English law far more than legislation does. Much of this modern legislation is not administered by lawyers but by civil servants; indeed lawyers often have very little to do with it. Modern legislation pertaining to the administrative state is thus politicians' law, and administrators' law, rather than lawyers' law. Nobody could get a feel for the spirit of the English legal system by reading the Social Security Acts, for instance, and it is hardly a coincidence that even today our first year law students spend far more time reading cases than statutes.

Next, it is our system of case law which still marks us off from many continental legal systems,<sup>63</sup> even if the gap is diminishing. In modern German law, for instance, cases are regularly cited and considered in the judgments of higher

<sup>63</sup> As was acknowledged by Lord Denning in *James Buchanan & Co. Ltd. v. Babco Forwarding* [1977] 1 All E.R. 518, at p. 522.

courts; but not in the same sort of way as in England. For instance, there is far less detail in the analysis of the facts of cases because "the search is not for precedent but for examples."<sup>64</sup> And anyhow it remains true, even in Germany, that the arguments are presented in a much more abstract manner than in English courts.<sup>65</sup> But beyond all this, I think it would be generally agreed that English lawyers and judges are much more at home handling case law than they are handling legislation. Case law usually enables judges to thread their way through a maze of authorities, balancing the need for generalisation in the law with a healthy respect for the particular facts of particular cases, and especially of the case in hand. Legislation is often more rigid, producing anomalies which our methods of interpretation fail to solve, and sometimes illustrating that the particular case in hand was quite unforeseen when the legislation was drafted. Furthermore, despite many modern attempts to suggest that the courts now adopt more purposive methods of construction of statutes,<sup>66</sup> the more literal and grammatical methods of interpretation are still pursued by the judiciary in the great majority of cases; and few people can read a case on statutory interpretation with a satisfied sense that some intelligent and rational process of decision-making is being followed. And then we must also remember how even decisions on the interpretation of statutes become themselves subject to the complexities of the English system or precedent. So even if a statute does attempt to introduce some new principle into English law,

<sup>64</sup> See Markesinis, "Conceptualism, Pragmatism and Courage," *loc. cit.* at p. 58.

<sup>65</sup> *Ibid.* at p. 60.

<sup>66</sup> See Bennion, *Statutory Interpretation*, (1985) pp. 656-674.

what that principle is, and how it is to be developed, will very soon become settled by precedent.

Of course, it may be objected, part of the fault for all this lies in the way legislation is drafted in England. Most legislation is not drafted in the form of a statement of true principles, broad generalisations. Much of it is drafted in the form of a set of specific rules, ad hoc solutions to particular problems. Nobody would read a modern English statute for its literary elegance as it was said that Flaubert used to read the French *Code Civil*.<sup>67</sup> But this only goes to confirm my point about the power of the pragmatic approach in English law. Even when we do use legislation, an instrument well suited to the enactment of broad principles and generalisations, we find ourselves so shackled by traditional common law methodology, that we fail to use legislation in an effective and principled manner. Our preference for precedent or pragmatism over principle is thus itself partly responsible for the unsatisfactory way we handle statute law. In particular, the detailed and crabbed style of legislative drafting means that it becomes almost impossible for the courts to draw principles from legislation, to treat legislation as a living graft on the common law, and to develop the law as an integral whole.<sup>68</sup> What is more, the blame for this aspect of legislation cannot in fairness be laid at the legislature's door. Most legislation, as I have said, derives from politicians and administrators, but it is lawyers who are responsible for the form and shape of legislation. It is government lawyers who have persuaded politicians and administrators that legislation should be drafted in the way

<sup>67</sup> See for some fierce, but not unjustified, criticisms of the style of English legislative drafting, Honoré, *The Quest For Security: Employees, Tenants, Wives*, (Hamlyn Lectures, 34th Series, 1982), pp. 118–123.

<sup>68</sup> See my "Common Law and Statute Law," (1985) 48 M.L.R. 1.

we are all too familiar with; and the result, whether by design or accident, is to continue the tradition which means that the methodology of the common law remains supreme, that pragmatism reigns over principle.

Thus, somewhat paradoxically, it is the common law which remains the true repository of principle in the English legal system, with legislation still retaining the characteristics of an intruder. Of course this is paradoxical because I have attributed to the common law the chief characteristic of being precedent- rather than principle-oriented, and yet I am now suggesting that the common law is the source of most principles in English law. But on further examination the paradox melts away. As I said earlier, nobody questions that even the common law, even the case law system of precedent, does to some degree work through generalisations and therefore through principle. The only claim I am making is that, as between the two, the spirit of English law seems to be better reflected by the idea of precedent than of principle.

One further dimension to the preference for precedent over principle, the concrete over the abstract, is to be found in the modern proliferation of overt discretions in the legal system. Sometimes these discretions are perhaps merely doing for the twentieth century what the jury and Equity did for earlier centuries—that is providing some method of tempering the generalisations of legal principle to the facts of specific cases. But as I have pointed out on a previous occasion,<sup>69</sup> there is much evidence to suggest that English judges are being increasingly swayed by the urge to do justice in the circumstances of every particular case, and they often seem to be assisted in this by legislation expressly

<sup>69</sup> See my "From Principles to Pragmatism" (Oxford, 1978).



creating judicial discretion. In the process, new phenomena are emerging, such as the increasing use of common law and legislative "guide-lines." The law is only slowly coming to grips with the concept of guide-lines; they seem to be neither principles nor rules, but appear to be a sort of check-list of factors relevant to be borne in mind in making a proper decision in the particular circumstances of the case.

I want now to suggest that the general English preference for precedent over principle, like the more general preference for the pragmatic over the theoretic, can also be traced back to some important political ideologies rooted in the constitution settlement of 1688. Of course, the general system of precedent in English law is much older than that, and I do not profess to trace the system back to its earliest roots. But I do believe that the general English preference for the cautious, step by step methodology of change and reform, which is symbolised by the preference for the system of precedent over principle, also derived much strength from the impact of the French Revolution on English political thought. The political philosophy of Edmund Burke is perhaps unfashionable in England today; but the survival of the English common law, and the failure of Bentham's efforts to replace it with codification, do in a sense symbolise the degree to which Bentham's legacy has been qualified by that of Burke. While most English lawyers are aware of the immense impact which Benthamism had on the development of our law,<sup>70</sup> I suspect that few today appre-

<sup>70</sup> In particular as a result of Dicey's *Law and Opinion in England*, misleading though much of that was in its understanding of the role of Benthamism in nineteenth century legal history. See my *The Rise and Fall of Freedom of Contract* (1979), esp. pp. 231-237.

ciate the extent to which Benthamite theory has been tempered by Burkean pragmatism.

Burke, of course, summed up the political ideology of eighteenth century England very much in the pragmatic tradition. The British Constitution, like the common law, had been built up by a slow process of accretion, brick upon brick. It had not been made in a clean sweep by Constituent Assemblies, bent on reforming everything from the political process to the daily calendar by which we live. Even the Revolution of 1688 was not, Burke had famously insisted, a true revolution, but a minor shift in the line of succession to the Crown, an illustration indeed of "the use both of a fixed rule and an occasional deviation."<sup>71</sup> When laws and institutions grow organically in the English way, it is dangerous to tamper with the different bits which may seem useless and outdated. The proof of this is that the system as a whole works, even if we cannot say why it works, and what rational purpose the different bits may serve. Each part of the total edifice may well have its purpose, even where we cannot understand it. Trying to rebuild anew, on the basis of pure theory, and without regard to the experience of the ages, is dangerous.<sup>72</sup> So here again we see how the spirit of English law has favoured precedent over principle, case law over legislation, pragmatism over theory.

### *The Practical and the Academic*

My fourth contrast is that between the practical and the academic, and it is, I am sure, no coincidence that the word

<sup>71</sup> See the "Reflections on the Revolution in France," in *Edmund Burke on Government, Politics and Society* (ed. B. W. Hill (Penguin), 1975), p. 285.

<sup>72</sup> *Ibid.* esp. at pp. 326–327.

academic has two distinct senses. On the one hand, it can mean a point of law or an approach to a legal question which is possibly of theoretical, but of no practical importance, and on the other hand, of course, it can refer to a scholar or teacher. While it would perhaps be unfair to suggest that English lawyers typically regard academics in the second sense as persons of possibly theoretical but no practical importance, it is not, I think, unreasonable to suggest that in the English legal system the scholar or teacher is a person with a decidedly inferior status. We are so used to this disparity of status in England that it usually passes without comment, and tends to be regarded as part of the natural order of things. In England, judges and practitioners are so obviously persons of greater importance, higher status and more extensive responsibilities than academics that it is perhaps difficult to appreciate that things are not necessarily thus, and that indeed, such matters are often differently arranged even in other common law countries such as the United States.

If we first of all compare the function of the academic and the practitioner or judge in the English legal system, it seems clear that, according to the received wisdom, the academic has a fairly modest role. His job is to teach, but what does he teach? Why, clearly, he teaches the law laid down by the courts and by Parliament. Naturally, this itself emphasises his subordinate role in the system as a whole. But there is also a pretty strong tradition among English lawyers that law is anyhow not taught, but learned. Book-learning is often regarded with some scorn, as compared with practical experience, learned on the job. I recall some years ago an expert witness being cross-examined in a trial by a distinguished barrister who tried to throw some doubt on the witness's credentials by asking the devastating ques-

tion: "I suppose your knowledge all comes from books?" The witness answered, not unfairly, as it seemed to me, that that was one of the usual ways of acquiring knowledge.<sup>73</sup> But the scepticism about the value of book learning seems to me to persist, as is reflected by the continued strength of the system of articles and of devilling in chambers. It is, after all, not long since the ablest intending legal practitioners were recommended to read classics at Oxford, and then "pick up [their] law as [they went] along."<sup>74</sup>

The academic is also expected to do research and to write, but what kind of research is he expected to indulge in? Well, in very recent times, academics have begun to do serious empirical research into the workings of the legal system in a whole variety of ways. For instance, they have begun to study the workings of the court system in a number of different areas, such as in the sentencing system,<sup>75</sup> in regard to bail,<sup>76</sup> legal aid,<sup>77</sup> family law matters,<sup>78</sup> as well as in regard to accident compensation.<sup>79</sup> Some of

<sup>73</sup> I cannot now trace this exchange.

<sup>74</sup> Lawson, *The Rational Strength of English Law*, (1951) p. 29.

<sup>75</sup> See, e.g. Ashworth, *The English Criminal Process: A Review of Empirical Research* (1984).

<sup>76</sup> See, e.g. King, *Bail or Custody* (1971)—a piece of empirical research which is now somewhat out of date, but was almost the first serious attempt to study what actually happened when prisoners asked for bail.

<sup>77</sup> Figures on criminal legal aid for indictable offences are now published in the annual Criminal Statistics, but little is still published about legal aid in magistrates' courts. See generally, Zander, [1969] Crim. L.R. 632.

<sup>78</sup> See, e.g. Eekelaar and Clive, *Custody after Divorce* (Centre for Socio-Legal Studies, 1977) and Eekelaar and Maclean, *Maintenance After Divorce* (1985) for samples of a substantial piece of empirical research in this area.

<sup>79</sup> See, e.g. Harris *et al*, *Compensation and Support for Illness and Injury* (Oxford, 1984). It must not be forgotten that some of the earliest work in this area (by Ison, see his *The Forensic Lottery* (1967)) pre-dated the Pearson Report by many years.

this work has been taken seriously by those responsible for the law, though I think it may be significant that it seems to be more often the Home Office than the chief legal departments of the Government which responds to this kind of research. Judges and practitioners have so far shown scepticism, if not downright hostility, to some research of this kind. Consider, for instance, how little impact the legal system has so far had from all the empirical research, much of it commissioned by the Pearson Royal Commission, into the accident compensation system. Although we now know how unbelievably costly, wasteful, inefficient and even inequitable, the system of tort compensation for accidents is in the mass, this knowledge has so far had no perceptible effect on individual cases at all. But in any event, by and large, this kind of empirical research has still scarcely scratched the surface of the English legal system. In comparison with the total range of the legal system, there has been relatively little of it, and its impact has been small.

If we leave on one side this kind of empirical research, and ask about the other research activities of English legal academics, it is, of course, apparent, that (apart from writing of a completely theoretical or even philosophical nature, about which I shall say something more later), much legal research is simply devoted to reading about, and restating the law in convenient and accessible form. The purpose of the English legal textbook, or the standard practitioners' book is thus not thought of as a significantly creative exercise. Others—especially judges, of course—*make* the law; academics simply read it up, and then try to reduce it to some sort of shape or order. Of course there is critical comment aplenty, in the learned journals, and sometimes in the textbooks too. And some of this comment may occasionally be found useful by barristers arguing later cases; and still

more occasionally, judges may actually cite the views of a learned author and perhaps even do him the honour of adopting his arguments. These things do happen; but it is, after all, the judges who decide in a practical sense whether the academic is right or wrong. And although some modern judges have paid the academic profession some handsome compliments,<sup>80</sup> it is only a few years since we were forcibly reminded by the House of Lords that there are great dangers in judges placing any reliance on textbook authority, even when the textbook is simply purporting to analyse judicial decisions.<sup>81</sup>

I shall in my last lecture suggest that this view of the function of the academic does him less than justice, and to be fair, it is perhaps on the wane; but historically there is no doubt that the relatively minor role of the jurist or the academic is one of those factors which have differentiated English from continental law; and if today that difference is diminishing, it is, as Professor Lawson has said, still the case that in the common law world, academic lawyers "have to work very hard to make themselves heard whereas the Civil Law is inconceivable without the jurist."<sup>82</sup> It is perhaps not surprising, in view of the historical role of the jurist in Roman law, that academics still play a major role in modern civil law systems. In Germany, for instance, we are told that the prestige of law professors equals if it does not exceed that of the most distinguished judges; and judges will discuss academic writings at length in their judg-

<sup>80</sup> See Sir Robert (now Lord) Goff "The Search for Principle," (1983) *LXIX Proc. British Academy* 169.

<sup>81</sup> *Johnson v. Agnew* [1980] A.C. 367, at p. 395. Surprisingly, this was in a speech of Lord Wilberforce, one of the most thoughtful and intellectual of modern English judges.

<sup>82</sup> *A Common Lawyer Looks at the Civil Law*, p. 69.

ments.<sup>83</sup> The status of law professors is also high in France, though French judges never discuss anything at length. But even in modern America, which of course has almost no civil law antecedents, the academic plays a far higher role than he does in England. One, though not the only, cause of this must surely be that in many modern European countries, as also in America and Canada, academic lawyers are often appointed to the bench. In England, of course, this never happens.

Now the more modest role of the English academic is surely one of the reasons that English law often seems to lack shape or structure or rational arrangement. Professor Lawson himself suggested that a civil lawyer's first reaction on encountering the common law would be to say that it was not a legal system at all, but "something queer, outlandish and barbarous."<sup>84</sup> And more recently Professor Simpson, who has made a serious study of the relationship between legal systems and legal literature,<sup>85</sup> has said that the common law "is more like a muddle than a system . . . [It is, he says] difficult to conceive of a less systematic body of law."<sup>86</sup> These remarks, from distinguished academics, do not look exactly like compliments to the English legal system; but somehow this very same lack of system, rationality and order in the law is often seen as the very virtue of the pragmatic and workmanlike common law which I touched upon earlier. So, for instance, Lord Roskill has recently criticised, if not too seriously, those academic lawyers "who

<sup>83</sup> Markesinis, *loc. cit.* at p. 59.

<sup>84</sup> Lawson, *op.cit.* at p. 4.

<sup>85</sup> See "The Rise and Fall of the Legal Treatise," 48 *Un.Chi.L.Rev.* 632 (1981).

<sup>86</sup> "The Common Law and Legal Theory," p. 99, in *Oxford Essays in Jurisprudence* (ed. Simpson, 1973).

will seek intellectual perfection rather than imperfect pragmatism.”<sup>87</sup>

I have said that the view of the academic as having a modest role in the English legal system may be on the wane; but if it is, this fact is not yet reflected in the different social status accorded to the academic on the one hand and the practitioner and judge on the other. It is particularly invidious for an academic to raise these issues as a matter for serious comment because by doing so he must inevitably seem to be complaining about his own inferiority of status. Nevertheless, it does seem to me worth making a few remarks about the different status of the academic on the one hand, and practitioner and judge on the other, because I am firmly convinced that the differences in their status are not unconnected with the whole role of theory, reason, and rational argument in English law. Most of the differences are obvious enough, and hardly need to be dwelt upon. All High Court Judges, for instance, become knights (or Dames) and are paid over £60,000 per annum, while academics can at best become professors and are paid about £20,000 per annum. A very small number of exceptionally distinguished academics are honoured by knighthoods, but their salaries remain unchanged. Perhaps this reflects the true worth of the functions performed by the two professions, but if so, it is odd that in America law professors in top law schools are generally paid more than most judges, even though American judges have much greater constitutional responsibilities than English judges. Nor are these differences in salaries and status the result of market forces, because they are determined by the government, and not

<sup>87</sup> “Law Lords, Reactionaries or Reformers,” (1984) *Cur.Leg.Probs.* 247, at p. 258.



the market. Judges must, of course, have demonstrated professional skills of the highest calibre prior to their appointment; and I do not for a moment wish to deprecate the value of those skills. But it is equally true that academics must demonstrate exceptional intellectual abilities if they are to rise to the highest ranks in the academic world, and I do not know how one is to judge the relative worth of these differing skills.

Other differences in status are visible in England as compared with America. For example, I have friends in America who are regularly called upon to conduct seminars for judges on the processes of judging; in England, when someone had the temerity to suggest some years ago that judges should be given some training in sentencing, the immediate reaction was to ask who could possibly train the judges?<sup>88</sup> Or again, consider the occasions on which the government calls on practitioners or judges for advice or to act as chairmen of committees charged with some study of the law or to examine into some incident. It is very rare that academics are invited to perform such functions in England,<sup>89</sup> but it is far from rare in America.<sup>90</sup> It is embarrassing for an academic to raise these matters, so I stress that the only reason that I do so is that

<sup>88</sup> See Ashworth, *Sentencing and Penal Policy*, (1983) pp. 66–67.

<sup>89</sup> A notable, but almost unique, exception was the invitation to Professor L. C. B. Gower to report into the problems of regulating the securities industry, see his Report, "Review of Investor Protection," Cmnd. 9125 (1984). Of course academics do now play a prominent role on the Law Commission and have for long been associated as members of law reform committees. But such bodies are nearly always chaired by judges.

<sup>90</sup> For instance, the Chairman of the Study Group appointed by the Chief Justice of the United States Supreme Court in 1971 to inquire into the caseload of the court was a professor of the Harvard Law School—Professor Paul Freund.

they tell us something about the nature of our legal system. Indeed, it is, I suggest, clear enough that the relative status of the academic and the practitioner in the English legal system is a reflection of the differences I have been trying to outline across the whole spectrum of theory and practice. Academics are theorists and the English legal system has an aversion to theory.

## *2. The Strengths of the Pragmatic Tradition*

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In this lecture I want to pay due respect to the virtues and strengths of the English pragmatic tradition. As an academic myself, I can hardly be expected to have the same scorn for theory that the official vision of the English legal system seems to display, and I shall in my next lecture say something about the weaknesses of the pragmatic tradition. Furthermore, the strengths of the pragmatic tradition, the so-called English genius for “muddling through,” the tendency to elevate the virtues of sturdy commonsense over those of rational argument, have so often been trumpeted by a traditional type of bluff, hearty, no-nonsense lawyer that it is easy to react against these exaggerations. In this lecture I want to avoid both the exaggerations and the reaction and to probe a little more deeply into precisely where the strengths of the pragmatic tradition can actually be located.

I shall start by looking at some aspects of the English judicial process, taking that in its broadest sense to include

the role of the bar, the conduct of trials and the making of legal decisions. But I confine my remarks largely to the work of the High Court and the appellate courts. I am well aware that this is to ignore what is quantitatively the largest and perhaps most significant part of the legal system, and I know that many of my colleagues would complain that there is a sort of elitism in the constant tendency of academics (and perhaps practitioners also) to devote their thoughts and their rhetoric to the higher courts and to ignore what happens in magistrates' courts or administrative tribunals, or even on the very ground floor, as it were, before disputes reach the stage of adjudication in courts or tribunals at all. My justification is that I am trying in these lectures to capture something of the spirit or ethos of the English legal system, to identify an aspect of English legal culture; and in this respect the tone is set by the higher courts. And surely Miss Hamlyn would approve of this concentration on the higher courts, elitist though it may be; for one of the differences between England and continental countries, as I have already suggested, lies in this very tendency of the English legal system to depend upon judges of great eminence and prestige.

### *Logic and Experience*

In my last lecture I pointed out that the constant rejection of "logic" by judges was often misconceived. Judges do habitually use logic, in the sense that their decisions nearly always involve, in the ultimate analysis, a finding of a major premise, consisting of a general proposition of law, a finding of a minor premise which consists of a determination that the facts of the present case constitute that premise, and an application of the one to the other to produce a true logical deduction. Indeed, as I have already said, it is clear that

judges frequently use even mathematical logic in their decisions.

Some excellent examples, not only of the use of this kind of mathematical logic but also of the pragmatic grounds on which its use may be limited or qualified, can be found in a series of cases concerning the interest rates to be awarded for damages in personal injury cases. I will take a moment to refer to just two of these problems. Under current statutory provisions the court is bound to award interest on damages for personal injuries unless there are special reasons to the contrary. In the case of damages for pain and suffering and loss of amenity, what are customarily called damages for non-pecuniary loss, it was at first held by the Court of Appeal that no interest should be awarded on the special ground that such damages are assessed at the rates prevailing at the date of trial. So if a person lost a leg in an accident in 1982 at a time when the damages for the non-pecuniary aspects of such an injury would have been (say) £20,000, but his case did not come on for trial until 1986 by which time the level of damages for such a loss had risen to £30,000, the judge would be bound to award the plaintiff the sum of £30,000. So the longer the action was deferred, the higher the damages would be. This is itself an illustration of a sensible piece of pragmatism, the general tendency of the courts to fix damages on the basis of the facts known to them at the time of the trial rather than trying to shut their minds to those facts and instead to put themselves back at the date of the injury and then speculate on what might have happened. Strictly, according to the usual principles of the law, damages ought perhaps to be assessed as at the date of the injury. But that would be extremely harsh if no allowance was made for inflation, while if allowance was made for inflation, it would only prove a more

complicated and probably less accurate way of assessing the damages than going by the figures prevailing at the date of the trial.

But given that damages for non-pecuniary loss should be assessed at the date of the trial, what then is to happen about interest? In *Cookson v. Knowles*<sup>1</sup> the Court of Appeal thought that this was a special reason for not awarding interest on such damages. But in *Pickett v. British Rail*<sup>2</sup> a few years later this view was disapproved by the House of Lords. The House pointed out that interest on damages is customarily awarded for two different purposes: one is to compensate for the time that the plaintiff has been "kept out of his money," as the phrase is, and the second is to compensate for the fall in the value of money due to inflation since the money should have been paid. The practice of assessing damages for non-pecuniary loss at the rates prevailing at the date of the trial means that there is no need to award interest to compensate for the effects of inflation. The plaintiff has already been compensated for the effects of inflation. But it does not mean that there is no need to award interest for the first of these purposes: the plaintiff has still had to wait for his money until the trial, instead of receiving it immediately he was injured, or anyhow, at the date of service of the writ, from which interest customarily runs for such awards. It was therefore held that the plaintiff should be awarded interest for this purpose. So the ultimate result here was a combination of pragmatic common sense and genuine logic. Assessing damages at the date of trial is pragmatism; but awarding interest with the inflation element removed is logically required once the purposes for which interest is awarded are granted.

<sup>1</sup> [1977] Q.B. 913.

<sup>2</sup> [1980] A.C. 136.

My second example, however, shows how this kind of logic can be limited in practice. This example concerns the special damages which are often involved in personal injury cases. Special damages, of course, are those items of pecuniary loss which have occurred before the trial and so can be itemised. Now these items of loss will obviously date from different times. For instance wage losses may date from a whole series of successive pay days, perhaps weekly pay days, during the whole time between the accident and the trial. Other pecuniary losses may similarly date from different times, but will often date from haphazard times since they will often have been incurred at irregular periods. Now interest on special damages must be at the higher rates, which include both the inflation element and the real interest rate, for the appropriate period, but what period should this interest cover? I am tempted to say that as a matter of strict logic this interest should no doubt be calculated on each item of loss as and when it was incurred. But in practice this is not done, and it is not done because it would simply not be worth the trouble and cost of trying to make such precise calculations. In the leading case of *Jefford v. Gee* Lord Denning M.R., speaking for the Court of Appeal, declared that interest on "special damages should be dealt with on broad lines. The amounts of interest at stake are not large enough to warrant minute attention to detail."<sup>3</sup> Thus, in substance, the courts award interest for half the period from the date of the accident to the date of the trial for all these miscellaneous items of pecuniary loss, on the rough and ready assumption that they have been incurred more or less evenly spread over that period. In actual practice, the courts do not even do this, but simply award damages for

<sup>3</sup> [1970] 2 Q.B. 130, at p. 146.

the whole period, but at half the usual interest rate, which of course is mathematically and logically exactly the same thing. The courts have been disinclined to depart from this approach even where the greater part of the special damages is attributable to a substantial and quantifiable wage loss several years before the accident.<sup>4</sup> And there are other sorts of cases apart from personal injuries in which the courts have rejected the use of “excessive logical refinement” in the assessment of damages as “impracticable.”<sup>5</sup> Is this approach really illogical? Clearly not in the correct sense. And the reason why it is not illogical is of some general importance.

It is not illogical because the law has other objectives besides those more detailed objectives I have referred to above about the purpose of interest awards. One of these other objectives is the efficient administration of justice, including both the trial of cases by the courts, and the provision of a framework in which disputing parties can settle their claims with the minimum cost and difficulty. Now the desire to avoid excessive detail in the calculation of interest rates on special damages clearly illustrates how this general objective of the judicial process qualifies the more detailed objectives concerning the award of interest in personal injury cases. Efficiency in the administration of justice requires that we do not spend more money trying to work out what damages to award than the amount of damages themselves. But it will be seen at once how this also illustrates a much more general difficulty about the use of logic in the law which can affect almost any decision on any sub-

<sup>4</sup> See, e.g. *Dexter v. Courtaulds Ltd.* [1984] 1 All E.R. 70.

<sup>5</sup> See, e.g. Kerr J. in *Kyprianou v. W. H. Pim & Co. Ltd.* [1977] 2 Lloyd's Rep. 570, at p. 580.



ject. In an open ended system of rules like the common law, major premises can hardly ever be comprehensively stated. It is nearly always open to the judges to read in qualifications or exceptions to apparently firm rules because there are nearly always other purposes and objectives of a general character which can in particular circumstances qualify the more specific rules which the court is dealing with. General objectives such as the efficient administration of justice, fundamental procedural rules requiring that justice be seen to be done, broader principles drawn from other areas of the law, and so on, must often qualify the precise legal rules before the court. Even statutory rules, which in this country often appear to be stated in dogmatic and unqualified form, still have to be read in the light of general principles and objectives of this character. For example, a statutory provision declaring that anybody who does such and such shall be guilty of an offence still has to be read in the light of general principles of the criminal law, such as requirements of *mens rea*, the capacity of children or insane persons, the responsibility of secondary parties, and so on. That is why it is rarely possible to take even the simplest statutory prohibition as the major premise of a syllogism, feed in the finding that the accused has done the prohibited act as the minor premise, and then expect the conclusion to follow validly that the accused is guilty of the offence. The statutory provision will very rarely, and perhaps never—and I incline to think “never” is more correct—contain the whole of the major premise which is required before syllogistic logic can get to work.

Judges who reject “strict logic” are often doing nothing more than insisting that the apparent premises of a syllogism proffered in argument must be qualified by other factors of the kind I have just mentioned. It is clear, for

instance, that this was what was going on in the *Majewski* case, which I referred to briefly in my last lecture. When the law lords in that case refused to hold that drunkenness was on the same footing as mistake they were clearly influenced, I think, by the belief that one objective of the criminal law was to satisfy the moral sense of the man in the street, and that this would not be done by putting drunkenness on a par with mistake. There is nothing contrary to logic in that, although the conclusion is of course debateable on other grounds.

Now it seems to me clear that *this* restriction on the use of logic, though in the strict sense not illogical, is in fact one of the great strengths of the common law methodology. Precisely because major premises can so rarely be stated definitively and comprehensively, the courts retain the constant power to qualify or amend previous rulings in the light of other principles of the law, other objectives of the legal system, as new facts come to light, new disputes arise. Even with statute law they retain this power to some degree, though certainly to a more limited degree; and that is one of the main reasons that English law seems to have greater pragmatic power when dealing with the common law than when dealing with legislation.

This is, however, not the only kind of situation in which judges purport to reject the use of logic or of "strict logic." In some cases, this kind of language means merely that they are rejecting the application of an analogy. But even here there is, I think, a quite intelligible sense in which when they do this they are often consciously pursuing a pragmatic course at the expense of creating a coherent, systematic body of principle. This, too, is often a sign of strength and realism in the law, rather than any indication of irrationality. As I have already discussed the general place of logic in

the law at some length I will confine myself here to three further illustrations.

Let me take first a case which may today seem a poor example of the common law's sense of fairness, but which I think must still be allowed to have some real pragmatic strength. In *Best v. Samuel Fox & Co. Ltd.*<sup>6</sup> in 1952 the House of Lords was faced with the question whether a wife had a right of action for loss of *consortium* against a third party who had caused physical injury to her husband to such a degree as to deprive him of his sexual capacity. Now at that date there was no doubt that a husband had an action for loss of *consortium* against a third party who injured his wife, though there were certainly doubts as to whether that action lay where the deprivation was only partial, and not a total loss of *consortium* as in this case. But assuming that an action lay for partial loss of *consortium*, was the action to be made available to the wife? If this case had not arisen until the 1970s I think it is almost inconceivable that the House of Lords would not have allowed the action. But in 1952 the House rejected the claim. "The common law," said Lord Porter, "is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord with another or others is no ground for its rejection."<sup>7</sup>

While it may be difficult to justify this in modern terms, it must be remembered that the whole action for loss of *consortium* appeared to be a complete anomaly in 1952 (and indeed it was eventually abolished in 1982), and the question as it appeared to their lordships was therefore whether to extend an admitted anomaly or whether to limit an ano-

<sup>6</sup> [1952] A.C. 716.

<sup>7</sup> At p. 727.

maly with a further anomaly. To a person who believes in equality of rights between men and women, the decision must appear quite inequitable. But in a purely pragmatic sense what the decision did was to restrict the number of claims for loss of *consortium*, claims which the House of Lords regarded as undesirable. Whether one approves the result or not, it does at least seem to me to illustrate again the common law's preference for pragmatism over principle, and the relatively low priority accorded to a systematic development of rights.

My second example is, I think, a more defensible decision. In *R. v. Barrett*<sup>8</sup> the accused was charged with committing various assaults on court bailiffs who had been sent in to eject him from the house in which he was living. His defence was that he had an honest belief that he was entitled to stand his ground and defend himself in his own house, and that according to the principle of the *Morgan* case<sup>9</sup> it was immaterial whether his belief was unreasonable. It could, in fact, have hardly been more unreasonable. The accused had been ordered in divorce proceedings to pay his wife the sum of £2000 which he had steadfastly refused to pay. Despite endless appeals and applications to the courts, he had maintained this refusal until a charging order had been made on his house, and eventually the house had been sold over his head, a fact of which of course he had been given ample and full notice and every opportunity to resist. It was as a result of this sale that the bailiffs had been called in to turn him out of the house which no longer belonged to him. While asserting that a logician might have insisted in strict logic that the *Morgan* principle

<sup>8</sup> (1980) 72 Cr. App. R. 212.

<sup>9</sup> [1976] A.C. 182.

applied to the case, the Court of Appeal upheld the accused's conviction on the grounds that a mistaken belief in facts which had repeatedly been determined by the courts could not be set up as a defence to a charge of assault in this circumstances. Any other conclusion would surely have been an outrage to common sense, because one of the main purposes of having a system of courts is to provide a means of determining finally what the rights of parties are when they get involved in this sort of dispute. When the courts have made their decisions after full hearing, and with the parties taking their part, and when appeals have been exhausted, it is absurd that one of the litigants should be permitted to insist that he is right and the courts are wrong, and should further claim to be entitled to *act* on that belief. The only flaw in the court's reasoning is its suggestion that a logician might have disapproved of its decision, which seems to me a complete libel on logicians.

The stress on *facts* which I shall discuss in more detail below, and which seems to me to be closely bound up with the inclination of the common law towards precedent rather than principle, also seems to have a bearing on one of the senses in which, as we have seen, English judges tend to be so averse to "logic." A rich factual analysis enables judges to avoid what may be a facile and apparent consistency of approach which overlooks deep underlying distinctions. Consider, for instance, the judgments of the Court of Appeal in the recent case of *R. v. Deputy Governor of Camphill Prison*.<sup>10</sup> The question at issue here was whether the courts had powers of judicial review over the decisions of prison governors who exercised disciplinary powers over prisoners. Now a few years earlier the Court of Appeal had held that

<sup>10</sup> [1984] 3 All E.R. 897.

prison boards of visitors, who also have disciplinary powers over prisoners, are subject to the principles of judicial review,<sup>11</sup> and this decision was approved by the House of Lords in *O'Reilly v. Mackman*.<sup>12</sup> Were prison governors then in the same position as boards of visitors? The judges of the Court of Appeal wrestled in agony with this question, because they thought that there was no "logical" distinction between the position of prison governors and the boards of visitors, but they nevertheless felt that there were strong practical grounds for not subjecting prison governors to the control of judicial review. In the result the Court distinguished the earlier decisions but they were evidently deeply troubled by the apparent lack of logic in their decision. "I wish," said Griffiths L.J., "I could find a logical way in which to distinguish between governors and boards of visitors, but I have not been able to do so."<sup>13</sup> Now this worry at the apparent lack of logic in the decision was clearly quite misplaced.<sup>14</sup> Detailed factual examination of the position of prison governors and boards of visitors revealed many differences in their position, for instance, prison governors have managerial powers while boards of visitors do not; prison governors are responsible for day to day control and discipline in a way that boards of visitors are not; and so on. This detailed factual analysis was perfectly adequate to differentiate the two situations, and to avoid what would have been a facile and incorrect attempt to maintain consistency in the view of the court. Of course I say nothing as to whether the court was right in thinking that the factual differences pointed out by the judges were

<sup>11</sup> *R. v. Hull Prison Board of Visitors* [1979] Q.B. 425.

<sup>12</sup> [1983] 2 A.C. 237.

<sup>13</sup> [1984] 3 All E.R. 897 at p. 903.

<sup>14</sup> See Lee, Note (1985) 101 L.Q.R. 151.

sufficient to justify their conclusion, and it is noteworthy that the Northern Ireland Court of Appeal has refused to follow the English Court on this point.<sup>15</sup>

### *Rights and Remedies*

I turn now to say something of the strengths of the English legal tradition in the matter of rights and remedies. I said in my first lecture that I thought there were still many respects in which our law was more remedy-oriented than rights-oriented, and I want now to give some examples of the way in which this orientation contributes to the pragmatic strength of the law.

Pride of place here must go to two quite remarkable innovations which have recently been developed by the courts with respect to the use of interlocutory injunctions, namely the *Mareva* injunction, and *Anton Piller* injunction. These innovations have certainly justified the remark attributed to Harman J. in 1951 that, "Equity is not to be presumed to be of an age past child-bearing."<sup>16</sup> These two new types of injunction are now well known to practitioners especially in certain types of commercial litigation, but they concern areas of the law with which the average student is unlikely to come into contact. Yet they are such an interesting example of the practical strengths of English remedies in action, that they deserve some discussion in a lecture devoted to the pragmatic strengths of the English legal tradition.

Both of these developments are still very young, indeed scarcely ten years old. The *Mareva* injunction was originally devised to deal with the situation where a potential defend-

<sup>15</sup> *R. v. Governor of H.M. Prison, The Maze, ex. p. McKiernan* (1985), N.I.L.R. Bulletin, No. 6, 1985, p. 6; see Note in [1985] *Public Law* 527.

<sup>16</sup> See R. E. Megarry, (1951) 67 L.Q.R. 506.

ant, against whom a plaintiff wished to bring an action, was a foreign resident or foreign corporation with limited assets in this country. In many cases these assets are highly mobile, indeed they may consist of nothing more than cash in the bank or even a claim against an insurance company or something of that sort. Threatened with legal proceedings in England, such a foreign resident or corporation could simply remove its money and cock a snook at the majesty of English law. No matter that the plaintiff may have well-recognised rights which English courts would recognise, an English judgment would often be of little practical use unless it could be enforced against assets within the jurisdiction. There are, of course, many countries with perfectly reputable legal systems where litigation can be conducted or where English judgments can be enforced by reciprocal arrangements under which we also agree to enforce the judgments of the foreign courts. But there are also still many countries in the world where this is simply not the case.

Of course this problem has been with us for a long time, but in the 1970s it became particularly prominent because of certain new developments of commercial practice. Basically what happened was that large numbers of shipping companies began to organise their business so that virtually each individual ship was owned by a separate registered company, and a great many of these companies were incorporated in countries like Liberia or Panama, where they were very difficult to sue and where English judgments could not be enforced. Frequently, the only asset of the companies concerned was the one ship in question. The ships were, of course, mobile and were frequently worth less than the cargo they carried, which was often the source of the dispute. In addition, the shipping industry contains



many middlemen, charterers, brokers and so forth, who also may have no significant assets within the country where they carry on business, although they might have large claims for moneys due to them and might for brief periods hold large sums of money in English banks. Claims by cargo owners for damages against shipowners and charterers were often frustrated by the inability of the plaintiffs to lay their hands on any of this money, because the moment that claims were threatened or writs issued, the ships and money would disappear to foreign lands never to be seen again.<sup>17</sup>

The *Mareva* injunction was the answer to this problem. The injunction is applied for *ex parte*, that is, without prior notice to the defendant, which is of course a pretty drastic procedure, and is only justified by the fact that the whole point of the procedure is to restrain the defendant from removing the assets from the jurisdiction. Strictly, the proper course is to issue a writ, and have an affidavit drafted and sworn, in which the plaintiff sets out the nature of his cause of action, asserts that he has grounds for believing the defendant has assets within the jurisdiction, and gives reasons to suppose that those assets may be removed. The writ and the affidavit are not served on the defendant; indeed, in cases of extreme urgency the application can be made even before a writ is issued or an affidavit is sworn simply on the information provided to the judge by counsel. The application is of course made in chambers in private, and as I have said, *ex parte*, asking the court to make an order restraining the defendant from removing his assets or sometimes even from dealing with them, as where the assets

<sup>17</sup> See generally the account given by Kerr J. of the origins of the *Mareva* injunction in *The Siskina* [1979] A.C. 210.

comprise money in a bank. The court then makes the order, it is served on the defendant, and also on any bank or other third party which is known or believed to have assets belonging to the defendant, so that the first the defendant has wind of the proceedings is when he actually receives the court order. He is, of course, then entitled to go back to the court and ask to have the injunction lifted on proper grounds, but in practice this is rarely done. What normally happens is that if the defendant wishes to contest the litigation itself, he provides a bank guarantee or some similar security acceptable to the plaintiff, and his assets are then released<sup>18</sup>; but the plaintiff now has sufficient assurance that his rights will not be frustrated by inability to enforce any judgment he may get.

This procedure has rapidly established itself as an exceptionally useful practical weapon in much commercial litigation,<sup>19</sup> and within a couple of years of its introduction it was said that some twenty applications per month were being granted in the High Court. From the beginning, the courts showed awareness of the extremely difficult situation in which the plaintiff is often placed in these cases. He frequently knows very little of the defendant's assets, sometimes nothing more than the name of his bank, but this is enough. It is true that the plaintiff must also give some grounds for supposing that the defendant may remove his assets from the jurisdiction if the injunction is not granted, but here too the courts have shown great realism. As Lord Denning said in one of the early cases, there are some com-

<sup>18</sup> See *Third Chandris Shipping v. Unimarine* [1979] Q.B. 645.

<sup>19</sup> The decisive case establishing the authority of the courts to award such injunctions was *Rasu Maritima v. Perusahaan Pertambangan* [1978] Q.B. 644 which contains a characteristic judgment of Lord Denning, tracing the history of such procedures back to the 17th and 18th centuries.

panies whose very structure and nature invites comment and suspicion:

“We often see in this court,” he said, “a corporation which is registered in a country where the company law is so loose that nothing is known about it—where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire cat.”<sup>20</sup>

Of course practical problems arose, and had to be carefully dealt with. The procedure by way of *ex parte* injunction is plainly open to abuse, and the courts have therefore insisted that the plaintiff is under a duty to make full disclosure of all relevant facts before the injunction will be granted.<sup>21</sup> Then there were difficulties concerning the rights of third parties, such as banks, who might find themselves compelled to dishonour their clients' cheques at a moment's notice. Furthermore, banks might incur substantial costs in combing through their books to find out if a defendant had an account with them. Clearly third parties need protection in these and other ways against the effects of a *Mareva* injunction, and in a series of cases the courts have worked out a number of detailed rules to achieve this result without substantially weakening the utility of the injunctions themselves.<sup>22</sup> Since then, the *Mareva* injunction has gone from

<sup>20</sup> *Third Chandris Shipping v. Unimarine*, *supra*, at p 669.

<sup>21</sup> See, e.g. *The Assios* [1979] 1 Lloyd's Rep. 331.

<sup>22</sup> See *Z. Ltd. v. A.-Z.* [1982] Q.B. 558; *Iraqi Ministry of Defence v. Arcephey* [1980] 1 All E.R. 480.

strength to strength. It has been extended beyond the commercial sphere, and used against a personal defendant temporarily resident in England where there were grounds for thinking that he might disappear at any moment, taking with him some £34,000 which the plaintiff claimed the defendant had obtained from him by fraud.<sup>23</sup> It has been used in a fatal accidents claim to restrain foreign defendants from removing an aircraft from England, where the aircraft appeared to be their only asset in the country.<sup>24</sup> Indeed, the procedure has been so useful that the powers of the courts were extended by the Supreme Court Act 1981 to enable such injunctions to be granted even where there was no foreign element in the case, but it is simply feared that the defendant may remove or dissipate any assets before the plaintiff can obtain and enforce a judgment. In some cases the *Mareva* injunction is now made still more effective by requiring the defendant to disclose what assets he has where the plaintiff is unable to obtain this information. The latest extensions of the device came as recently as 1986 when the courts decided that in appropriate and extreme circumstances a defendant could even be temporarily restrained from leaving the country, either under the all but obsolete writ of *Ne exeat regno*, or by other suitable order if that was not available.<sup>25</sup>

Within a few years of the invention of the device Kerr L.J. remarked that it "has pervaded the whole of our law and . . . is an extremely useful addition to our judicial armoury."<sup>26</sup> Some of the most dramatic examples of its util-

<sup>23</sup> *Prince Abdul Rahman Al Sudairy v. Abu Taha* [1980] 3 All E.R. 409.

<sup>24</sup> *Allen v. Jumbo Holdings Ltd.* [1980] 1 W.L.R. 1252.

<sup>25</sup> *Al Nakhel Contracting & Trading Ltd. v. Lowe* (1986) 136 New L.J. 164; *Bayer A.G. v. Winter* (1986) 136 New L.J. 187.

<sup>26</sup> *Z. Ltd. v. A.-Z.* [1982] Q.B. 558, at p. 584.

ity have been provided by a number of frauds and swindles, some of gigantic proportions, in which money has been temporarily deposited in English banks, and in which the *Mareva* injunction has been used to prevent the dissipation of the money, sometimes within a matter of days. In one case, for instance, an injunction was granted to aid in the recovery of some £3.5 million alleged to have been obtained by a swindle,<sup>27</sup> and in another case where the defendants were alleged to have defrauded the plaintiffs of over £5 million, most of the money was traced within a few days into a number of London banks, and then recovered with the aid of a *Mareva* injunction<sup>28</sup>; in this case the defendants were required to disclose what had happened to a further sum of £383,000 which they had succeeded in getting out of one of the banks before the injunction could be obtained. In another case<sup>29</sup> in 1986, the defendant, who had been working in Saudi Arabia, flew to London, apparently bringing with him some £14,000 which it was claimed he had stolen from his employers in Saudi Arabia. The defendant planned to fly on out of England the next day, so he was met at the airport and served with a *Mareva* injunction later the same day, together with a further order to prevent his leaving the country.

The *Anton Piller* order has revealed a similar inventiveness, and willingness on the part of the courts to grant effective remedies to enforce legal rights. This order is used in a different sort of commercial context from the *Mareva* injunction, though the two have sometimes been married to pro-

<sup>27</sup> See the unreported case referred to in *Bekhor Ltd. v. Bilton* [1981] 1 Q.B. 923 at p. 958.

<sup>28</sup> *Ibid.* See also *Bankers Trust Co. v. Shepira* [1980] 1 W.L.R. 1274.

<sup>29</sup> *Al Nakhel Contracting & Trading Ltd. v. Lowe, supra.*

duce an exceptionally drastic legal remedy. The *Anton Piller* orders have been used principally against companies engaged in what may be called copyright piracy. In recent years the ready availability of means of copying pre-recorded audio and video cassettes has of course become well known. Although all such activity may technically amount to a breach of copyright, nobody seriously supposes that purely private recording can be controlled by law; but doing it on a commercial basis for profit is a very different matter. The copyright owners feel, with every justification, that large scale commercial dealings in copied tapes is a fraud which ought to be stopped, but it is in practice very difficult to control this kind of fraud. The problem is that the copies themselves may be well concealed, or even abroad; and when individual outlets are tracked down, these can easily enough be closed down, but books and papers and records can quickly be destroyed or removed and the pirates can find new outlets. The *Anton Piller* order was devised to deal with this problem.<sup>30</sup> Like the *Mareva* injunction, the essence of the order is secrecy, and it therefore is applied for *ex parte* in the same way as the *Mareva* injunction. What the *Anton Piller* order gives the plaintiff is the right to enter the premises of a retail outlet for the pirated goods, to search the premises, and the books and records available there, in order to discover who are the principals behind the fraud. In addition, the records may give the plaintiff information about the numbers of copied tapes which have been produced and sold, and this can then be used as the basis for a claim for damages based on lost royalties.

<sup>30</sup> See the leading case, *Anton Piller K.G. v. Manufacturing Processes Ltd.* [1976] Ch. 55.

Here again, new developments and extensions have occurred, and precautions have been taken to prevent abuse. Strictly speaking, the *Anton Piller* order does not give the plaintiff an actual right to enter the defendant's premises, but if the defendant refuses him access by force, he may be in contempt. In practice what happens is that the order is served by the plaintiff's solicitor, who will advise the defendant that he may consult his own solicitor, and will give him the chance to do so. But the defendant is for practical purposes restrained from disappearing or destroying the evidence in his premises. The efficacy of the *Anton Piller* order was greatly enhanced when it was decided that an order for disclosure of information could be attached to it, and although the House of Lords then proceeded to hold that such an order could not require a defendant to incriminate himself,<sup>31</sup> this decision was reversed within a few months by the Supreme Court Act 1981.<sup>32</sup> The availability of the orders was also extended in 1978 to catch the so-called "bootleggers" who attend live musical performances and record the music with secret recording devices concealed on their person or in suitable containers.<sup>33</sup>

Like the *Mareva* injunction, these *Anton Piller* orders have been astonishingly successful.<sup>34</sup> They are in very extensive use, and I am told on good authority that a large firm of London solicitors maintains a whole section of its litigation department devoted to handling and serving *Anton Piller* orders. Again, as with the *Mareva* injunction, many new uses have been found for these orders. For instance, they can be used in passing off actions as well as in copyright

<sup>31</sup> *Rank Film Distributors Ltd. v. Video Information Centre* [1982] A.C. 350.

<sup>32</sup> s.72.

<sup>33</sup> *Ex p. Island Records Ltd.* [1978] Ch. 122.

<sup>34</sup> See *Ann Staines*, (1983) 46 M.L.R. 278.

cases. Many goods are today produced with some sort of official cachet indicating their source, such as scarves in the colours of football teams, distributed on behalf of football supporters' clubs. Those of you who attend football matches will know that unauthorised persons may sometimes set up stalls outside football grounds selling pirated scarves and similar items, purporting to come from the supporters' club, but in fact made by unauthorised parties. I understand that an *Anton Piller* order was recently served on one of these gentlemen requiring him to disclose his sources of supply.

These two inventions seem to me to be signs of considerable pragmatic strength in the devising of new remedies by English courts, and it would be difficult to find examples of such astonishing innovation and rapid development in any field of substantive rights. One particularly striking feature of these developments has been the part played in them by the legal professions; and at a time when both professions are under a certain amount of public attack, I think it is only right to point out how greatly we depend in this country on the integrity and ability of the legal profession, not only in the routine administration of justice, but also in regard to creative new developments of this kind. These orders were devised by counsel—indeed, we even know that a particular Chancery junior was responsible for the invention of the *Anton Piller* order<sup>35</sup>—but the *Mareva* injunction was also in part the work of counsel. This is true, not only in the sense that it was in response to the initiative of the bar that the courts sanctioned the new procedures, but also (as I have already mentioned) because in extreme urgency

<sup>35</sup> Mr Hugh Laddie (now a Queen's Counsel), see Lord Wilberforce in (1985) 5 *Ox. J. Leg. St.* 445.



orders are often made without the formality of issuing a writ or having an affidavit sworn, in complete reliance on information supplied by counsel. This procedure therefore depends entirely on the integrity of the bar and would simply not be possible if the courts could not rely on counsel's word. And the *Anton Piller* orders also depend on the ability of the courts to rely on the solicitors who serve these orders in circumstances in which breaches of the peace or serious violence could easily occur. These are features of our legal system which contribute to its pragmatic strength, and assist in the development of effective legal remedies; yet they are features of the system which would rarely be studied in conjunction with the substantive law. They demonstrate, I think, how all the parts of a legal system, including the organisation and integrity of the legal profession, contribute their part to the law itself.

The injunction has also been a useful instrument for devising new remedies in other areas where the law is in need of development, but the courts have been hesitant to define or develop the substantive rights which would be implied by granting other remedies. So for instance the law relating to breach of confidence, which has developed apace in recent years, has done so almost entirely through the medium of the remedy of the injunction, rather than by the open expansion or development of substantive rights.<sup>36</sup> It could also be suggested that many other recent innovations in our private law, which have taken the form of granting judicial discretion, for instance, to strike down the terms of a contract<sup>37</sup> or set aside the terms of a will,<sup>38</sup> also illustrate

<sup>36</sup> See generally the Law Commission Report, *Breach of Confidence* Cmnd. 8388 (1981).

<sup>37</sup> See the Unfair Contract Terms Act 1977.

<sup>38</sup> See Inheritance (Provision for Family and Dependents) Act 1975.

this tendency to develop the law by invoking remedies and procedures, rather than by the grant of new substantive rights.

Any detailed study of the pragmatic strength which English law displays as a result of being remedy-oriented would also have to take full account of two other very practical subjects which are not generally regarded as a part of the substantive law, that is, the law and practice relating to costs and to the award of pre-judgment interest. I do not have time to discuss these at all adequately within the scope of these lectures, so I will simply point to the way in which American law, which generally does not follow the English practice as to costs or interest, has had to develop instead many complex new processes and forms of liability, for instance, by greatly expanding liability for malicious abuse of legal process<sup>39</sup> and by making wilful refusal to pay a debt a tort justifying exemplary damages in certain circumstances.<sup>40</sup> These new forms of liability, however, often seem much less effective in discouraging wasteful and dilatory litigation than the English rules and practices as to costs and the award of pre-judgment interest.<sup>41</sup> Indeed, I think one could go further and suggest that English law is exceptionally inhospitable to litigation. Certainly compared with America, but also (I believe) compared with France, the English legal system seems to discourage litigation by every means in the book. Again, I do not have space to examine this question in any detail, but I incline to think that this too is a sign of pragmatic strength in the legal system. Liti-

<sup>39</sup> See, e.g. Restatement of Torts (Second) § 674, and § 681 (b), and by way of illustration, *O'Toole v. Franklin* 569 P. 2d. 561 (1977).

<sup>40</sup> See Farnsworth, *Contracts* (1982), § 12.8, at pp. 883–884.

<sup>41</sup> This subject is dealt with more fully in P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law* (forthcoming).

gation rarely does anyone any good, and to facilitate it too readily may just encourage people to turn trifling disappointments into imagined grievances and injustices. Let me quote on this point the wise words of Lord Radcliffe:

“[Q]uite simply, life has to go on, and in a progressive society it is better that grievances, if they are not vital grievances, should be forgotten, rather than put right at the expense of public time and energy . . . [I]t is on the whole to everyone’s advantage that things done should not be undone and that everyone should be able to count on this . . . [I]t does not always serve the public interest that certain things should be put right by the courts, even if they ought to be adjusted in the ordinary decencies of private life.”<sup>42</sup>

I do not think it is any coincidence that it is also in the field of remedies that some other dramatic developments of judge made law have taken place in recent years. Consider, for instance, the power of the House of Lords to reverse its own previous decisions, which was asserted by the Practice Statement of 1966. I doubt if there has been a more vigorous exercise of this power than that which occurred in the *Miliangos* case in 1976,<sup>43</sup> when it was held that an English court could in an appropriate case give judgment in a foreign currency, thereby reversing some three hundred years’ of legal history. Perhaps also I can draw attention here to the way in which the House of Lords devised one of the most significant modifications to the privity of contract principle in *Beswick v. Beswick*<sup>44</sup> by developing the remedy of

<sup>42</sup> *Not in Feather Beds* (1968), p. 33.

<sup>43</sup> [1976] A.C. 443.

<sup>44</sup> [1968] A.C. 58.

specific performance rather than by any modifications of the substantive law. As you will remember, the House there held that the promisee could obtain a decree of specific performance to compel the promisor to carry out his contract for the benefit of the third party beneficiary. And if, as Lord Reid and Lord Scarman have both foreshadowed, the continued unwillingness of Parliament to reform the law of privity leads the courts to take this task on themselves, it will not be surprising if they do so largely by extending this procedural and remedial device. It would not be difficult, for instance, for the courts to require the promisee to allow his name to be used by the third party in an action against the promisor, so long as the promisee is given an indemnity against costs. This is pretty much what happened in the old law of equitable assignments, and ample precedent would be found for breaking the barriers of privity in this way.

### *Precedent and Principles*

I said in my first lecture that it was obviously impossible to draw a sharp line between systems of law dominated by precedent and those in which principle is conceived to be paramount. Precedents are supposed to create, or to lead to the development of, principles. At the same time, I also suggested that one could detect different tendencies in the common law system, which inclined to a greater emphasis on precedent, and in civil law systems, which inclined towards a greater reliance on principles, and especially perhaps principles of a broader and more comprehensive scope. I now want to develop this theme, and to suggest a number of particular respects in which the common law stress on precedent has real pragmatic strength. First, it is apparent that the great emphasis on precedent which is characteristic of English law in particular requires the facts of the case to be

treated as all important. Whether one case is "in point," whether or not it is distinguishable from an earlier precedent, must depend on close examination of the facts. And so we find, for this reason, though doubtless also for others, a tremendous emphasis in modern law on the facts of the particular case.

I shall start with a few comments on the fact-finding process, and it is necessary to bear in mind that the whole nature of English civil procedure has been revolutionised in the past half century by the virtual disappearance of the civil jury. Nearly all modern trials are conducted by judges alone, though of course with the aid of barristers operating within the adversary system, and a system of pleading which despite all modern liberalisation is still fairly strict. I believe that, in general (though with some qualifications), this fact-finding process is one of the strengths of the present day English legal system. In the first place, facts in civil disputes are today gone into with a wealth of detail that was unknown in former times, and this is a source of practical strength in a number of ways. Indeed, it is a source of strength, not merely in the business of locating the truth as to what happened, but also to the formulation of legal rules and the exercise of legal discretions which arise in relation to those facts.

The academic lawyer who tends to be most interested in principles of law is, perhaps, often in danger of overlooking the importance of the fact finding processes, and we have been well reminded by a number of judges of the great importance of this process both to the litigants and to the judges themselves.<sup>45</sup> Probably many more litigated disputes

<sup>45</sup> See generally on this, Megarry, "Law as Taught and Law as Practised," (1966) IX *Journal of the S.P.T.L.* 174.

turn on facts than on the law, though so far as I know there is no actual research into this question. Certainly the findings of fact by a trial judge are often more important than those of law, because it is so much harder to overturn the former on appeal. Furthermore, it has been suggested that adverse findings of fact are apt to disappoint litigants more than decisions on points of law.<sup>46</sup> But though disputes on points of fact may well outnumber disputes on the law, modern litigation procedures and practices are well designed to assist in clearing up many of these disputes. The system of pleadings, discovery, the adversary process itself, and the very detailed exploration of the facts which counsel tend to indulge in—though it may have its costs and its problems—does tend to reduce the areas of dispute, and to facilitate the ultimate decisions on those points which remain in dispute. As has recently been said by Bingham J., “The mills of civil litigation may grind slowly, yet they grind exceedingly small.”<sup>47</sup> It is surprising how many of the facts which at first appear to be seriously disputed turn out in the event to be largely agreed when everything has been put under the adversary microscope. And even as to those facts which remain disputed, by the time everything has been gone into with a fine toothcomb the probabilities are usually so clear that most issues—obviously not all—can be readily resolved without too much difficulty.

Moreover, judges are expected to give reasons for their findings of fact whenever there is a serious dispute as to the facts; and these reasons are often given in great detail.

<sup>46</sup> Bingham, “The Judge as Juror: the Judicial Determination of Factual Issues,” (1985) *Cur. Leg. Probs.* 1.

<sup>47</sup> *Ibid.* at p. 2.

Because the law reports are generally designed to record decisions on matters of law only, few judgments with a wealth of detail on such factual issues will be found in the official law reports, but a good many will be found in other sets of law reports, in particular Lloyd's Reports. This set of reports often includes commercial cases where the facts are of great complexity, and where the trial judge often records his findings in very great detail. Nobody who regularly reads these judgments can fail to be struck by two things: first, how many of the issues of fact turn out to be virtually agreed by the time all the evidence has been given, and secondly, how rarely it seems necessary for a judge to decide crucial factual disputes simply by preferring the evidence of one witness over that of another. Of course conflicts of testimony do occur, but judges are today perhaps less inclined to think they can resolve them just by studying the witnesses' demeanour. It is the corroboration of documentary and other evidence and the inherent plausibility of the evidence which are in practice more likely to turn the scales.<sup>48</sup>

The strength of these aspects of English civil procedure is, I think, demonstrated particularly by the way in which so many preliminary and interlocutory matters can be and are disposed of on affidavit evidence. According to the theory of the law, it is, of course, impossible for judges to try a disputed issue of fact on affidavit evidence, because in the absence of cross-examination of the witnesses the judge cannot decide which of two conflicting affidavits to believe. Yet it is a commonplace and everyday matter for the courts to make vitally important decisions in interlocutory matters on affidavit evidence, and in some classes of cases these decisions are almost as a matter of course accepted as final

<sup>48</sup> *Ibid.* at pp. 7-11.

by the parties, even though in strict theory they are just preliminary or holding decisions which could be overturned if the parties went to trial, and all the evidence was given orally and subject to cross-examination.<sup>49</sup> Of course, this willingness to accept an interlocutory decision as final is not uninfluenced by another powerful consideration—namely the cost of litigation. Some people may be concerned that citizens may be deterred from vindicating their rights because of the possible cost, and I do not for a moment deny that there are some kinds of cases in which this is a genuine worry. But in the cases I have presently in mind, where parties accept interlocutory orders as final, the impact of the rules as to costs and the legal practice on such matters seems to me again, as I have already suggested, to be a sign of pragmatic strength in the legal system. Full-scale litigation is a very costly exercise, especially in the High Court, and I see no reason at all why parties should not be encouraged to settle for a sort of second-class type of litigation, at lower cost, if they find that adequate for their purposes.

Much of the practical strength of the litigation process in English law undoubtedly stems from the adversary procedure, although it is almost essential to the successful operation of this procedure that the parties should be represented by able barristers, as of course they usually are. The adversary procedure may itself be open to challenge on the ground that the true function of a trial ought to be to ascertain the truth rather than merely to settle a dispute between two contending parties, and it may well be that in criminal procedure this does make a profound difference to the results of cases of many kinds. But it seems doubtful whether in most civil cases today a judge often feels that he

<sup>49</sup> See as to this *Fellowes v. Fisher* [1976] Q.B. 122.



is not really engaged in a quest for the truth, or has to decide the factual issues according to the burden of proof.<sup>50</sup>

I have said that the wealth of attention devoted to minute fact finding and factual analysis is a source of pragmatic strength, not only for its own sake, but also because of the implications this has on the formulation of legal rules and the exercise of discretions. I must now elaborate a little on this. So far as discretions go, the point is obvious enough. The exercise of discretion usually does require a grasp of the whole details of the factual situation; but it is not perhaps so obvious that this also has a powerful impact on the way the law itself develops. Minute analysis of the facts of cases makes for a richness in classification, makes judges more aware of the difficulties of formulating rules in rigid form, designed to apply to a wide variety of situations. Every lawyer has experience of looking at a case and being made aware how unsatisfactory it is to treat the case as falling under the rules which have been laid down or enacted for a class of similar cases, because of some unusual features presented by the case in hand. Cases of this kind must make the judges pause both to reformulate the principles they require, and to be hesitant about formulating them in too rigid a fashion. Lord Goff has recently commented on the effect which this minute analysis of the facts tends to have on the judicial process:

“[A] judge may have to consider a particular point of law. If so, he examines it in minute detail; he considers it in relation to a particular set of facts; he is assisted by counsel, each of whom has considered the law with care and will advance an argument designed to persuade the court to state the law, even to develop or

<sup>50</sup> Bingham, *loc. cit.* at p. 2.

qualify it, in a way which fits his own client's case. There are at least three effects of this exercise: the judge's vision of the law tends to be fragmented; so far as it extends, his vision is intense; and it is likely to be strongly influenced by the facts of the particular case. In terms of principle, the fragmented vision is of itself undesirable, except that it permits, even requires, an intensive examination; but the factual influence is almost wholly beneficial."<sup>51</sup>

This seems to me to put the matter very well. The fragmented vision of the judge does have its dangers, as Lord Goff points out, and as I have myself argued on a previous occasion.<sup>52</sup> Over-emphasis on doing justice in the facts of the particular case, to the exclusion of all other considerations, can lead to the pursuit of pragmatism at the price of abandoning all principle, and I return to this problem in my next lecture. But it is also true, as Lord Goff stresses, that the judge's fragmented vision, dominated as it is by the facts of the case, and assisted as he is by the adversary arguments of counsel, tends to be a particularly intensive one. An academic lawyer who has written on a branch of the law, and considered perhaps in some detail certain cases and factual problems, must often be surprised, and indeed humbled—as I will be the first to admit—when a new case throws up a variant on the point in question. The academic will then often have to admit that the judgment even of a judge at first instance, probes the point more deeply, and comes up with arguments which had simply never occurred to him. The academic suffers from dealing in generalities, or

<sup>51</sup> "The Search for Principle," (1983) LXIX *Proc. Brit. Acad.* 169, at pp. 182–183. See also Megarry, *loc. cit.*, at p. 178, for a similar passage.

<sup>52</sup> See my *From Principles to Pragmatism* (Oxford, 1978).

at any rate with the facts of many cases, rather than with the detailed facts of a particular case, and he also suffers because however self-critical he may be, he does not have to face the discipline of seeing his work and ideas attacked with the vigour which opposing counsel can bring to arguments in court.

Let me now suggest another respect in which the emphasis on the facts in modern civil litigation is often a source of pragmatic strength in the English legal system. A common form of argument used by counsel in legal cases is to suggest that if the court decides in favour of the opposing counsel's arguments, it will become necessary to draw lines which may be very difficult or impossible to draw. "Where will you draw the line?" is, of course, a question which must be faced by a legislator who is actually proposing to lay down lines for all future cases, but it is not a question which needs in general to be faced by common law courts who proceed in slow stages, moving from case to case. And the argument has generally received short shrift from English judges. Consider for instance these robust answers to the "Where will you draw the line?" argument. Here, for instance, is Lord Lindley in 1900:

"Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals? And yet who has any difficulty in saying that an oak-tree is a plant and not an animal?"<sup>53</sup>

Or again, here is Lord Coleridge in 1893:

"The Attorney-General has asked where we are to

<sup>53</sup> *Att.-Gen. v. Brighton & Hove Co-operative Assoc.* [1900] 1 Ch. 276, at p. 282.

draw the line. The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any line that could reasonably be drawn.”<sup>54</sup>

But the most famous answer to this argument is perhaps that of Lord Nottingham in the *Duke of Norfolk's* case as far back as 1681,<sup>55</sup> when in expanding the liberality of the rule against perpetuities, he was asked where he would stop, which is simply a variant of the line-drawing argument, and he answered, “I shall stop everywhere when any visible inconvenience appears, nowhere before.”

And there we have pure pragmatism in a nutshell. It works perfectly so long as we are more concerned to decide cases than to lay down guidance for future decision makers. It even works relatively well when the law is allowed to develop, as the common law has traditionally done, step by step. It amounts to saying that so long as we can see our way clear to what is the proper decision in this particular set of facts, we can leave future cases to the good sense of future judges. I shall return in my next lecture to some of the problems of this sort of pragmatism, but the difficulties must not blind us to the strengths.

In more modern times we have found a similar attitude towards a closely parallel argument, known today as the “floodgates” argument, the argument, in other words, that if liability is imposed in a particular type of situation, the floodgates would be opened to a torrent of new litigation. The argument was summed up in classic words by Cardozo J. of the United States Supreme Court when sitting in the New York Court of Appeals he denied liability for economic

<sup>54</sup> *Mayor of Southport v. Morris* [1893] 1 Q.B. 359, at p. 361.

<sup>55</sup> (1681) 2 Swanston 454, at p. 468.

loss in tort on the ground that to decide otherwise would be to impose “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”<sup>56</sup> Ever since *Donoghue v. Stevenson*<sup>57</sup> this argument has been treated with decreasing respect in English law, if only because constantly expanding liability in a variety of directions has still not seriously taxed the capacity of the courts. It is true that litigation has undoubtedly increased and that we do have to increase the number of judges from time to time, but as the population is still increasing and growing prosperity makes more people have more worthwhile issues to litigate about, this is not itself a cause for surprise or alarm. But here we note a curious point. If the rejection of the floodgates argument is based on the highly pragmatic and precedent-based idea that each problem can be treated on its merits as new cases come along, it is also true that the floodgates argument is itself a highly pragmatic argument. For the argument is fundamentally based on the proposition that rights and liabilities should not be imposed where they are likely to lead to more litigation than the courts are properly equipped to handle. In the *Junior Books* case<sup>58</sup> Lord Fraser and Lord Roskill rejected the floodgates argument as unattractive, because it involved drawing an “arbitrary and illogical line just because it had to be drawn somewhere.”<sup>59</sup> But (with respect) it seems to me that the learned law lords failed to observe that the answer to the floodgates argument is itself rarely a principled and “logical” argument, but is itself nearly always a highly pragmatic argument. True,

<sup>56</sup> *Ultramares Corp. v. Touche* (1931) 255 N.Y. 170, at p. 179, 174 N.E. 441, at p. 444.

<sup>57</sup> [1932] A.C. 562.

<sup>58</sup> [1983] 1 A.C. 520.

<sup>59</sup> Lord Fraser, [1983] 1 A.C. 520 at p. 532.

Lord Roskill claimed here that the House was merely extending an existing principle to a new situation, but when the House had to consider what implications this had for the classic *Spartan Steel*<sup>60</sup> type situation, they left this for future decision in true precedent-and-pragmatic fashion. Thus the reality is that the floodgates argument nearly always involves a conflict between conflicting pragmatic considerations, rather than a conflict between principle and pragmatism, or principle and precedent.

### *The Practical and the Academic*

I turn now to my fourth heading, where, as an academic myself, I am obviously in some little difficulty. Nevertheless, with due humility, I shall suggest that there are certain respects in which English law does demonstrate some pragmatic strength by refusing to be too “academic” in its approach and orientation. Whether all, or indeed, any academics in the sense of law teachers and scholars, would themselves actually support the over “academic” approach which English law generally avoids, is another question. Sir Robert Megarry once suggested that academics can be over logical, “putting together arguments which, though closely reasoned and logical are yet shot through with unreality.”<sup>61</sup> I suppose this must have happened sometimes, but I suspect that most examples of this kind of thing stem from the very nature of legal argument. The problem of course is that lawyers are used to the idea of supporting their views with *arguments* of the kind which could be submitted to a court, and these arguments are of all kinds, good, bad and indifferent. In my next two lectures, when I come to deal with the

<sup>60</sup> [1973] Q.B. 27.

<sup>61</sup> (1966) IX. *Journal of the S.P.T.L.* 176, at p. 181.

weaknesses of English pragmatism, I shall have to suggest that there have been cases where practising English lawyers and even judges have succumbed to an approach which can be criticised as over "academic." So I am not convinced that the over "academic" view is something of which only academics are guilty. Still, in this lecture I am trying to identify the strengths and not the weaknesses of the pragmatic tradition in English law.

I shall begin by raising a subject which is much too large and too important to accommodate fully within this lecture, but which is also too important to be left out altogether. I refer to the conflict over the deterrent effect of the criminal law. In modern times, the dismal failure of nearly all penological measures to stem the rising crime rates, as well as our continuous failure to be able to predict how different people will respond to different processes has led to the despairing view in some quarters that much criminal activity is really non-deterrable. Criminals, it is claimed, are not normal people whose behaviour responds to rational threats. Crime is committed by people on impulse, or from motives which do not take account of the deterrent effects of the law. On the other hand, common sense suggests that this simply cannot be right; perhaps people respond to threats in different ways; perhaps some people are so blinded with emotion or passion that no threats will deter them; perhaps some people are so simple minded or lacking in normal intelligence that they do not perceive the threats of the law in ways which others would perceive. All these possibilities can be allowed for, but at the end of the day, the law, the lawyers and the judges would almost unanimously, I feel convinced, insist that threatening people with unpleasant consequences will have some influence on their behaviour, just as will, indeed, tempting them with pleasant conse-

quences. This belief is also the foundation of our whole economic system, and I for one believe it is a sign of pragmatic strength that our practitioners and judges have not been too seduced by some of these modern assertions—it is probably over generous to call them “arguments.” I am also glad to note that Professor Nigel Walker, our leading academic criminologist, shares the beliefs of common sense in this respect.<sup>62</sup> Indeed, not only does common sense support the view that punishment deters, but there is also some real evidence that when people have some ground for thinking that the probability of detection and punishment has increased, a greater compliance with the law can be observed.<sup>63</sup> On the other hand, it is right to add that Professor Walker also says that there is very little evidence to suggest that an occasional exemplary sentence has any additional deterrent value whatever,<sup>64</sup> and in this respect I suspect that the judges would disagree with Professor Walker, though I am not at all sure that their views can claim to be supported by common sense.

Let me take next the possible conflict between “academic” arguments, in the sense of over refined, over theoretical arguments, and the common sense which English lawyers and judges often claim to rely upon. Within limits, it does seem to be true, as is often thought, that English judges tend to display a “sturdy” common sense, and that this is a source of pragmatic strength. Perhaps, as *du Parq L.J.* once suggested,<sup>65</sup> this predilection for common sense owes its origins to jury trial, and the fact that much of the

<sup>62</sup> See his *Punishment, Danger and Stigma* (1980), at chap. 4.

<sup>63</sup> *Ibid.* at p. 79.

<sup>64</sup> *Ibid.* at pp. 119–120.

<sup>65</sup> *Smith v. Harris* [1939] 3 All E.R. 960, at p. 967. See also Lord Reid in “The Judge as Law Maker,” (1973) XII *Journal of the S.P.T.L.* 22, at p. 26.



common law had to be developed in a form in which it could be made intelligible to juries. Perhaps this explains why so many students find equity much more difficult to understand than the common law, since equitable rules never had to be explained to juries! One wonders, for instance, what the average English jury would have made with a direction on the rule against perpetuities. But in all seriousness, it does seem that on the whole English law tends to favour the common sense approach and to eschew intellectual refinement. A search in Lexis for the past ten years, in which I tried to locate uses of the phrase “contrary to common sense” threw up several instances in which judges had used this as an argument for a decision, and none in which they had rejected it. The present Master of the Rolls has been particularly inclined to rely in his judgments on the dictates of common sense, and to repudiate the popular notion that the law is often contrary to common sense. For example, in a copyright case in 1981<sup>66</sup> the defendants made some posters out of single frames of a Starsky and Hutch film, the copyright of which was vested in the plaintiffs. According to the relevant legislation, copyright in a film subsists in the whole work or any part of it. The defendants argued with some ingenuity that a single frame could not be part of a film because the whole essence of a film was that it consisted of a sequence of frames, so that, although two successive frames could be part of a film, one frame could not. That conclusion would be “wholly contrary to common sense,” insisted the Master of the Rolls, and “despite a widespread popular belief to the con-

<sup>66</sup> *Spelling Goldberg Productions Inc. v. B.P.C. Publishing Ltd.* [1981] R.P.C. 283.

trary, the law does not usually contain propositions contrary to common sense.”<sup>67</sup>

Again, in an action on a bill of exchange,<sup>68</sup> the defendant, as the director of a private company, had accepted a bill of exchange on behalf of the company, but unfortunately for him, his name was not fully shown on the bill. The initial M, was used instead of his first name Michael. Under section 108 of the Companies Act 1948, then in force, this technicality was prima facie sufficient to render the acceptor of the bill of exchange personally liable, and when the company in question became bankrupt and failed to pay on the bill, the defendant was personally sued. But in this particular case the bill of exchange had actually been written out by the plaintiffs and sent to the defendant for acceptance, so the error was entirely their responsibility. “Common sense and justice,” said Sir John Donaldson, “seem to me to dictate that [the plaintiffs] shall fail. If I am right thus far,” he went on, “I should be surprised if the law compelled me to find in the plaintiffs’ favour because, contrary to popular belief, the law, justice and common sense are not unrelated concepts.”<sup>69</sup>

Common sense is, too, often invoked with every justification, in aid of the interpretation of contracts, or other documents like notices and so forth. Only a few months ago, a case came before the Court of Appeal<sup>70</sup> concerning the validity of a notice to quit, where a tenant was required to vacate the premises “within three months.” However, the

<sup>67</sup> At p. 301.

<sup>68</sup> *Durham Fancy Goods v. Michael Jackson (Fancy Goods) Ltd.* [1968] 2 Lloyd’s Rep. 98.

<sup>69</sup> At p. 101. For a similar expression of faith in common sense by the Master of the Rolls, see *Warinco v. Samur* [1977] 2 Lloyd’s Rep. 582, at p. 588.

<sup>70</sup> *Manorlike Ltd. v. Le Vitas Travel Agency Ltd.* [1986] 1 All E.R. 573.

lease entitled the tenants to “not less than three months’ notice,” and it was argued for the tenant that a notice to quit “within” three months expired before midnight on the night in question, while his lease entitled him to stay on until midnight. I suppose the difference might have been put in terms of the 24 hour clock by saying that the landlord’s notice required the tenant to leave by 2400 hours, while the tenant’s lease entitled him to stay until 0000 hours of the following day. This argument was rejected by the Court of Appeal on the commendable ground that it was contrary to common sense to impute so bizarre an intention to the landlords. More generally, Lord Diplock declared a couple of years ago that, “If detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.”<sup>71</sup> To which one may respond not just with a hearty Amen, but a hope that others besides business men are entitled to have their dealings interpreted with common sense.

But it isn’t always quite as easy as that. A series of cases which followed the Domestic Violence and Matrimonial Proceedings Act 1976 illustrates how English methods of statutory interpretation can sometimes come close to departing from plain common sense. This Act, which was passed at a time of growing public anxieties over “wife battering” and similar cases of domestic violence, enabled the courts to grant injunctions to exclude a spouse from the matrimonial home in cases of serious violence, and then went on to grant similar powers to unmarried co-habiting parties. Unfortunately the Act left a number of questions

<sup>71</sup> *The Antaios* [1984] 3 All E.R. 229, at p. 233.

quite unresolved; in particular, it gave the court no guidance as to what was to happen if a co-habitant was ejected from a home which actually belonged to him. How long was he to remain ejected? Was the Act designed in effect to enable the court to deprive him of his property for ever? Or for as long as his erstwhile co-habitant remained in occupation of the property? These difficulties led some of the judges in the Court of Appeal to hold that the Act was designed purely for procedural purposes, and that no injunction could be granted to eject a violent co-habitant from property which belonged to him.<sup>72</sup> This conclusion was justified by a nice piece of intellectual reasoning: the section dealing with spouses was only designed to have procedural effects, because spouses already had the protection of the matrimonial property legislation; and it was therefore argued that the section dealing with co-habitants, which simply extended the courts' powers to deal with spouses, must also be confined to procedural consequences. But the argument was wholly contrary to common sense, because if valid it would have meant that the courts could only protect a co-habitant if she was actually the owner of the premises in which she was being subjected to the violence in question. This would have been such an unusual case that the statute would have been quite emasculated; and although the courts are occasionally driven to such constructions where an Act simply gives them no alternative, and Parliament can then be left to put matters right, here actual violence was being done or threatened, and it hardly seemed an appropriate response therefore to leave the matter to statutory amendment. In the result the House of Lords overturned the limited construction of the Act which the Court

<sup>72</sup> See *B. v. B.* [1978] Fam. 26; *Cantliff v. Jenkins* [1978] Fam. 47.

of Appeal had first placed upon it.<sup>73</sup> Lord Kilbrandon declared that though he appreciated “the intellectual force of the appellant’s argument,” he declined to hold that Parliament had “decreed a trifling and illusory remedy for a known disgraceful mischief, and to hold it in the interest of the conceptual purity of the law.”<sup>74</sup> I would only add that it must not be supposed that it is always academic lawyers who want to uphold the “conceptual purity” of the law, as is shown by the number of judges who took the opposing view in this particular case.

Indeed, my next example of the triumph of the law’s pragmatic strengths over undue subtlety and intellectual refinement actually shows the view of my academic colleagues, if not the “academic” view, to have been vindicated. I refer to the way in which the House of Lords broke the fetters by which it had been previously shackled, and declared in 1966 that it was no longer going to be absolutely bound by its own decisions. Now it had previously been a matter of some debate whether the House of Lords could do this. Professor Glanville Williams, for instance, had argued that as the rules of precedent were made by the courts, they could also be unmade by them, and that the decision by the House of Lords in the *London Street Tramways* case<sup>75</sup> that it was absolutely bound by its own decisions could not bind the House not to change its mind.<sup>76</sup> But this view was vigorously controverted by Mr R. E. Megarry as he then was, who contended (in a discussion about the Court of Appeal)

<sup>73</sup> *Davis v. Johnson* [1979] A.C. 264.

<sup>74</sup> At p. 339.

<sup>75</sup> [1898] A.C. 735.

<sup>76</sup> (1954) 70 L.Q.R. 469. See also the penetrating discussion by A. W. B. Simpson in *Oxford Essays in Jurisprudence*, (ed. Guest 1961), pp. 155–163.

that the bonds of precedent could not be loosened without legislation.<sup>77</sup>

“To argue that the courts are bound by precedent on all subjects save the law of precedent is to make an exception which some will find . . . unreal. Perhaps one has to imagine the Court of Appeal arguing this:

1. The Court of Appeal has already held the law on this point to be *alpha*.

2. The Court of Appeal has already held that decisions of the Court of Appeal are binding on the Court of Appeal.

3. Precedents are binding on all subjects save that of precedent. Proposition 1 thus binds us but Proposition 2 does not.

4. Therefore we are free to hold the law on this subject to be *beta*.

If that is the path by which legislation can be avoided, let us have legislation.”

In the event, as we know, the Scots Law Commission, when it was set up by the Law Commissions Act 1965, decided to recommend that legislation be introduced freeing the House of Lords from the effect of the *London Street Tramways* case so far as Scotland was concerned,<sup>78</sup> but after much consultation and discussion the Lord Chancellor decided with the agreement of all the law lords, to issue the famous Practice Statement, in which the House simply cut the Gordian knot and declared that it would no longer

<sup>77</sup> (1954) 70 L.Q.R. 471.

<sup>78</sup> See for the role of the Scots Law Commission, Sir Thomas Smith, in *Essays in Memory of Professor F. H. Lawson* (ed. Wallington and Merkin 1986), pp. 133–144.

regard itself as absolutely bound by its own decisions. Even this did not quell all doubts. Apparently Lord Simon of Glaisdale raised the question in a case in 1972<sup>79</sup> of whether the Practice Statement was not *ultra vires*, and invited counsel to argue the point<sup>80</sup>; counsel declined, very wisely in my opinion, and since then the House of Lords has exercised the power to overrule its own decisions in a few cases, though certainly very sparingly. Now there is no doubt that as a matter of abstract theory, the power of the House of Lords to issue the Practice Statement was a highly arguable point. After all, it was a very strange sort of Practice Statement. Whose practice was it directed to? It was in truth a simple statement as to the future intentions of their lordships; and perhaps that statement of intent should have been made in the course of hearing an actual appeal, and been subject to arguments from counsel. Yet in the end the making of the statement disposed of legal arguments and doubts. In one sense, it was a case of lifting oneself up by one's own bootstraps, but in another sense it was a case of over-academic arguments being rejected by academics and ultimately by the only tribunal that really mattered. It worked. Pragmatism triumphed to the great advantage of English law.

<sup>79</sup> *Jones v. Secretary of State for Social Services* [1972] A.C. 944.

<sup>80</sup> See Alan Paterson, *The Law Lords* (1982), p. 152.





### 3. *The Weaknesses of the Pragmatic Tradition*

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I have in my last lecture done due homage to the pragmatic tradition in English law. I turn now to be more critical. Pragmatism may have strengths—I believe it does—but it also has weaknesses and dangers, and it is of these that I wish to speak in this lecture.

#### *Logic and Experience Again*

I return first to questions of logic and rationality once again. I have already pointed out that “logic” has been attacked and criticised and departed from by a great many lawyers in a wide variety of contexts. I have of course quoted to you Holmes’s famous aphorism that the life of the law has not been logic but experience, and perhaps I should now also quote to you Professor Hart’s remark that this is perhaps “the most misused quotation from any American jurist.”<sup>1</sup> The point of this observation was to draw attention

<sup>1</sup> *Essays in Jurisprudence and Philosophy*, p. 129.

to the way in which Holmes's remark has been used as a kind of anti-formalist banner in American law, a justification for refusing to take the major premises of too many legal syllogisms as the absolute unqualified propositions they often appear to be. But I have said enough about this in my earlier lectures, and I want now to go on to suggest that there is a further danger that this rejection of so-called "logic" can be, and sometimes is, erected into a kind of general anti-rationalism. I have referred, for instance, in my earlier lectures to the way in which Englishmen and perhaps especially English lawyers, sometimes make a positive virtue of their skill in "muddling through" to some hopelessly irrational compromise or pragmatic solution to a problem.

Of course it is true that law is often a severely practical business, and that sometimes, indeed very often, the only concern of the lawyer is to find out what the law is on some particular point; it is also true that we have generally-accepted criteria which will often enable the trained lawyer to discover what the law is on a given point without undue difficulty and with a high degree of probability that he is right. What is more, it seems pretty clear that this is not just an English idiosyncrasy, but a pretty well necessary *desideratum* of law in general. Complex modern societies simply cannot be administered without countless rules, and it is of the essence of a rule that it must often be applied by citizens to their own behaviour, or by officials, including even judges, to disputes, without too close an inquiry into the purposes, or meaning of the rule. Life just must go on, and we cannot treat every dispute about rights or duties as a utilitarian inquiry into the best possible means of regulating our affairs, or as a philosophical inquiry into the most just way of distributing entitlements and duties.

So it is understandable that the lawyer, that is, in this context, the legal practitioner and the judge, often take a severely practical view of the law, and are not too interested in theory. Occasionally, no doubt, even the most pragmatic of lawyers cannot avoid reflecting on what he is doing, and why he is doing it, or more broadly, on what the legal system as a whole is doing and why it is doing it. But even then there is a tendency to suggest that if something is working alright, it is best to leave it alone. Politicians and civil servants, perhaps even more strongly than lawyers, are disinclined to embark on changes in the law if the law seems to them to be working alright. So the pure pragmatist is hostile to theory and rationality on two counts. First, he claims to be interested in the practical exercise of ascertaining and applying the actual law; and secondly, he is apt to be disinclined to want to seek change if the actual law seems to be working alright.

But each of these aspects of pragmatism suffers from very serious limitations. The practising lawyer or even the magistrate or County Court judge, who is only interested in what the law actually *is*, is surely entitled to assume that it is someone else's business, if it is not his, to see that the law is not an ass. It is true that it is no longer fashionable to think of the law as a real science, a great body of scientific principles, deducible from a few assumptions about human nature of the natural law variety. We no longer believe that legal concepts and principles have any scientific basis, or can all be linked together in an interconnecting series of principles which can all be traced back to a handful of axioms.<sup>2</sup> To that extent the rationalism of the eighteenth

<sup>2</sup> Morris Cohen was one of the last writers to argue that logic and legal principle can be defended on an (almost) scientific basis—the kind of thing of which the arch exponent was long thought to be the American writer Joseph Beale, see Cohen's "Law and Scientific Method,"

century has gone, probably for good. But on the other hand, it is also true that we no longer live in an age and a world in which it is customary to think of the law as the product of a Divine Creator whose mysterious purposes are unfathomable to human beings. So the law has lost something of its mystique and sacredness, and it is not possible in the long run to insist on obedience to laws which cannot be seen to serve some rational human purposes. If most of us still accept the duty to obey the law even when the law seems irrational and absurd and unjust, it is partly because we know that not too much of the law is like this, and that when it is as bad as this there is usually some reasonable prospect that it will get changed in due course. How could it be otherwise in a democracy? Surely only a superstitious or a servile people could be content to abide perpetually by rules, just because they are laws, and for no other reason, no matter how irrational or purposeless they might seem to be.

I do not say that we can wholly do without some element of the mystique in the law. Indeed, I think we would be in deep trouble if we tried to do this, and it may be that we have already gone too far in the process of demystifying the law, stripping bare its lack of mystery and its too human origins. Everybody may have the vote, but it is not given to everybody to think rationally about the foundations of our

reprinted in Ames, Cardozo *et al.*, *Jurisprudence in Action*, 115 at p. 127:

“Law without concepts or rational ideas, law that is not logical, is like pre-scientific medicine—a hodge-podge of sense and superstition . . .”  
For a more modern view, see Leff, “Economic Analysis of Law: Some Realism About Nominalism,” 60 *Virg. L. Rev.* 451, at p. 459: “There was nonsense in Beale, but, ah, there was a feeling of elegance and power too. It was lovely to be able to say things like, ‘law . . . is not a mere collection of arbitrary rules, but a body of scientific principles.’ It was marvelous not to be embarrassed to say that ‘Law . . . in great part . . . consists of a homogeneous, scientific and all-embracing body of principle . . .’”

laws and society, nor is everybody's opinion on these matters worth as much as everybody else's. But still, making all due allowance for the limitations of democracy, it is quite impossible today to forget that the people expect the law to serve certain rational ends even if it is sometimes difficult to secure agreement on what those ends should be. So our first answer to the pure pragmatist must be to insist that law is a purposive enterprise, that law is part of the business of government, and that reason and rationality are indispensable in the construction and use of law. Reason may not be able to tell us where we want to go, and why, but it can certainly help us to decide whether a particular measure will help us to achieve our aims.<sup>3</sup> Holmes himself, for all his rejection of logic, was one of the first jurists to recognise and state this clearly: "[I]t is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."<sup>4</sup> And if to search for reasons is to play with theory, went on Holmes, "We have too little theory in the law rather than too much."<sup>5</sup>

It was in this context that Holmes made his famous remark that, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."<sup>6</sup> Historical explanations, in other words, may tell us how the law came to be what it is, but history is no reason for keeping the law thus. Perhaps, as Professor Lawson suggested in his Hamlyn lectures,<sup>7</sup> when the law was

<sup>3</sup> See MacCormick, *op. cit.* chap. X.

<sup>4</sup> "The Path of the Law," 10 Harv. L. Rev. at p. 469.

<sup>5</sup> *Ibid.* at p. 476.

<sup>6</sup> *Ibid.* at p. 469.

<sup>7</sup> *The Rational Strength of English Law* (1951), p. 12.

first thus laid down it was rational in serving the ends of the law as they were then perceived to be, but it cannot be rational today merely because it was rational in the past. But then how can we reconcile this distinction between historical explanation and forward-looking purposiveness with our doctrine of precedent? Respect for precedent seems to blur this distinction, but there is really quite a simple explanation of this apparent paradox. There are, of course, different types of reason for making decisions, just as there are many different types of goals which the legal system is designed to serve. Following precedent serves a different kind of goal from those which may be served by specific rules of law; and where the precedent in question seems unsatisfactory or seems to serve no sensible goal in itself, it may seem perverse to suggest that following the precedent can still somehow be seen as rationally serving goals of the law. Bentham indeed was convinced that to follow precedent was to act “without reason, to the declared exclusion of reason and thereby in opposition to reason.”<sup>8</sup> But Bentham was wrong. Clearly there are many good reasons for following a precedent irrespective of whether the decision was itself a good rational decision when made, such as the desire to act consistently, the desire to make the law more certain and predictable, the desire to economise on judicial decision making and so on. All these are perfectly rational grounds for having a system of precedent, though I am not of course saying anything about the weight of these reasons, nor about the extent to which it is best to serve *these* goals rather than other, more substantive goals, involved in the merits of the issue itself. In any event, I think it clear that Holmes underestimated the value of sheer tradition in maintaining

<sup>8</sup> *Constitutional Code* (collected works of Jeremy Bentham) (ed. F. Rosen and J. H. Burns, 1983), vol. 1, p. 434.

a culture and a sense of social cohesion. The kind of people we are, the kinds of values we respect and the kind of law we have and need depend to some degree on the very fact of long historical continuity and tradition. But that raises different and more complex issues which I shall not go into now.

It is worth adding that the use of reason and rational argument in these ways is something which not only the pure pragmatist must face up to; it is also an answer to the extreme political and radical view of law as a mere manifestation of power. There are today sceptics who insist that law is just an instrument of power, and that those who have power simply choose the values which they wish to further. Even judges, on this view, are simply furthering policies of their own choosing when they make important decisions about the law, and are not engaging in rational debate.<sup>9</sup> This is a complex question which I do not have time to explore fully here, so I will content myself with a number of bare assertions. First, rational argument for the purposes I have suggested does presuppose some starting points in the form of agreed goals. It is only when we know what our goals are, that we can debate rationally as to the best means of getting there. Secondly, it is, I think, clear and obvious that agreement could never be secured today on any single starting point unless it was so vacuous that it would be pretty well useless for this purpose, for instance, that all law must serve the welfare of the people. But thirdly, it is by no means impossible to secure a wide measure of agreement on some at least of the assumptions which judges and other decision makers must use as starting points. I do not sug-

<sup>9</sup> See Murphy and Rawlings, "After the Ancien Regime: The Writing of Judgments in the House of Lords 1979/1980," (1981) 44 M.L.R. 621 and (1982) 45 M.L.R. 34.

gest that judges always search for such consensus assumptions, and that they never pursue policies of their own,<sup>10</sup> though even then I very much doubt whether judges ever consciously pursue individual idiosyncratic policies. If judges do sometimes take starting points which seem controversial to those who are not judges, I suspect it is because the judiciary as a whole tends to regard those starting points as non-controversial, which may well be a comment on the nature of our judiciary.

I must now confront the question which I have been approaching rather slowly. Does the pragmatic tradition of English law and the English legal system mean that we are hostile to rationality in the sense that we pay too little attention to the purposes of the law and legal processes? I now feel that this is a much more difficult question than I once thought. The difficulty seems to me to stem from the fact that, as I have already observed, the law serves so many disparate goals, that many decisions which may seem at first sight to be anti-rational turn out on further examination to be defensible on rational grounds, provided only we are prepared to take a long view about some of the goals of the law and legal decision making. Consider for instance the problem of statutory interpretation, and the way in which literal methods of interpretation can be and often are contrasted with "purposive" interpretation.<sup>11</sup> Literal methods of interpretation which defeat the probable parliamentary intention and produce silly and even absurd results seem, from one viewpoint, to be quite anti-rational. But this is perhaps arguable: it is in truth irrational only if we assume that the function of the judge is to give effect to the parlia-

<sup>10</sup> See John Bell, *Policy Arguments in Judicial Decisions* (1983).

<sup>11</sup> See, e.g. Bennion, *Statutory Interpretation* (1985), pp. 200–211 (on "grammatical meaning") and pp. 657–674 (on "purposive construction").



mentary intention even when that intention is contrary to the literal meaning of the words of the enactment. But a judge who give effect to a strictly literal interpretation even when he says at the same time that he thinks it clear that the parliamentary intent was something different thereby demonstrates that he does *not* accept this starting point at all. He is clearly showing that he regards it as his duty to give effect to the literal meaning in preference to the probable intention of Parliament. Why should a judge do that? Well, it is not difficult to think of some reasons for this procedure, just as there are reasons for a strict observance of the doctrine of precedent. For instance, it may be said that the legislative process is designed to produce a law in fixed textual form, and that statutes are drafted so as to be interpreted literally; or again it may be said that the purpose or intention of the legislature is often very difficult to divine, and this is particularly likely to be the case where the literal interpretation seems to lead to strange results. And so on. Now you may think that these are not very strong reasons for construing an Act so as to produce a result which is probably contrary to the intentions of the legislature, and would also be widely agreed to be unsatisfactory or undesirable in itself. And you may think that reasons of this kind ought to be more readily outweighed by more directly purposive considerations, bearing more immediately on more directly tangible goals. But it is not clear whether reasoning of this sort can really be said to be anti-rational.<sup>12</sup>

On the other hand, this may be too favourable a verdict.

<sup>12</sup> I have pursued this point elsewhere, arguing that the law uses “formal” reasons as well as “substantive” ones, and that the former are often perfectly good reasons though they may be inappropriately used—but then so can substantive reasons. See Essay 5 in my *Essays on Contract* (1986); the theme is developed further in P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law* (forthcoming).

To some extent this attempt to find rationality in all judicial and other decisions suffers from much the same weakness as the attempt to find economic rationality on the part of judges. It assumes, in other words, what it seems to be seeking to find. Since we find it hard to believe that judges can be irrational, we search for ulterior motives and explanations for decisions which look at first sight pretty irrational, and if we make a general assumption of rationality we must of course always find some explanation which we can regard as rational. Since it is always *possible* to give such long term reasons for decisions which on their face seem absurd and irrational, we can easily come to the conclusion that there is no such thing as irrationality in the law at all. That is obviously too easy a cop out. Furthermore, one of the problems with this line of approach is that it is not difficult to find cases which are inconsistent with any formulation of long-term objectives such as may be made, for example, of the doctrine of precedent or of literal methods of statutory interpretation. So, for instance, it is possible to find cases in which judges have preferred to give effect to what they *thought* were the intentions of Parliament, even though the legislative text plainly said something different; while there are other cases in which judges have insisted that this is an impermissible procedure.<sup>13</sup> Similarly, the doctrine of precedent is sometimes followed slavishly, and sometimes evaded by “distinguishing,” or other similar procedures. These inconsistencies prevent us adopting the easy solution to our question of simply defining the judicial process so as to include an element of rationality.

What it comes down to is this: that there are immediate purposes to be served by laws and decisions of this or that

<sup>13</sup> See Bennion, *op. cit.* pp. 212 *et seq.* illustrating these inconsistencies.

character, and that there also possible long term purposes which can sometimes be served by opposing laws and decisions. Laws and decisions which are apparently irrational in the sense that they do not seem to be appropriate means of proceeding to agreed goals *may* sometimes be justified as rational on the ground that they serve these longer term goals, but we cannot just assume that they are always rational in this way.

If then we cannot answer the question by mere definition-al *fiat*, can we suggest any other answer? Is English law too often irrational in the simple sense that the law, or legal decisions, cannot be justified as serving any agreed upon goals? I think it is, though I can see that any answer to this question is likely to be largely impressionistic, and I am prepared at least to say that I think this reproach less justified today than it might have been twenty or fifty years ago. Perhaps it is not likely that a modern appeal judge would echo the words of Jessel M.R., in a case in 1877. Faced with an old rule of dubious justice, he said, "It is very dangerous for modern judges to endeavour to find modern reasons for these old rules,"<sup>14</sup> presumably with the implication that rules should be applied blindly, regardless of their purpose. There are some relatively modern cases, for instance, *Boots v. Pharmaceutical Society*,<sup>15</sup>—the case about offer and acceptance in self-service shops—which seem to me to illustrate a continued tendency to treat legal concepts as objective phenomena without regard to the purposes of the legal rules

<sup>14</sup> *Ex p. Good, Re Armitage* (1877) 5 Ch.D. 46. But the decision at first instance in *Bell Houses Ltd. v. City Wall Properties Ltd.* [1966] 1 Q.B. 207 did involve a highly mechanistic application of an old rule without any attempt to analyse its purposes. The decision was reversed but on a different point, [1966] 2 Q.B. 56.

<sup>15</sup> [1953] 1 Q.B. 401.

which embody those concepts. On the other hand there are some strikingly purposive decisions like *The Eurymedon*<sup>16</sup>—the case about the right of a stevedore to rely on immunities in a bill of lading—in which the courts have stressed the importance of moulding and modifying legal concepts like offer, acceptance and consideration, to produce sensible results in an everyday commercial context. But that was a close run thing, a decision by bare majority of the Privy Council, reversing the New Zealand Court of Appeal.

We must also note how, even in a well-reasoned opinion like the judgment of Lord Wilberforce in that case, the apparent conflict between the pragmatic and the logical is rather assumed away, than confronted head on. Insofar as the theory of the law of contract seemed to lead to a result which Lord Wilberforce evidently found offensive to commercial commonsense, it was the theory which came off worst. Now I have absolutely no quarrel with the result in this case, which seems to me to illustrate the pragmatic strength of the law. It was the minority in that case who were guilty of the “excess of logic” of which academics are sometimes accused, insisting that the correct theoretical analysis of the concepts of bilateral and unilateral contracts, prevented the court from reaching a sensible result. The traditional conceptual theory which seemed to stand in the way of the decision was bad theory, and it was rightly not allowed to prevent the sensible results being reached by the majority. My only objection to the judgment of Lord Wilberforce is that he made so little attempt to reconstruct the conceptual theory of the law to justify his conclusions, and at best only a half-hearted analysis was made of the theoretical issues. The trouble with this rather disdainful

<sup>16</sup> [1975] A.C. 154.

approach to conceptual theoretical issues is that even judges sometimes feel the need to base their decisions on some sort of theoretical analysis, and if the theory of the law is weak judges may sometimes abandon the pragmatic traditions of the law, and get themselves embroiled in the most dreadful conceptual morass. One striking example of this sort of morass is provided by the series of Court of Appeal judgments which preceded the House of Lords decision in *Johnson v. Agnew*<sup>17</sup> which mercifully cleared up the mess.

Unfortunately this kind of “logical” refinement (I would rather say “pseudo-logical refinement”), is by no means uncommon, and it does not always get put right. The story of damages for lost expectation of life is a messy and indeed lamentable illustration of what can go wrong when the common law’s step by step pragmatism comes into collision with the need for an overall view of an area of law, built on a sound theoretical basis. In *Pickett v. British Rail*<sup>18</sup> in 1980 the House of Lords was faced with an apparently very hard example of the workings of the rule in *Oliver v. Ashman*.<sup>19</sup> In the later case, the Court of Appeal had held that a claim by a living plaintiff for damages for personal injury which had shortened his expectation of life exhausted his claims for lost earnings during the so-called “lost years,” that is, the period when the plaintiff might have been expected to be alive and earning if it had not been for his injuries. The problem with this ruling, of course, was that damages for lost expectation of life were limited by previous decisions to a nominal and arbitrary amount, of about £1,500, which could be very much less than the lost earnings after the plaintiff’s expected and premature death. In the ordinary

<sup>17</sup> [1980] A.C. 367.

<sup>18</sup> [1980] A.C. 136.

<sup>19</sup> [1962] 2 Q.B. 210.

case of an accident victim who was actually killed in the accident, this rule did not cause any real problem, because damages for the victim's earnings losses could be recovered by the dependents in an action under the Fatal Accidents Acts. But in the *Pickett* case the plaintiff was not killed in an accident, but had contracted lung cancer through the negligence of the defendants, and he had himself died shortly after the trial leaving a widow and two children. Because he had himself sued for damages for his injuries, no action lay under the Fatal Accidents Acts on behalf of his dependents, and the limitation of the damages for lost earnings after his death to the arbitrary sum of £1,500 left them with a much depleted claim compared with what they could have recovered under the Fatal Accidents Acts if the action had not been commenced until after the plaintiff's death. So the result seemed very unfair, and the House of Lords overruled *Oliver v. Ashman* and allowed damages for the losses of earnings.

But this decision had a disastrous effect on other situations where the rule in *Oliver v. Ashman* had worked perfectly well, and shortly after the *Pickett* case, a whole stream of new cases started to come before the courts in which non-dependent relatives of children claimed damages for losses of earnings as a result of accidental deaths. In *Gammell v. Wilson*<sup>20</sup> two of these cases reached the House of Lords who now threw up their hands in despair at the mess which they had made of the law, and insisted that the legislature step in to clear it up. The legislature responded to this appeal with some speed by incorporating some amendments into the Administration of Justice Act 1982, but the story as a whole illustrates some of the weaknesses of the pragmatic tradition

<sup>20</sup> [1982] A.C. 27.

in the law. In the first place, the case by case approach—which undoubtedly has its strengths in the right place—was misused here, because the difficulties which followed the *Pickett* case were only too foreseeable at the time when that case was before the House of Lords, and it was irresponsible of the House to push aside the consequences of their decision. Secondly, having once made the decision in *Pickett*, the House could, I think, have quite legitimately narrowed its effect in *Gammell v. Wilson* so as to prevent its application to cases of the death of children without dependent relatives. But at this point, pragmatism was discarded, and replaced by an excess of logical refinement. Thirdly, even though Parliament responded rapidly to the House of Lords' cry for help in *Gammell v. Wilson*, it did so, as usual when reforming the law, without retrospective effect. The result was that for some years difficult cases continued to come before the courts for solution raising troublesome points under these two decisions, even though these cases were in one sense obsolete before they were decided, so that the cost incurred in these cases was a complete social waste. And finally, even when Parliament did step in, it did so without an adequate examination of the theoretical basis of what it was doing, so that the law remains in some respects erratic and arbitrary in operation.<sup>21</sup>

I want now to suggest that there are certain other respects in which it does seem to me still the case that English law is neglectful of the need for rationality in the law. What I have in mind here are not so much cases where the law and courts fails adequately to consider the purposiveness of law and legal processes, so much as cases in which the law tends to conceal what is going on. Let me just give

<sup>21</sup> See Cane and Harris, (1983) 46 M.L.R. 478, at p. 482.

one example of the kind of thing I have in mind; it concerns the problem of implying terms in a contract. It is standard doctrine in English case law that you can only imply a term in a contract when it is necessary to make the contract workable,<sup>22</sup> and not just because you think it is fair or desirable, but it is difficult to be convinced that this is all that goes on when terms are implied in a contract. The truth is that the criterion of “necessity” is virtually meaningless once you get past the point at which it is literally and physically necessary for something to be added to the contract to make it work, and yet it is perfectly clear from the case law that you can imply terms well beyond that point. The truth is that if the term is not literally necessary, it can only be “reasonably necessary,” and it does not dispose of the difficulties simply to insist that the standard of reasonableness is business need or even practice. Many practical difficulties ensue, at least in part because the highest courts simply will not spell out the criteria of reasonableness more fully in this context.

In 1985 two cases were decided within a few days of each other, one in the Privy Council and one in the House of Lords, both involving this question. In the first case,<sup>23</sup> an employee had forged cheques on his employer’s account over a long period of time, and these cheques had been paid by the employer’s bank. When the fraud was discovered the employers demanded repayment and the bank claimed that the loss was caused by the employer’s negligent and inefficient supervision of its accountant. In the Court of Appeal of Hong Kong it had been held that there was an implied term in the contract between the employer and the bank

<sup>22</sup> See *Liverpool C.C. v. Irwin* [1977] A.C. 239.

<sup>23</sup> *Tai Hing Cotton Mill Ltd. v. Liu Chong Bank* [1985] 2 All E.R. 947.



that the employer would not so negligently conduct his business as to cause loss to the bank. On appeal the Privy Council rejected the implied term. It was not necessary to imply the term, said Lord Scarman, because it could not be said to make the contract ineffective that the bank would have to suffer because of the employer's negligence. A few days later judgment was given by the House of Lords in the *Harvela* case.<sup>24</sup> Here a vendor of shares had invited two parties to bid for the shares by sealed tender or confidential telex, and undertook to accept the highest bid. One party offered \$2,175,000 for the shares, while the other party offered \$2,100,000 or \$101,000 more than any other offer. The question was whether this second bid was permissible, or whether there was an implied term in the invitation that every bid had to be for a fixed sum. The Court of Appeal, applying the standard English cases, had held that it was not strictly necessary to imply any such restriction into the invitation and that therefore this second bid was good. The House of Lords disagreed, insisting that the whole point of such a system of bidding was to rule out bids of this kind. In characteristic style Lord Diplock treated this result as almost too obvious for words, though he had the grace to add that he appreciated the result could not be quite so obvious as he himself thought seeing that the Court of Appeal had come to a different conclusion.<sup>25</sup> So in both these cases, lower courts who had loyally tried to follow previous authorities found themselves reversed, with something approaching disrespect.

Is it not clear that something is going wrong here because the theoretical basis of the law is so weak? In both these

<sup>24</sup> *Harvela Investments Ltd. v. Royal Trust Co. of Canada* [1985] 2 All E.R. 966. The dollar amounts refer to Canadian dollars.

<sup>25</sup> [1985] 2 All E.R. at pp. 969-970.

cases reasons are offered, more or less convincing reasons according to taste, for the ultimate decisions, in one case to exclude and in the other to include, the proffered implied term, apart from the mere use of the formula that the implied term was or was not necessary. But the continued insistence that this is the exclusive test for reading terms into a contract is surely misleading and unhelpful to lower courts, as these two cases demonstrate. Given the number of cases in which the judges have invoked Holmes to justify their rejection of logic and theory, it seems appropriate to cite a passage from him dealing with this same question of implied terms:

“You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.”<sup>26</sup>

I said a little earlier that the pure pragmatist is not only generally rather hostile to matters of theory and rationality, but that he is also disinclined to meddle with things that seem to be working alright. Let me now say a few words about this second inclination. At first sight nothing could seem more obvious and sensible than to leave things alone if they are working well. But even this piece of pure pragmatism isn't quite so straightforward as it seems, because until we know what purposes we want to achieve we can't really say whether something is working well or not. A rule or a legal institution may appear to be working perfectly satis-

<sup>26</sup> “The Path of the Law,” 10 *Harv. L. Rev.* 457, at p. 466 (1897).

factorily, but when you stop to think about it, you may begin to wonder if it is really helping to achieve the goals we ought to be aiming at. And even if it is successfully doing that, this may be a reason for studying it the more closely, if not for meddling with it. Let me illustrate what I have in mind by looking for a moment at the role of the Lord Chancellor in the English legal system. We all know that there is something pretty anomalous and odd about the Lord Chancellor's position, because after all it violates so many of the rules that underlie the modern understanding of the judicial function. The Lord Chancellor is a judge, who sits, indeed presides, in appeals in the House of Lords when it sits as a court. He also appoints a great many of the other judges, and even as to the most senior judges who are nominally appointed on the recommendation of the Prime Minister, it seems certain that the Lord Chancellor's advice is normally sought and accepted by the Prime Minister. He also bestows the rank of Queen's Counsel. In addition, the Lord Chancellor is recognised to be head of the judiciary in the very real sense that his lead on many important matters to do with the administration of the judicial system is likely to be accepted or followed. So for instance, it is now known that it was Lord Gardiner who, as Lord Chancellor, proposed (though he did not originate the proposal) that the House of Lords should adopt the Practice Statement of 1966 which freed the House from the absolutely binding obligation to follow its own previous decisions. And it is also known that Lord Kilmuir, as Lord Chancellor, formulated the so-called Kilmuir rules, an informal code of practice governing the public participation of the judiciary in controversial matters.

At the same time the Lord Chancellor is an active politician. He is a member of the cabinet, and head of an execu-

tive, though small, department of state. He has ministerial responsibility for various bodies, like the Law Commission and the Law Reform Committees, and for the administration of a body of laws such as the legal aid Acts. Then again, the Lord Chancellor is a member of the legislature. He sits on the Woolsack, presiding in the House of Lords in its legislative capacity. Here is another paradox or anomaly, because the Lord Chancellor, a judge, is not expected to be politically neutral in the legislative House of Lords, as is the Speaker of the House of Commons, who of course is not a judge. The Speaker does not speak in debates, while the Lord Chancellor often speaks a great deal; indeed he is on many issues the government's chief spokesman in the House of Lords.

Of course all this is perfectly well-known, and English lawyers have lived with this anomalous situation for so long that they have ceased to wonder about it or perhaps even to think about it. It works, or so it seems, even if few of us would take seriously Gilbert's Lord Chancellor who, in *Iolanthe* proclaims, or rather sings:

“The law is the true embodiment  
Of everything that's excellent.  
It has no kind of fault or flaw,  
And I, my Lords, embody the Law.”

But are there not some aspects of all this that we ought to start thinking about again today? Even if we don't take too seriously the idea of the separation of the powers in all its applications, lawyers and judges are fond of proclaiming that the independence of the judiciary is the cornerstone of the constitution. Indeed, the Lord Chancellor himself constantly invokes the principle of the independence of the judiciary as a ground for rejecting proposals for changes in

the law or political practice. But how independent is the judiciary when the Lord Chancellor manages to combine all these political and judicial functions in one person? Not only is he himself not independent of the government, but his powers of patronage and promotion are so extensive that his position might be said to threaten the independence of other judges or aspirants for judicial office. I do not, of course, for a moment suggest that the present Lord Chancellor would exercise his powers of promotion or patronage so as to favour or disfavour a barrister or judge who acted in a way which the government might find unpalatable. But there are far more subtle ways of exercising power and patronage some of which might indeed seem perfectly right and proper to the Lord Chancellor. Clearly, for instance, the Lord Chancellor has in the past (with the support of the majority of the judges) taken the view that other judges ought to steer clear of media exposure on controversial issues, hence the Kilmuir rules. But it is also now clear that not all the judges agree with the Kilmuir rules, and they have been very publicly challenged by Judge Pickles. It seems hardly open to doubt that someone who does not believe in these rules, and openly flouts them in this way will seriously damage his chances of appointment or promotion in judicial office. Indeed Judge Pickles has publicly announced that he has no interest in judicial promotion, which is why he feels able to challenge the Kilmuir rules.

But I do not really want to get into a discussion of the Kilmuir rules themselves. What I do want to raise are some questions which might seem of a rather more theoretical nature, although they are by no means without practical import. As to the practical implications of some of these questions, one only has to reflect for a moment on the fact that it was because of his ministerial responsibilities that

Lord Hailsham was in 1986 challenged before the Lord Chief Justice on a petition for review brought at the instance of the Bar Council, and in substance found to have acted contrary to the established principles of administrative law.<sup>27</sup> Clearly, one possible reason for judges not having administrative responsibilities is that it is part of the function of the judiciary to oversee the administration's due observance of the law. But the issues are more complex and puzzling than that.

I am puzzled in particular as to why conduct which seems to be perfectly acceptable when it is indulged in by the Lord Chancellor is not regarded as acceptable if indulged in by other judges. Is this because there is only one Lord Chancellor, and an anomaly can therefore be swallowed if it is small enough? But this hardly seems a satisfactory answer to my question when we remember what a fundamental constitutional principle it seems to be that judges are supposed to be non-political. We do not usually accept breaches of fundamental principles just because they are small ones. Or is it because the Lord Chancellor is usually an astute politician as well as an able lawyer who can somehow be trusted to keep apart his political and his judicial role? Or is it, perhaps, possible that many judicial decisions, especially those demanded of senior appellate

<sup>27</sup> *R. v. Lord Chancellor, ex p. Alexander* (1986), referred to (though not reported, in) 136 *New L.J.* 297. The proceedings never went to a final judgment but only because the Lord Chancellor in substance conceded victory to the Bar, and agreed that his prior determination of the level of legal aid fees should be treated as interim only, and subject to further negotiations with the Bar. This is confirmed by the fact that an order for costs was made in favour of the Bar. *cf. Bates v. Lord Hailsham* [1972] 1 W.L.R. 1373.

judges, are in truth policy decisions, as many academics argue and as Lord Hailsham himself seems to admit,<sup>28</sup> so that a judge with a political background may even be a better judge than one who has a purely professional background? And if that is the case, can we really be sure that apparent aloofness and abstention from controversial issues are the best postures for judges?

Then again, there must be doubts about the premisses of the pure pragmatist who says "It works, so leave it alone." In a sense it does work. The Lord Chancellor is usually, in modern times almost always, a figure of high repute both as a politician and a lawyer, and though there may be the occasional question about his immense powers of patronage in terms of judicial appointments and promotions, the quality of the English judiciary generally continues to be very high. But then in another sense all this can only be said to be working well if we limit our objectives in certain traditional ways. Other people, non-lawyers, especially those on the radical left, may not think it works well at all. I myself have little affinity with those on the radical left, but I can certainly see an argument being made that our judges are very unrepresentative of the community, and ought to be made more representative. If it is said that this is inevitable given that judges are drawn solely from the Bar, the next question must be, is it right that our judges should continue to be drawn exclusively in this way? And if it is said that legal trials as presently conducted could not be properly handled by those who had no experience at the Bar, then the question must be, do we want our legal trials to be so conducted that

<sup>28</sup> See John Bell, *Policy Arguments in Judicial Decisions* (1983), p. 5.

only those who are members of this tiny profession can handle them?

I do not claim to have the answers to these questions, many of which raise very far-reaching issues. But I am afraid that our pragmatic traditions often tend to discourage people from opening up such questions, and I am quite sure they ought occasionally to be posed and considered.

### *Rights and Remedies*

I have previously suggested that English law is still very remedy oriented, and that this is, in some respects, a source of pragmatic strength. It is, I think, clearly right to say that the emphasis on remedies is somehow very English, and very pragmatic. "Let us not get too bogged down in matters of principle, or arguments about rights," one can see the Englishman saying, "the question is a straightforward practical one: what's to be done?" Of course the law is not totally devoid of theoretical analysis, and indeed some of its worst mistakes have involved an over-refinement of "logical" reasoning, but, as we have already seen, there is an undoubted tendency to eschew theory and pursue the pragmatic in English law. I now want to suggest some respects in which this stress on remedies can be a source of weakness in the law, and that a greater interest in theoretical analysis of the issues would be desirable, and greater emphasis on questions of rights, and of course duties, would also be helpful.

Let me start by reverting for a moment to the Diceyan view which I mentioned in my first lecture, that fundamental constitutional rights are the incidental product of ordinary litigation, and that the protection of these rights by effective remedies is the really vital matter. I think it is clear



that Dicey had particularly in mind the writ of habeas corpus as a more effective preserver of individual liberty than the grandiloquent assurances of the rights of man which have so often been found in many foreign constitutions. Of course, it goes without saying that it is of the utmost importance that rights be effectively enforceable by practical remedies; rights without remedies may be meaningless words. But it is equally true that remedies without an adequate theoretical understanding of what they are for, what purposes they serve, what rights and duties they are designed to uphold, are unlikely to serve as a satisfactory basis for the law. This might seem so obvious that it hardly needs illustrating, but I am afraid it is sometimes obscured by the extreme pragmatism of English law. A case occurred some years ago, one of those minor cases that never made the headlines or even the Law Reports, which suggests to me that even with the writ of habeas corpus it is sometimes desirable to think about the rights which remedies are designed to serve.

As I have said, the case made no headlines, nor was it reported, and I rely on my memory of contemporaneous newspaper accounts for what happened. The case involved a person who had been taken to a police station and detained there for some days while he was being questioned by the police. But he had not been charged with any offence, nor brought before a magistrate. Under the law as it stood before the Police and Criminal Evidence Act 1984 this was almost certainly illegal, so a writ of habeas corpus was applied for on behalf of this anonymous detainee. The matter came before the Lord Chief Justice, Lord Widgery, at which time the situation continued unchanged. The applicant was still uncharged, and was still detained, but the Lord Chief Justice was told that it was expected that

charges would eventually be preferred. Lord Widgery refused to issue the writ. Whether the applicant was illegally detained or not, he said, was immaterial. The issue of the writ was discretionary, and he exercised his discretion by refusing to issue it. The sole ground for this remarkable decision was that the police could regularise what was an irregular situation at any moment by charging the applicant; so that the issue of the writ could be immediately rendered a *brutem fulmen*. Here was the very apotheosis of pragmatism. An illegal detention could at any time be converted into a legal detention, so there was no point in deciding if it was illegal, or condemning it and granting redress if indeed it was so found.

I confess that I was appalled at this decision, and I remain deeply shocked at its implications. The Lord Chief Justice of England had in effect told the police that they could commit such an illegality without redress by the remedy extolled above all others for its effectiveness by our traditional constitutional lawyers. It is not surprising that such police action later became quite commonplace, though of course one does not know to what extent this decision actually influenced police practice. Today the position has been completely changed by the very detailed provisions as to detention without charge in the 1984 Act, but that does not affect the point I want to make. What concerned me was the total failure to ask about the purposes and rights which the writ of habeas corpus was designed to serve, or at least could be made to serve in this kind of situation. Obviously, one function which it could have served would have been to require the police to lay charges as soon as possible, and not to detain a suspect for questioning without charge, illegally as it was then thought. Refusing the writ in such a case was an open invitation to the police to violate

the rights of suspects and continue to pursue illegal detention practices.<sup>29</sup>

Let me now take another kind of issue which also raises the Diceyan approach to constitutional rights. We have, of course, no constitution guaranteeing the freedom of the press in English law, and Dicey's approach was to say that there was no such thing as a freedom of the press. The freedom of the press simply follows from the ordinary rules of English law which say that everybody is free to do anything which is not specifically prohibited, but he does so under and subject to the law. So the press may publish anything it chooses provided it observes the law of libel, the law of contempt and all the other laws which may affect the transmission or publication of information. In *Harman v. Home Office*<sup>30</sup> a question was raised as to the liability of a solicitor for contempt of court in passing on to a journalist documents in her possession under a discovery order, even though those documents had been read out in open court and could have been taken down by any reporter present. Lord Diplock, delivering the leading judgment in that case insisted that the case raised no questions about fundamental rights. Indeed, he prefaced his speech by saying that the case had attracted a good deal of publicity and that it was therefore desirable to clear up misconceptions by saying what the case was *not* about.

“It is *not* about freedom of speech, freedom of the press, openness of justice or documents coming into the ‘public domain’; nor [he added for good measure, disagree-

<sup>29</sup> For a more general discussion of the weakness of habeas corpus as a remedy for protecting fundamental rights today, see Lester, “The Constitution: Decline and Renewal,” in *The Changing Constitution* (ed. Jowell and Oliver 1985), at pp. 290–291.

<sup>30</sup> [1983] 1 A.C. 280.

ing in this respect with the minority judges] does it in my opinion call for consideration of any of those human rights and fundamental freedoms which [are protected by the European Convention of Human Rights].”<sup>31</sup>

The case was, said Lord Diplock, simply about the rules governing the conduct of a solicitor who has obtained documents under an order for discovery. Now I am bound to say that this approach, based though it is on the traditional Diceyan explanation of constitutional rights, seems very unsatisfactory. What Lord Diplock totally failed to understand, it seems to me, is that a case may be about more than one question; indeed, even on the Diceyan view, constitutional rights arise and must be decided incidentally in the course of ordinary litigation. But that they do so arise it seems utterly absurd to deny. Of course the *Harman* case raised issues about the use of documents obtained in discovery proceedings, but it also raised issues about the right of the press to make use of information, as Lord Scarman and Lord Simon rightly insisted in their dissenting speech.

But there is a second problem with the approach of Lord Diplock and the other majority judges in the *Harman* case. If it is insisted that our law recognises no such thing as a fundamental or a constitutional right—and in the more recent *Guardian* case<sup>32</sup> Lord Diplock again refused to treat the freedom of the press as a “constitutional right”—then the judges will be failing in one of their basic duties. They will be failing to accord due weight to certain values in the inescapable policy choices which they are called upon to make as judges. Obviously, if our constitutional rights can

<sup>31</sup> At p. 299.

<sup>32</sup> *Secretary of State v. Guardian Newspapers* [1985] A.C. 339, at p. 345.

only be decided incidentally in the course of ordinary litigation, then decisions on those rights will often require a weighing of policies and values. But how can policies and values be properly weighed if no *additional* weight is accorded to those rights which have long been regarded as fundamental or constitutional in English society? The very glories of freedom which Dicey, as a true descendant of Whiggish England, was so concerned to extol, assume that we value certain rights more highly than others. Among these are clearly those political rights, such as the right to vote in free and fair elections, and the freedom of the press which is a necessary concomitant of political freedoms. Obviously the protection of these rights must sometimes clash with other values and maintaining the balance between them will be difficult and will require delicate judgment. But the mere fact that we have not enshrined these particular rights in a Bill of Rights does not mean that most English people do not regard them as having special weight in any clash of values, and indeed our adherence to the European Convention demonstrates that we do so regard them. That is why the Convention was rightly regarded as relevant by Lord Scarman and Lord Simon in the *Harman* case, and why the majority were guilty of a grave dereliction of their responsibilities in failing to appreciate that fundamental constitutional issues *were* involved in that case.

So here is an example of the way in which the remedy-based approach, the unwillingness to think in terms of rights, leads to conclusions and indeed methods of thought and ways of approach, which I find little short of disastrous.<sup>33</sup> As has been said, the approach trivialises issues of

<sup>33</sup> For the contrasting approach of the European Court operating under the Human Rights Convention, see Lester, *loc. cit.*, at pp. 287–290.

great importance to us all.<sup>34</sup> I do not, however, think that these results can all be laid at Dicey's door. Dicey himself, I believe, assumed in the way so typical of the comfortable English lawyer of his time and class, that Englishmen were so thoroughly imbued with the need to maintain their fundamental rights, that when these issues arose in ordinary litigation, the rights in question would be accorded due weight. I doubt if he ever entertained the thought that these rights could be accorded so little weight in ordinary litigation that they could sometimes be sunk almost without trace.

There is another problem with the Diceyan legacy, this time in the field of statute law. In modern times, of course, many important rights, some of which can certainly be characterised as fundamental rights, are conferred by legislation. Now there is, of course, no way in which these rights can be seen as arising in the course of ordinary litigation, but what I want to draw attention to here is not merely the point that these rights are specifically conferred by statutes but that our tradition of statutory drafting in this area suffers once again from the unwillingness of our legislature to confer rights by way of fundamental principle. Too often the pragmatic approach leaves us with a legislative hotch-potch, ill-suited to the development of an atmosphere in which fundamental rights can be developed or protected by the judiciary in a spirit appropriate to the importance of the issues. Let me quote here the words of Mr. Lester commenting on our legislation protecting equality of treatment without unfair discrimination:

“[B]ecause British legislation is characteristically specific, pragmatic, and piecemeal, there is no coher-

<sup>34</sup> See Barendt, “Dicey and Civil Liberties,” [1985] *Public Law* 596.

ence about the guarantees of non-discrimination in this country. In Britain it is unlawful to discriminate on racial grounds, but racial discrimination is not unlawful in Northern Ireland. It is unlawful in Northern Ireland to discriminate on grounds of religious belief or political opinions, but such discrimination is not unlawful in Britain. It is unlawful throughout the United Kingdom to discriminate on the grounds of sex; but the protection of the law is divided by the Irish sea, so that the Equal Opportunities Commission and the Equal Opportunities Commission for Northern Ireland are forbidden to share information about their investigations into suspected unlawful sex discrimination, and the employment provisions are confined only to employment at establishments in Britain or Northern Ireland."<sup>35</sup>

Surely pragmatism and the focus on remedies produces the wrong sort of result in such areas as this. Again, it seems to trivialise fundamental issues to treat them in this way. How is it possible that such a fundamental ideal as equality in the law should be given full scope and perform its valuable educational and social functions, if it is not protected by declarations of right in broader and more principled shape?

I want now to turn to another facet of my theme. I suggested in my second lecture that the adversary procedures of English courts were often a source of great strength, not only in the fact finding process, but also for the development of the law itself. It is a salutary experience for anyone who proposes that the law is, or should be thus and thus, to be then faced with someone who is paid to point out all the

<sup>35</sup> Lester, *loc. cit.* at pp. 280–281 (footnotes omitted).

reasons why that would not be a good thing.<sup>36</sup> The work of academics and perhaps also law reform bodies suffers, by contrast, from this lack of a devil's advocate. This is one respect in which it often is helpful if rights emerge from remedies, from litigation in particular cases. But I do feel bound to say that it sometimes seems to me that the judgments of the judges in important appellate cases would themselves benefit from this kind of scrutiny by a paid devil's advocate, such as can be provided (for example) through the system of judges' clerks which exists in America. I cannot help feeling that a young and able law graduate, even straight out of university, could have saved an enormous amount of trouble by pointing out (for instance) the weaknesses in certain passages in the speeches in the *Suisse Atlantique* case,<sup>37</sup> if those speeches had been subjected, while still in draft, to the sort of scrutiny which is provided by a good judge's clerk in America.

This therefore is a situation where the use of an adversary type procedure could be suitably extended. But I now want to point out that there are certain disadvantages to the judicial development of the law which arise from the adversary process. One such disadvantage immediately springs to mind. An advocate who is employed to make as powerful an argument as he can often tends to make the same point in several different guises. He can never be sure which way of putting the point is likely to impress the judge most, so he plays safe by putting the point in three or four different ways. But of course, if he did that openly, he would defeat

<sup>36</sup> All important legislation drafted by Parliamentary Counsel is subjected to this kind of minute hostile scrutiny even before it is introduced into Parliament, because the draftsmen work in pairs, one who drafts, and one who criticises.

<sup>37</sup> [1967] 1 A.C. 361.



the object of the exercise because the judge would see that only one point was being made. So the advocate is tempted to make the one point look as though it is really several points. And unfortunately the judge may be taken in by this. So our law becomes more complex than is necessary, in contrast, as I understand with the civil law where (at least according to Jhering)<sup>38</sup> one of the elegant features of their systems is "the economy of juristic concepts."

Let me illustrate this point, with a couple of tort cases. Take first the well-known case of *Baker v. Hopkins*,<sup>39</sup> one of those tragic rescue cases in which Dr. Baker went to the aid of two men who had gone down a well filled with poisonous gases, and was himself killed as a result of being overcome by the gases. In an action against the employer of the men, brought by Dr. Baker's widow, it was held that the defendants were clearly negligent in planning the work with almost complete disregard of the dangers, but four separate defences were argued: (1) that the defendants owed no duty of care to Dr. Baker; (2) that Dr. Baker's death was caused by his own voluntary actions and not by the defendant's negligence; (3) that Dr. Baker knowingly accepted the risks, and was therefore defeated by the maxim, *volenti non fit injuria*; and (4) that he was guilty of contributory negligence. Now each of these defences was argued and dealt with separately by the Court of Appeal judges, and there are three fairly full judgments in consequence. But try as I can, I simply cannot see how more than one question really arose from these facts once the negligence of the defendants was proved. It seems to me perfectly obvious that if an intelligent layman were asked his opinion of these facts he would

<sup>38</sup> Cited by Lawson, *A Common Lawyer Looks at the Civil Law*, p. 67.

<sup>39</sup> [1959] 1 W.L.R. 566.

say that the real question was whether the defendants' negligence was responsible for what happened, or whether Dr. Baker himself bore some share of the responsibility. Each of the four legal categories into which the case was divided simply looked at the same question in different language, and the judgments of the three judges simply went round and round the same questions using different language and concepts. Nor is it even possible to say that the one question was sub-divided into four distinct sub-questions. The sub-questions are not distinct at all. They simply are the same question, discussed in different legal terms. This is a particularly striking example of the phenomenon, but it is in fact very common to find causation issues being raised in addition to allegations of negligence, and in these cases it is again almost always found that the two issues simply duplicate the same discussion. The defendant argues that he could not foresee what happened, and even if he could, it was such a strange event that he could not be said to have caused it, and judges treat these two defences as raising different questions, although in the vast majority of cases the answers come out exactly the same, and when they do not, something pretty funny has happened.<sup>40</sup>

Another example of this kind of thing, though in the particular circumstances, it failed, was the attempt of counsel in the recent case of *Kralj v. McGrath*<sup>41</sup> to claim aggravated damages in a particularly unpleasant case of personal injury caused by medical negligence. Now damages in a personal injury case can already, and nearly always do in

<sup>40</sup> An attempt to sub-divide the causation issue still further was fortunately defeated in *J. E. B. Fasteners Ltd. v. Marks Bloom & Co.* [1983] 1 All E.R. 583.

<sup>41</sup> [1986] 1 All E.R. 54.

fact, include a sum by way of compensation for pain and suffering, and this sum is in a sense fixed "at large," that is without specific quantified losses being proved. Furthermore, it is clear since *Cassell & Co. Ltd. v. Broome*<sup>42</sup> that aggravated, as opposed to exemplary damages, are designed to compensate for the plaintiff's loss and not to punish the defendant for his misconduct, so it is difficult to understand what damages could be recovered as aggravated damages which cannot already be recovered as general damages. In truth it seems to me quite clear that aggravated damages would only mean the plaintiff recovering twice over for the same injuries, simply conceptualised in different language. As I have said, the claim failed in this case, but we are by no means free from the danger that the increased itemisation of damages will lead to over recovery through this unnecessary duplication of legal conceptions and categories. This kind of thing is, I believe, largely due to the way in which our case law develops through the adversary processes of the law, in the pragmatic step by step manner, and sometimes without adequate overall examination of the rational basis of what is being done.

In addition to cases of this kind, there are, I believe, a great many other areas of our law in which adherence to the doctrine of precedent leads to the very reverse of "an economy of juristic concepts," so that the inter-relation between two characteristics of the pragmatic approach redoubles the less desirable features of each. When a doctrine of the law has hardened and ossified over the years both our judges and our legislature often prefer to outflank it by developing new doctrines and techniques rather than openly modifying

<sup>42</sup> [1972] A.C. 1027.

or rebuilding the old. This leads to the piling of new layers of law on the old, and a constant growth in complexity. Consider, for example, the way in which the doctrine of promissory estoppel has grown up because of the over-rigidity of the doctrine of consideration. So today we have two doctrines where one would suffice. In a more rational world, we would surely modify the old doctrine of consideration, instead of leaving it standing and simply piling another doctrine on top of it. The same is surely true of the doctrine of the "intention to create legal relations" which duplicates the job that consideration was originally designed to do. Much the same can be said, in my view, though others will disagree, about the way in which the insurance system has been piled on top of tort law, instead of being allowed largely to replace it.<sup>43</sup> Or again, consider the incredible complexity of the present law relating to misrepresentation in contract, where the common law was first supplemented by equitable rules, and the combined set of rules, already complex enough in all conscience, then had the Misrepresentation Act 1967 piled on top of them.

Occasionally the courts have rebelled at this sort of process, as, for instance, where the House of Lords insisted that since the Unfair Contract Terms Act 1977 it is inappropriate to resort to artificial methods of construction in order to avoid the application of apparently harsh and unreasonable

<sup>43</sup> One particularly striking example (though an international one) of this sort of phenomenon is the way in which the whole law of general average—a primitive and rather crude form of insurance—has been allowed to continue after modern systems of insurance developed; so that today, shipowners and cargo owners have to insure against their liability to pay general average contributions, which is as though insurers were compelled to insure against their insurance liability. That the added costs of this layer of law are significant and probably pointless is confirmed by the detailed study of Selmer, *The Survival of General Average: A Necessity or an Anachronism?* (1958).

exclusion clauses.<sup>44</sup> So here the courts have tried to escape from the troublesome business of using two doctrines to achieve the same result, an older unsatisfactory one and then a newer and more rational one. Unfortunately, given the way the adversary process works, I fear that even the House of Lords will never succeed in preventing counsel from presenting two arguments where one might be enough. What counsel, faced with an awkward and perhaps harsh exemption clause, will still not be tempted to argue, first that the clause does not apply as a matter of construction; and secondly, that even if it does, it is unreasonable and therefore void under the 1977 Act? There is in my view no doubt that our law is far more complicated than it need be in a large number of fields because of this duplication of legal concepts and arguments, and this in turn seems to me to be due to the vices of pragmatism. The time does come, in law as elsewhere, when old structures are simply too ramshackle to be further patched up, and when they must be torn down and new buildings designed from scratch. But that does require proper study of the rational basis of the whole design so that the new building can be erected on satisfactory foundations. I fear that it is all too rare that this happens in our legal system.

### *Precedent and Principles*

All this leads naturally onto the third heading under which I have been discussing the strengths and weaknesses of the common law tradition. My task now, it will be apparent, is to suggest that there are serious weaknesses in the common law pragmatic tradition, because of the tendency, sometimes more and sometimes less pronounced, to concentrate

<sup>44</sup> See *Photo Productions v. Securicor* [1980] A.C. 827; *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds* [1983] 2 A.C. 803.

on precedent rather than on principle. And I hope it is clear by now that I do not refer here only to precedent in the narrow sense which the word bears in our system of law, but also to a more general tendency to decide cases *ad hoc*, to try to settle disputes by wholly pragmatic means, without regard to the principles of law and the broader purposes which those principles must have. In this sense, indeed, my complaint is that the abandonment of principle often leads also to an abandonment of precedent in the narrower sense. Discretionary decisions, for example, decisions in all the circumstances of the case, decisions under apparent legal principles, but principles so malleable that they can be made to yield up any solution at all, all these are illustrations of the broad tendency to pursue precedent as opposed to principle, in the sense which I am now giving these terms.

I have discussed on two earlier occasions, some of the main anxieties which I have with regard to the current trends in English law in these respects, so I can deal with this heading briefly today, simply restating very shortly some of the points I have developed elsewhere, and adding a very few further thoughts.<sup>45</sup> First, then, I have suggested before that the trend in modern English law has been increasingly toward the pragmatic in this particular sense, towards deciding cases according to all the circumstances, in an attempt to do justice in the particular circumstances of the case. I have warned that this trend seems to me to neglect the broader deterrent or hortatory purposes of the law, and it is of course an old theme that this tendency makes the law less certain and predictable.

<sup>45</sup> See my *From Principles to Pragmatism* (Oxford, 1978) and my Chorley lecture, "Common Law and Statute Law," (1985) 48 M.L.R. 1.

Let me now just add a few further comments on this very broad theme. First, while this purely dispute-oriented approach to law has its strengths, it also has great dangers. These dangers can be manifested in two completely opposing ways. On the one hand, this kind of pragmatism sometimes leads to mechanical rule application of the worst kind, and on the other hand, it sometimes lead to an almost complete abandonment of all rules. The first danger arises because pure pragmatism, taken to extremes, can encourage a mindless, blind application of rules or precedents without any attempt to understand what the law is for, what is its rational basis, how the law as a whole is structured. Here is Holmes again, on the absurdities to which this kind of approach can lead:

“There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and found nothing about churns, and gave judgment for the defendant.”<sup>46</sup>

The story seems laughable, but whenever a modern judge dismisses a claim simply because it is totally without precedent, is he not doing much the same thing? And it can hardly be suggested that this never happens even today. Equally, when a judge does apply a precedent, there is an obvious need to ensure that it is not applied blindly, but through the search for principle. As Morris Cohen put it many years ago, “the very first question, What does the case stand for? involves a theoretic issue—namely, On what

<sup>46</sup> “The Path of the Law,” 10 *Harv. L. Rev.* at pp. 474–475.

principle can the actual decision be supported, or from what principle can it be deduced?"<sup>47</sup> The opposing danger, which seems to me much more worrying today, is that the courts will hammer so strongly on the particular facts of the case that in the end the search for principle underlying precedents will be virtually abandoned. We all know how common it is today for a case to be dismissed as applying only "on its special facts," but, if taken literally, this is a meaningless formula, and demonstrates the urgent need for radical rethinking of the doctrine of precedent.

I would like to add another word about the proliferation in modern times of discretions and guidelines in the law. These are coming to be almost a new species of legal animal. In civil law, discretions are now to be found all over the place, often conferred expressly by statute, empowering the judge to depart from the ordinary rules whenever it seems just or expedient to do so. So, for instance, there are discretions as to the grant of equitable relief, especially, perhaps, interlocutory injunctions, discretions as to unreasonable exemption clauses under the Unfair Contract Terms Act, discretion under the Law Reform (Frustrated Contracts) Act as to the awarding of a just sum for benefits conferred under a frustrated contract, discretion to override the normal limitation period in a personal injury action. In modern times the House of Lords has repeatedly insisted<sup>48</sup> that the Court of Appeal must not substitute its own dis-

<sup>47</sup> "Law and Scientific Method," in Ames, Cardozo *et al.*, *Jurisprudence in Action* (1953), p. 121.

<sup>48</sup> See, *e.g.* *American Cyanamid v. Ethicon* [1975] A.C. 396; *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191; *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds* [1983] 2 A.C. 803; *Garden Cottage Foods v. Milk Marketing Board* [1984] A.C. 130.



cretion for that of the trial judge,<sup>49</sup> thereby encouraging the tendency to treat each case on its own merits, and restricting the development of the law through normal appeal processes. Similarly, there has been a growth in the use of "guidelines" in the law, sometimes under statutory provisions (as with the Unfair Contract Terms Act) and sometimes as a matter of common law, for instance with regard to sentencing in criminal cases, and also with regard to the appropriate jury directions which a judge must give in criminal trials.<sup>50</sup> The precise legal status of such "guidelines" is by no means always clear,<sup>51</sup> but like discretions they appear to encourage a flexible approach to legal practice which may be useful and even necessary in certain cases, but can easily degenerate into complete "*ad hoc*tery," a casuistical methodology which eventually supplants the need for rigorous legal analysis and thought and replaces it with gut feeling and sentiment.

This danger is perhaps nowhere more apparent than with regard to the principles of sentencing in criminal cases. Those whose business it is to study the grounds on which judges choose one sentence rather than another agree that judges justify their decisions on a variety of different grounds: the deterrent, the retributive, the denunciatory and so on. Now there is, of course, nothing wrong or

<sup>49</sup> I do not myself understand how these cases can be reconciled with the actual decision of the House of Lords in *Evans v. Bartlam* [1937] A.C. 473 where it was pointed out that the statutory provisions conferring appellate power on the Court of Appeal expressly state that the court "shall have all the authority and jurisdiction of the court or tribunal from which the appeal is brought," (see now Supreme Court Act 1981, s.15(3)), and that the Court of Appeal must therefore exercise its own discretion where discretion exists.

<sup>50</sup> See *e.g.* *R. v. Hancock and Shankland* [1986] 1 All E.R. 641.

<sup>51</sup> See the discussion in Ashworth, *Sentencing and Penal Policy* (1983), pp. 35-42.

irrational with this sort of eclecticism. But the pragmatist who simply chooses which of the various possible aims of the criminal law he will try to pursue in each individual case is in grave danger of abandoning all principle unless he can rationally distinguish the cases in which he will appeal to one aim rather than another; or unless he can show that he has some consistent set of priorities which governs the selection of one aim rather than another.<sup>52</sup> And it must be said that there is so far absolutely no sign that the Criminal Division of the Court of Appeal is able to do either of these things, or even appreciates the desirability of doing so.<sup>53</sup> The law here seems in grave danger of following the example of a recent politician, who had better be nameless, of whom it was said that although he was a man of principle, he invoked a different principle for every occasion.

I will conclude this brief discussion of the weaknesses of the pragmatic tradition with respect to precedent and principles by returning briefly to the questions of statutory drafting. As I pointed out in my first lecture, our statutes tend to be drafted, not as statements of principle, but as compendia of detailed rules. Every statutory sub-section tends to be a wholly *ad hoc* enactment, fitting no doubt into some overall legislative scheme, but operating in a detailed and precise way. I have also pointed out how difficult it is for statutes drafted in this way to be used for the further development of common law principles, building on the enactments as analogies, or as foundations from which to proceed. Let me illustrate by comparing our Unfair Con-

<sup>52</sup> Walker, *Punishment, Danger and Stigma* (1980), p. 44.

<sup>53</sup> See Ashworth, *Sentencing and Penal Policy* (1983), p. 448, referring to the "English habit of muddling along without being explicit about the priorities and preferences embodied in sentencing practice."

tract Terms Act with the provisions of the American Uniform Commercial Code, Article 2-302. The United Kingdom Act contains 32 sections and four Schedules. The 32 sections contain, if my arithmetic is right, 91 sub-sections. Article 2-302 of the U.C.C. contains two sub-sections. Yet it is clear that Article 2-302 is more extensive and more principled in its operation since it strikes at unconscionable contracts and terms, leaving it to the courts entirely to decide what this means. It is true that Article 2 of the U.C.C. nominally only applies to contracts of sale of goods, but American courts have widely applied the section by analogy to other contracts (as indeed the Commentary to the Code specifically invites them to do)<sup>54</sup> and many American courts are prepared to hold unconscionable contracts void at common law anyhow. Thus this article simply legitimates use of a broad principle of law, leaving the courts to implement the principle in their usual case by case procedure. The United Kingdom Act, on the other hand, contains no real principle; despite its title it does not apply to all unfair contract terms, nor does it apply a uniform principle to such terms. Perhaps it is easier to predict how a court will decide a specific case, using the United Kingdom statute than the U.C.C., but in the long run, is it not evident that we have been indulging in legislative casuistry, the kind of "*ad hoc*tery" which restricts the development of the law along broad and rational principles?

#### *The Practical and the Academic*

I come then to my fourth heading, and here it is my task to try to persuade you that the pragmatic tradition suffers

<sup>54</sup> See Comment to Art. 1-102 of the U.C.C. and cases cited in White and Summers, *Uniform Commercial Code* (2nd ed., (1980)), p. 18.

because of its aversion to rationality, theory, and in general what may be called the academic approach to law.

Now my critique of the pragmatic tradition has so far largely taken the form of criticisms of the legal profession itself, the practitioners, the judges, the legislature, and it may appear that I have been at least implicitly blowing the trumpet, as it were, of the academic legal profession. Given the nature of my theme, this is hardly surprising. Obviously, one must expect that those most concerned with the practical administration of the law will be those most inclined to the pragmatic approach. But I now want to point to a number of ways in which I believe that this general pragmatic tradition has had adverse effects for which the academic profession itself cannot escape its share of the blame. In particular, the English academic profession has largely ignored many legal "subjects" as unsuitable for teaching or academic study. Where are the English law professors in the law of taxation or civil procedure, for example, why do we have so few academics in the field of commercial law, or conveyancing; why, indeed, do we have so few academics who devote their work to the study of the English legal system itself, to the legal professions, to the system of legal aid, to the law and practice relating to costs, and to a variety of similar subjects?

The answer to my question is, I think, only too clear. These subjects are all, on the face of it, highly "practical" subjects, and if a subject is intensely practical it tends to be assumed in the English legal world, that only legal practitioners can be truly expert at it. How can an academic, in his ivory tower, surrounded by books, but without daily contact with the problems of clients, learn nearly as much about these "practical" subjects as the legal practitioner who operates on the ground? The problem has been aggra-

vated in recent decades because so few academics now have any real experience of legal practice. It is clearly difficult if not impossible for an academic to get a feel for a "practical" subject like tax or conveyancing if he has no experience of legal practice. But these difficulties also stem in part from the relatively low status of the academic legal profession. One has only to take a subject like legal ethics, and ask how much weight would be attributed by English practitioners or judges to a book on this subject by an English academic, to see why such a subject may have little attractions for an academic lawyer. Yet the subject is an intensely important one which raises political controversy from time to time—it involves, after all profound issues of morality, economics and the public interest—and academics ought to be involved in it. Much the same is true of many other subjects of this character. The expertise is often found exclusively in the legal profession, or (as in the case, for example, of taxation) the expertise is divided between the profession and the civil servants. Academics have scarcely gained a foothold in many of these subjects.

But academics cannot escape some share of the blame for their failure to tackle subjects of this kind. What the academics need to bear in mind is that it is not their task to ape the practitioners. Clearly, academics who have little or no contact with private practice cannot hope to become as expert in the nitty-gritty of a subject as those who are working with practical issues day in and day out. But academics ought to be involved in these subjects all the same, because all of them, no matter how "practical" they may seem, have implications which repay rational and theoretical study. Indeed, when things begin to go desperately wrong with some of these areas of law, the lack of an adequate academic literature is a major obstacle to rethinking and reform, as

for instance, is the case with the conveyancing system at the present time. But it is not merely for the purposes of reform that academics ought to be involved in the study of practical subjects. Indeed, I am inclined myself to think that academics are today too much involved in law reform, and too much law reform is designed merely along pragmatic lines, to put right the nuts and bolts of a system already heavily oriented towards the pragmatic. Academics ought to be involved in the long term thinking about a subject, in the study of a subject to its depths, in the deep understanding of the issues, and this kind of academic activity is often at odds with the desire for the quick solution which much law reform seems today to be aiming at. Those familiar with the American legal scene will know something of the role which academic lawyers play in that country, but the English lawyer who looks across the Atlantic may still be astonished by the proliferation of high quality writing on subjects which in England are hardly ever touched by academic lawyers, such as (to take a few random examples) the law of bankruptcy, statutes of limitation, or legal ethics.<sup>55</sup> I believe we are the poorer in England for our lack of academic input into many of these subjects, and this too is a symptom of the general averseness of the English legal world to the academic rather than the practical.

I turn back now to look at some other aspects of this pragmatic tradition insofar as it affects legal reasoning in English law. I said in my second lecture that English lawyers are prone to rely a good deal on arguments of common

<sup>55</sup> I well remember when I was at Harvard in 1982–1983 the intense excitement generated in academic circles by the discussion and formulation of some new rules on legal ethics at the American Bar Association meeting in that year.

sense, and I accept that in many circumstances this is a source of pragmatic strength. I certainly have no desire to argue that an excess of logical refinement, of the kind to which some academics may be prone, is preferable to plain common sense. On the other hand, common sense undoubtedly has its limitations, and let me remind you of some of them. Take first of all the common sense of physical experience. We all have our physical senses to guide us in our observation of the world, and most of us are pretty clear about the things we see and feel and hear. English lawyers would, I am confident, side very much with Dr. Johnson in refuting Bishop Berkeley's scepticism of the reality of material objects, by the simple process of taking a hearty kick at a stone. But then we must remember how misleading some common sense observations are liable to be. For centuries, most people thought it a matter of plain common sense that the sun went round the earth. Francis Bacon, Lord Chancellor between 1618 and 1621, never doubted it, even though he was very interested in scientific questions, and indeed had pretensions to being a distinguished philosopher of science.<sup>56</sup> Consider, too, how until very recent times, lawyers were apt to assume that eye witness identification was the most reliable kind of evidence in criminal trials, and how difficult it is to convince people that they have not actually perceived things that they had previously had no doubt about.<sup>57</sup> Lawyers must also rely a great deal, in the process of proof, on *probability*, but they are generally extremely weak on probability theory, preferring to depend

<sup>56</sup> Morris Cohen, "The Place of Logic in the Law," 29 Harv. L. Rev. 622, at p. 628, n. 11 (1916).

<sup>57</sup> See Report of the Devlin Committee on Evidence of Identification in Criminal Cases (1976).

on the very unreliable intuition and common sense of the plain man.<sup>58</sup>

Common sense is, I am afraid, sometimes a mere cover for the person who does not choose to study the facts. Because law often deals with facts which are not sufficiently well known, and which need research to bring them to light, it is relatively easy for lawyers to rely on broad intuitive judgments of common sense, but these intuitive judgments are often faulty, and there can be no excuse for the lawyers who actually oppose the research needed to discover the truth. There is, it seems to me, a real anti-scientific and anti-empirical tendency in English law which constantly needs to be guarded against. Remarkably enough, this sort of anti-empiricism is often to be found even in connection with the very working of the legal system itself. Practitioners and judges often seem astonishingly ignorant of the way in which the law is actually working. For instance, Dr. Ashworth has pointed out that the guidelines given by the Court of Appeal as to sentences which may be appropriate to everyday offences like burglary or housebreaking reveal a total failure to understand what goes on in magistrates' courts, because the guidelines require sentences of such severity to be passed that they actually exceed the powers of magistrates' courts.<sup>59</sup> Similarly, only twenty years ago it was being complacently assumed by the judges that all those charged with serious offences were able to get legal aid, and it required academic research to bring to light the statistics from which it could be seen that this was just not

<sup>58</sup> See Eggleston, *Evidence, Proof and Probability* (2nd ed., 1983) Chaps. 2, and 10-12.

<sup>59</sup> Ashworth, *Sentencing and Penal Policy* (1983), p. 41.



the case.<sup>60</sup> Fortunately, the statistics in this instance had the desired effect, but this has not always been the case. The long history of penal reform in this country demonstrates, I am sorry to say, a lamentable story of opposition by the judiciary to almost every reform, on the ground that it would weaken the deterrent effect of the law, even where it could be shown that similar reforms in the past had not led to any such weakening, for instance, because juries became more willing to convict of minor offences after the abolition of the death penalty.<sup>61</sup>

Or again, consider a case like *Street v. Mountford*<sup>62</sup> in which the House of Lords had to decide whether the Rent Acts could be evaded by using a licence as a mere disguise for a tenancy. The House of Lords held that they could not, and Lord Templeman said that "the courts should be astute to detect and frustrate sham devices and artificial transactions whose only object [was] to disguise the grant of a tenancy and to evade the Rent Act."<sup>63</sup> But nobody attempted to produce any evidence to show the massive extent to which the Rent Acts had in fact been evaded by these means as a result of the Court of Appeal decision in *Somma v. Hazelhurst*<sup>64</sup> which was in the result overruled in *Street v. Mountford*. Yet I am informed that, certainly in London, and I dare say in many other large cities, it was virtually impossible to obtain a lease as opposed to a licence to occupy ordinary residential premises during this period, and that the most modest empirical research would have

<sup>60</sup> See Zander, "Promoting Change in the Legal System," 42 M.L.R. 489, at pp. 507-508.

<sup>61</sup> See Gardiner and Curtis-Raleigh, "The Judicial Attitude to Penal Reform," (1949) 65 L.Q.R. 196, 208.

<sup>62</sup> [1985] A.C. 809.

<sup>63</sup> At p. 825.

<sup>64</sup> [1978] 1 W.L.R. 1014.

revealed the extent to which the Rent Acts had been evaded. Of course, the House of Lords went through the usual motions of saying that if the Acts had been successfully evaded that was a matter for Parliament and not the courts, but if it had been demonstrated by empirical evidence that the effect of *Somma v. Hazelhurst* had been virtually to repeal the Rent Acts in practice in a very large area of the country, this would surely have been a relevant consideration for the House of Lords to bear in mind.

Let me now give a more worrying example of this anti-research, anti-academic tradition in English law. One of the great problems about trying to understand the English sentencing system, and therefore in trying to see how it can be improved, is that we know so little about what persuades sentencers to pass one sort of sentence rather than another in a particular case. There is no systematic evidence "on which one can base any assertion about the degree to which the principles of sentencing laid down by the Court of Appeal or principles and opinions derived from personal or local sources predominate in sentencing practice."<sup>65</sup> A few years ago a serious research project was planned by a group of Oxford-based academics in which it was intended to ask sentencers how they reacted to certain kinds of offences, and what they thought of certain sorts of sentences. This perfectly serious project was stopped by the ukase of the present Lord Chief Justice who decided, on behalf of the judiciary, that all co-operation with the project should be refused.<sup>66</sup>

This anti-research, anti-academic predilection of some members of the higher judiciary cannot be condemned too

<sup>65</sup> Ashworth, *Sentencing and Penal Policy* (1983), p. 54.

<sup>66</sup> *Ibid.* Preface, p. xix.

emphatically, and if such condemnation does not improve relations between academics and judges then that is something which must be borne. In fact it is becoming more common these days to read the occasional lecture or address by some senior judge in which compliments are paid to the academic profession for the valuable work they do. These compliments may be intended quite sincerely but they would be more impressive if they did not seem to refer largely to academic work which consists of writing practitioners' textbooks, and so of helping the task of practitioner and judge. No doubt much academic work of this kind is valuable and constructive; and I shall say more about it in my next lecture. But this kind of academic work is often merely an extension of the work of practitioners and judges, and it fits snugly with a conception of the legal world, in which academics are not a *part* of the legal order, but are merely commentators on the work of those who are part of it. That is too narrow a view of the academic role, and it must be appreciated that the best academic work will often be unsettling for practitioners and judges. It will often challenge assumptions which have reigned supreme for generations, and it is not surprising perhaps that those who have learned a subject by practising it should be resistant to change.<sup>67</sup> It would be quite wrong, indeed absurd, to expect that the walls of Jericho should fall at the first blast of the academic trumpet. But research often leads to unexpected

<sup>67</sup> The same phenomenon is observable in business and industry. A business consultant (with a D.Phil. on Hegel) has recently written: "That deep-seated and pernicious English belief that thinking leads away from reality into fantasy or impracticality has bequeathed us droves of practical men whose teacher has been long years of experience. As a result they find it difficult to adapt or change or see how the future might differ from the past, or to subject data to fresh analysis." Stephen Bungay, "Learning to Survive," *Oxford Magazine* (1986), No. 10, p. 6.

and even unwelcome results, and the most severely practical man must be prepared to look at the results of such research with an open eye if he claims to be a rational being. Common sense is no substitute for real research.

Much the same is true of observations of social phenomena, and indeed common sense here is apt to be even more dangerous because it is more difficult to refute error here by scientific demonstration. But consider how recently it used to be affirmed as a plain matter of common sense that women were inferior to men in understanding and intellect, and how it must therefore follow that a husband was entitled to the obedience of his wife in domestic matters.

As this example illustrates, one of the most pervasive issues which arises in the law is whether one type of factual situation, (say) B, which resembles fact situation A and also fact situation C, to each of which the law has long attached clearly different legal results, ought to be treated like situation A or C. In performing this exercise, untutored common sense is often an inadequate guide. After all, was this not what Coke was getting at when James I told his tiresome Chief Justice that he had as much reason, or sense, as anybody else, and that he therefore did not see why he should not dispense justice in his own courts? Cases at law, said Coke, are not to be decided by, "Natural Reason, but by the artificial reason and Judgment of Law, which Law is an Art which requires long Study and Experience, before that a Man can attain to the Cognizance of it."<sup>68</sup>

One of the chief functions of legal training is to enable us to see that questions often have implications and ramifications beyond the immediate problem; we know, from the

<sup>68</sup> *Prohibitions del Roy* (1608) 12 Co.Rep. 63.

experience of the law, which is the experience of centuries, that if (for instance) we make this move here, this may have rippling effects on that situation *there*, and we know that if we try to deal with that situation there in the same fashion, this will cause all sorts of problems of this or that character. Facts and circumstances which may appear similar at first sight, turn out, when examined in the light of combined legal experience, to have profound dissimilarities which may not be apparent to the man in the street. Consider, for instance, the reasoning which led Lord Abinger in *Winterbottom v. Wright*<sup>69</sup> to deny the plaintiff driver injured by a defective carriage, the right to sue the negligent manufacturer who had contracted with the owner:

“[I]f the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring an action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would arise.”<sup>70</sup>

The interesting thing about this passage is that the result which Lord Abinger thought absurd and outrageous, and presumably therefore utterly contrary to common sense, is nowadays regarded as so obviously right and fair that Lord Abinger's *dictum* is itself often felt today to display a complete inconsistency with common sense. This is clearly wrong. The dictates of common sense have changed over the years, and it is important that lawyers should be aware that this can happen. So common sense is a useful attribute,

<sup>69</sup> (1842) 10 M. & W. 109.

<sup>70</sup> *Ibid.* at 114.

but we must beware of using it so as to save ourselves the trouble of thinking issues through properly as, I fear, does happen too often. Indeed, a good case can be made for saying that two of the most criticised House of Lords decisions of my life time, namely *D.P.P. v. Smith*<sup>71</sup> and *Anderton v. Ryan*<sup>72</sup> are illustrations of this tendency to rely on the apparent dictates of common sense, rather than to think issues through with the care that reasoned arguments require.<sup>73</sup>

<sup>71</sup> [1961] A.C. 290.

<sup>72</sup> [1985] 2 All E.R. 355. See the devastating critique by Glanville Williams, "The Law Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodios?*" [1986] C.L.J. 33.

<sup>73</sup> This passage was written before the decision in *R. v. Shivpuri* [1986] 2 All E.R. 334 in which Lord Bridge virtually admits that this is exactly what happened in *Anderton v. Ryan*.

#### *4. Theory Beneath the Surface*

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My thesis so far can be summarised very briefly. I have been arguing that the English legal tradition is highly pragmatic in a variety of ways, that this pragmatic tradition has considerable strengths but also serious weaknesses. Filling in the headmaster's report, one might be tempted to say simply, "Good practicals, but lacking in theory." But I now want to suggest that things aren't quite as straightforward as that. There is, of course, a great deal of theory in our law and in our legal system. Some of it is obvious enough, but a lot of it lies hidden beneath the surface. Let us see if we can bring some of this up to the light of day.

##### *Implicit Theory*

The first point that must be made is to insist that there can be no practice without theory, and that the pragmatist who says theory just does not matter is himself acting on an implicit theory of his own. Law may be in some respects a highly practical subject, but it is quite impossible that it

could exist at all without theory. Law is a *purposeful* enterprise. We live by law in modern societies for *reasons*, because we have intelligible and discoverable human goals. The whole concept of the rule of law requires not just that we have rules, and that government is bound by rules, but also that these rules should be based on purposes and reasons which are open to public debate. The opposite of government by rule is government by whim, but rules which have no rational basis are no better than whims. Only a completely despotic ruler, whose mere word is law, could get away without giving some reasons for his orders, and how can he give reasons without some sort of theory? And even the most complete despot will soon find he needs law in order to rule more effectively since it is hardly practicable to govern a state by simply handing out *ad hoc* orders. The most pragmatic of practical men, who insists that he has no use for theory is, even unknown to himself, using implicit theory in the very process of insisting that he has no need for theory. What is more, the theory that he is implicitly relying on is not a very attractive theory, for it is a close cousin to the theory of the complete despot who just wants to give orders and has no theory at all. In fact it looks very like an elitist theory in which those who wield power do not want to justify or explain too carefully what they are doing or why they are doing it.

It seems to me, indeed, that the pragmatic traditions of English law have close connections with a sort of elitism which surfaces from time to time in our legal system. The pure pragmatist who spurns all theory and all rationality is behaving rather like the man who says, "Don't confuse me with the facts, my mind is made up." He is asking us to trust him, he is seeking to avoid having to explain his reasons, what he is doing and why. To explain, to give



reasons, to theorise, is to invite accountability, to expose oneself to criticism and refutation. This elitism has affinities with the reactions of the exasperated parent who is faced with endless questioning from his children who want to know *why* they must do this, and are not to do that, and who, in the end, cuts short the questioning with the positivist's answer, "Because I say so." This answer may in some contexts be justified (as every parent knows!), but it is only justified because we take for granted that the parent is indeed paternalist, and because the children are not of an age to understand all the reasons for the parental rules. The same answer given by various agents of authority to the people in a democratic society is a good deal less acceptable,<sup>1</sup> although even here it may sometimes be justifiable to the extent that doubts continue to exist about the capacity of the public to react to laws in a completely rational way.<sup>2</sup>

Let me illustrate this by referring to the way in which, at various periods in our legal history, the law has relied heavily on the prerogative power of pardon as a way of mitigating the penalties of the criminal law. In eighteenth century England, it is well enough known, the penal code appeared on the surface to be bloody if not barbaric. Hundreds of capital offences existed on the statute book and very large numbers of people were tried and convicted of these offences; but at the same time, we also know that large numbers of these capital sentences were never carried out. An elaborate system of reprieves and of obtaining such reprieves existed, but it remained outside the legal system. In a sense this was another example of good old English

<sup>1</sup> See my "Judges and Policy," 15 *Israel L. Rev.* 346 (1980).

<sup>2</sup> See my "The Legacy of Holmes Through English Eyes," 63 *Boston Un. L. Rev.* 341, at pp. 380-382 (1983).

pragmatic compromise. It was difficult to agree on which offences should be punishable capitally, and which should be less seriously treated, so the simple solution was arrived at of making nearly all serious offences capital while enabling the authorities to pardon those who seemed in practice less guilty or for whom mitigating circumstances existed. What was the point of this facade? One purpose certainly seems to have been that of making the criminal law appear to be more severe than it really was.<sup>3</sup> Given the weakness of the police system and of the power available to the forces of law and order in eighteenth century England, it is understandable why the maximum deterrent value had to be extracted from the criminal law.<sup>4</sup>

But you will notice the implications of this approach. The mitigating factors are not to be the subject of inquiry in the courts themselves. The accused is not allowed to show that there were special factors in his case, the judges are spared the burden of openly modifying the law, refining it, by introducing mitigating concepts and the like. In this way the judges do not have to show how they can justify different decisions in like cases. If one accused is reprieved while an equally innocent accused is hanged, the latter has no real grievance on the ground of unequal application of the law. Both actually deserve to be hanged, according to the theory of the law; the first has been lucky in receiving the hand of mercy, but nobody can demand mercy as a right. Here one sees clearly enough how pragmatism and elitism go hand in hand. We are not far removed from the tyrant who wants to rule with-

<sup>3</sup> See Douglas Hay, "Albion's Fatal Tree," in *Albion's Fatal Tree* (ed. Hay and others, 1975).

<sup>4</sup> This is conceded even by J. H. Langbein, in "Albion's Fatal Flaws," (1983) 98 *Past & Present* 96 which is otherwise very critical of Hay's essay.

out any theory at all, without the need to explain and justify his actions.

This tinge of elitism is still observable in the nineteenth century, as is shown by the way the law handled the celebrated case of *Dudley and Stephens*.<sup>5</sup> Professor Simpson's fascinating study of this case<sup>6</sup> has shown how from the very first the legal establishment decided that Dudley and Stephens should be tried, and if possible convicted of murder, whilst it was all along intended that they should have their sentences commuted to short periods of imprisonment. Again, you may wonder, as Professor Simpson does, at the apparent inconsistency involved in this approach. But again, it seem to me that at least one plausible explanation of this apparent inconsistency is to be found in the pragmatic and elitist compromise which reserves mercy to the authorities, while insisting that on the face of things the ordinary processes of the law should be gone through.

These are, no doubt, some rather special and perhaps extreme examples of the elitist tendencies of English law throughout the ages; nor for my present purposes is it necessary to show that the tendency still exists, though I myself think it does.<sup>7</sup> My point simply is that the pure pragmatist who professes to scorn all theory is himself usually proceeding on the basis of some theory, seeking (albeit perhaps unconsciously) some rational objective; and his prag-

<sup>5</sup> (1884) 14 Q.B.D. 273.

<sup>6</sup> *Cannibalism and the Common Law* (1984).

<sup>7</sup> In *Lynch v. D.P.P. for Northern Ireland* [1975] A.C. 653 it was argued for the Crown that the defence of duress in a criminal case could be dealt with by executive action. This proposal was "firmly rejected" by Lord Wilberforce who stressed that the defence was better dealt with in a criminal trial where the evidence could be given in open court and tested by cross-examination.

matism may simply amount to an unwillingness to discuss his objectives, to examine his premisses, to open himself to accountability.

So the truth is that the inclination towards pragmatism, and the aversion to theory which I have suggested are characteristic of the English legal system, turn out to be an aversion to explicit theory rather than an aversion to all theory. Implicit theories exist all around us in the law and the legal system, sometimes half acknowledged, sometimes understood but not thought suitable for discussion, and sometimes probably not appreciated at all. I need hardly point out that this reliance on implicit theory does not adequately substitute for an avowed willingness to discuss explicit theory. Experience is, in truth, no substitute for logic in the appropriate place, a pragmatic emphasis on remedies is no adequate substitute for an understanding of the rights which those remedies are invoked to protect, the use of precedent without principle would render the law a meaningless jumble, and the wholly practical lawyer without the assistance of the academic would probably do much the same. And implicit theory is no substitute for explicit theory for the obvious reason that it is not available for discussion and refutation.

### *The Influence of Implicit Theory*

Let me now turn to another example of the influence of theory in our law in the past, an area, indeed, where implicit theory continues to exercise an overwhelming influence today, and where it is, and has long been a matter of extreme political importance. I refer, of course, to our doctrine of parliamentary sovereignty. Now it has for a very long time been a central feature of our political system, of our unwritten constitution, that Parliament has sovereign

and unlimited powers and that it can never deprive itself of these powers, strive as it may. Until relatively recent years this theory received little attention, as a theory. It was treated more as a fact of political life, and to some degree as a fact of the legal system. The courts treated all legislation as beyond challenge on the grounds of substantive content, and Parliament anyhow rarely purported to restrict its own future powers. Furthermore, until the passing of the Parliament Act 1911, which restricted the powers of the House of Lords, the theoretically unlimited sovereignty of Parliament was in practice limited by the need to obtain the concurrence of both Houses. But in recent years the unlimited sovereignty of Parliament has begun to trouble a good many people for a number of reasons which I need only mention very briefly. First, our electoral system is constantly producing governments who have only obtained the support of 40% or fewer of the voting electorate, and it is not evident why such governments should think they have a right to pass any kind of legislation they please. Secondly, the ever increasing growth of government power has created greatly revived interest in the idea that the powers of government should be limited by the *rights* of the people, and that these limits should not be set by governments and Parliaments themselves. The steady stream of cases under the European Convention on Human Rights has also begun to make people wonder why these issues cannot be dealt with by our own judges if they are fit to be dealt with by judges at all. Thirdly, our membership of the EEC raises very fundamental issues about sovereignty in that it may one day be necessary for our courts to rule on the validity of legislation which contravenes the EEC Treaties or regulations with direct effect made under the Treaties. And fourthly, our Scots colleagues have recently begun to point

out with some force that the present Parliament is the Parliament of the United Kingdom, not that of England alone, and that it derives its historical origins from the Acts of Union of the English and Scottish Parliaments which clearly did not envisage that the United Kingdom would have complete legislative omnipotence.

So for these, and perhaps other, reasons, there has been greatly renewed interest in the basis of parliamentary sovereignty. Is it really true that Parliament cannot limit its own sovereignty, for instance, by entrenching a Bill of Rights? Is it indeed possible that Parliament has already done this, by passing the European Communities Act? Is it possible, perhaps, that parliamentary sovereignty never really existed at all, given the apparent restrictions imposed on Parliament's powers by the Acts of Union? Is it even possible—to think the unthinkable—that the judges could one day depart from the idea that Parliament is absolutely sovereign and can do anything it chooses? These are questions of immense political significance, and obviously I cannot get seriously involved in them here. What I do want to suggest, however, is that these questions simply cannot be answered except with the use of theory. Even the most traditional lawyer or politician, who insists that Parliament just is sovereign and just cannot limit its sovereignty, is, probably unbeknown to himself, the slave of theory. Where, after all, did we get the idea that Parliament is sovereign and can do anything it pleases? It is true that there are a handful of cases and *dicta* which can be cited in support of this sovereignty, but nobody suggests that these cases are actually the *source* of this sovereignty, in the same way that judicial decisions which we can cite are the source of various common law doctrines. All these cases and *dicta* acknowledge the sovereignty of Parliament as though it already existed, not as

though it were being created or given legitimacy by the decisions themselves. Nor can we point to any serious historical conflicts between Parliament and the courts to suggest that the present sovereignty of Parliament has in some sense been the product of social or political conflict.

No, the truth is that we have drifted into the belief in the sovereignty of Parliament with the aid of a good deal of theory, and this theory was largely the work of academics, in particular, of course, of Dicey. "The doctrine of parliamentary sovereignty," says Professor Heuston, "is almost entirely the work of Oxford men."<sup>8</sup> Similarly, Professor Simpson has written that the explanation for the general acceptance today of the traditional theory of parliamentary sovereignty,

"is very largely connected with the fact that the basic book and the best written book is Dicey, and it is around Dicey that nearly all lawyers study constitutional law. This has been so for a very long time now. Dicey announced that it was the law that Parliament was omniscient . . . The oracle spoke, and came to be accepted."<sup>9</sup>

Of course we can trace it back further than Dicey, because we can find signs of it in Blackstone's *Commentaries*, (based on his lectures at Oxford as Vinerian Professor) where the theory of sovereignty is stated, not just as a fact of the British Constitution, but as a necessary rule of political and legal logic. "[T]here is and must be," says Blackstone, "in all [governments] a supreme, irresistible, absolute, uncon-

<sup>8</sup> *Essays in Constitutional Law* (2nd ed., 1964), p. 1. Apart from Dicey and Blackstone, Heuston mentions also Hobbes (of Magdalen Hall) and Anson, Bryce, and Holland, all of Oxford.

<sup>9</sup> "The Common Law and Legal Theory," in *Oxford Essays in Jurisprudence* (ed. Simpson 1973), p. 96.

trolled authority, in which the *jura summa imperii*, or the right of sovereignty, resides.”<sup>10</sup> Well, elsewhere in the *Commentaries* Blackstone says something quite different,<sup>11</sup> and suggests that Parliament is not indeed omnipotent, and that it cannot pass laws which are absurd or manifestly contrary to reason, and it is these *dicta*, rather than the ones I first cited, which tend to be quoted in American books to this day. If we want to know why in England it is the other way about, we must look to Dicey’s theory to give us the answer.

Now the orthodox theory of parliamentary sovereignty seems uncomfortably close to the kind of elitism which I earlier linked with the traditional pragmatism of the English legal system. If we the citizens, or even they the judges, ask why Parliament must be treated as an omnipotent legislature and why Acts must always be held to be valid law, the traditionalist can no longer answer, as Blackstone did, that every government *must* have sovereign powers. The standing example of federal systems, like that of the United States, has long demonstrated that there is a crucial distinction between a sovereign nation and a sovereign legislature, and it is now demonstrably untrue to say that a sovereign state must always have a sovereign legislature with power to do anything. So the only answer the traditionalist can give to our question is, in effect, to say: “There is no reason why Parliament must be treated as absolutely sovereign. It just has been for a long time the law of our constitution, and it just *is* today the law of our constitution.” But these are not very appealing as reasons. Indeed, to suggest that because parliamentary sovereignty has been the law of the constitution for a long time, and that therefore it should

<sup>10</sup> Bl. Comm. I, p. 49.

<sup>11</sup> Bl. Comm. I, p. 91, and p. 160.



continue to be the law today, is itself an argument which requires some kind of theory to bolster it up. If we press on to ask how it can be shown that this just *is* the law of the constitution today, all we can be told is that the judges and everyone else accept that it just *is* the law of the constitution. Now in some contexts that may not be a bad answer, though you will see that even this depends upon a theory, namely the theory that the law of the constitution should rest upon what the judges and everyone else accepts.

But in other contexts, this answer would not be helpful at all. If the question is raised in some particular context which has never arisen before, whether the traditional theory is valid, it will hardly do to tell the judges that Parliament must be sovereign because the judges have always accepted that sovereignty. After all, why should not the judges decide that the time has come to cease accepting that Parliament must always be sovereign?<sup>12</sup> At any rate, the argument will hardly do without some theory of the function of the judges, and the doctrine of precedent. And if it is insisted that parliamentary sovereignty rests upon its general acceptance by the public at large, that too may raise difficulties in certain imaginable contexts. Just suppose that a government, elected one day with, let us say, the support of 35% of those voting, passed a law which challenged some fundamental rights of a large segment of the population—say the right to send their children to private schools—and let us assume that this law was defied by the public on a large scale. How then would we know, how would the judges know, whether the defiant section of the public were merely objecting to the law itself, rather than to the funda-

<sup>12</sup> As at least one of them has begun to hint they may do in New Zealand: see Joseph and Walker, "A Theory of Constitutional Change," *Ox. J. Leg. St.* (forthcoming).

mental constitutional claim of Parliament to be able to pass any law it chooses?

Now I am not saying that the traditional view of parliamentary sovereignty cannot be supported with some kind of rational argument, some theory about the role of judges, the role of elections, the role of Parliament, the place of history, the difficulties of any alternative to the present theory, and so on. Nor am I predicting that if our judges ever had to decide any of these momentous questions they would openly discuss these theoretical issues. Given the pragmatic traditions of the law, and the judicial aversion to explicit theory, I strongly suspect that they would attempt to avoid open discussion of these issues if they possibly could. All I am insisting is that these questions cannot be rationally decided at all without theory, and if the judges ever do pronounce on them without open use of theory, it will be because they have themselves a theory not only about the constitutional issues themselves, but also about the appropriate function of the judges, and the undesirability of their becoming openly involved in discussion of theory.

### *Implicit Theories and the Judicial Function*

It is apparent then that implicit theories play a very large part in our legal system. The tendency to pragmatism itself is in a sense based on implicit theory; the sovereignty of Parliament is based on implicit theory. Let me now turn to the role of the courts and suggest that a good deal here is also taken for granted in the way of implicit theory.

We all know today that judges sometimes make law, not indeed in the same way that the legislature makes law, not usually with the same broad sweep, not always in response to similar arguments, and certainly not without severe restrictions on their capacity (for instance) to introduce

institutional change. But still, judges decide what the law is, and in the case of appellate judges this is a very important part of their function. Now in modern times a huge amount of academic attention has been paid to the nature of this aspect of the judicial function. We have all sorts of theories about what judges ought to be doing, and what they are doing when they make new law. We have a substantial literature about the kinds of arguments which are regarded as appropriate for a court to use in justification of its decisions and about the kinds of arguments which are clearly not appropriate. But what about the judges themselves? How do they view their function as lawmakers? How do they view their role as against the legislature? What about legal practitioners? What do they think about the kinds of arguments which may appropriately be addressed to the courts? These questions are difficult to answer satisfactorily, because the issues of theory are not openly confronted by the judges themselves. The judges tend to say little about these issues in their judgments in court, and practitioners themselves develop an instinct for the kinds of arguments which may be used in court, and the kinds which may not. Once again, in other words, the theory turns out to be implicit in the way barristers and judges work, but it is there for all that.

Consider the fundamental issue whether, and to what extent, issues of policy can appropriately be addressed by barristers and judges. Insofar as the law is unclear in any particular case, and some development of the legal rules is needed before a case can be decided, it seems to most academics today to be almost beyond dispute that judges do actually use arguments of policy.<sup>13</sup> They argue, for

<sup>13</sup> See John Bell, *Policy Arguments in Judicial Decisions* (1983).

instance, that negligent parties should bear the consequences of their negligence by being made liable,<sup>14</sup> but subject to countervailing considerations, such as the “floodgates” argument which I discussed in my second lecture,<sup>15</sup> or to the desirability of adhering to international arrangements limiting liability for negligence, as in shipping cases.<sup>16</sup> They held, in the *Majewski* case which I also referred to in my second lecture that drunkenness should not be a defence to criminal conduct even where it negatives the *mens rea* which is normally, as a matter of principle, the basis of criminal liability, and it hardly seems open to doubt that this was based on judicial views as to policy. They have recently decided that a manufacturer does not have any copyright in the design of the components built into his products, mainly (it seems clear) because they disliked the monopolistic power over the supply of spare parts which any other decision would have given to manufacturers.<sup>17</sup> And so on. Yet Lord Scarman has argued that the courts must decide unsettled points of law solely on the basis of principle and not of policy, and other judges, on occasions without number, have insisted that issues of policy are for Parliament and not the courts.<sup>18</sup> What does this mean? Are principles not themselves based on policy? Is the extension of a principle something which can be justified in terms of the principle itself, or does it need policy justification? How

<sup>14</sup> *Junior Books v. Veitchi* [1983] 1 A.C. 520; *Saif Ali v. Mitchell* [1980] A.C. 198.

<sup>15</sup> *Candlewood Navigation v. Mitsui Lines* [1986] A.C. 1; *The Aliakman* [1986] 2 All E.R. 145.

<sup>16</sup> *The Eurymedon* [1975] A.C. 154.

<sup>17</sup> *British Leyland v. Armstrong Patents* [1986] 1 All E.R. 850.

<sup>18</sup> *McLoughlin v. O'Brian* [1983] A.C. 410; see also *Furniss v. Dawson* [1984] A.C. 474; *Sidaway v. Bethlem Royal Hospital* [1985] 1 All E.R. 643, at p. 651.

can courts resolve an apparent clash of principles when, as so often happens, one principle points in one direction and an opposing principle points in another direction? These are difficult, indeed profound, issues of theory, and nobody expects the judges to turn their opinions into academic excursions into pure theory, but surely we are entitled to expect our judges to have some interest in what they think they are doing when they decide new points of law. At present it seems that judges just decide, almost from case to case, whether they are going to rely on principle, or on policy, on some mixture of the two. Are we not entitled to have a better indication of how policy and principle intermesh in complex cases, but how can this possibly be done without a theory of the judicial function?<sup>19</sup>

All this necessarily take us into some discussion of the very division of labour between courts and legislature. Why are certain issues reserved to the courts in our society and others left to the legislature? What, indeed, is the function of an ultimate appellate court? I do not doubt that English lawyers would unhesitatingly say that it is the primary function of the House of Lords to decide appeals, even in a sense to correct the "errors" of the lower courts,<sup>20</sup> although it also has a secondary function as a law-making body. But who has decided that these are the primary and the secondary functions respectively? It is not part of the necessary or immutable order of things: it is, for instance quite clear that the primary function of the Supreme Court of the United States is not to decide disputes between litigants, but to resolve conflicts of power, and certain major issues of social policy. But in England it tends to be just assumed that the

<sup>19</sup> See the excellent discussion by Weaver, "Is a general Theory of Adjudication Possible?", (1985), 48 M.L.R. 613.

<sup>20</sup> See generally Alan Paterson, *The Law Lords* (1982).

primary function of the House of Lords is to decide disputes. It is simply taken for granted; it is one of those implicit theories which underlies the functioning of the courts. I do not say that this is an indefensible implicit theory, and indeed there is a lot to be said for it. But some people may wonder about the purpose of having two tiers of appeal courts, if the primary purpose of the highest court is just to correct the "errors" of the lower courts. In what sense can it be said that the decisions of the House of Lords are more "correct" than those of the Court of Appeal? Since most of us (*pace* Professor Dworkin) no longer believe that there is only one true answer to a disputed point of law, there is, on the face of it, no reason to suppose that a decision of the House of Lords is likely to be any better than that of the lower courts. So it is difficult to avoid the conclusion that the reason for having a second appeal court must be that the courts do possess legislative powers. It is that which makes it desirable in the public interest that important cases should only be decided after the sort of mature reflection which it is difficult to secure in the lower courts, who are, of course, far more concerned with settling the particular dispute between the parties. Now this theory of the judicial function is to some extent recognised, in that appeals to the House of Lords are more readily permitted where there is some public interest in the outcome, that is, where some important issue of law is at stake, but it is by no means impossible for a case to reach the Lords where there is no real public element involved at all—for instance where the case turns on the construction of a particular contract. Recognising more openly the implicit theory of the law would surely save the public a good deal of money if these cases were never permitted to get beyond the Court of Appeal.

More generally it seems to me that we still lack an adequate theory to help explain when the courts will be innovative, and when conservative; when they will overrule old decisions and survey a whole field from the ground up, and when they will insist that change and reform is for the legislature. If there is indeed implicit theory governing these matters, (and some would say there is none<sup>21</sup>) then it does seem to lie buried pretty deep. It is true that we are not wholly without guidance on these questions. For instance, we have Lord Wilberforce's speech in *Launchbury v. Morgans*,<sup>22</sup> telling us that where there are three different possible ways of reforming the law it may be difficult for the courts to choose between them on a principled basis, and that perhaps the choice is best left to Parliament. But although this sort of attitude may be relevant in some cases, nobody would say that the courts must today call a halt to the development (say) of the law of promissory estoppel or the tort of negligence merely because there are more than two alternative avenues which lie ahead. So something further is clearly needed. Another point made by Lord Wilberforce in the same case was that any judicial reform of the law would have retrospective effect, and in the area of motor insurance this could raise formidable problems. Clearly, this is an important point, but in a sense it only leads to further questions of theory. Why should we continue to insist that judicial changes in the law must have retrospective effect?

<sup>21</sup> See MacCormick, *Legal Reasoning and Legal Theory* (1978) p. 128; Paterson, *The Law Lords* chap. 7 disagrees (see esp. his n. 70), but his views are somewhat battered by the decision of the House of Lords in *R. v. Shivpuri* [1986] 2 All E.R. 334, overruling their earlier decision in *Anderston v. Ryan* [1985] 2 All E.R. 355 when it was less than a year old. In this last case a new set of criteria was used to justify overruling the previous decision.

<sup>22</sup> [1973] A.C. 127.

The answer of course is that the judges originally started out with the declaratory theory of law, and according to that theory any judicial change of direction must be deemed to be merely a discovery of what was, after all, law along even though the judges did not realise it.<sup>23</sup> But now that the declaratory theory has been abandoned even by the judges themselves, what is there to stop them abandoning the conclusion which they drew from it and announcing that new decisions, in appropriate cases, are only to have prospective effect?<sup>24</sup> The American courts have long since taken this step in a wide variety of circumstances<sup>25</sup> and it is time we looked at it more closely in England.

Then again we have Lord Reid's remarks in *Beswick v. Beswick*<sup>26</sup> to the effect that if Parliament procrastinated much longer on the issue of third party beneficiary rights in contract, the judges might have to do the job themselves. This also tells us something about when judges should intervene and innovate, but not very much. After all, few would argue that because Parliament is likely to procrastinate until Doomsday before introducing proportional representation, therefore the judges should do the job for them. Clearly, third party beneficiary rights is a more suitable subject for judicial activity than electoral reform, and in this instance it is not difficult to see why. But there are other instances where it is not nearly so obvious why reform

<sup>23</sup> See Lord Simon in *Jones v. Secretary of State for Social Services* [1972] A.C. 944, at p. 1026.

<sup>24</sup> Thus Lord Simon has several times called for a re-examination of this question, as in the *Jones* case, *supra*. See also Nicol, "Prospective Overruling: A New Device for English Courts?", (1976) 39 M.L.R. 542.

<sup>25</sup> See, e.g. Munzer, "Theory of Retroactive Legislation," 61 Tex. L. Rev. 425 (1982); Traynor, "Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility." 28 Hastings L.J. 533 (1977).

<sup>26</sup> [1968] A.C. 58, at p. 72; these words are echoed by Lord Scarman in *Woodar v. Wimpey* [1980] 1 All E.R. 571, at p. 591.



should not be undertaken by the judges. Why, for instance, did the House of Lords balk at any attempt to modernise the hearsay rule in *Myers v. D.P.P.*<sup>27</sup> when only a year earlier they had struck out innovatively with the *Hedley Byrne*<sup>28</sup> decision? Why did they feel able to introduce such a radical innovation in the *Miliangos*<sup>29</sup> case, allowing courts to give judgment in foreign currencies, when they felt unable to tidy up the mess they themselves had made of the problem of lost expectation of life in *Gammell v. Wilson*<sup>30</sup> to which I referred in my third lecture? It seems to me that at least a partial explanation for this haphazard pattern of judicial creativity and judicial caution lies in the absence of an adequate explicit theory of the judicial function, and the relationship of courts to Parliament. It is important that the courts should stop thinking of themselves simply as junior partners in the legislative process and start analysing more clearly when judicial legislation has advantages over parliamentary legislation, as it clearly often does. What, after all, is the point of an independent judiciary if this does not mean that there are some jobs which ought to be left to the judges?<sup>31</sup>

Indeed, the need for some theory on what kind of law reform should be left to the judges seems to me to be urgently needed in the Law Commission, and perhaps in Parliament too. The Law Commission some years ago presented the Lord Chancellor with a substantial Report on

<sup>27</sup> [1965] A.C. 100.

<sup>28</sup> [1964] A.C. 465.

<sup>29</sup> [1976] A.C. 443.

<sup>30</sup> [1980] A.C. 278.

<sup>31</sup> For a few random thoughts on these issues, see my review of Bell's *Policy Arguments in Judicial Decisions* in XXXIII Am.J. Comp. Law 342, at pp. 346-347 (1985).

the law relating to breach of confidence,<sup>32</sup> and the Government has already promised legislation to implement it. Much of this Report contains a good deal of sense, but the weakest part of it is the section which explains why it is necessary to legislate at all. Of course the law is uncertain in some areas, and of course leaving it to the courts will mean the the law will develop "piecemeal,"<sup>33</sup> but this is an almost completely new area of law, which has so far been quite successfully built up by the courts on a case by case basis. Now unless we have already decided that judicial legislation is undesirable in principle, this seems exactly the sort of area which is best left to development by the courts. It deals with private law rights, not the criminal law; it relies almost entirely on the sort of concepts that the courts have been working with for centuries, such as express and implied undertakings, good faith, trust, and property; and it uses the good old common law and equitable remedies of damages and the injunction. To cast this law into legislative form at such an early stage of its development—even if the legislation clears up one or two problems before they arise—is positively to invite rigidity and premature ossification, as indeed the Senate of the Inns of Court and the Bar both suggested to the Law Commission. And surely we now have enough experience of legislative law reform to appreciate that legislation usually creates as many new problems as it solves. It is true that the Law Commission did ask itself how best the law should be developed in the future, whether by legislation or the courts, and to some extent I am simply disagreeing with their judgment. But what concerns me is that questions of this kind, posed in the context of a particular proposal, cannot be easily answered in the absence of a

<sup>32</sup> Law Com. No. 110, Cmnd. 8388 (1981).

<sup>33</sup> See para. 6.1 of the Report.

satisfactory theory of the function of the courts. If, as the Law Commission thought in this instance, it would be undesirable to leave the development of the subject to the courts, this may itself be because the courts are also too restrictive in their approach to law reform. And that in turn may be because they also lack a satisfactory theory of law reform.

You may think the very idea of a theory of law reform is rather absurd. Who needs a theory to decide if the law is unsatisfactory and how best to reform it? Evidently what is needed is research into the facts, study of the existing law and its deficiencies, and then the formulation of proposals for reform. Evidently, indeed. But what is so evident about this? It is in truth a method of law reform based on an implicit theory; at least today perhaps the theory is implicit, but it was explicit enough in the hands of its inventor, Jeremy Bentham. It was Bentham who propounded this method of legal change, and you will notice how even this theory makes implicit use of another theory, namely the theory that what the law *is* must be fundamentally distinguished from what it *ought to be*. This crucial tenet of Bentham's own positivist theory of law underlay his theory of law reform. Bentham insisted that before the law can be reformed we have to distinguish very clearly what it currently is from what we think it should be. The first step is to find out what the law is. The second is to discover what is wrong with it. The third step is to decide how to put it right, and the fourth step is to change the law to give effect to what we have decided must be done. This change should be carried out by an exercise of sovereign power—by legislation, for Bentham, I need scarcely remind you, was a great believer in legislation by legislatures, and an emphatic opponent to all judicial legislation.

Now reform of the law does not *have* to be conducted in this way. Imagine a country which does not accept the positivist theory of law, which rejects the notion that a clear line can and constantly must be drawn between law as it is and law as it ought to be. Assume that the courts of that country change the law a great deal more than they do here, so much indeed, that it is often very difficult to say what the law is, because you never know whether it is going to change in the very process of being applied or decided. In this way law reform might become a continuous, incremental process, almost indistinguishable from deciding actual cases according to the existing law. Obviously the courts of such a country would have to have a different theory of law, a different theory of the relationship of the courts to the legislature, and indeed a different theory as to whole nature of the judicial function. I am inclined to think that this is indeed the case in the United States. Now I am not suggesting that we should necessarily want to borrow some of the American theories that I have just identified; but what I do suggest is that it would be a good thing if English lawyers realised that that the traditional English way is not the only way of doing things, and that if we think it is the best way, or the way that suits us best, that is because we do hold certain implicit theories about many of these issues. These implicit theories may be none the worse for being dragged out into the daylight and exposed to the possibility of discussion and criticism. But they should not remain buried for ever in darkness.

In any event, I am far from convinced that if these implicit theories were brought out into the daylight they would survive permanent scrutiny. Indeed, bringing these theoretical issues out into the open might make us appreciate that there are many possible alternative ways of proceeding,

compared with our traditional approach. On a previous occasion I have suggested that there is room for developing the idea that the judges should apply statutes by analogy, so that legislation and common law could sometimes march in step, rather than in a constant sort of leapfrogging process.<sup>34</sup> Clearly, much could be done to tidy up the law along these lines, if the will was there. But there are all sorts of other possibilities too. Just to offer one, why should not Parliament be invited to debate the Law Commission's Report on Breach of Confidence, if it wants to, give it a general blessing without translating it into a detailed set of statutory provisions, and then invite the courts to take account of it in developing the law? Indeed, more generally, perhaps we need a procedure by which Law Commission Reports could be treated as available for implementation, either by Parliament or by the courts, according as seems most appropriate to the particular case. Once we abandon the declaratory theory of law we surely must appreciate that judicial legislation needs to be treated more seriously as a species of legislation, even with all the limitations inherent in the judicial role, so that machinery needs to be available for others besides the judges to make an input into this type of legislation. A whole range of possibilities opens up here, all of which stem from abandoning the declaratory theory of law, and many of which depend upon what alternative theory we put in its place. So far, it seems clear, we have not put any alternative theory in its place.

#### *The Contribution of Academic Lawyers*

Let me say something about some other sources of implicit theory in our law. I have already suggested that the theory

<sup>34</sup> See my "Common Law and Statute Law" (1985) 48 M. L.R. 1.

of parliamentary sovereignty owes a great deal to the work of academic lawyers and theorists. I now want to go on to suggest that legal theory, and the work of academics, has in truth played a much larger role in the development of our law than has generally been acknowledged, and that a great many fields of our law have been profoundly influenced by academic writing and theory. As we have already noted, the prevailing view, which is influenced by the general aversion to theory which I have tried to describe, is that academics have and have always had a fairly humble role, the role of teaching what the law actually is, leavened with some critical component and bolstered perhaps by some theoretical and even philosophical speculation. But on this view the law is certainly not made by academics, but by judges and by Parliament. Once again, as when dealing with the relative status of judges and academics, I feel a certain embarrassment about raising these matters, because it must look very much as though I am trying to blow the academic trumpet. But I have no conscious desire to do this. My brief is not held on behalf of myself and the academic legal profession, but on the side of rationality and theory. I do believe the importance of theory and rationality has been neglected in our legal system, and one symptom of that is the general unwillingness of the legal world to recognise the role which academics have played in the development of the law in the past.<sup>35</sup>

I must start by pointing out how, once again, the appar-

<sup>35</sup> It must be said that there are some signs of change. Lord Goff, for instance, (himself a former academic and textbook writer) has twice spoken of the importance of the role of academics in creating principles out of isolated instances. See his Maccabean Lecture, "The Search for Principle" (1983) LXIX Proc. Br. Acad. 169 and his Childs Oxford lecture, "Judge, Jurist and Legislator" (1986).

ent aversion to theory betokens an implicit acceptance of theories—theories about the nature of law, for example. Consider, for instance, how immense is the gulf in England between legal philosophical writings and speculations, on the one hand, and the reasons offered for decisions by judges, or even the sorts of arguments to be found in Parliament on the other. Consider, again, how far apart are non-lawyer philosophers from the law itself, and how rarely moral issues are discussed by philosophers and lawyers together—for instance at conferences or in learned journals—as though the moral issues really *mattered* to the lawyers and to the law. It is true, as I have suggested, that even practising lawyers and judges may be prepared to agree that one function of the academic is to think and perhaps even write about theoretical issues in the law or philosophical implications of the law. But the almost universally held view in England seems to me to be that these issues are in some sense separate from the law, not a part of it. The study of legal theory is not regarded as a study *of* the law, but as a separate subject altogether.

In America, by contrast, it is no rare thing to find lawyers and philosophers meeting together to discuss important and serious legal issues at their very roots, as it were, and several learned journals publish material devoted particularly to such questions—such as *Philosophy and Public Affairs*. This contrast, to my mind, illustrates the very fact that American legal theory is profoundly different from ours, that the moral basis of law is deeply rooted in American legal culture, while with us, the separation of law and morals continues to be the all-pervasive influence. I am not suggesting that legal positivism has become part of our legal culture because of the influence of academic writers; I think it is far more likely that legal positivism has flourished as a

theory in England because it is already deeply embedded in the legal system.

But there are other areas of the law where it does seem to me that the influence of academic lawyers has been profound, though usually unacknowledged. Let me illustrate this by looking at the development of two of the most central areas of the common law, the law of contract and the law of tort. I have written at length elsewhere of the emergence of modern contract doctrine during the last two centuries or so, so I can deal with this briefly here. I have argued—and there was nothing new in this—that the judges of the period 1770 to 1870 were greatly influenced by the theories of political economy, and in particular by the ideology of *laissez faire*. Much of this political economy was itself of a very theoretical character, and took its origins, of course, from the great work of Adam Smith, *The Wealth of Nations*, and he, I need hardly add, was a professor at the University of Glasgow. In addition, I suggested that some of the most fundamental ideas underlying the law of contract were only given expression in the writings of theorists and philosophers. Take, for example, the idea that the law of contract is principally designed for the protection of reasonable expectations—what is today often assumed to be the one key principle of the law of contract. This idea may have been implicit in the decisions of the judges, but they did not openly acknowledge it. It is, however, to be found in the philosophical writings of David Hume<sup>36</sup> and Adam Smith,<sup>37</sup> and it was recognised as of profound legal importance by that greatest of all legal theorists, Jeremy Bentham. He, in his usual fashion, belaboured the lawyers for failing

<sup>36</sup> *Treatise of Human Nature*, Book II, Part II, Section I.

<sup>37</sup> *Lectures on Jurisprudence* (ed. Meek, Raphael and Stein 1978), pp. 87–88.



openly to acknowledge the importance of the whole concept of expectations:

“[T]he word expectation,” he protested, “is scarcely to be found in their vocabulary; an argument can scarcely be found in their works, founded upon this principle. They have followed it, no doubt, in many instances, but it has been from instinct, and not from reason. If they had known its extreme importance, they would not have omitted to name it.”<sup>38</sup>

But it was not only from the political economists that our nineteenth century judges drew their ideas in contract cases. Another fertile source of borrowings was in fact a French law text, namely the *Traité des Obligations* of J. J. Pothier, which was translated into English in 1806, and there was also a good deal of reliance on several well known American writers, such as Joseph Story, who was a Professor at Harvard and also a Judge of the United States Supreme Court. However, it must be admitted that there was a great shortage of English academic legal writing on contract during the early part of the nineteenth century—which is why our judges often resorted to French and American texts—and there can be very little doubt that this absence was itself the major reason for the extremely unsatisfactory shape of the law during this period. There was, of course, a traditional body of learning of a kind, but it was dominated by the practitioner’s requirements, and structured to his point of view. This was why so much of the literature of this period stressed matters of procedure,

<sup>38</sup> *Principles of the Civil Code* (ed. Bowring), vol. 1, p. 308.

pleadings, writs and proof, all designed to answer the practitioner's questions: what do I need to prove, and how, to make this claim, or assert this defence? It was, in truth, not until the academic writings of the late nineteenth century that a modern law of contract came into existence in England. The thesis I developed in my *The Rise and Fall of Freedom of Contract* was that modern contract law was very largely *created* by the academic writers of the late nineteenth century, especially Sir William Anson and Sir Frederick Pollock. These two academic were, in particular, responsible for two very important innovations.

First, it was they who first developed the idea that there was such a thing as a *general* law of contract, which ignored all distinctions between the different kinds of contracts, and the different sorts of people who entered into them. This was an important point, because it facilitated the idea that the law of contract was *neutral* between all people, that everyone was indeed entitled to the equal protection of the law. When you eliminate the distinction between commercial contracts and consumer contracts, between contracts of loan, contracts of employment, and tenancies, between contracts to marry and contracts of partnership, you make it much harder to justify paternalist intervention which protects some parties against others. And this, of course, was precisely what the political economists had been advocating since the time of Adam Smith. The law of contract, they stressed, should treat all alike; all contracts were based on the economic desire to make a free and value-enhancing exchange, and all contracts deserved to be upheld equally. This tendency to the abstract, to generalise, was one of the main differences between the law newly stated in the books by Anson and Pollock, and the law to be found in the cases, for even if the judges were inclining towards this same tend-

ency to abstraction and generalisation, the cases themselves were inevitably always about specific types of contracts.

The second innovation for which Anson and Pollock were principally responsible, at any rate so far as English law is concerned, was to give the law a new kind of shape and structure. Instead of looking at contract law from the point of view a barrister who comes on the scene only after a contract has been made, and when litigation is already contemplated, Anson and Pollock tried to look at the law from a more rational perspective. They wanted to ask new sorts of questions, which had rarely troubled the practitioner, such as, What is a contract? How do you make a contract? How does a contract get discharged? And so on. As Professor Simpson puts it:

“[Until Anson and Pollock] there existed no literary tradition of expounding the law of contract in a form which invites the reader to proceed to the solution of problems by applying general principles of substantive law, principles under which the messy business of life is subsumed under ideal aseptic types of transaction, the types themselves being analysed and their legal consequences presented in a systematic form.”<sup>39</sup>

When we think today of the general shape of contract law, we all think in pretty similar sorts of terms. We think of how contracts are made—offer and acceptance, the doctrine of consideration, the intent to create legal relations and so on; we think of vitiating factors like mistake, misrepresentation and fraud and undue influence; we think of the terms

<sup>39</sup> “Innovation in Nineteenth Century Contract Law,” (1975) 91 L.Q.R. 247, p. 251.

of the contract, conditions, warranties and the like; we think of the termination of contracts, by performance, frustration or breach; and we think of remedies. All this comes from Pollock and Anson, and today it is not only academics who think in these ways: the practitioners and the judges do so too, and so, indeed do the modern practitioners' books which finally abandoned the hopeless lack of shape and rational basis which they had obstinately hung onto long after the modern law had become firmly established.<sup>40</sup> Now although I have argued in my *Rise and Fall of Freedom of Contract* that the judges had been heavily influenced by the theories of political economy since the late eighteenth century, it is not at all easy to see how much of the law which Anson and Pollock put into canonical form was already implicit in the cases, and how much of it was actually their own devising, based on preconceptions about the rational shape of a system of contract law, drawn perhaps from Roman and civil law and perhaps even natural law sources. Certainly some of it was clearly drawn from their own ideas with virtually no support in the case law of the time. Pollock, for instance, virtually invented the doctrine—so far as English law is concerned—that an agreement is not a contract unless the parties intend to create legal relations, though he borrowed the idea from Savigny.<sup>41</sup> And Anson may well have been responsible for inventing the modern doctrine of privity, which he thought he saw in the cases, but which was really not there at all.<sup>42</sup> Beyond examples

<sup>40</sup> See the Preface to the 22nd edition of *Chitty on Contract*, (1961) by J. H. C. Morris.

<sup>41</sup> See Simpson, *loc. cit.* at pp. 264–265.

<sup>42</sup> See my review of the centenary edition of Anson's *Contract* in (1981) 1 *Legal Studies* 100, at p. 102.

like this it is difficult to go, because we are today all so thoroughly saturated in the classical theory of contract that it is impossible any longer to read the nineteenth century cases without knowing how they slot into the structure built by Anson and Pollock. To put it at the lowest, it seems to me that these two academic giants are probably entitled to just as much of the credit for the creation of the general law of contract as all of the nineteenth century judges put together. The judges may have provided the bricks, but the design of the building was largely the work of the writers.

Now some of us today, myself included, are worried that the structure of classical contract law which was created by Anson and Pollock and came eventually to be accepted by all, is itself in need of rethinking, because it has increasingly become a structure of a sort of ideal which nowadays rarely fits the reality. That is another story, and perhaps only bears witness to the strength of this academic-based theory. All I will say about that now is that once again, it seems to me, it is our theory which needs re-examination. Modern contract law probably works well enough in the great mass of circumstances, but its theory today is a mess. What is contractual liability based upon? We no longer believe in will theory, but most lawyers do seem still to believe in "the intention of the parties" as the basis of liability. However, the extreme objectiveness of contract rules in practice belies this apparent basis of liability. The truth is that there are a great many circumstances in which a person is made liable in contract even though he did not intent to assume the liability for what happened, or for the state of affairs existing at the time of the contract. Few contracting parties, even among businessmen, read through and understand the details of a lengthy printed contract; and if the contract is not in writing, many of its terms will be supplied by the

courts, and not by the parties at all.<sup>43</sup> Then again, if contract law is based on the intention of the parties, it is strange how often liability only seems to arise after one party has changed his position in reliance on the other's promises or behaviour, something which hardly seems relevant if liability depends on intentions. The truth is that the whole role of reliance as a basis of liability has yet to be adequately acknowledged in modern law, and its relationship to contractual intent also remains to be understood. There is arguably a good deal of implicit theory governing these matters already embedded in the law, but it has not yet been adequately developed and made explicit in the courts.

Let me now say a little about the development of modern tort law. The picture is similar in some respects, but differs in other respects from that relating to contracts. It differs, in particular, in that tort law, ancient and modern, has never had a neat and tidy theoretical structure, like contract. Moreover, the individual torts, and especially negligence, have continued to play a much more important role in tort theory than the individual types of contract play in contract theory. On the other hand, we find that there are in the modern law some general principles of liability, in tort no less than in contract, and we also find some kind of structure in the law, or at least a variety of ways in which the law can be structured. None of these is a wholly satisfactory way of trying to structure the law, and no single theoretical basis for the subject has yet emerged, unless we take account of

<sup>43</sup> Notice how Lord Scarman insists in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank* [1985] 2 All E.R. 947, at p. 955, that even implied terms in a contract are not "imposed" on the parties by the courts; but cf. Lord Wilberforce, more realistically using the language of "imposition" in the *Panalpina* decision [1981] A.C. 675, at p. 696.

the modern economic ideas which have so far made little impact on English law.

But what is at any rate reasonably clear is that the academics made their contribution here, as in contract, even though they were never able to rationalise the law so tidily. But a glance at the tort books of the nineteenth century will show that the practitioners' books which preceded the more academic writings were infinitely worse when it came to matters of theory and structure. One of the major practitioner's books of the mid-nineteenth century was Addison on *Wrongs and Their Remedies, Being a Treatise on the Law of Torts*, first published in 1860. Now Addison, who also wrote on Contract, was a great believer in principles, and he lamented that the study of tort law, embedded as it was in a technical system of pleading and procedure, had hitherto been "tedious and repulsive."<sup>44</sup> But with the disappearance of the forms of action, and the rationalisation of procedure which was then well in motion, Addison looked forward to a more scientific treatment of the law. He wrote optimistically that "the pathway to legal science" was now opening, and that it should be comparatively easy for anyone to learn some of the basic principles of tort law, even those who did not intend to practise law. Alas, after these inviting words, the book itself is very disappointing, and indeed, scarcely recognisable as a book on the subject we know as torts. It is, in fact, just a catalogue of torts, with little apparent rationality in structure or arrangement or order. Chapter one deals with the infringements of territorial rights and servitudes, and section one of chapter one starts with the right to the use of running water, hardly the place where a modern treatise on tort law would begin. Chapter two deals with the

<sup>44</sup> Preface, p. vii.

obstruction of easements and profits, chapter three with nuisance and liability for injuries caused by animals; chapter four deals with injuries to lands, and tenements by waste, negligence and fire. And so the dreary list goes on, right through the complete 21 chapters. Nowhere in this edition do we find the glimmerings of a theory, or even an idea of the role of tort law in some general theory.

It is not until the sixth edition of Addison in 1887 that we find some real interest in the theory of the subject developed in a new chapter one on the Nature of Torts, and a new chapter two on Defences, but in that year a much more formidable book appeared, namely Sir Frederick Pollock's *Law of Torts*. For some reason, possibly the belated effect of the Judicature Acts, the late 1880s seems to have been a watershed period for writings on torts. After Pollock's book, several other books on torts followed in quick succession. In 1888 there appeared a short book for students, Fraser on the *Law of Torts*, which was evidently much influenced by Pollock, and this book, though it has not survived to modern times, was very popular, running to ten editions and becoming substantially fatter as the years went by. The year 1889 saw three new books on torts, the first edition of Clerk and Lindsell on *Torts*, the first edition of Beven on *Negligence*, and an English edition of a book originally published in America in 1878, Bigelow's *Elements of the Law of Torts*.

Now these new books, though they were not all written by academics (Clerk and Lindsell, for instance were barristers) do show a much more serious attempt to grapple with the theory of the subject. Pollock, especially, insists in his Preface that there really is a law of torts, and not just a number of rules about various kinds of torts. "[T]his is a book of principles if it is anything" he writes in his Preface,



a sort of open letter to Mr Justice Holmes. Thus he identifies and deals with some general principles of liability. For instance, there are general rules governing the possible parties to a tort, rules affecting the liability of the state, of infants, of corporations, of lunatics and so forth. There are general rules of vicarious liability, affecting all torts, there are general rules concerning the effect of death on torts, and so on. There are general rules about the remedies available, especially damages. Here at last we seem to be on some sort of firm structured ground, which bears at least a passing resemblance to the sort of structure revealed by the general principles of contract law. But the trouble is that these general principles of liability clearly do not fill the same central role in tort as the general principles fill in contract. Too much is left out here, and has to be dealt with in detail in the handling of the individual torts. But then there is this further difficulty: how do the individual torts fit in with the general principles? How should they be classified? Pollock sees that there are basically two ways to classify torts. First, we could try to divide the law up according to the interests of the plaintiff which he claims to have been infringed: thus we could classify the subject by looking at personal injury torts, other torts infringing personal rights such as defamation and false imprisonment, torts involving interference or damage to land and then chattels, and torts involving an interference with commercial rights. Alternatively, we could try to classify torts by looking at the different bases of liability, and so divide the law of torts up into torts based on intentional conduct, torts based on negligence and torts of strict liability. The older way of looking at tort law, in which torts had largely been an offshoot of property law, had tended to classify torts by looking at the kind of right which the plaintiff complained had been infringed. But the

new academic writers preferred to classify torts according to the kind of wrong which the defendant had committed, an approach which perhaps reflected the more moral and less property basis of the law in the late nineteenth century. Pollock was in the forefront here, so far as England was concerned (though America had already led the way<sup>45</sup>) and was followed rapidly by Fraser and eventually by Salmond, a book which was first published in 1907 and was destined to become the most widely used torts book of the twentieth century.

How much influence did these academic writings have on twentieth century tort law? Did their theories and their ways of thought percolate through to the practitioners and the judges as had happened with contract law? This is a very difficult question to answer, and it may well be, indeed, that no answer is really possible in the sort of general terms that can be essayed with contract. At any rate more detailed research is needed into the modern history of tort law before these questions can be tackled. One possibility, at least, is that academic writers gave modern tort law its emphasis on fault—on intentional misconduct and negligence—which certainly seems to have had a very pervasive practical influence. There seems little doubt that this happened in America,<sup>46</sup> where, until the last two decades, tort law was based firmly on the general principle that “fault,” at least in the usual objective sense of the concept, was a necessary basis of liability. And Salmond also certainly adopted this view, though his early editions, in which

<sup>45</sup> Thus Bigelow's book, though the English edition was published after Pollock's, was first published in America before Pollock's book, and it divides torts up in the new manner.

<sup>46</sup> See G. Edward White, *Tort Law in America: An Intellectual History* (1980) pp. 15–19.

he treated fault in tort law as a kind of *mens rea*, read rather strangely today.

Pollock himself certainly did not take this view. In a review of Pound's *Interpretation of Legal History* in 1923 Pollock vigorously denied that the American dogma of "no liability without fault" was part of English law.<sup>47</sup> It was, he insisted, contrary to the whole law of trespass, much of the law of nuisance, the whole law of defamation and to the principle of vicarious liability. Pollock also added, in this same review, that "academic doctrines and formulas count for very much more in American schools, it seems also in American courts, than in ours."<sup>48</sup> Well, that is, of course, the traditional view; but I wonder whether Pollock was not mistaken here. Academic doctrines are not often openly borrowed by judges and practitioners in England, as they are in America, but, as I have suggested, they may have their influence nonetheless. And in this particular instance, the growth of the fault idea as the leading principle of tort law seems to have been almost as marked in twentieth century England as in America. Certainly, the House of Lords in *Read v. Lyons*<sup>49</sup> seems to have embraced the fault principle as enthusiastically as earlier American judges. Moreover, the gradual expansion of liability for proven negligence, almost always advocated by the weight of academic opinion, has been just as marked a feature of modern English, as of American Law.

If the verdict on the influence of academics on the modern shape of tort law must, for the moment, remain in some doubt, there is a more general case for thinking that legal writing, and particularly academic writing, is in the

<sup>47</sup> (1923) 39 L.Q.R. 163, at p. 167.

<sup>48</sup> *Ibid.* 163.

<sup>49</sup> [1947] A.C. 156.

long perspective of history, an important part of the law itself. Professor Simpson has demonstrated how English legal literature has, over the centuries, mirrored the law, and influenced it.<sup>50</sup> When lawyers believed in reason and natural law, literature took the form of discussion of maxims, drawn from reason or natural law. When lawyers believed above all in principles, and thought law to be a science, textbooks abounding in principles were written. And when these principles were believed to derive from authoritative sources rather than from reason, then the literature dealt only in principles laid down by some authority. When judges insisted that they never made the law, but only discovered it, legal literature was at great pains to conceal its originality, and to insist that everything could be deduced from existing sources. Although it is much easier to show how writers were influenced by the practising lawyers and judges, and much more difficult to prove the movement of ideas in the opposing direction, it seems certain that we have greatly underestimated the influence of academics on the development of the law in the past.

Moreover, it must also be said that the published records of our law tend to conceal the influence of academics even when they have been very great. A fascinating example of this kind of thing has occurred while I have been preparing these lectures. All law students today know that the law relating to criminal attempts has for some years been bedevilled by problems about impossible attempts. Can a person be convicted of attempting to commit a crime when the attempt was in some sense impossible of being successfully carried out? The

<sup>50</sup> "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" 48 *Un. Chi. L. Rev.* 632 (1981).

problem has been around for a good many years. Indeed, when I was a law student Professor Glanville Williams judged a moot at my college in Oxford based on the famous Sherlock Holmes story in which Professor Moriarty shoots at the stuffed dummy which Holmes has left in his room. Professor Williams was then already engaged in his campaign to rid the law of the idiocy that Professor Moriarty could not be convicted of attempting to murder Sherlock Holmes. His efforts received a severe set back in the House of Lords decision in *Houghton v. Smith*<sup>51</sup> in 1973, when the House actually revived a number of long overruled criminal law decisions and decided, among other things, that if a pickpocket puts his hands into an empty pocket he could not be guilty of attempting to steal. I need not attempt to describe the allegedly “sound reasoning” which led the House of Lords to revive these old cases, because, as Professor Hart has observed, there is really nothing in them which can be described as “reasoning” at all, let alone “sound reasoning.”<sup>52</sup>

Nothing daunted Professor Glanville Williams (with the support of many other distinguished academic criminal lawyers) then persuaded the Law Commission to embark on a study of criminal attempts, and powerfully influenced their Report which recommended that this defence of impossibility should be abolished, and which appended a draft Bill to give effect to that proposal.<sup>53</sup> A Bill was speedily introduced into Parliament to deal with the subject, but

<sup>51</sup> [1975] A.C. 476.

<sup>52</sup> “The House of Lords on Attempting the Impossible” (1981) 1 Ox. J. Leg. St. 149, at p. 155.

<sup>53</sup> Criminal Law: Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) Law Com. No. 102. Professor Williams was a member of the Working Party which had already considered proposals for the reforming the law of attempts.

the Law Commission proposals had already been tampered with. The Bill attempted a compromise on the subject, a compromise which had already been considered and rejected by the Law Commission for reasons which Professor Glanville Williams had long been arguing. Fortunately, all was not yet lost. The Bill was referred to a Special Standing Committee of the House of Commons which invited Professor Williams to give evidence before it. He tore the Bill to pieces before the Committee which was so impressed, that the original Law Commission proposals were substantially reinstated,<sup>54</sup> and the Bill was in due course enacted as the Criminal Attempts Act 1981. That should and would have been the end of the story, except for the amazing decision of the House of Lords in *Anderton v. Ryan*<sup>55</sup> which, in defiance of the manifest intention of Parliament, as well (it might be thought) of the plain words of the 1981 Act, held that some vestiges of the impossibility defence survived the Act. Once again, the indefatigable Professor Williams returned to the attack, this time with a biting critique of the decision in an article, the title of which posed the question, *Quis Custodiet Ipsos Custodios?*<sup>56</sup> And on this occasion, as we all know, his efforts were finally rewarded. In *R. v. Shivpuri*,<sup>57</sup> which I referred to briefly at the end of my last lecture, the House of Lords finally recanted, and overruled *Anderton v. Ryan*. Lord Bridge, giving the main speech, did indeed acknowledge that he had received assistance from Professor Williams' latest onslaught,

<sup>54</sup> See (1981) 131 New L.J. 459. The whole story of the drafting and enactment of the Bill is to be found in Professor Griew's notes to the Act in the *Current Law Statutes Annotated* for 1981.

<sup>55</sup> [1985] 2 All E.R. 355.

<sup>56</sup> [1986] C.L.J. 33.

<sup>57</sup> [1986] 2 All E.R. 334.

though he could not refrain from commenting on the lack of moderation in the language—which might in the circumstances have been thought well justified. But despite this acknowledgement nobody who did not know the full story would realise from the speeches in the House of Lords the extent to which Professor Glanville Williams was responsible for the ultimate result. It will be as well if future generations of lawyers are made aware that this piece of law reform has been almost entirely the result of the work of academic lawyers, carried out for the greater part, in the teeth of judicial hostility and scepticism. Fortunately, the ending to this story<sup>58</sup> enables us to answer Professor Glanville Williams' own question, *Quis custodiet ipsos custodios?* The answer clearly is—Professor Glanville Williams, or in default, some other academic lawyer of equal calibre.

This little episode needs to be remembered for a number of reasons when the role of the academic and the place of theory in the law are under consideration. In particular, it needs to be borne in mind when academics are basking in the unaccustomed praise of judges, when, for instance, Lord Goff suggests that the law must be developed by judges and jurists acting in partnership.<sup>59</sup> It would be churlish not to welcome this kind of approach from a distinguished law lord, himself also a distinguished jurist. Of course, judges and academics have a complementary role to play in the development of the law, and mutual respect and mutual understanding of these roles can only be healthy for the future of the law. At the same time, the academic must

<sup>58</sup> Whether it will prove a happy ending remains to be seen, but at least the present position is that clearly intended by the Law Commission and Parliament.

<sup>59</sup> See his Maccabean Lecture, "The Search for Principle" (1983) LXIX Proc. Br. Acad. 169, pp. 185–187.

always remember that, while the judges are engaged in the often very pragmatic business of deciding cases, it is he who must be primarily responsible for the part played by reason and theory in the law.



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