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# A BLAST FROM THE PAST: THE RESURGENCE OF LEGAL FORMALISM

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*[This article is a contribution to the dialogue between Justice Michael Kirby and John Gava on the nature of legal reasoning. In essence, Gava argues that Justice Kirby is an unelected judge who should stick to applying apolitical legal principles. Prospective and present members of the High Court are also calling for fidelity to principle and precedent. These traditionalists, spearheading a resurgence of legal formalism, declare that law is a self-regulating mechanism with an autonomous existence. In contrast, the author argues that black-letter analysis, with its fixation on legal principles, obscures the extra-legal forces that shape the judicial process. An important aspect of this article is the dissection of Sir Owen Dixon's jurisprudence. Gava and his fellow conservatives' critique of judicial activism is premised upon the denial of the interdependence of politics and law. Justice Kirby is simply characterised as a deleterious force on the body politic. The author argues that this ignores the inherent politics of formalism that exerts a conservative influence on not only the discharging of the judicial function but also the governing of society. Gava's jurisprudence echoes Bismarck supporting the democratic claims of ordinary people whilst in practice bolstering the structure of power that ensured the containment of popular control over policy and politics. Australia is a corporate democracy controlled by an alliance of business groups and an executive that uses state power to contain popular pressure. The author contends that the judiciary is a branch of the state and is intrinsically political. Its judgments facilitate the reproduction of social and power relations, and put a stamp on the conduct of social affairs. The author argues that Justice Kirby is a modern liberal intent on making capitalist democracy live up to its promise of social justice. This article avers that formalism places obstacles in the path of social justice. It is a legal philosophy that reinforces the ideological domination of the power elite.]*

## CONTENTS

I	Introduction .....	163
II	Everything Old is New Again .....	165
III	Dixon's Contractual Universe Moves .....	167
IV	Dixon's Proactive Constitutional Jurisprudence .....	172
V	The Perils of Change .....	174
VI	Conclusion.....	181

## I INTRODUCTION

This article engages with the dialogue between Justice Michael Kirby<sup>1</sup> and John Gava<sup>2</sup> and initiated in the pages of this journal. Their discussion has raised an issue of deep fascination for legal scholars. What has emerged from their exchange is a competing conceptual framework of the underlying dynamic of the judicial process. In essence, Gava is an advocate of traditional jurisprudence.

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<sup>1</sup> Justice Michael Kirby, 'Welcome to Law Reviews' (2002) 26 *Melbourne University Law Review* 1.

<sup>2</sup> John Gava, 'Law Reviews: Good for Judges, Bad for Law Schools?' (2002) 26 *Melbourne University Law Review* 560.

The Blackstonian declaratory theory that judges do not make the common law, but merely declare and apply it, finds an echo in Gava's juristic logic. Gava is obviously not an unbridled supporter of Blackstone's logic, but his neo-formalist approach bears an uncanny resemblance to that of his illustrious predecessor. Justice Kirby, on the other hand, eschewed formalism as early as his 1983 Boyer Lectures.<sup>3</sup> He has spent the intervening years refining an alternative jurisprudential model, which may well be his lasting legacy.<sup>4</sup>

Justice Kirby is obviously not the only jurist opposed to formalism. In recent years, a number of judges, including Justice Michael McHugh,<sup>5</sup> Sir Anthony Mason<sup>6</sup> and Justice Ronald Sackville of the Federal Court<sup>7</sup> have explored the issue of discarding settled law if it conflicts with the needs of contemporary society and community values. But regional revisionism is in the air. Among those spearheading the revisionist counterattack are figures at the apex of Australia's legal system. Chief Justice Murray Gleeson, in a restrained but unmistakable manner, speaks of the need to exhibit fidelity to legal discipline and warns of the dangers of judicial creativity.<sup>8</sup> Justice Kenneth Hayne forthrightly expresses his support for traditional jurisprudence with its bedrock in rules and precedent.<sup>9</sup> Prior to his elevation to Australia's supreme legal body, Justice Ian Callinan bewailed the judicial activism exhibited by the High Court. He advocated a swift restoration of strict legalism.<sup>10</sup> The most recent appointment to the High Court, Justice Dyson Heydon, has vigorously condemned any deviation from traditional jurisprudence.<sup>11</sup> Across the Tasman, New Zealand Professor John Smillie has defended the formalistic approach to adjudication against what he perceives as the deleterious effect of a judicial swing to discretion and conscious value judgments.<sup>12</sup>

In this article, I examine the different models of legal reasoning dividing the judiciary. Traditional jurisprudence, with its view that adjudication is an objective and mechanical process, will be contrasted with a vision of judicial law-making which replaces settled law if it is not in line with contemporary community values. I will argue that both legal philosophies are problematic. In particular, I will critique the model posited by Gava, with its belief that disputes can be

<sup>3</sup> Justice Michael Kirby, *The Judges* (1983).

<sup>4</sup> Justice Michael Kirby, 'Judicial Activism' in Justice Michael Kirby, *Through the World's Eye* (2000) 93.

<sup>5</sup> Justice Michael McHugh, 'The Law-Making Function of the Judicial Process' (Pt 1) (1988) 62 *Australian Law Journal* 15.

<sup>6</sup> Sir Anthony Mason, 'The Judge as Law-Maker' (1996) 3 *James Cook University Law Review* 1.

<sup>7</sup> Justice Ronald Sackville, 'Why Do Judges Make Law? Some Aspects of Judicial Law Making' (2001) 5 *University of Western Sydney Law Review* 59.

<sup>8</sup> Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4.

<sup>9</sup> Justice Kenneth Hayne, 'Letting Justice Be Done without the Heavens Falling' (2001) 27 *Monash University Law Review* 12.

<sup>10</sup> Ian Callinan, 'An Over-Mighty Court?' (Paper presented at the Fourth Conference of the Samuel Griffith Society, Brisbane, 29-31 July 1994) <<http://www.samuelgriffith.org.au/papers/html/volume4/v4chap4.htm>>.

<sup>11</sup> Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47(1) *Quadrant* 9.

<sup>12</sup> John Smillie, 'Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand' [1996] *New Zealand Law Review* 254.

resolved by the application of objective rules in a neutral universe. I argue that the genesis of law is a product of social, economic and political relations.

## II EVERYTHING OLD IS NEW AGAIN

In the post-First World War years, there was a consensus in the social sciences that an end to history had, in one important aspect, arrived. Both in theory and in practice, Keynesianism was triumphant as classical economic liberalism perished in the economic slump and dictatorships of the 1930s. Living in a world dominated by contemporary economic rationalist experiments, we now know this belief in the irreversible triumph of a post-liberal democracy with a beneficent welfare state was an illusion. Jurisprudence followed a similar intellectual trajectory to that of the social sciences. The loss of faith in free markets and laissez-faire thinking during the Great Depression had a deep impact on legal reasoning. The American legal realist movement grew out of disenchantment with the viewpoint that law, like the economy, could be regarded as a self-regulating mechanism.<sup>13</sup> Anglo-American jurisprudence was transformed by the emergence of a corporate welfare society and the loss of faith in liberal individualism. Conceived in North America, legal realism was exported to every corner of the British Empire.

Formalism became a pejorative term. Mechanical jurisprudence was regarded as an antiquarian methodology geared to perpetuating the myth that legal reasoning was autonomous from the economy and political ideology.<sup>14</sup> The indeterminacy of legal reasoning and the realisation that two cases are never the same ensured that juristic logic became a contentious domain. To cite Julius Stone's famous phrase, 'leeways of choice' suddenly opened up to jurists.<sup>15</sup> Legal doctrine could be manipulated to justify a plethora of decisions. Jurists such as Oliver Wendell Holmes stressed the extra-legal and subconscious factors involved in the judicial process.<sup>16</sup> Law was demystified by the recognition of the existence of a choice between alternative solutions when settling disputes. As the realisation dawned that words lack a fixed determinative meaning due to the ambiguity of language and its context, it became legitimate to consider the policy or political ramifications of rules and precedent. The common law method of legal reasoning was given a realist edge. It became conventional wisdom that judicial adjudication was interpretative and inescapably choice-bound and value-laden. Just as almost everyone became a Keynesian at a particular historical juncture, it became fashionable for legal thinkers to eschew the declaratory theory of law. However, the backlash was never far away. It fell to Sir Owen Dixon to play a major role in revamping formalism.

Gava champions Dixonian neo-formalism whilst berating Justice Kirby's alleged descent into judicial activism. Gava's narrative fails, however, to explore the subtle jurisprudence of both these thinkers. For example, Gava does not

<sup>13</sup> Alan Hunt, *The Sociological Movement in Law* (1978) 39.

<sup>14</sup> Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809, 843.

<sup>15</sup> Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985) 271.

<sup>16</sup> Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 466.

examine Sir Owen's complex and contradictory philosophy of law. He presents an ahistorical and atheoretical Dixon, rather than a judge who existed as a historical counterpoint to the realist tradition or a legal theorist equipped with a cogent methodological framework. Sir Owen's historical mission was to update the declaratory theory of law, and he had the intelligence and passion to forge a form of judicial method that responded to legal realism, albeit one that stemmed from the belief that law is a seamless web underpinned by objective rules.

In a 1955 speech to the Yale Law School, Sir Owen Dixon distilled years of rich and careful thought about the nature of legal doctrine.<sup>17</sup> The thrust of the speech was Dixon's break with the shackles of the Blackstonian theory of adjudication. Under pressure from the pervasive influence of the realists, Dixon made a concession. For a strict formalist guided by Blackstone, decisions flow from settled principle. The axiom that the judicial process is based on a rule being applied to a set of facts is a categorical imperative. Dixon was a staunch advocate of a rule-based jurisprudence, but at Yale he noted that novel circumstances provided scope for judges to make law.<sup>18</sup>

Gava offers no analytical framework to delineate the master category that Dixon J utilised when undertaking judicial law-making. Gava understands that at Yale Dixon broke with the doctrinal approach of classical formalism, but he views the breach as unproblematic because Dixon remained faithful to a conceptual model based on autonomous legal rules that were internally consistent.<sup>19</sup> Gava's viewpoint is unsurprising as Dixon offered only an impressionistic account of the juridical logic harnessed by a judge when developing the law. In the seminal passage that marks a rupture with Blackstone, Dixon averred that when a court changed the rules, the method to apply requires accordance with

the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content.<sup>20</sup>

He does not proffer any causal mechanism to explain the chain of reasoning that leads from settled law to either a change of rules or an entry into a new province for adjudication. One can surmise that Dixon's concept of developing law is predicated on locating permanent principles that can be adduced to cope with changing economic, social and political conditions. If so, this is a watered-down version of the declaratory theory, but it charts a perilous course since it contains the fatal concession that external forces or, in Dixon's words, 'new conditions'<sup>21</sup> play a role in legal reasoning. This approach buries Blackstone's legal fetishism that doctrine was a discrete form of reasoning without reference to social reality. However, it also sets the hares running to find the inarticulate premises that underpin Dixonian neo-formalism.

<sup>17</sup> Sir Owen Dixon, 'Concerning Judicial Method' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1965) 152.

<sup>18</sup> *Ibid* 158.

<sup>19</sup> Gava, 'Law Reviews', above n 2, 566-7.

<sup>20</sup> Dixon, above n 17, 158.

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

In order to appraise Sir Owen's neo-formalism, it is necessary to examine his jurisprudence in practice. His contractual and constitutional jurisprudence best illustrate his methodological approach.

### III DIXON'S CONTRACTUAL UNIVERSE MOVES

A vexed issue in contracts jurisprudence has been the search for a suitable legal test to determine the status of employment. On a practical level, current law on this issue may decide the classification of those seeking compensation for an injury or death in the workplace. To be successful in a claim for workers' compensation, the claimant must prove that they were employed under a contract of employment. Until the middle of the 20<sup>th</sup> century, the law was settled: an employee was distinguished from an independent contractor by the application of the 'control test'. The notion of the employer's actual right to control and supervise work was taken as the axiomatic definition of a contract of employment.<sup>22</sup> As both a puisne Justice and the Chief Justice of the High Court, Dixon J pioneered a novel method of categorising economic relationships between parties. The underlying dynamic of Dixon J's doctrinal innovation was his understanding that changes in the workplace were posing problems for the classic control test.

In *Humberstone v Northern Timber Mills*,<sup>23</sup> Dixon J implicitly recognised that the deregulatory labour market system underpinning an economic order confronting change was losing its legitimacy and putting pressure on the classic control test. He stated that '[t]he regulation of industrial conditions and other laws have, in many respects, made the classical tests difficult of application and it may be that ultimately they will be re-stated in some modified form.'<sup>24</sup> The irony was that Dixon J had already taken the initiative four years earlier. In the 1945 case of *Queensland Stations Pty Ltd v Federal Commissioner of Taxation*,<sup>25</sup> Dixon J formulated a test that replaced control as the sole criterion for gauging an employment relationship. Instead, control was just one of a number of indicia to be weighed in determining whether a contract is one of employment.<sup>26</sup> Dixon J's test was refined by the Mason Court in *Stevens v Brodribb Sawmilling Co Pty Ltd*.<sup>27</sup> *Stevens* provides the contemporary common law test for identifying an employee. Following Dixon J's approach, the application of the current test focuses on the degree of control as a significant factor, but utilises other factors including form of payment, ownership of tools, method of taxation, chance of profit or loss, and economic dependence of one party on another to distinguish between an employee and an independent contractor.<sup>28</sup>

<sup>22</sup> See *Haupt v Haupt* (1929) SASR 393, 396 (Napier J); *Yewens v Noakes* (1880) 6 QBD 530.

<sup>23</sup> (1949) 79 CLR 389 ('*Humberstone*').

<sup>24</sup> *Ibid* 404.

<sup>25</sup> (1945) 70 CLR 539 ('*Queensland Stations*').

<sup>26</sup> *Ibid* 552.

<sup>27</sup> (1986) 160 CLR 16 ('*Stevens*').

<sup>28</sup> *Ibid* 24 (Mason J). Gray J provides an interesting interpretation of this test in *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179, 184.

In forging a new definition of employment, Dixon J transformed the legal status of a fundamental social relationship. He resiled from continuing deference to the authority embodied in the control test that was formulated in the 1858 case of *R v Walker*.<sup>29</sup> Dixon J's jurisprudential advance signalled disenchantment with existing case law on this issue. Dixon J eschewed judicial restraint and developed the law in a way that had important socioeconomic ramifications. His initiative begs the question of the master category that underpinned his law-making foray. With the benefit of hindsight, it is possible to track the commercial basis of Dixon J's novel adjudication on the contract of employment. This refutes Gava's assertion that it is only contemporary activist judges, spearheaded by Justice Kirby, that mould law to suit market relations.<sup>30</sup>

The historical causality of Dixon J's rejection of the control test is evident if considered in light of the socioeconomic climate of Australia in the period during which he 'revamped' employment law. The *Humberstone* and *Queensland Stations* judgments were handed down in the early post-Second World War period. The war vastly expanded the scale and scope of Australian economic development. A restructuring of the economy ensured large-scale manufacturing supplanted the pastoral sector at the apex of the economy.<sup>31</sup> Major industries were beginning to be dominated by oligopolies and monopolies. The triumph of large-scale manufacturing industry was a watershed for the classical entrepreneur who combined ownership with control of the capitalist firm. The direct link between ownership and control, a seminal feature of economic life in the age of the formulation of the control test, was severed. A sophisticated administrative apparatus emerged to organise a labour process where technological developments spurred the growth of occupational strata of the most diverse kind.<sup>32</sup> The mechanisation of the office and factory created occupations antithetical to the operation of the control test. The control test was a product of the era of the steam mill, and it became increasingly obsolete in an economy where specialist skills were beyond the understanding and constant supervision of employers.

In formulating a multiple indicia test, Dixon J enabled a contract of employment to be identified for a plethora of occupations that were at the commanding heights of the new economy. An advantage for big business was the capacity of the test to minimise social wage costs. This is achieved by the test providing legal validation for the expansion of the ranks of the self-employed. Truck drivers, couriers and building workers can be recruited by firms and induced to operate as independent contractors. In a sense, these individuals become surrogate employees. They are yoked to the overarching control of big business and their formal freedom from wage-labour is an illusory trap.<sup>33</sup> Business expenses and personal costs, whilst providing a buffer against illness and old age, eat into net profits. Any breaks from work due to illness or economic crises are cata-

<sup>29</sup> (1858) 6 WR 505.

<sup>30</sup> John Gava, 'The Perils of Judicial Activism: The Contracts Jurisprudence of Justice Michael Kirby' (1999) 15 *Journal of Contract Law* 156.

<sup>31</sup> Michael Dunn, *Australia and the Empire: From 1788 to the Present* (1984) 164.

<sup>32</sup> Robert Connell and Terence Irving, *Class Structure in Australian History: Documents, Narrative and Argument* (1980) 271.

<sup>33</sup> *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179, 184 (Gray J).

strophic and threaten penury. At the same time, big business gains from the higher productivity and profits that ensue from an army of formally independent contractors who will work tirelessly to hold on to the dream of enrichment associated with self-employment.

For example, in *Queensland Stations* and *Stevens*, the multiple indicia test was employed to categorise owners of trucks as independent contractors, despite timber companies being the sole provider of work and exercising rigid control over every crucial aspect of the workplace. The potential of the test to obviate any semblance of corporate social responsibility is evidenced by a widow's failure in *Humberstone* to gain workers' compensation for the workplace death of her husband. By flexibly serving the needs of the modern labour market, this test facilitates the expansion of the capital accumulation process in the modern corporate era. Dixon J's test is also applicable in the current epoch of the information services economy where computer technology has created new occupations that provide for increasing autonomy of personnel. Big business is given scope to structure its mode of recruitment knowing that the legal test will cater for both employees and independent contractors, so long as the legal arrangement struck is well drafted to avoid any litigation perils. In the recent High Court case of *Hollis v Vabu Pty Ltd*, homage is paid to Dixon J for engineering a flexible test applicable to contemporary life.<sup>34</sup> The Court lucidly expressed the view that it was changing historical circumstances that spelt the death knell of the 19<sup>th</sup> century control test.<sup>35</sup> Implicit in *Vabu* is acceptance of the premise that Dixon J pioneered an economic reality test for identifying a contract of employment in the modern capitalist era. It appears that when a judge is long dead and granted iconic status, it is safe to refer to the extra-legal factors that underpinned their adjudication philosophy.

The way business is able to utilise the test to maximise its employment options emphasises the inherently commercial basis of Dixon J's employment doctrine. Of crucial importance is the way the Dixon test provides a mantle of legality to the social relationship underlying the institution of wage labour. The test obscures the mechanics of power that exist in a bargain struck by palpably unequal parties and provides a legitimating ideology for employers to extract a surplus from workers and dispose of it as they see fit. Because Gava's legal philosophy is so deeply rooted in formalism, he can only focus on legal logic when defending Dixon J's jurisprudence. In so doing, Gava perpetuates the fallacy that a contract of employment test can be formulated without the economic ideology or political philosophy of the judge being a component part of the process. For Gava, legal thought is independent of economics, politics and social reality. The legal ideology imbued in the contract of employment pinpoints law as a branch of politics. In contrast to Gava's abstract empiricism, the history of the employment test highlights law's role as a site of social struggle. Essentially, labour law is concentrated economics and politics. Gava's attachment to rules prevents him from seeing what his hero Dixon J intuitively grasped in his judicial practice. The development of Dixon J's employment test reminds

<sup>34</sup> (2001) 207 CLR 21, 40–1 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) (*'Vabu'*).

<sup>35</sup> *Ibid.*



us that judges need to be judged according to what they do and not what they say about themselves.

While formulating an employment test that suited a new commercial age, Dixon J kept faith with the moral and political ideology of classical contract law. His contribution was confined to recasting the categorisation of employment relations. He remained steadfast in support of the guiding principles of contract doctrine. Dixon J's ideology of law was predicated on methodological individualism. This doctrine is based on social phenomena being derived from atomistic individuals existing outside any set of social relationships. In contract jurisprudence, methodological individualism is the motor force of the will theory that justifies legal obligations on the basis of voluntary bargains struck by free and equal individuals maximising their own self-interest. Command and coercion governed by structural inequalities between contracting parties are absent from this legal equivalent of pure market theory. It was to take another generation of neo-liberal judges to begin the task of transforming the main pillars of contract law. Gava has cogently summarised the fruits of their labour and obliquely hinted at the social forces that underpinned the reform process. He notes:

Judges are more and more willing to take into account factors such as reliance and unconscionability to reshape and even create contracts in a fashion more suited to the perceived needs of the community. For example, most judges will take a very careful look at any contract where there is a substantial disparity in economic power between the parties. This will often be the case in employment contracts.<sup>36</sup>

It is no surprise that Gava is not a supporter of changes to the structure of contract rules for he shares Dixon J's conception of legal thought regarding juridical individualism and equality. Gava's critique of Justice Kirby is founded on a set of governing ideas that synchronise with neo-formalism. If Gava were a judge, it is tempting to speculate on the policy values and political ideology that would inform his decisions. An important clue is offered in Gava's chapter on privity, where he notes that:

Contract provides an arena for citizens to act and not just respond to law. It also recognizes and treats people as equals in their dealings with others who may be socially and economically more powerful. This in turn contributes to the development of equality in the political and legal arenas.<sup>37</sup>

This viewpoint epitomises the classical contract law approach. It posits abstract individuals operating in a market economy that facilitates equality both on a contractual and political level. In Gava's court, the adjudication process would be geared towards safeguarding the rights of juridical individuals to enter into contractual relationships. Gava's view suggests that he would promote the values of liberal individualism, enshrined in the sacred principles of freedom of contract, as the pathway to fair bargains. Gava's legal fetishism would be expressed by taking account of the rights and obligations of the free and equal

<sup>36</sup> John Gava, 'The Paradox of Job Contracts', *The Age* (Melbourne), 14 January 1993, 13.

<sup>37</sup> John Gava, 'Is Privity Worth Defending?' in Peter Kincaid (ed), *Privity: Private Justice or Public Regulation* (2001) 199, 224.

parties appearing before him, but excluding consideration of the organisation of society and the power dynamics of the relationship. In essence, it is submitted that the application of formal equal rights would result in inequality in practice. Rights are not abstract universal entities. They are linked to individuals in a property owning society and will be utilised by the dominant party to enhance their power and wealth.

The notorious case of *Lochner v New York*<sup>38</sup> is a symbolic example of the crippling human cost of the classical contract model. In 1905, under the banner of an abstract conception of freedom of contract, the US Supreme Court prevented a state from limiting the number of hours that bakers were required to work. Justice Kirby notes that the US Supreme Court fashioned a number of *Lochner*-type doctrines to strike down social policy legislative programs.<sup>39</sup> The free market zealotry of the US Supreme Court was only tamed by President F D Roosevelt promising tough action if the conservative judicial activists impeded New Deal legislation.<sup>40</sup> Gava is silent on the issue of conservative judges utilising doctrine to limit the scope of legislative programs. In Gava's reactionary judicial universe, only neo-liberals such as Justice Kirby override parliamentary judgments.

Neo-liberal judges are not tribunes of the people. They are not hostile to the extant political and economic system. Yet, while their anti-formalism poses no problems to the framework of capitalism, it is infinitely preferable to the judicial activism of judges with a conservative ideological viewpoint. For conservative members of the judiciary, apolitical legalism is adopted as an article of faith and equated with the commonsense of the age. This is a fairy tale that cloaks the conservative values of the legal system. Gava is a prisoner of this commonsense approach. His formalist methodology ensures he is oblivious to the legal ideology that is inherent in conventional juridical logic. At least neo-liberal judges do not attempt to disguise the fact that law is a living organism and the product of a key state institution. They recognise that under these conditions law is not always found, but may need to be created. Gava is free to build judicial castles in the air because he champions the view that law is a separate aspect of social life. He has no concept of the dialectics of law and its integral role in a capitalist economy.

In contrast to Gava's ahistorical analysis, Edward Thompson notes that English law has always been 'deeply imbricated within the very basis of productive relations, which would have been inoperable without this law.'<sup>41</sup> Contract law, for example, provides a legal rationalisation for the economics and politics of capitalist society. Patrick Atiyah observes that the structure of modern contract law was shaped by 'an amalgam of classical economics, of Benthamite radicalism, of liberal political ideals, and of the law itself, created and moulded in the shadow of these movements.'<sup>42</sup> The will theory ignores the reality that the

<sup>38</sup> 198 US 45 (1905) ('*Lochner*').

<sup>39</sup> Kirby, 'Judicial Activism', above n 4, 101.

<sup>40</sup> *Ibid.*

<sup>41</sup> Edward Thompson, *Whigs and Hunters: The Origin of the Black Act* (1990) 261.

<sup>42</sup> Patrick Atiyah, *Essays on Contract* (1990) 11.

meeting of two wills expresses an economic relationship. The legal doctrine mystifies the economic relationship underpinning the juridical relationship. Gava's misshapen contract jurisprudence would usher a *Lochner*-type adjudication process into Australia, and in turn abolish the legal developments that have witnessed the intervention of neo-liberal judges in cases where unfair bargains have been procured due to deep inequality.

A reading of the great liberal theorists also undermines Gava's judicial epistemology. As far back as Thomas Hobbes, liberal theorists have struggled to reconcile market relations with some kind of equality. Crawford Macpherson documents the failure of this project.<sup>43</sup> Far from achieving equality, market relations engender inequality as the ownership of commodities is translated into rights that accord with the degree of economic power.<sup>44</sup> The cash nexus economy left no room for anything other than market morality to flourish. Individualism was the historical product of the competitive struggle to dominate others in order to accumulate the property that would secure individual autonomy.<sup>45</sup> The classical model of contract law enforces peaceful conditions for the distribution of property and the economic invasion of the weak by the strong. Gava's legal reasoning would facilitate the recasting of unequal economic relationships into legal obligations. The content of contract doctrine has been transformed in order to better reflect the values of the majority of society. In the process, judicial legitimacy and authority have been boosted. The central dynamic of the transformation process has been a generous judicial vision of the nature of liberal democracy. Arguably, the judges responsible for reforming the notions of contract law have helped tame the undemocratic features of the market and bolstered liberal democracy.

#### IV DIXON'S PROACTIVE CONSTITUTIONAL JURISPRUDENCE

Dixon J's judicial philosophy is explicitly on parade in his constitutional adjudication. Dixon J's constitutional jurisprudence exhibits the inseparable nature of the craft tradition, politics and ideology. For example, Dixon J's laissez-faire economic ideology is the keystone of his interpretation of s 92 of the *Constitution*. The Dixon Court interpreted s 92 in a manner that guaranteed that the private sector was safe from any government nationalisation program. His Honour's championing of free market forces in interpreting this head of power highlights the concentrated economics and politics that underpinned his legal reasoning. One admires the skill exhibited by Dixon J in cloaking his economic and political values. For, as Brian Galligan notes, '[o]ne has only to read Dixon's opinions to see that he was not in fact a strict and complete legalist.'<sup>46</sup> Gava has been seduced by the sophisticated vocabulary and technical virtuosity of Dixon J and the fellow judges that are given his stamp of approval. Gava's impressionistic analysis provides a misguided view of Dixonian-type

<sup>43</sup> Crawford Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (1979).

<sup>44</sup> *Ibid* 86.

<sup>45</sup> *Ibid* 57.

<sup>46</sup> Brian Galligan, *Politics of the High Court* (1987) 39.

judges. The deep logic of Dixon J's methodology eludes Gava. He conveys the surface sheen of Dixonian-type jurists whilst being oblivious to the concentrated economics and politics embodied in their legal doctrine.

At stake in the reading of the interstate trade and commerce section was a crucial socioeconomic issue: were state and/or federal governments vested with the political power to regulate interstate trade or commerce?<sup>47</sup> The politics of constitutional adjudication regarding s 92 had been axiomatic for a number of years before Dixon J's interpretation triumphed. Labor supporters on the bench, such as Evatt and McTiernan JJ, had waged a vigorous struggle to strengthen state and federal legislative powers by interpreting s 92 in a manner that would promote state ownership at the expense of free enterprise.<sup>48</sup> Dixon J turned the tables on the social democratic High Court judges and spearheaded a deregulatory drive to protect individual business rights in interstate trade at the cost of restricting state and federal government regulation.<sup>49</sup> Business groups and the mainstream press were vocal in their praise for the free enterprise reading of s 92 and the decisions that cemented this position.<sup>50</sup> The concept of apolitical formalism is an elaborate confidence trick and Geoffrey Sawer perceives the charade when he depicts Dixon J's reading of s 92 as 'a guarantee of individual liberty appropriate to the circumstance of a private enterprise or capitalist society, "liberty" in a sense determined by Herbert Spencer's sociology.'<sup>51</sup>

Sir Owen recognised the mainspring of his reading of s 92. In a letter written in 1937 to Justice Latham, a fellow laissez-faire liberal, he lifted the judicial veil. Dixon cast aside the rhetoric of formalism that disguised his brand of politics and declared:

In cases relating to transport and other 'means', 'implements' and 'agencies' of commerce, if not in all cases, I think it is almost clear that we must proceed by arbitrary methods. No doubt there will be limits but political and economic considerations will guide the instinct of the court chiefly. In time the thing will work back to some principle or doctrine but what it will be I am unable to foretell.<sup>52</sup>

Here, Sir Owen clearly abjures the idealised notion that legal reasoning is an autonomous, neutral and rational process that is to be distinguished from the partisan and arbitrary world of politics. Dixon's understanding of the contingency and indeterminacy of legal reasoning is also evident in his admission to Justice Kitto that he had never agreed with the judgment of a fellow judge

<sup>47</sup> Ibid 112.

<sup>48</sup> Ibid. See, eg, *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30 (Evatt and McTiernan JJ); *Hughes & Vale Pty Ltd v NSW [No 1]* (1953) 87 CLR 49 (McTiernan J) and *Hughes & Vale Pty Ltd v NSW [No 2]* (1955) 93 CLR 127, 183 (McTiernan J).

<sup>49</sup> Galligan, above n 46, 113. See, eg, *Glipin (O) Ltd v Commissioner for Road Transport and Tramways (NSW)* (1935) 52 CLR 189; *Hughes & Vale Pty Ltd v NSW [No 1]* (1953) 87 CLR 49.

<sup>50</sup> Galligan, above n 46, 112.

<sup>51</sup> Geoffrey Sawer, *Australian Federal Politics and Law 1929–1949* (1974) 66. See also Herbert Spencer, *The Study of Sociology* (1873).

<sup>52</sup> Letter from Dixon to Latham, 1 June 1937, cited in John Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (1980) 67.

‘without having some cause to regret it afterwards.’<sup>53</sup> In more recent years, advocates of strict legalism decried the Mason Court for its willingness to read implications into the *Constitution*. Justice Callinan, for example, prior to joining the High Court, expressed disdain for the constitutional jurisprudence of activist judges who imply provisions into the *Constitution*.<sup>54</sup> In another moment of refreshing candour, Dixon J exposed the myopia of this type of arid formalism when he averred in *Australian National Airways Pty Ltd v Commonwealth* that ‘[w]e should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications.’<sup>55</sup>

## V THE PERILS OF CHANGE

The apolitical formalism of Gava is responsible for his misshapen analysis of Justice Kirby’s jurisprudence. Gava provides a caricatured version of Justice Kirby’s jurisprudence which obscures the historical lineage of his legal consciousness. Gava’s epistemology is based upon making law independent of politics and society. This brand of metaphysical philosophy is imbued with disdain for anything other than the legal pronouncements of judges. It provides the detached intellectualism necessary to sidestep a jurisprudence based on a view of law as being constituted by the dialectical interaction of economic, political and social conditions.

Sir Anthony Mason has declared his intellectual debt to Julius Stone, whose sociological jurisprudence opened his student eyes to the law-making function of judges.<sup>56</sup> Justice Kirby’s social welfarist jurisprudence also owes a debt of gratitude to Stone’s influence on Australian legal history, but ultimately is descended from a line of judges stretching back to Higgins J. Dixon and Higgins JJ are the towering antinomies of Australian judicial philosophy. Higgins’ jurisprudence was forged by his rejection of laissez-faire liberalism. The *Harvester* judgment,<sup>57</sup> for example, is posited on a denial of the verities of Smithian economics that espouses the view that the economy acts as an unconscious regulator of the free exchange of the buying and selling of labour power.<sup>58</sup> For Higgins J, protective wage legislation was implemented to avoid workers being ‘left to the usual, but unequal contest, the “higgling of the market” for labour, with the pressure for bread on one side, and the pressure for profits on the other.’<sup>59</sup> Higgins J understood that the High Court, as a branch of the state and supported by the labour power provision,<sup>60</sup> was empowered to act as an umpire in market relations. It had a duty to blunt the unbridled capacity of capital to

<sup>53</sup> Sir Frank Kitto, ‘Why Write Judgments?’ in Justice R A Blackburn (ed), *Judicial Essays* (1975) 7, 14.

<sup>54</sup> Callinan, above n 10, 8–9.

<sup>55</sup> (1945) 71 CLR 29, 85.

<sup>56</sup> Mason, above n 6, 1.

<sup>57</sup> *Ex parte H v McKay* (1907) 2 CAR 1 (‘*Harvester*’).

<sup>58</sup> Adam Smith, *The Wealth of Nations: Books I–III* (first published 1776, 1982 ed) 119.

<sup>59</sup> *Harvester* (1907) 2 CAR 1, 3.

<sup>60</sup> *Australian Constitution* s 51(xxxv).

impose an unfair bargain on those who only had their labour power to sell. Higgins J was not an apostle of the classical model of contract law that stated that the content of the doctrine was premised upon free and equal parties. As his Honour stated:

I cannot think that an employer and workman contract on an equal footing, or make a 'fair' agreement as to wages, when the workman submits to work for a low wage to avoid starvation or pauperism (or something like it) for himself and his family.<sup>61</sup>

Stuart Macintyre has identified new liberals, such as Justice Higgins, as the source of the arbitration and conciliation system that established a centralised wage-fixing system at the onset of the 20th century.<sup>62</sup> These new liberals lobbied to dilute the impact of market forces and to promote social welfare measures that facilitated state intervention to reduce poverty and inequality. As Macintyre notes, these 'Australian liberals insisted that the state had a duty to come between private individuals if their actions threatened the welfare of others.'<sup>63</sup> When Justice Higgins died in 1929, the Melbourne Trades Hall Council flew its flag at half-mast.<sup>64</sup> Higgins was not a member of the labour movement nor did he seek the abolition of capital. But unionists recognised that Higgins J's jurisprudence was not governed by an abstract dogma that declared its autonomy and apolitical nature whilst reinforcing social inequality and rank injustice. Higgins J's judicial practice was informed by the view that law is a social product and the welfare of society its governing principle. Both Justices Higgins and Kirby's progressive activism finds a bedrock of support and legitimacy in the lives of ordinary Australians seeking social justice.

It is evident from his judgments and his copious articles and speeches that Justice Kirby fits within the mould of social welfarism pioneered by Justice Higgins. However, it is in a recent tribute to Manning Clark that the wellspring of his juridical philosophy manifests itself most clearly. Justice Kirby gives due praise to a master of history but scolds Clark for his loss of faith in liberal democratic institutions. Justice Kirby avers that Clark attacked the 'trinity of bourgeois liberalism, democracy and material progress.'<sup>65</sup> In contrast, Justice Kirby argues that 'this nation appears to maintain its commitment to liberalism, electoral democracy and material progress.'<sup>66</sup>

It is his belief in the values of a liberal mixed economy and interventionist state that propels Justice Kirby's conceptual framework. This is the basis for Justice Kirby's grand vision that, in novel circumstances, settled law can be

<sup>61</sup> *Harvester* (1907) 2 CAR 1, 4.

<sup>62</sup> Stuart Macintyre, 'Neither Capital nor Labour: The Politics of the Establishment of Arbitration' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890-1914* (1989) 178, 187.

<sup>63</sup> *Ibid* 186.

<sup>64</sup> John Rickard, *H B Higgins: The Rebel as Judge* (1984) 309.

<sup>65</sup> Justice Michael Kirby, 'Manning Clark, "Bourgeois Democracy" and Strange Tales from Supreme Courts' (Speech delivered at the Second Manning Clark Lecture, Canberra, 26 March 2001) <[http://www.lawfoundation.net.au/resources/kirby/papers/20010326\\_ManningClark.htm](http://www.lawfoundation.net.au/resources/kirby/papers/20010326_ManningClark.htm)>.

<sup>66</sup> *Ibid*.

discarded if it conflicts with contemporary values or social change. Moreover, as early as his 1983 Boyer Lectures, Justice Kirby understood the ambiguity of words, and that choice is an intrinsic part of judicial interpretation.<sup>67</sup> The indeterminacy of law ensures equally plausible decisions can be handed down, and that discretion is thus a legitimate judicial function. In contrast, for Gava and Smillie, the rejection or dilution of an organising set of principles and precedent that underlie the common law tradition opens the way for a loss of the certainty, consistency and predictability that are the touchstones of formalism.<sup>68</sup> Gava and Smillie have a deep distrust of judges breaking free of the shackles of restraint and exhibiting creativity, imagination, discretion and engagement with conscious value judgments.<sup>69</sup> Almost any deviation from precedent is treated as a step on the road to perdition.

Of crucial importance in any analysis of Justice Kirby's juridical logic is the caution he displays when a departure from rule-based adjudication is undertaken. Justice Kirby is a thinker conscious of the perils of change. He tends to lionise the role of judges and the ceremonial rites of judicial office, but not to the point that he views his position as standing above economic and political life.<sup>70</sup> Even Gava admits that, in the main, Justice Kirby is an 'impressive judge in the common law tradition, careful to work within the traditions and existing principles in the law of contract.'<sup>71</sup> In a 1999 article, Justice Kirby noted that 'defiance of, and disobedience to, clear legal authority is impermissible to anyone.'<sup>72</sup> Justice Kirby's judicial activism is tightly controlled. By and large he is content to operate within the confines of mainstream legal thought. He is deeply attached to the taught legal tradition, and never crosses the Rubicon to consider whether law provides a neutral garb for politics, and is thus inseparably connected to providing a legitimating ideology for liberal democracy. Nevertheless, his excursions into judicial creativity greatly agitate legal conservatives like Gava.

It is reasonable to be sceptical on the subject of Justice Kirby plumbing the depths of the forces that animate his own development of law, for legal ideology is a product of material circumstances. In brief, the origins of any legal ideology are located in the fundamental social relations that ensure the reproduction of the economy and society. Like all social phenomena, legal ideology largely originates independently of the individual. But with this caveat in mind, it is important to take note of Justice Kirby's own assessment of what drives his law-making. In the 1997 Bar Association of India Lecture he opined:

If the role of judges in developing legal principle is to be recognised overtly and not secretly in whispers, it behoves courts to adopt a new protocol or methodology for the judicial function. This would identify the leeways for choice; invite the provision of sufficient information and materials on social and eco-

<sup>67</sup> Kirby, *The Judges*, above n 3, 39.

<sup>68</sup> Smillie, above n 12, 273.

<sup>69</sup> *Ibid* 257; Gava, 'Law Reviews', above n 2, 565.

<sup>70</sup> Justice Michael Kirby, 'Law at Century's End: A Millennial View from the High Court of Australia' (2001) 1 *Macquarie Law Journal* 5.

<sup>71</sup> Gava, 'The Perils of Judicial Activism', above n 30, 156.

<sup>72</sup> Justice Michael Kirby, 'Lord Denning and Judicial Activism' [1999] *Denning Law Journal* 127, 135.

conomic consequences of the competing choices; and expand the opportunities to selected interest groups to be heard to assist the court to come to the preferable conclusion.<sup>73</sup>

This type of rationale for developing law is the catalyst for Gava to level a series of charges. The charge sheet comprises various forms of what Gava terms 'instrumentalist judging'.<sup>74</sup> Each charge is aimed at delegitimising the legal reasoning employed by Justice Kirby when he develops new doctrine. The cardinal lapse is trespassing into economic, social and political governance, and thus undertaking a role anathema to judicial adjudication. In Gava's view, the sole function of judges is to apply rules and precedent, while leaving Parliament to develop law. In short, Gava stresses that unelected judges are not vested with the right to participate in governing society. Even more radically, Gava claims that Justice Kirby's legal methodology is 'profoundly anti-democratic', at least when it strays beyond established legal principle.<sup>75</sup>

There is a modicum of truth in Gava's claims. At first blush, one is repelled by the prospect of judges vitiating representative democracy. But critical analysis of Gava's reasoning reveals that he is bewitched by abstract empiricism. Gava's conceptual poverty on the nature of bourgeois democracy precludes him from perceiving the public policy foundations for neo-liberal judicial activism. In a capitalist democracy there is no uniform view on economic, political and legal relations. In a class society, different groups are always challenging the dominant juridical relationships, and judicial divisions reflect this social struggle. Judicial activism of whatever hue is evidence of a society torn by internal contradictions. Gava's advocacy of mechanical jurisprudence negates the fact that if Justice Kirby left the bench tomorrow his place would be taken by someone incapable of abiding by the canons of neutral, apolitical formalism. In the end, the choice for any jurist is which legal philosophy they should adopt as a guiding principle, and whether it would promote a more just society or covertly, no doubt, buttress the extant power structure.

The 19<sup>th</sup> century English Prime Minister Benjamin Disraeli was a conservative, but he understood that capitalist property relations ensured a two nation society bedevilled by conflict and considered it a tragedy that rich and poor were so visibly unequal in every sphere including law.<sup>76</sup> If Disraeli were alive, he would arguably salute a judicial activism that consciously took the side of the underdog in order to reinforce a property-owning democracy. He would see such activism as a necessary ransom for social peace. Disraeli's case emphasises the point that one need not come from a disadvantaged social group to have the heart to see social reality and engage in judicial activism to ameliorate gross inequality. The history of progressive radicalism is one of people being prepared to forsake the interests of their class origins in order to give succour to those on the downside of society.

<sup>73</sup> Kirby, 'Judicial Activism', above n 4, 97.

<sup>74</sup> Gava, 'Law Reviews', above n 2, 567.

<sup>75</sup> Ibid.

<sup>76</sup> See Benjamin Disraeli, *Sybil or the Two Nations* (1980).



Gava also fails to perceive that the evolution of society has raised complex questions about the nature of the doctrine of the separation of powers and other legal shibboleths that have compartmentalised the role of law. Thus Dicey's 19<sup>th</sup> century thesis on the supremacy of Parliament may be contested terrain in the 21<sup>st</sup> century. In fact, as George Winterton notes, the doctrine of the supremacy of Parliament popularly linked to Dicey was a product of the English Civil War and, in that age, legal doctrine was employed to bolster the politics of both sides.<sup>77</sup> Given that the doctrine of parliamentary supremacy has always been a struggle of conflicting forces and not some universal abstract entity, contemporary judges may have a legitimate right to assist in regulating the social system regardless of the disdain of critics such as Gava and Smillie. The approach of these two conservative academics is built upon confining judges to the adjudication of disputes by applying a rule to a narrow band of facts that excludes consideration of values, choices, interests or the unequal power of parties. Yet neo-formalism is suffused with politics, despite Gava and Smillie's attempt to quarantine the autonomous craft tradition from extra-legal forces. By only focusing on a circumscribed set of facts and the applicable rule, orthodox adjudication masks, but does not eliminate, the politics of law. It ensures legal rules covertly operate to distill power relations. A decision-making process guided by neo-formalism plays a fundamental role in the political organisation of society despite the apolitical claims of its disciples. But the tragedy is that it executes a governing role in society by obscuring its values and political ideology.

Despite Gava's protestations, the role of the judiciary as a branch of the state sanctions its right to aid in governing society. The fact that the judiciary is a linchpin of a liberal democratic state — and that judicial power is incontrovertibly directed towards the reproduction of the extant social system — automatically ensures jurists play a political role even when apolitical adjudication is proclaimed. In fact, it could be argued that the judiciary acts as a counterbalance to the power of the executive, summed up by Lord Hailsham in his memorable phrase 'elective dictatorship'.<sup>78</sup> Viewed from this angle, Gava's barb about unelected judges governing society if judicial activism flourishes is given a different complexion. Judges' law-making function could be perceived as a bulwark against the tyranny of an executive unchecked by any brake applied by a powerless legislature. Justice McHugh has eloquently supported the practice of judges supplementing their role of applying rules with the power to make law, and he justifies judicial law-making on the basis that it is a device for entrenching democracy. Justice McHugh believes that the judiciary could complement the popularly elected legislature were these two organs to combine their powers to engage in law-making that would give a fillip to democracy.<sup>79</sup> In particular, Justice McHugh envisages judges becoming tribunes of those excluded from the political process by elite groups who pressure government into passing legisla-

<sup>77</sup> George Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-Examined' (1976) 92 *Law Quarterly Review* 594.

<sup>78</sup> Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (1978) 9.

<sup>79</sup> Justice Michael McHugh, 'The Law-Making Function of the Judicial Process' (Pt 2) (1988) 62 *Australian Law Journal* 116, 123.

tion that benefits their narrow sectional needs.<sup>80</sup> This is a reformist agenda that is aimed at achieving something akin to Disraeli's 'one nation' concept of unifying disparate social groups.<sup>81</sup> Despite its limitations it strikes a chord, particularly when cognisance is taken of the Business Council of Australia's successful lobbying for the dismantling of Justice Higgins' centralised wage-fixing system.<sup>82</sup> Apart from the deregulatory legislative coup embodied in the *Workplace Relations Act 1996* (Cth), the fingerprints of the Business Council of Australia are also all over the recent changes to directors' duties.<sup>83</sup> The wording of the statutory duty of care and the inception of the business judgment rule are testimony to the lobbying power of the Business Council of Australia.<sup>84</sup>

Despite the seductive allure of judicial law making, it is problematic on a number of levels. It is not Gava's nightmare of the prospect of parliamentary power being usurped by unelected judges making law that causes a degree of consternation — parliamentary democracy is imperilled far more by corporations setting the political agenda and flouting the interests of the consent of the governed than any threat posed by judicial activism. It is the fiction of a community consensus on values that is of concern. This is not just a matter of the socioeconomic position of judges rendering them ill-equipped to pick the contemporary values of the Australian people, as the formalists like to proclaim. Although this viewpoint is given some credence when Sir Anthony Mason argues that judges can legitimately engage in making law because they have a beam on community values due to their daily conduct of cases providing them with a 'unique window on their community',<sup>85</sup> in reality the courtroom and legal rules will never give a true reflection of Australia's social relations, values or conflict between interest groups. Rules are founded on juridic individualism. In a court, the rights and duties of legal individuals are abstracted from the web of social relations that is the crucible of human consciousness and values. The court is a part of the state apparatus and a discrete institution far removed from the places where work and struggle ensure the reproduction of society and shape the interior life and value system of individuals. Only a narrow fragment of people's lives are interrogated in a courtroom. Such a narrow concept of the values and competing ideologies extant in Australian society ensures that no jurist can decisively break with formalism. One way or another, the formalist framework and the social forces it supports will set the parameters of the judicial function. Judicial anti-formalism requires knowledge of the ensemble of social relationships on the street as well as court rules. The legal equivalent of a Disraeli or a

<sup>80</sup> Ibid.

<sup>81</sup> Disraeli, above n 76.

<sup>82</sup> Peter Sheldon and Louise Thornthwaite, 'The Business Council of Australia' in Peter Sheldon and Louise Thornthwaite (eds), *Employer Associations and Industrial Relations Change: Catalysts or Captives?* (1999) 47, 53–66.

<sup>83</sup> *Corporate Law Economic Reform Program Act 1999* (Cth) inserting ss 180(1) and (2) into the *Corporations Act 2001* (Cth).

<sup>84</sup> Frank Carrigan, 'The Role of Capital in Regulating the Duty of Care and Business Judgment Rule' (2002) 14 *Australian Journal of Corporate Law* 215, 231.

<sup>85</sup> Mason, above n 6, 15.

William Thackeray<sup>86</sup> is called for. The legal imagination requires a quotient of social empathy.

Justice Kirby has taken a major step by challenging the notion that the search for what he terms 'permanent values' to locate judicial law-making is a realistic goal. He considers that Australia's multicultural society makes it hard to speak of 'permanent values.'<sup>87</sup> It is a brave call by Justice Kirby to query the community-value thesis of legitimating judicial activism. It suggests that to base judicial activism on this methodological premise is fatally flawed. It may well be that there is far more than Australia's multicultural aspect to undermine the concept of a community consensus on values underwriting the validity of judicial law-making. A market economy generates deep economic and social inequalities where conflicting values contend for dominance. Values become a contested terrain between those who support and benefit from a market economy and those who scorn market morality and propound communal social values based on economic, political and legal egalitarianism.

Inequality in contemporary Australia is on a scale that makes Disraeli's two nations phrase apposite. After processing the data of a study comparing nine advanced nations, Peter Saunders, Director of the Social Policy Centre at the University of New South Wales, concluded that economic inequality in Australia is high by international standards.<sup>88</sup> Unfortunately, the state of wealth inequality has not improved in the past few years. Basing his figures on data supplied by a 1998 Australian Bureau of Statistics survey, Simon Kelly of the National Centre for Social and Economic Modelling stated that in Australia,

[t]he wealthiest 10 per cent have 43 per cent of the total wealth and the top 50 per cent have 90 per cent of the wealth. Viewed from the other direction, the bottom half of the population have only 10 per cent of the wealth, the least wealthy 20 per cent have only 1 per cent and the poorest 10 per cent has no wealth at all.<sup>89</sup>

Political liberty withers with the growth of the concentration of wealth. The concentration of wealth creates a financial oligarchy. Representative democracy vacates the field. Economic power is translated into social and political power. A value creed founded on egotistical individuals pursuing their self-interest triumphs and the losers become people who are no longer free. Values such as fraternity, equality and even a 'fair go' are marginalised. This is particularly the case with the recent triumph of economic rationalism. A neo-liberal judge such as Justice Kirby can counter the forces of reaction with an alternative value system but cannot claim this is as an expression of community values sufficient to ground judicial law-making. Justice Kirby cannot even claim to act on behalf of the values cherished by all progressive people, for his neo-liberalism binds

<sup>86</sup> William Thackeray, *Vanity Fair* (1847). *Vanity Fair* is a panoramic novel in which Thackeray brilliantly captures the life of different social classes and the streetscape.

<sup>87</sup> Kirby, 'Judicial Activism', above n 4, 95.

<sup>88</sup> Peter Saunders, 'Income Inequality in Australia: Lessons from the Luxembourg Income Study' (Paper presented at the Economic and Social Policy Group Income Distribution Seminar, Sydney, 5 May 1989) 32.

<sup>89</sup> Simon Kelly, 'Wealth on Retirement — Latest Estimates for Australia' (Paper presented at the Ninth Annual Colloquium of Superannuation Researchers, Sydney, 9–10 July 2001) 15.

him to a set of values that are aimed at stabilising and lessening conflict within Australia while offering no challenge to the dominant social relations that spawn inequality. He can offer no set of values for transforming Australia into a society where the material basis for a genuine set of community values prevails. At best, Justice Kirby can produce social welfarist decisions that lessen the impact of grave injustices. At the present juncture of Australian history, this is a noble endeavour. It may also be the case that there is sufficient accord between the progressive elements of Australia to conditionally legitimise the juridical logic of Justice Kirby. For, in a bleak age, it is far preferable to consent to a form of legal reasoning aimed at blunting the edges of social injustice than to accept the covert social engineering imbricated within the organising principles of neo-formalism. Acceptance of that credo guarantees legal conservatism and support for a power elite bereft of the capacity to offer succour to those on the downside of society.

## VI CONCLUSION

A contest of values exists at the heart of the judicial process in Australia. Neo-formalism has a bewitching quality and it ensnares the bulk of neophyte lawyers. Its spell can last a lifetime and be the guiding intellectual star of its acolytes. It is a legal philosophy characterised by the conservative goals of order, tradition and support for extant institutions. Being a conservative is not necessarily a subjective state of mind. Gava may well eschew the label. The point is that Gava and his academic and legal confreres are, by virtue of their body of ideas, objectively within the boundaries of conservative philosophy. Legal conservatives reveal their jurisprudential credo in numerous ways. In a recent article, Justice Hayne argues that the primary responsibility of legal academics is to instil in students the capacity to identify the rule or principle in a case.<sup>90</sup> His Honour upholds the autonomous craft tradition and any digression from rule-based jurisprudence is classified as ‘an exercise in polemics or an exercise in emotion.’<sup>91</sup> Justice Hayne appears to be unaware that his pedagogical vision is in safe hands. Just as mechanical jurisprudence is on the advance on the High Court, it is also sweeping through the academy if the triumph of craft training at Macquarie and La Trobe is any guide. These two law schools are a pale shadow of the socio-legal venues they once were. The bench and the academy, following in the wake of the dominant business ideology, have consolidated conservative ideas to the benefit of corporate Australia.

Justice Hayne’s pedagogical approach exemplifies Thomas Veblen’s analysis of legal education. Veblen argued that if legal education were to be craft based and future practitioners taught to dedicate themselves to focusing on autonomous rules and procedures, then it qualified as vocational training and should be taught in trade schools.<sup>92</sup> As John Ralston Saul avers, it is not the function of a university to create professional labour power for the job market. As he states, ‘[a]

<sup>90</sup> Hayne, above n 9, 18.

<sup>91</sup> *Ibid.*

<sup>92</sup> Thomas Veblen, *The Higher Learning in America: A Memorandum on the Conduct of Universities by Businessmen* (1969) 155.

student who graduates with mechanistic skills and none of the habits of thought has not been educated.<sup>93</sup> Universities are part of the Enlightenment project and should engender the critical analysis capable of partaking in the quest to pursue truth and knowledge at whatever personal cost. Neophyte lawyers should be taught to excavate below the surface in order to discern the social forces that shape legal reasoning and the production of principles. A scholarly education will equip law students to become lawyer-citizens and not merely functionaries of capital or the state. Moreover, command of legal doctrine is not excluded from this vision.

The formalist framework is imbued with the spirit of legal authoritarianism. Its supporters accept as a governing principle the reductionist view that the ambit of law is measured purely within the terms of its own logic and rules. Law exists in suspended animation cut off from socioeconomic forces. Formalism states that values, choices, policy, social determinants and political ideology are not part of judicial adjudication. Except, of course, judges must be judged on what they do and not what they say about themselves. On this yardstick, the apolitical and non-ideological claims of formalism are fallacious. For example, Dixon J's political ideology resonates in his judgments and in his role as a public intellectual at places like Yale.

It is a fiction that there are apolitical permanent principles that act as a chart for piloting a judge through the turbulent waters of recasting the law when confronted by conflicting authorities or novel situations. However, this theory of adjudication still exerts a stranglehold on conservative jurists. Justice Heydon is the latest jurist to declare that the development of the law is guided by juridical logic. However, unlike Sir Owen Dixon, Justice Heydon cannot even bring himself to admit that changed social conditions impact on legal consciousness. The Dixon of subtle jurisprudence, capable of formulating a novel contract of employment test for a new economic age, is lost on Justice Heydon. His fundamentalist adjudication philosophy resurrects the governing precepts of declaratory law. His Honour declares himself a disciple of Dixon, but pristine Blackstone is the true source of his legal imagination. His jurisprudence is based on logically related rules being parlayed together and this exercise in logical analysis culminates in an extension of a prevailing legal rule capable of dealing with any set of facts. While attempting to paraphrase Dixon J's judicial method, he is far more successful in highlighting his own form of legal reasoning. For Justice Heydon, there is no need for any new rule or principle to be developed. A pre-existing legal rule is available for every contingency. During the course of discussing Dixon's approach to legal change, Justice Heydon states that '[w]hen new cases arose, existing principles could be extended to deal with them, or limited if their application to the new cases was unsatisfactory.'<sup>94</sup> This surface analysis, with its selective paraphrasing, entirely misses the new social conditions that Dixon referred to at Yale in 1955 as the catalyst to engage in doctrinal revisionism. Unlike his followers, Sir Owen did not try to pretend that a Chinese

<sup>93</sup> John Ralston Saul, *The Unconscious Civilization* (1997) 74.

<sup>94</sup> Heydon, above n 11, 12.

wall separated his mind from his society. His legal conservatism was free of pedantic formalism.

Justice Heydon's form of metaphysical idealism excludes any consideration of changing social forces underpinning legal change. It is a methodology impregnated with Hegel's idealist view that only our mind exists.<sup>95</sup> It supports the autonomous theory of adjudication. Legal ideas govern, and juridical relationships are a product of the judicial consciousness. For Justice Heydon, there is only the sterile mantra that logical abstract categories rule and ensure the autonomy of law. This is legal fetishism *per simpliciter*. This phenomenon is evident in Justice Heydon's linkage between judicial activism and the rule of law. According to Justice Heydon, maverick judges have sidestepped objective legal rules and precedent to impose their own subjective form of reasoning and, in the process, destroyed the rule of law.<sup>96</sup> This rule of law shibboleth is a component of the myth of apolitical legalism. It mystifies the social and power relations that form the material basis of law. The rule of law in a class society can only offer formal equality and, in the final analysis, this is an ideological device that legitimates the dominant formalist methodology and the power elite served by its conception of rules and precedent. For all of its shortcomings, neo-liberal judicial activism acts as a counterweight to the rule of law being utilised to blindly support the status quo. Its advocates have, at the very least, transcended the barren view that legal logic, rules and precedent exist in splendid isolation. Abandoning the theological mode of legal thought that depicts law as an autonomous entity, jurists such as Justice Kirby have nourished the tree of life. Their conceptual framework allows scope for legal developments designed to ameliorate grave injustices that impact adversely on those that the abstract conservative view of the rule of law renders invisible.

There is no epistemological break between the legal reasoning utilised in simple and hard cases. Realism exploded the claim that there is an autonomous juristic logic untouched by the broader social structure and its values. Judicial law-making is inevitable, but claims that any doctrinal changes are guided solely by the coherence of the internal logic of the legal system falter in the face of law's indeterminacy. Both parties to a dispute can marshal good arguments and claim intellectual rigour is on their side. Justice Kirby cogently captured the inherent indeterminacy of law in his Boyer Lectures. Speaking of the necessity of making choices, particularly when a matter has reached the highest courts, he said: 'By the time a disputed case gets there, there is usually a choice to be made between two competing approaches to the law. Often, neither is indisputably correct — witness the numerous 4:3 decisions of our highest court.'<sup>97</sup> The claim that doctrinal change is a product of logic alone obscures the role legal rules play in affirming existing social relations. The traditionalists' advocacy of fidelity to coherence and consistency only highlights the pervasive influence of legal

<sup>95</sup> Georg Hegel, *Hegel's Science of Logic* (Arnold Miller trans, first published 1969, 1998 ed) 481–3 [trans of: *Wissenschaft der Logik*].

<sup>96</sup> Heydon, above n 11, 10.

<sup>97</sup> Kirby, *The Judges*, above n 3, 39.

ideology in reinforcing the social order. In other words, coherence and consistency are part and parcel of legal ideology.

The sophisticated vocabulary employed by lawyers fails to cloak the political essence of legal thought. Galligan is deadly accurate when he argues that law and politics are indivisible.<sup>98</sup> Both politics and law are, as he notes, involved in reproducing the public authority and legitimacy required to govern society.<sup>99</sup> One of the great conundrums of Australian jurisprudence is which course Justice Kirby will take in future years to further elucidate the forces that guide legal development. The whiff of grapeshot from his opponents hangs visibly in the air. One of the most powerful accounts of the judicial function was penned over 80 years ago, but perhaps Justice Cardozo's words will be an inspiration. For Justice Cardozo the guiding principle of legal development was axiomatic:

we pass, therefore, to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology. The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.<sup>100</sup>

It is richly ironic that Smillie grasps a cardinal feature of the sociology of law. In an imaginative insight, Smillie states that '[r]ule-based adjudication is necessarily conservative. It reflects a generally positive view of the status quo and a belief that any radical change from past practice is likely to produce worse rather than better outcomes.'<sup>101</sup> Having provided this insight into the political philosophy that underpins formalism, Smillie steers clear of any development of the extra-legal forces that guide the judicial process. But enough is said to undermine the conceptual foundations of the claims of apolitical formalism. Smillie can spend the rest of his article labelling every other type of jurisprudence as tainted by extra-legal factors, but nothing can detract from his brutal honesty regarding the conservative base of formalism.

Gava, Smillie, Chief Justice Gleeson and Justices Hayne, Callinan and Heydon constantly refer to tradition, restraint, continuity, certainty, consistency, fidelity and predictability as the cornerstones of their jurisprudence. These are the catchwords of conservatism. The spirit of Burkean conservatism lives on in the political ideology espoused by these jurisprudential thinkers.<sup>102</sup> They speak as if the words and concepts they cherish are unsullied by politics and ideology. Smillie claims that since judicial activists cannot agree on a single philosophy, it is better for judges to 'settle for securing the formal values of certainty, consistency and predictability.'<sup>103</sup> This ignores the fact that the balance of social forces in Australia militates against a single philosophy emerging within the ranks of those judges that eschew formalism. Judicial differences should be regarded as part of the rich tapestry of a divided society constantly undergoing social and economic change. Citizens would also be empowered if there were a variety of

<sup>98</sup> Galligan, above n 46, 1.

<sup>99</sup> *Ibid.*

<sup>100</sup> Justice Benjamin Cardozo, *The Nature of the Judicial Process* (1921) 65.

<sup>101</sup> Smillie, above n 12, 258.

<sup>102</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, 1968 ed).

<sup>103</sup> Smillie, above n 12, 273.

judicial methodologies openly acknowledged. The law would be demystified and the potential for seeing where each judge fitted on the ideological spectrum increased. At the moment, this prospect is fettered by a lack of clarity of the contrasting values that haunt the judicial process. In the case of all brands of formalism, the stumbling block is its professed apolitical nature. The price of glossing over the forces that guide legal development is paid by the further decline of democracy.

Gava and Smillie are gifted intellectuals, but alas they are shipwrecked in a different age and country. Leslie Hartley has written, 'the past is a foreign country: they do things differently there.'<sup>104</sup> Legal formalism has its roots in the 19<sup>th</sup> century heyday of Pax Britannia. Sir Owen Dixon's conditional acceptance of the view that judges develop law helped reinforce the legitimacy of formalism. But its present dominance may be a mirage of power. The hegemony of the British Empire in Australia was the keystone of the institutionalisation of formalism. This stage of history passed away and now Australia's social sphere is being turned upside down by the Promethean forces unleashed by globalisation. History promises to be pitiless in its treatment of an adjudication model steeped in the past and adherents incapable of seeing law as an inseparable strand of political ideology.

<sup>104</sup> Leslie Hartley, *The Go-Between* (1985) 1.