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***"Scepticism and Judicial Method"***

In the relevant scholarly literature, scepticism has animated debates over the relationship between law and morality and the differences between utilitarian or positivist<sup>1</sup> and reason-based<sup>2</sup> theories of the law.<sup>3</sup> Scepticism has also haunted the debate over the extent to which judges and judicial methods can or should accommodate contested values and policy considerations.<sup>4</sup> These high philosophical themes oblige me to explain immediately that the aim of this paper is modest. It is to consider briefly certain cultural theories associated with Continental philosophers such as Jean-François Lyotard, Jacques Derrida and Michel Foucault as they might interest practising barristers.

I know it would be a mistake to assume French philosophers agree with or about each other. When Voltaire extravagantly praised the poet and physiologist von Haller to Casanova, Casanova replied that the admiration was not mutual. In fact, Casanova said that when he recently spoke to von Haller, von Haller disparaged Voltaire. After a thoughtful pause Voltaire replied: "Perhaps we are both mistaken."<sup>5</sup>

Lyotard, Derrida and Foucault are all members of the postmodern pantheon. They are associated with currents of thought responding to political and social conditions of the modern state, and said to constitute an enabling ideology for improving those political and

social conditions. Broadly speaking, postmodern thinkers reject established values, grand narratives and the possibility of objective truth or knowledge. They oppose whatever they consider to be authoritarian or elitist and they encourage relativism and pluralism. Such thinking has fuelled some of the debates referred to as the culture wars.

Those who have most appropriated postmodern ideology in legal circles are liable to describe themselves simultaneously as "subversive" and "progressive", a formulation, or boast, which of itself immediately reflects the difficulty of seeking radical change in a justice system which has the confidence of the community.

Insofar as they relate to the law, the culture wars reflect a struggle between a desire to preserve our justice system as it is because it enforces normative behaviour, on the one hand, and a quite incompatible desire to be progressively liberated from those norms, on the other.<sup>6</sup>

Postmodern cultural theories are contrarian and profoundly sceptical. They are regularly expressed in obdurately opaque language. They have proved enormously popular and influential in the academy, in Australia, America and elsewhere, especially in the humanities - in history, literature and philosophy.

While the tide has now turned in those fields,<sup>7</sup> the influence of such thinking has spread to both legal scholars and legal policy makers. There is an easily discernible flavour of such thinking in the way in which contemporary debates are framed over old antinomies

between "justice" and "law",<sup>8</sup> and between "strict legalism"<sup>9</sup> (or "originalism"<sup>10</sup>) and "judicial activism".<sup>11</sup> Legal books and articles published recently show, and in some instances acknowledge, their indebtedness to postmodern thinking.<sup>12</sup>

Postmodern theories are also explicitly echoed in a more structural critique of our justice system. It is said that the law is a repressive construct and that the judges who administer it are part of an elite, or hegemony, and have understandings of justice and pluralism which are concomitantly incomplete. Such critiques have had their influence on calls for a different judiciary and for the transfer or dilution of the Executive's powers of appointing judges.

Barristers commonly react to postmodern theory with some degree of alarm and puzzlement, not least because those seeking to implement such theories in the justice system seem to display deeply paradoxical attitudes. On the one hand, they sometimes seem barely able to suppress their contempt for the present state of the law and our legal institutions and have armed themselves for battle with a strong belief in the transformative powers of a coercive bundle of social strategies known as political correctness. Yet on the other hand, they accept that the rule of law is central to our liberal democracy.

It is not my purpose to attempt any comprehensive critique of the theories I have mentioned. Nor do I suggest that there is anything wrong with challenges, even most radical and profound challenges, to our social institutions, or with profound questioning of our legal sanctions or the working assumptions behind them. That is one of the freedoms of living in a modern liberal democracy. What I would like to

consider is some of the fine detail of the scepticism, that of Foucault in particular, and to consider that particular type of scepticism in the context of judicial method.

It would not be possible to do proper justice to the range, the subtleties and the nuances of postmodern thinking in the space of a short paper and I refer to Lyotard and Derrida no more than is necessary for the purposes of mentioning pervasive concepts associated with their names.

Jean-François Lyotard (1928 - 1998) is best known to English speakers for his work *The Postmodern Condition: A Report on Knowledge*.<sup>13</sup> One of Lyotard's best known ideas is that accounts of human history consist of "*grand*" or "*meta*" narratives which, while focussing on events, at the same time suppress alternative versions of such events. The version of events suppressed is identified as the version which could be told by those in some sort of subordinate relationship to the cultural mainstream.

That idea has resonances in the practice of history. For example, E P Thompson in his preface to *The Making of The English Working Class* states that he is writing the history of "the poor stockinger, the Luddite cropper, the 'obsolete' hand-loom weaver, [and] the 'utopian' artisan",<sup>14</sup> figures normally effaced in historical accounts of the Industrial Revolution, in order to rescue them from what he calls "the enormous condescension of posterity."<sup>15</sup> In Australia, the search for, and the presentation of, alternative narratives has most notably been found in an expansion of studies of indigenous history and women's history.

Jacques Derrida (1930 - 2004) is perhaps most famous in the English speaking world for a process of reading, or a philosophical strategy, which he calls *deconstruction* and which bears on the relationship between thought and language. Stated simply, Derrida questions the assumption that a word and the object it designates are the same, or that a word and an action it describes are the same. Words for Derrida not only have numerous meanings, but also those multiple meanings are often themselves contradictory. Once that premise of linguistic ambiguity is accepted, it follows, so the argument goes, that a multiplicity of interpretations of any text, or any historical event is possible, if not inescapable.

Legal thinkers and historians have long recognized that the search for a definitive interpretation of complex historical events eludes success. Sir Owen Dixon noted this in the context of of his own times in *Concerning Judicial Method*,<sup>16</sup> the speech delivered at Yale in 1955. He said of the then practice of history, "History concedes the validity of a diversity of subjective interpretations."<sup>17</sup>

Following the idea of deconstruction, Derrida also coined the word *differance* to express the idea of the multiple (even unfinished) meanings in any text. If one were taxed with expressing the essence of postmodern thought in its civil application in a single sentence it might run like this: "postmodernism suggests that civil communities and the political and legal institutions which govern those communities should develop and implement a much greater tolerance of difference, ie diversity, among community members." It does not follow that administrative action justified by some mantra derived from such a

formula will necessarily have the propounded effect, nor that the purpose will be precisely as claimed, no more than that a republic founded on Virtue<sup>18</sup> will necessarily be virtuous. History, or experience, enforces a quite different conclusion.

Central to the thinking of Michel Foucault (1926 - 1984), to whom I now turn, was the idea that social and political institutions, and particularly the law, were mechanisms by which *elites*, or what he styled *hegemonies*, exercised power through mechanisms of coercion and regulation. He is known for his historical investigations into what he terms *discourses*. For him, a discourse is a field of both specialised knowledge and practices, by reference to which power is exercised. Power and knowledge for him are one and the same. He was not the first to observe the connection, although he perhaps inverted what Bacon expressed in his aphorism: *scientia potentia est*. Of course, the two men attached very different value to *scientia*.

Foucault's most challenging ideas in relation to the law are: (1) the idea that a person is a rational individual is a figment of Enlightenment thinking; (2) the idea that truth is relative - that is "truth" is truth for someone or some group, but it is never objective in the empirical sense; and (3) his idea that legal prohibitions on certain human conduct, particularly sexual conduct, reflected nothing more complicated than a repressive assertion of majoritarian views. As one critic said of postmodern theories generally, "what is under assault here is the *normative*".<sup>19</sup>

Although I touch on each of the three ideas of Foucault mentioned, let me concentrate for a minute on "truth" and judicial

method. When Sir Owen Dixon made reference to Pilate's question "What is truth?"<sup>20</sup> he noted that Pilate did not wait for an answer because he was "about to leave the judgment hall."<sup>21</sup> Here, and elsewhere, Sir Owen Dixon was emphasising that those "in the judgment hall", judges under a duty to judge, are required to establish truth or, putting it another way, reach a correct result.

Foucault frankly acknowledged Nietzsche's influence on his views of the relativity of truth. Nietzsche's answer to Pilate's question "What is truth?" was as follows: "A mobile host of metaphors, metonymies, and anthropomorphisms... Truths are illusions which we have forgotten are illusions".<sup>22</sup> That conception of truth cannot easily be reconciled with a judge's sworn duty to "do justice according to law", which is predicated upon findings by the trier of fact about the truth of past events. However, a sceptical attitude to truth encourages some reconsideration of the institutional and other limitations on judging, a topic to which I will return.

Before I go any further, in a work just as influential as the works of the Continental philosophers I have mentioned, Karl Popper in *The Logic of Scientific Discovery* (1959)<sup>23</sup> argued that no scientific hypothesis could be proven to be absolutely true. And Albert Einstein is most remembered for his theory of relativity in relation to time and space. Suggestive as the analogies seem, however, it might come as a surprise to Popper or Einstein, or Heisenberg, Schrödinger or Planck, for that matter, to find Foucault nominated as their spiritual heir.

In any event, let me allow Foucault to speak for himself.

## **Foucault on the Enlightenment**

In *What is Enlightenment?*<sup>24</sup> Foucault said the Enlightenment "has determined, at least in part, what we are, what we think, and what we do today".<sup>25</sup> He refers to Kant's description of the Enlightenment "as the moment when humanity is going to put its own reason to use".<sup>26</sup> He thinks of the Enlightenment "as a set of political, economic, social, institutional, and cultural events on which we still depend"<sup>27</sup> which propounded the tradition of rationalism as a means of ordering human affairs.

## **Foucault on Sovereignty**

Foucault explains that his reaction against unquestioning acceptance of values traditionally associated with the Enlightenment, specifically humanism and rationalism, is an attempt by him to recalibrate what is and what is not "indispensable for the constitution of ourselves as autonomous subjects."<sup>28</sup>

Hence his interest in all forms of sovereignty or authority over others including the law. His historical studies of "power/knowledge" in psychiatric institutions<sup>29</sup> and prisons<sup>30</sup> were intended to explicate the political and economic structures of modern society<sup>31</sup> and to challenge the traditional view that reason explains the framework of the law. Power/knowledge is a key Foucauldian epistemological concept set up in radical opposition to any reconciliations of human instinct and culture, for example through science or law.



He said he wanted to study the "problem of power" because "[o]n the right, it was posed only in terms of constitution, sovereignty, etc, that is, in juridical terms; on the Marxist side, it was posed only in terms of the state apparatus."<sup>32</sup> He inverted Clausewitz's formula to: "politics is the continuation of war by other means."<sup>33</sup>

In "The Carceral", the final section of *Discipline and Punish*, first published in 1975, Foucault explains his theory that the institution of the law, as it has developed in modern society, goes further than merely criminalising offences which are attacks on the common interest.<sup>34</sup> In other words law, as an institution, reaches far beyond the social contractarian theories of Hobbes, of Locke (and of Rousseau). Foucault asserts that the institutions which replaced the sovereign's power which he identifies as "the school, the court, the asylum [and] the prison" penalise "departure from the norm"<sup>35</sup> rather than penalising behaviour which really threatens the autonomy of members of the community.

This is his main complaint about social and political arrangements of modern nation states, including liberal democracies such as our own. He perceives the law, at least in part, as an instrument of repressive social cohesion because it insufficiently tolerates ways of living, ie expressions of human autonomy, which pose no genuine threat to civil peace or the good of other members of the community.

## **Foucault on Truth**

Foucault says "[e]ach society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true."<sup>36</sup>

He emphasised when referring to truth he was not referring to facts to be discovered and accepted, as in science; rather he said he was speaking about "truth" as a "system of ordered procedures for the production, regulation, distribution, circulation, and operation of statements."<sup>37</sup> He described his intellectual enterprise as being about "detaching the power of truth from the forms of hegemony, social, economic, and cultural, within which it operates at the present time",<sup>38</sup> law being in his view a form or expression of hegemony.

## **Foucault on Repression**

Foucault considers repression to be "emblematic of what we call the bourgeois societies".<sup>39</sup> For him, disciplinary power was an invention of bourgeois society designed to maintain community cohesion.

On that note and against that background, the first volume of Foucault's last and unfinished work, *The History of Sexuality*, first published in 1976, contains a revealing anecdote.<sup>40</sup> It is about a

feeble-minded peasant in Lorraine in 1867 who engages in sexual behaviour with a child. The peasant was then reported, led by the gendarmes to a judge, who turned him over to a doctor. Foucault objects to what he would call the "legalising" and "medicalising" of the peasant's behaviour. Human actions we would describe as "indecent dealing with a child", and criminal in a person of sound mind, and as meriting some social and legal sanction and prevention, are described by Foucault as "inconsequential bucolic pleasures"<sup>41</sup> and as "barely furtive pleasures between simple-minded adults and alert children."<sup>42</sup>

Foucault recounts this anecdote to draw attention to what he regards as the arbitrariness of definitions framed to describe human behaviour, and the contingent nature of meaning or truth. This point is repeated in many places and under many guises throughout his oeuvre. He rejects our culture's long tradition of belief in objective truths, and the law's use of reason to establish truth, since "truths" for him are fashioned by whatever is the dominant group paradigm or discourse.

Foucault's criticisms of the law, at least in this last work, seem little more than heuristic devices because he shows no interest in the child in the anecdote I have described; he is only interested in what happened to the peasant. He ignores the possibility that categorising human behaviours as "good" or "bad", "permitted" or "forbidden", can reflect a genuine consensus of a diverse community rather than some form of repression by a dominant group. That a community requires protection for its members against certain behaviours, the prohibition of which is an institutional norm, is an extremely unremarkable way to organise a complex civil society. Few judges would think that Foucault

got the balance right between the autonomy of the peasant and the rights of the child.

There is a considerable body of distinguished work in which scholars probe Foucault's idea that community standards, reflected in legal standards, need to be reconsidered and reshaped so as to accommodate greater variations in human behaviour and to reflect greater toleration of different expressions of human autonomy.

But, rather than move in that direction, I want to go back for a moment to think about the charge that our legal institutions reflect and implement arbitrary governance. To do this involves reflecting on what "sovereignty" really means in Australian constitutional history and, before that, English constitutional history. Sovereignty, that is the power to command others, is an idea which can no longer be wholly disentangled from the protean concepts of liberty and equality.

The Army Debates, sometimes referred to as the Puritan debates, which commenced in the autumn of 1647 are extremely valuable in revealing the close detail in political currents in Puritan thought before the *Act of Settlement* 1701. First, the one point on which the victors of the First Civil War were agreed was the need to ensure that any restored King would need to be bound so as never again to exercise absolute or arbitrary sovereignty.<sup>43</sup>

Secondly, one of the four main groups in the Debates, the Levellers, supported the idea of democratic suffrage, an idea which never completely left the English political stage once it had been

determined that the sovereignty of the King was to be shared in some way.<sup>44</sup> Admittedly, it did not come into its own until the 19th century.

Thirdly, all parties to the Debates had an egalitarian concept of reason. Reason was thought of as common to all, independent of education. This underpinned the ardent contemporary belief in free speech - the humblest person was just as entitled to be convinced or to convince another in relation to an idea. Debate was thought of as a constructive method for establishing the truth.

Over forty years later, James II having left the Kingdom, in the Convention Parliament of 28 January 1689, Sergeant Maynard asserted "our government is mixed, not monarchical and tyrannous, but has had its beginnings from the people."<sup>45</sup> Sir Robert Howard said "[t]he constitution of the government is actually grounded upon pact and covenant with the people."<sup>46</sup> Sir Robert Sawyer observed "[t]he government be fallen to the people, which people we are".<sup>47</sup> Then after the vote to declare the Throne vacant was taken, the House of Lords was concerned to "declare the constitution and rule of the government."<sup>48</sup>

The Bill of Rights 1689 asserted "the right of free speech" and provided that parliaments ought to be held frequently for "the amending, strengthening and preserving of the laws."<sup>49</sup>

These manoeuvres were preliminary to installing a new sovereign on the basis that "laws and liberties" were to be preserved. It was recognised by Parliament that in asserting its own sovereignty it would be necessary to detach the judiciary from the absolute and

arbitrary sovereignty of the King. Judges, who up until the constitutional settlement had been appointed and removed by the King, were often servile to his wishes.<sup>50</sup> Under the Act of Settlement 1701 judges were appointed for the first time as independent judges in terms which remain familiar in our own polity.<sup>51</sup>

Whilst the constitutional settlement was not, in terms consonant with modern understanding of these terms, either liberal or democratic (and it reflected religious dogma), it nevertheless institutionalised representative government and divided sovereignty.

Through representative government and the placing of the laws and nominated liberties in the hands of independent judges, sovereignty in the sense of power over others became the opposite of absolute and arbitrary. It became limited and predictable.

Personal liberty involved a freedom to act, including in relation to property, and a freedom to speak, in any way not prohibited by the law. Criminal laws could only be prospective. Equality meant everyone was equally bound and protected by the law, although it did not mean political equality. The independence of the judiciary existed to protect the community from arbitrary command.

Blackstone, writing later in the 18<sup>th</sup> century, not only recognised that the Constitutional Settlement divided sovereignty between the King, the Lords and the Commons,<sup>52</sup> he also considered that the electors who returned members in the House of Commons exercised sovereignty.<sup>53</sup>

The extent to which the relationship between the subject and the state thereafter rested on the positive authority of the common law and the independent judges is well illustrated in a series of cases concerning general warrants for searching premises. In 1765,<sup>54</sup> Lord Camden was wholly unimpressed with the arbitrariness of general warrants which for some 80 years after the Act of Settlement had been issued by the Executive through the Secretary of State. He asserted that if the power to issue general warrants was not to be found "in our books", ie in common law precedents, it did not exist. In *Wilkes v Wood*<sup>55</sup> he instructed a jury that a warrant which did not identify a particular object of a search was "totally subversive of the liberty of the subject."

In the same context, Blackstone said when speaking judicially "[e]very man's house is his castle".<sup>56</sup> The first Earl of Chatham, Pitt the Elder, addressed Parliament the following year in more fulsome terms but to the same effect. These developments resulted in the enduring rule that warrants and applications for them should be properly particularized as mentioned by Judge Posner in the context of terrorism.<sup>57</sup>

The differing techniques of common law<sup>58</sup> and equity,<sup>59</sup> one looking to precedent and operating analogically, and the other looking to doctrines intended to be comprehensive enough to cover novel circumstances, operated together to avoid arbitrary, ie capricious or unjust, results flowing from conflicting desires for certainty and flexibility.

What is my point in reaching back in time instead of looking forward in the context of the particular brand of contemporary scepticism under discussion? It is this: the unwinding of sovereignty in English constitutional history and the contemporary ideas of liberty and equality associated with that particular political development involved the institution of an independent judiciary to resist arbitrariness in the behaviour of the Crown or Parliament or the Executive and the differing techniques of common law and equity were directed to balancing certainty, predictability and flexibility.

When the detail of those developments is considered it does not seem just to assert that the common law developed as an institution, encouraging arbitrary command over subjects or as a discipline inimical to pluralism. The freedoms most essential to pluralism were forged and maintained by a community and a judiciary set against arbitrariness.

Let me "fast forward" from the institution of representative government and the diffusion of sovereignty in late 17th century England to the forging of political institutions and government in the mid 19th century in the Australian colonies and let me take my home State, Victoria, as an example.

Gold was discovered in Victoria on 8 August 1851. The *Separation Act* from New South Wales had been in force a mere five weeks. These were the circumstances of a massive migration to Australia where political structures as we know them now were in their infancy (as was social infrastructure as shown by any of the familiar paintings of the time). The centrality of the gold rushes to nation



building is a familiar and popular topic with Australian historians,<sup>60</sup> not least because the social and economic circumstances in which "Jack was as good as his master" led quickly and inexorably to a demand for a theoretically classless society, to be expressed by the political equivalent, suffrage without property qualifications.<sup>61</sup>

The nexus between owning property and being entitled to vote was broken once itinerant miners had a franchise based on holding a mining licence. Whilst it is true that upper houses in various colonies, later states, retained property qualifications, egalitarian theory included at the time not only equality before the law but also political equality. Despite the gap between the ideal and the reality, which exists with every ideal, egalitarian theory suffused public consciousness in Australia prior to Federation.

On the other hand, "liberty" and "equality" had been redefined for the French in 1789 followed by a very different transition from a monarch with absolute sovereignty to republican political and legal institutions.

That leads to a twofold caution: first against assuming Foucault's ideas about the unwinding of sovereignty in France can be transposed, and stand as accurate analyses of the development of the rule of law in common law countries, especially our own; secondly, against forgetting the long history of major liberties such as free speech and freedom from arbitrary search and detention, which are central to, and protective of pluralism.<sup>62</sup>

The Constitution of the Commonwealth of Australia emerged against the colonial background I have sketched. Sovereignty, in the sense of the power to command others, is distributed through the separation of powers between the legislature, the executive and the judicature. Under ss 7 and 24 the Senate and the House of Representatives shall be respectively composed of members "directly chosen by the people". Section 128 contains the mechanism whereby the electors qualified to vote have the ultimate power to alter the Constitution. As matters developed, voting became compulsory. Whilst one can point to imperfections, the details of our representative democracy foster, rather than discourage, pluralism.

Judges under our Constitution are required to deal with conflicts between states and between states and the Commonwealth, as well as those between subject and state and subject and subject, and they are required to interpret the Constitution of an ever-changing nation.<sup>63</sup>

The "general willingness to yield to the authority of the law courts"<sup>64</sup> referred to by Dicey is maintained in our system by manifold rules and ideas designed to ensure the law is never arbitrary, capricious or wholly unpredictable.

Back to Foucault for a moment. There is no doubt law is a discourse or construct if not quite in the Foucauldian sense, or at least with the Foucauldian consequences. It is a practical human institution which is not aimed at perfectibility and may not even pretend to it. It must also be conceded that words and concepts familiar to the law, "the liberty of the subject", "equality", "rights", "obligations" may change in content and that statutory language may be ambiguous.

The judge's role is often to determine content in the face of multiple meanings and to select a meaning for normative purposes.

It should also be conceded that what may be "true", in the sense of correct at one time, may change and even be completely reversed as a result of social change. A simple example is the now inapplicable legal notion that because a husband and wife were "one", neither could commit a tort against the other.<sup>65</sup>

It is also not difficult to think of constitutional cases where a return to the text and/or a reconsideration of meaning results in overthrowing years of authority, in circumstances where, for example, those authorities had not established the certainty expected of the law, *Cole v Whitfield* and *Ha's* case being familiar examples.<sup>66</sup>

Nevertheless there are factors in complex equilibrium, which bear on judging and judicial method. They can be grouped rather artificially as institutional factors, principles and doctrines, and procedural matters, with considerable overlap between them.

The most important institutional factor is our constitutional arrangements and the particular distribution of sovereignty and the independence of judges.<sup>67</sup> Equally important in an institutional sense are the inherited liberties of the subject against the state - freedom of speech, freedom from arbitrary search or detention and freedom from retrospective criminal legislation.

Related to the independence of judges is the obligation of judicial neutrality and the need for a judge to declare any bias or conflict of interest.

Next there is the requirement for judges to carry out their tasks in public, to hear both sides and to give reasons for judgment which can be scrutinised and criticised.<sup>68</sup> That exercise of "reason" is not unlike the conception of reason I described before: a conception that reasoned argument can establish truth in the sense of a correct result and persuade readers of that correctness. The audience for judicial reasons includes the community. There cannot be any doubt that postmodern theory has drawn attention to the possible plurality or diversity of community views. Then there are the appellate structures.

Practicality also always bears on judicial method because a judge's orders must be obeyed.

Also there are the expectations of the community. No matter how diverse a community may be in expressing personal autonomy, it requires, as it is entitled to, complete clarity in the criminal law and reasonable certainty and predictability in the civil law, including commercial law.<sup>69</sup>

It is also necessary to note the levels of legislative activity in our time which have enlarged opportunities for the exercise of judicial discretion. The rules developed to ensure this is done judicially militate against arbitrary exercise of discretion.

Taking principles and doctrines next: there are many, but they include the principles of the criminal law and its standard of proof, the principles of common law and equity, including all the equitable doctrines based on the values of good faith and conscience, constantly refined principles of statutory interpretation and the special principles and techniques of public law.

Procedural matters include exclusionary rules, privileges and many cognate strategies, the common rationale of which is identified as "fairness".

No justiciable matter, even of striking novelty, is likely to involve a set of facts about which established law has nothing to say or offer.

The factors I have mentioned all bear on judicial method<sup>70</sup> and encourage coherence.<sup>71</sup> Decisions which are paradoxical, dependent on personal virtuosity, or arbitrary are discouraged by that matrix. Our community understands and accepts change in the law and the authority of final decisions on novel and difficult matters, even when a tight majority is involved because of the combination of the factors mentioned.

By comparison, the type of scepticism I have discussed has its own nihilistic logic and capacity for a new form of arbitrariness if normative standards are undermined. That is likely to be resisted in the transnational jurisprudence of human rights, in balanced law reform or in policy debates directed to the legislature where the particular type of scepticism discussed may provide useful insights and be harnessed constructively.

However if this type of scepticism is to be directed to the exercise of reason in judicial method or to the public's confidence in the rule of law, it would need to forge its own greater tolerance for our past and a greater appreciation of the balances developed in our system over centuries, designed to counter arbitrary governance.

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<sup>1</sup> A tradition represented by John Austin, *The Province of Jurisprudence Determined* (first published 1832) and H L A Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* 593.

<sup>2</sup> Exemplified by John Rawls, *A Theory of Justice* (1971).

<sup>3</sup> Gary Wickham, "The Law-Morality Relation Revisited - A Challenge to Established Traditions by the Australian Sceptical Approach" (2006) 15 *Griffith Law Review* 27.

<sup>4</sup> Michael Coper, "Concern About Judicial Method" (2006) 30 *Melbourne University Law Review* 554 (an earlier version of which was delivered at the Boston, Melbourne, Oxford Conversazione on Culture and Society referred to in note 5; the paper is published at 43 of the proceedings); see also Ronald Sackville, "Continuity and Judicial Creativity – Some Observations" (1997) 20 *University of New South Wales Law Journal* 145; Leslie Zeins, "Judicial Activism and the Rule of Law in Australia" in Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (2000), 391; Kylie Burns, "The Way the World Is: Social Facts in High Court Negligence Cases" (2004) 12 *Torts Law Journal* 215.

<sup>5</sup> "Correspondence of Grimm and Diderot" (1814) 74 *Monthly Review* 517, 524.

<sup>6</sup> Jeremy Rabkin, "Partisan in the Culture Wars" (1998-1999) 30 *McGeorge Law Review* 105, 107.

<sup>7</sup> See, for example, Terry Eagleton, *After Theory* (2003); Jean Baudrillard, *Forget Foucault* (Nicole Dufresne trans, 1987) [trans of: *Oublier Foucault* (1977)].

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- <sup>8</sup> Sir Frederick Pollock, *A First Book of Jurisprudence* (5th ed, 1923) 30-33.
- <sup>9</sup> M D Kirby, "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty", *Proceedings of the Boston, Melbourne, Oxford Conversazione on Culture and Society: "Judicial Activism – Power Without Responsibility?"* (University of Melbourne, Australia, 22 October 2005) 27, 28.
- <sup>10</sup> M D Kirby, "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty", *Proceedings of the Boston, Melbourne, Oxford Conversazione on Culture and Society: "Judicial Activism – Power Without Responsibility?"* (University of Melbourne, Australia, 22 October 2005) 27, 33.
- <sup>11</sup> Stephen Breyer, "Judicial Activism: Power Without Responsibility? The Sir Robert Southey Lecture", *Proceedings of the Boston, Melbourne, Oxford Conversazione on Culture and Society: "Judicial Activism – Power Without Responsibility?"* (University of Melbourne, Australia, 22 October 2005) 71, 71.
- <sup>12</sup> See, for example, Donald K Anton, Penelope Mathew and Wayne Morgan, *International Law: Cases and Materials* (2005); and Chris Dent, "To See Patents as Devices of Uncertain (but Contingent) Quality: A Foucaultian Perspective" [2007] IPQ 148.
- <sup>13</sup> Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoffrey Bennington and Brian Massumi trans, 1984 ed) [trans of: *La Condition postmoderne: Rapport sur le savoir* (1979)].
- <sup>14</sup> E P Thompson, *The Making of the English Working Class* (revised ed, 1968) 12.
- <sup>15</sup> Ibid.
- <sup>16</sup> Sir Owen Dixon, "Concerning Judicial Method" in *Jesting Pilate and Other Papers and Addresses* (collected by Judge Severim Woinarski) (2nd ed, 1997) 152.
- <sup>17</sup> Ibid 154.
- <sup>18</sup> Robespierre, *Oeuvres complètes*, (vol 5, 1910-1967, E Hamel ed) 17; quoted in Ruth Scurr, *Fatal Purity: Robespierre and the French Revolution* (2006) 209.
- <sup>19</sup> Terry Eagleton, *After Theory* (2003) 13.

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- 20 Sir Owen Dixon, "Jesting Pilate" in *Jesting Pilate and Other Papers and Addresses* (note 16) 1, 10.
- 21 Ibid.
- 22 Friedrich Nietzsche, "On Truth and Lies in a Nonmoral Sense" (Daniel Breazeale trans) [trans of: "Über Wahrheit und Lüge im aussermoralischen Sinn" (1873)] in Keith Ansell-Pearson and Duncan Large (eds), *The Nietzsche Reader* (2006) 114, 117.
- 23 Karl Popper, *The Logic of Scientific Discovery* (translated and reformulated by Karl Popper, 1959 ed) [trans of: *Logik der Forschung* (1934)].
- 24 Michel Foucault, "What is Enlightenment?" (Catherine Porter trans) [trans of: "Was ist Aufklärung?"] in Paul Rabinow (ed), *The Foucault Reader* (1984) 32.
- 25 Ibid 32.
- 26 Ibid 38.
- 27 Ibid 42.
- 28 Ibid 43.
- 29 See Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (Richard Howard trans, 1988 ed), which is an abridged and translated version of *Folie et déraison: Histoire de la folie à l'âge classique* (1961). A full translation has since been published as *The History of Madness* (2006).
- 30 See Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, 1991 reprint) [trans of: *Surveiller et punir: Naissance de la prison* (1975)].
- 31 Michel Foucault, "Truth and Power" (an interview by Alessandro Fontana and Pasquale Pasquino, originally published in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Colin Gordon ed) (1980)) in Paul Rabinow (ed), *The Foucault Reader* (1984) 51, 51.
- 32 Ibid 57.
- 33 Ibid 64.
- 34 Note 30 at 299.



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- 35 Ibid.
- 36 Note 31 at 73.
- 37 Note 31 at 74.
- 38 Note 31 at 75.
- 39 Michel Foucault, *The History of Sexuality: Volume 1 (An Introduction)*  
(Robert Hurley trans, 1990 reprint) [trans of: *Histoire de la sexualité, 1: la volonté de  
savoir* (1976)] 17.
- 40 Note 39 at 31.
- 41 Ibid.
- 42 Note 39 at 32.
- 43 A S P Woodhouse (ed), *Puritanism and Liberty* (1938) [14].
- 44 Ibid [91], 357.
- 45 Michael Evans and R Ian Jack (eds), *Sources of English Legal and Constitutional  
History* (1984) 348.
- 46 Ibid 349.
- 47 Ibid.
- 48 Ibid 350.
- 49 Ibid 354.
- 50 Frederick George Marcham, *A Constitutional History of Modern England, 1485 to  
Present* (1960) 121.
- 51 It was stated in the Act of Settlement 1701 that: "judges' commissions be made  
quam diu se bene gesserint, ... but upon the address of both houses of parliament it  
may be lawful to remove them." Section 72(ii) of the Australian Constitution states  
that federal judges "shall not be removed except by the Governor-General in  
Council, on an address from both Houses of the Parliament in the same session".
- 52 Sir William Blackstone, *Commentaries on the Laws of England* (vol 1, 1765) 48-51.
- 53 Ibid 164-165 and 171; see also Sir Frederick Pollock, *A First Book of Jurisprudence*  
(1923) 273-274.

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- <sup>54</sup> *Entick v Carrington* (1765) 2 Wils KB 275 [95 ER 807].
- <sup>55</sup> (1763) Lofft 1 [98 ER 489].
- <sup>56</sup> *Bostock v Saunders* (1773) 2 Black W 912 [96 ER 539].
- <sup>57</sup> Richard A Posner, "Not a Suicide Pact: The Constitution in a Time of National Emergency" (Australian Bar Association Conference, Chicago, United States, 27 June 2007).
- <sup>58</sup> Sir James Parke's (later 1st Baron Wensleydale of Walton) much quoted description of the techniques of the common law in *Mirehouse v Rennell* (1833) 1 Cl & F 527 at 546:
- 'Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we are ourselves could have devised. It appears to me to be of great importance to keep this principle of decisions steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.'
- <sup>59</sup> D E C Yale (ed), *Lord Nottingham's Chancery Cases* (vol 1, 1957), xci quotes Lord Hardwicke:
- 'But as to fraud, no invariable rules can be established. Fraud is infinite, and were a court of equity once to lay down rules, how far they would go, and no further, in extending their relief against it, or to it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive.'
- <sup>60</sup> See, for example, Ernest Scott, *A Short History of Australia* (4th ed, 1920); J B Hirst, *The Strange Birth of Colonial Democracy* (1988); David Goodman, "Eureka Stockade" in Graeme Davison, John Hirst and Stuart MacIntyre (eds), *The Oxford Companion to Australian History* (1998) 227; David Goodman, "Making an Edgier History of Gold" in Iain McCalman, Alexander Cook and Andrew Reeves (eds), *Gold: Forgotten Histories and Lost Objects in Australia* (2001) 23.

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- <sup>61</sup> Lord Robert Cecil, *Gold Fields Diary* (Sir Ernest Scott (ed), 1935); see also William Westgarth, *Victoria Late Australia Felix* (1853) 345-346.
- <sup>62</sup> Martha C Nussbaum, *Frontiers of Justice* (2006) 80.
- <sup>63</sup> Sir Alfred Deakin, Second Reading Speech for the *Judiciary Act* 1903, Commonwealth, House of Representatives, *Parliamentary Debates*, 18 March 1902, 10962 at 10965, 10966, 10967.
- <sup>64</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed, 1920) lxxvii.
- <sup>65</sup> *Phillips v Barnet* (1876) 1 QBD 436 at 438, 440, 441.
- <sup>66</sup> *Cole v Whitfield* (1988) 165 CLR 360; *Ha v State of New South Wales* (1997) 189 CLR 465.
- <sup>67</sup> *Fingleton v The Queen* (2005) 216 ALR 474 at 486 [38] per Gleeson CJ.
- <sup>68</sup> *Ibid* at 486 [39].
- <sup>69</sup> Murray Gleeson, "A Core Value" (Judicial Conference of Australia: Annual Colloquium, Canberra, Australia, 6 October 2006), 3.
- <sup>70</sup> Sir Gerard Brennan, "The Judicial Method" (1996) 8 *Judicial Officers Bulletin* 73; M H McHugh, "The Judicial Method" (1999) 73 *Australian Law Journal* 37.
- <sup>71</sup> J D Heydon, "Limits to the Powers of Ultimate Appellate Courts", *Proceedings of the Boston, Melbourne, Oxford Conversazione on Culture and Society: "Judicial Activism – Power Without Responsibility?"* (University of Melbourne, Australia, 22 October 2005) 87, 100.