Shaky Premises: Values, Attitudes and the Law

MARTIN KRYGIER* AND ARTHUR GLASS**

Once upon a time, Australian judges used to worry a good deal about a bad question. That question (BQ) was whether they applied or made the law. The question was bad because it was impossible to answer intelligently. People often tried to answer it though. And they still do.

One bad answer (BA1), very popular in this country until recently, was that judges — even appellate judges — apply the law. Thus, according to Kitto J, for example, "the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined".[1] To do otherwise was to go beyond the law, into morals or politics and these were not within the judges' domain.

The difficulty with this view is that it has always been manifestly implausible or, at the very least, inadequate. If things were that easy, why all the fuss? But obviously things are often not easy at all. Law is frequently unclear, meanings change over time, new facts present new problems, interpretations are underdetermined, decision is hard, complex, elusive et cetera. Nevertheless judges are required to come to particular conclusions from what are often necessarily indeterminate materials. Unless understood in a sense so enriched that it undermines the contrast between applying and making (for one involves the other),[2] "application" was never a particularly perspicuous label. Since none of this was news to any lawyer, it is not surprising that many lawyers felt uncomfortable trying to deny it or evade its implications.

Of course, one could choose the other alternative (BA2): judges make law. As some say, they legislate, at least sometimes. Indeed, given the way the question was posed, whoever disagreed with the first answer *had* to choose the second.

Countless followers of legal realism — and in Australia above all Julius Stone — exposed endless "leeways of choice" in legal materials, within which law *had to* be made. Stone believed that these leeways were particularly pervasive and

* Associate Professor in Law, University of New South Wales.
** Senior Lecturer in Law, University of New South Wales.

1 *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374. Kitto J elsewhere, and more floridly, develops his legal values (or are they attitudes?) thus: "I think it is a mistake to suppose that the case [before the court] is concerned with 'changing social needs' or with 'a proposed new field of liability in negligence', or that it is to be decided by 'designing' a rule. And, if I may be pardoned for saying so, to discuss the case in terms of 'judicial policy' and 'social expediency' is to introduce deleterious foreign matter into the waters of the common law — in which, after all, we have no more than riparian rights". See *Rootes v Shelton* (1967) 116 CLR 383 at 386–7.

2 One thinks here of Gadamer's comments on application, in Gadamer, H G, *Truth and Method* (1982).

permissive in appellate cases on disputed points of law. Since he was more assiduous than most, he spent some 50 years cataloguing sources of such leeways, and much of the same time developing encyclopaedic guides to theories of justice and society which might be useful to judges forced to reach beyond the law to make their decisions. Unfortunately for him, his guides became dated before Australian judges began to listen. They might be more receptive today.

Though judges on the bench often speak in ways consistent with BA1, it has become unfashionable to affirm it, particularly when judges try to *account* for what they do. Given the way that BQ is set up, however, that only leaves BA2. Only two things remain for discussion: how often judges make law — always, often, rarely — and what they make it out of when they do, since *ex hypothesi* it must be something other than law.

But there is something unsatisfactory with this choice too. On the one hand, it seems to underrate the institutional specificity of courts. It leaves it quite puzzling, for example, why we try to choose our best judges for appellate courts. Since, on this account, the law seems to be least decisive there, and morals and policy most relevant, it is hard to see what Gerard Brennan has to offer which Phillip Adams, or John Laws, or Paul Keating, or John Howard do not. After all, it hardly seems important that he knows more law than they do. That might qualify him for the District Court perhaps, but not obviously for the High Court, full as it is of hard cases, leeways, and matters of moral and political judgment. Perhaps the hierarchy should *begin* with legal adepts and make way, as we climb, for the morally and socially attuned: Brennan, Keating and Laws, for example.

If we follow this logic we certainly have a fresh agenda for redesigning Australian institutions, but we don't have much with which to understand the institutions we have or the "designs" they implicitly embody. For this analysis leaves off accounting for the institutionally distinctive things that judges do, just when the questions get interesting. Surely, if judges make law, they do so *as judges* in a particular legal tradition, with particular idioms, values, and ways of knowing, thinking, and arguing *within* which, not merely *with* which, they operate, even when — most *especially* when — things get hard.[3] What goes into that particular sort of activity — and what role law continues to play in it — is complex and intriguing; but an analysis in which law is exhausted as soon as it is unclear stops precisely when these things get going. The binary logic of BQ, however, forces just such an unenviable choice. A richer account, such as Ronald Dworkin's, for example, which addressed the distinctively complex character of judicial justification, would have to leave BQ aside and respond to different questions altogether.

Second, this sort of analysis is plagued by normative problems which clearly motivated the orthodox attachment to BA1. These are familiar problems, one of which has to do with the rule of law; another with the interplay between institutions in a constitutional democracy; and a third with the specific competences of particular institutions. The attractiveness of BA1

3 See Krygier, M, "Thinking like a lawyer" in Sadurski, W (ed), *Ethical Dimensions of Legal Theory* (1991) at 67.

stemmed in large part from its apparent ability to provide satisfying solutions in these three different domains. If legislators made the laws, and judges applied them, then the rule of law could be served — for law would control decisions, and adjudication would be predictable, would not have retroactive effect and should not take anyone by surprise; so could democracy, since law would not be made by unelected, undismissible officials; so too could efficiency, since those with the best access to relevant information (politicians to public opinion and policy advice; lawyers to law) would be in charge of precisely those decisions for which their institutional position qualified them. The only problem is that BA1 is false or inadequately true.

But any account of judging has to address these problems, and BA2 is typically rather clumsy and coy in doing so. The coyness is understandable. After all, judges are sworn to uphold the law, and if that is not what they are doing it is unsurprising that they do not boast about it. One common strategy of confession and avoidance is to search for something stronger than their own opinion, or even the ordinary opinions of others, to fill the gap that BA2 posits between law and decision. So, Mason calls upon "fundamental values",[4] Brennan J (as he then was) speaks of "the relatively permanent values of the Australian community"[5] and Braithwaite, J, (as he still is) offers to reveal them on the basis of surveys of people's deep values, as distinct from their more superficial attitudes.

It is hard not to sympathise with this endeavour. After all, offered the choice between superficial and deep, who would vote for the former? Of course, if it is just judges who thus qualify the values they prefer, one has a right to be suspicious. How do they know the values? The difference? How do they measure the depth? John Braithwaite has answers to all these questions: he refers us to surveys conducted by Valerie Braithwaite. In doing so, he adds concreteness, specificity and evidence to what are often mere and perhaps empty cliches out of the mouths of judges.

Nevertheless, it is important to keep in mind the familiarity — and the limitations — of the question with which Braithwaite begins, and the answer to which he comes. According to him, the role of community values is, precisely, to fill in where the law leaves off. Judges should "conduct their deliberation in ways that require them to justify decisions in terms of the law, and in terms of community values when the law is indeterminate or when the common law loses touch with societal change".[6] To fill gaps or to repair inadequacies, then, the judges must reach outside the law and they should reach for community values. That is to say, he asks BQ and answers it with BA2. It seems fair, then, to consider how he might deal with these familiar problems — of institutional specificity and justifiability — with which BA2 seems to be lumbered, as well as to assess his account on its own terms. We begin with that account in Part 1 below, and proceed to discuss those problems in Parts 2 and 3.

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4 Quoted in Braithwaite, J, "Community Values and Australian Jurisprudence" (1995) 17 *Syd LR* 351 at 366.

5 Id at 352.

6 Id at 365.

1. *The People's Premises*

Central to Braithwaite's argument that judges should "incorporate systematic consideration of community values into their deliberations",[7] is the distinction between community values and community attitudes. In the hands of the social psychologists to whom he refers, communal values are *general* standards (at least local, perhaps trans-cultural, perhaps universally true) which guide judgment, while community attitudes are *particular* beliefs which arise out of or refer to particular situations. Values are fewer and deeper and more likely to be widely shared within a community while attitudes are more numerous, less a matter of reflection, more diverse and more subject to manipulation. Braithwaite argues that he can direct judges to a reliable source of values as the starting point for deliberation — the "people's premises" for the "judges' argument". But what does this claim amount to?

You do not have to read many law cases to see that what is at stake is not whether values such as "health, peace, freedom [or] equality of opportunity"[8] are legitimate for judges to bear in mind. Of course they are. But how — *in the context of a particular case* — should these or other social values be understood; how much weight are they to be given; how, among competing often incompatible conceptions of them, are they to be interpreted? How values should figure in the reasoning of the court will be relative to many factors — the legal materials at hand, the subject matter of the case, the ends which the law is thought to serve, et cetera. What all these matters have in common (and the list could be extended) is that they connect any judgment about the appropriateness of communal values to the particular occasion of their application.

It might be said that this kind of criticism is by the way, for it leaves untouched what Braithwaite has actually done. No one article can do everything. Identifying a novel source of premises may only deal with one aspect of legal argument but it is still a contribution to the "jurisprudence of values" (as he puts it). It is for others, or another article, to discuss just how these non legal premises are put to work.[9] But if the values are unhelpful (a point we elaborate upon immediately) and the work is all, the contribution might be considered questionable.

First, quite apart from their "motherhood" qualities, the values on which Braithwaite relies are all *declaratory*. The survey would appear to do no more than reveal the percentage of rather odd people in the population who completely reject human dignity, wisdom, health et cetera as guiding principles. And while we know that the others acknowledge them as principles that should guide action and judgment, we do not know what significance these values actually have in people's lives, for there is no circumstance in which they are put to a reality test. One *can* look for operative values, but it is a far more particularised, complicated, and time-consuming business than asking respondents to rate their attachment to items on a prepared list.[10] Unless one

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7 Id at 365.
8 Id at 372.
9 Id at 368.
10 For one effort to do this, see Kurczewski, J, *The Resurrection of Rights in Poland* (1993). This work, and this issue, are discussed in Krygier, M, "The Constitution of the Heart" in

does so, however, it is not clear that one has penetrated very deep at all into values that animate people's lives, as distinct from their mouths. Operative values are, in fact, likelier to be manifest in real responses to real world choices, but it would appear that Braithwaite would not approve of judges consulting these, for in his terms they would rate as attitudes.

Second, the values are so baldly stated that it is not at all clear what relationship, if any, they have to what others might understand by the same name. Here the issue is not merely that these are "motherhood" values, or that they are too general, but rather that their meanings are "essentially contested" even in the abstract, and not the uncontroversial or univocal starting points that Braithwaite seems to imagine them to be. Against slaveholders, for example, partisans of freedom share something; but they might have little else in common. Marx and Mill, after all, both favoured freedom but notoriously they did not favour the same thing. Again, like the people of Australia, Kant favoured human dignity. But unlike Braithwaite, he also favoured capital punishment for capital offences. Was he just manifesting a bad attitude, or perhaps a different understanding of a commonly named value — one which he did more than anyone else to explicate? And these are scarcely isolated examples.

These differences occur in relation to many general and generally characterised values. Specific complications occur in relation to social values which are also immanent legal values. Take one other value from Braithwaite's list: "the rule of law". He several times emphasises its importance and, of course, it also figures centrally in the common law tradition. Braithwaite emphasises that judges must observe the rule of law because it is intrinsically valuable and because there is a community consensus about it. But what is that consensus about? In the survey, the rule of law is explained as meaning: "Punishing the guilty and protecting the innocent".[11] That is an important goal of a legal order and it is not surprising that most people favour it. But it is not likely to be contentious in a legal context, in this country at least, and — while related to it — it is not usually called the rule of law by lawyers. On the other hand, many legal understandings connect with the rule of law, for instance, considerations relating to non-retrospectivity, clarity, promulgation, consistency, lack of ambiguity, opposition to acts of attainder, permission for what is not explicitly prohibited, etc. The survey does not tell us anything at all about these values, nor are they very familiar to most people, but judges have thought about them a lot and one would hope that they would take them seriously.

The point here is not merely that one would have to "modify the wording"[12] to reflect the textured and complex meanings of the rule of law in legal discussions, but that these are not values to which, or to the implications of which, lay people are likely to have given much thought. Nor is there much reason why they should. Again it is hard to see the worth as a premise of popular consensus on the "rule of law",[13] in the face of the far more specific and rich understanding of that value in the law. And even without popular consensus, the value is and should be central in the common law tradition.

Law and Social Inquiry (forthcoming).

11 Above n4 at 357.

12 Id at 369.

13 Id at 368.

These remarks are not intended to trivialise the values in the Braithwaites' list, but to question their ability to serve as "a sound, comparatively uncontroversial, non-arbitrary foundation in terms of which more controversial reasoning must be justified".[14] But even if one accepts the list, it is hard to know what one should do with it.

Take an example Braithwaite refers to — the (American) capital punishment cases (similar thoughts might be prompted by current Australian discussions of euthanasia). Of what help would it be to the court to be directed to the capacious and conflicting premises of human dignity, protection of human life, a world of peace, the rule of law, freedom, et cetera?[15] It is not that these are unimportant and irrelevant values, but how do they direct us to a particular decision in a particular case? Surely all the work remains to be done.[16]

To put the point more generally, community values are not at issue in all cases but only in those cases which raise matters of controversy. Surveys which attempt to recover popular or conventional morality, no matter how they are done, can only produce a list of agreed values if these values are described in the most general terms. That is why we can agree about them. But no amount of contemplation about values in this blank form will help the court. Even if there were agreement on their meaning in the abstract — which there is not — the legal significance of such notions as freedom, or human dignity, or a world of peace will only come from being thought of in a particular context. However, once the court supplies this context it will lose the moral consensus. If the actual question of the case was put to the people, then by definition as a controversial case there would be controversy and moral discord. In these circumstances, is it appropriate for Braithwate to claim that he is putting the people's values into the judges' reasoning?[17]

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14 Id at 365.

15 Or other values from the apparently justiciable first 45 on the list, which might bear on one's attitude to capital punishment: "GOOD HEALTH: Physical well-being"; "HAPPINESS: Feeling pleased with the life you are leading"; "SELF-IMPROVEMENT: Striving to be a better person"; "A GOOD LIFE FOR OTHERS: Improving the welfare of all people in need"; "ACCEPTANCE BY OTHERS: Feeling that you belong"; "AN ACTIVE SOCIAL LIFE: Mixing with other people"; "PERSONAL SUPPORT: Knowing that there is someone to tak.e care of you"; "BEING ALWAYS ON THE GO: Keeping busy by having lots of interests"; "AN EXCITING LIFE: A life full of new experiences or adventures", etc. Lower level values of relevance include: "STABILITY: A life not liable to sudden or unexpected change"; "SALVATION: Being saved from your sins and at peace with God"; "A LEISURELY LIFE: Being free from pressure and stress"; "CAREFREE ENJOYMENT: Being free to indulge in the pleasures of life".

16 In passing, note how it is not only the values side of the distinction which does not seem right here. If it is a fact that for certain crimes more people are in favour of capital punishment than against it, these views, while hardly decisive for the court, should not be dismissed so easily as a matter of (bad) attitude rather than legitimate values. Evidence of conventional morality on specific issues should interest the court. Not as a premise for their deliberations but rather as informing the judges that they will have to work that much harder to persuade this section of their audience.

17 Above n4 at 372.

2. *The Judges' Reasons*

Braithwaite thinks of judicial deliberation as involving four ingredients: (1) the law; (2) interpretations of the law; (3) empirical assumptions;[18] and, when these prove insufficient for decision, (4) "extra-legal" considerations, among which Braithwaite prefers community values.[19] Many cases can be decided on the basis of (1) to (3) but when the law runs out, or is ambiguous, or is out of touch, then judges must go to (4). Where else could they go?

This is, of course, a version of BA2, the familiar and misleading account of the relationship between law and non-law, with which we began. Legal reasoning cannot, however, and does not proceed in this way. One cannot go to (4) only after (1) to (3) are exhausted. There is simply no reason to find the legal material inadequate unless you already stand in something like — but more complex than — (4). Think of the jurisprudential chestnut: a statute forbidding vehicles in a park.[20] Or, another celebrated subject of legal and jurisprudential reflection: is a stewing chicken a chicken?[21] These momentous questions — what is a vehicle? when is a chicken not a chicken? — and others analogous to them, arise in a particular context; a context which not only produces instability of meaning but also provides the means for shoring it up. For the circumstances of the case will make available to the decision-maker, and others, particular facts, values and purposes. And it will be asked at the beginning of the inquiry into statutory or contractual language (not at the end of it), what was the point of banning vehicles from the park, or what in the instant case is the extrinsic evidence which throws the ordinary meaning of "chicken" in doubt?

In other words, no one in legal practice is looking for and nor could they find gaps, or lack of clarity, or ambiguity, in the legal material for their own sake. There have to be reasons to make these claims, and those reasons and any assessment of the adequacy or otherwise of the legal materials to deal with the problem must bring in to the inquiry *from the start*, matters extrinsic to what Braithwaite takes to be law. Of course everything in this discussion turns on what is meant by "the law".

For what it is worth, we favour an account which distinguishes between law and non-law in two ways: (1) at the start of any inquiry into the law as a way of identifying the primary materials for legal interpretation, and (2) as a way of delimiting the interpretive context in which these materials are to be understood. Bearing in mind that any attempt to draw limits here will not be obvious and just what is pertinent and what is extraneous to law may well be the very issue of the case. But whatever view is taken of this dispute between positivism and its opponents,[22] no contemporary description of adjudication

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18 The idea, of course, is that (2) and (3) are an integral part of putting law to work.

19 Above n4 at 365.

20 See Hart, H L A, "Positivism and the Separation of Law and Morals" (1958) 71 *Harv LR* 593 at 607ff; Fuller, L, "Positivism and Fidelity to Law — A Response to Professor Hart" (1958) 71 *Harv LR* 630 at 661ff; and countless others.

21 *Frigaliment Importing Co Ltd v BNS International Sales Corp* 190 F Supp 116 (1960).

22 We see little difference between the latest Dworkin and the late Hart on this point. See book review by Glass, A, of Marmor, A, *Interpretation and Legal Theory* (1992) in (1993)

should be content with a linear account; one which has the judge moving beyond the law when, and only when, it proves somehow on its own terms inadequate.

Consider Braithwaite's discussion of the methods of statutory interpretation.[23] His approach, he says, will work against "myopic" readings of legislation. The judges are encouraged to use their traditional methods — seek the plain meaning, use legislative intent, use legislative history — but if these leave "the meaning or the relevance of the law ... in doubt" move on to community values. Again, this misdescribes the nature of the inquiry. There can be no doubting of the meaning of the legal materials without a consideration of the relevant values. In short, the problem is rarely the inherent ambiguity of language. The meaning of the statute is only put in dispute by the circumstances of the case, circumstances which at the outset include consideration of the relevant values.

It might be said at this point that all we have shown is that Braithwaite has chosen an inadequate framework for describing judicial reasoning. If need be, let him refine his remarks on this point and this will still leave intact his claims about the people's values. We disagree. Further reflection upon the law/non-law distinction — upon the peculiar restrictions placed on legal argument and the reasons for these restrictions — would produce an account of judicial reasoning which is incompatible with Braithwaite's proposals. For he makes too little of the legal material and too much of the people's values.[24] In particular, he ignores the assumptions and normative understandings which attach themselves to legal texts, and he fails to see that any consideration of popular values is not direct but mediated by way of these assumptions and understandings.

Within the law will be many such understandings concerned with how the courts should treat the subject matter before them. These understandings can be seen at work underpinning the types of argument which are thought of as characteristically legal — for example, arguments based on textual meaning, coherence, history, purpose, institutional legitimacy or competence, et cetera. We cannot speak of this large topic here.[25] It is enough to say that legal traditions are densely textured and layered; that they embody particular values, principles, and commonplaces, whose implications have often been pondered and particularised over generations; and that their significance is not exhausted whenever the rules are indeterminate or inadequate. This has two implications. First, to understand this significance is to understand how deep is the error involved in BQ and BA2. As Dworkin has insisted more than once,

> Judges do not decide hard cases in two stages, first checking to see where the institutional constraints end, and then setting the books aside to stride off

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15 *Syd LR* 397 at 399 and Hart, H L A, "Postscript" to *The Concept Of Law* (2nd edn, 1994) at 266ff.

23 Above n4 at 365–6.

24 Braithwaite seems aware of immanent institutional values (id at 364, 366), but he seems hardly to distinguish them from popular values, and he tells us nothing about the ways in which they might complicate his accounts either of the law or of community values.

25 For a lucid discussion of these matters, see MacCormick, N, "Argumentation and Interpretation in Law" (1993) 6 *Ratio Juris* 16.

> on their own. The institutional constraints they sense are pervasive and endure to the decision itself.[26]

Second, to acknowledge the inadequacy of BA2 is to recognise that immanent values, and their interrelationships with written law and with popular values, need much more attention than they find in Braithwaite's argument.

In sum, the peculiar requirements of law and the institutional context in which legal argument takes place give rise to a rich set of norms, argument types and techniques. Their existence does not avoid the need to appeal to arguments made in terms of values or principles. But this deontological move is not properly thought of as occurring after the legal material is exhausted. And as any consideration of values will be in relation to a particular setting, their legal meaning, and their force when weighted against all the other considerations, will be strongly influenced by this setting. The question for the judge, at least as this role is presently understood, is never a matter of asking "what would be the best aim or principle to pursue here?", but "what aim or principle is plausible or available in the light of the existing legal materials?"[27]

This might all seem to Braithwaite to smack of elitism. For where he asks judges to defer to the people's premises, we seem to exalt those of the judges themselves.[28] It seems to us, however, that the reverse is true. Direct judicial appeals, to community values rather than attitudes turns out to be a highly anti-democratic recommendation. It puts too little faith in people, too much in judges, and in any event is unlikely to work well.

3. *Values, Attitudes and Democracy*

Braithwaite's commitment to democracy is curious. On the one hand, it is obviously sincere and deep. He believes that judges' decisions should be informed by the people's values, not their own (or for that matter his own), and not merely by the law. Drawing on those values, he argues, they defer to "the authority of the Australian people",[29] and he believes that is good authority to have. He seeks a court which is both internally of diverse composition and "exquisitely open to the diversity of ways of thinking in the community".[30] He makes several sensible recommendations to enhance such openness. He aspires to "a plural dialogue, where many voices can be heard, unconstrained by forces of domination".[31]

On the other hand, he insists that there is no place in judges' deliberations for people's responses to particular circumstances that occur in their everyday

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26 Dworkin, R, *Taking Rights Seriously* (1978) at 86–7.

27 To adapt some words of MacCormick, N, cited above n25.

28 Note that it is not, as Braithwaite has it, a choice between "judges applying their own cognitions to the institutional order" or deliberating upon reliable and democratically based research (above n4 at 362). For one thing, judging will always involve a subjective moment. For another, the whole point of the practices to which we have alluded is to link legal judgment to a form of public reason which works to restrict the role of private judgment.

29 Above n4 at 363.

30 Id at 367.

31 Ibid.

lives. These are "attitudes" not "values"; they are "racist, patriarchal, homophobic and bigoted in a great variety of ways";[32] contaminated by the circumstances which prompt them,[33] shaped by "agents of domination," such as "churches, husbands, parties, mass media, peers and employers".[34] In general they are "constituted by dominations and by misunderstandings of the world to a degree that values are not".[35] Judges should be wary of them. Indeed Braithwaite welcomes judges' insulation from them. It allows them to deliberate reasonably and calmly about the law and the implications of the people's values. Now there may be some vision of the world which would justify this proposal, but it cannot be called democratic.

For one thing, it proves too much. After all, politicians are in fact much more plainly under the sway of popular attitudes than judges, for they have to placate constituents full of attitudes, win elections and deal with lobbyists, and they do not have the law to fall back on. Who more than they suffers the pressure of

> [r]ule by public opinion of the day [which] is particularly dangerous in a world where control of the means of forming public opinion is concentrated in few hands; a busy world in which most citizens do not have time to talk with each other or to think deeply about most questions of public opinion?[36]

Perhaps that is a deep failure of institutional design. After all, they have to deliberate about important matters too. Why should they not be be institutionally protected against all these expressions of attitudinal false consciousness? All that remains is to work out a method of nominating the best of them — perhaps as we do judges — give them the list, and tell them to get on with it. Needless to say, we do not suspect that Braithwaite favours this solution, but many of his arguments point this way.

Second, the role that Braithwaite's central distinction plays in his argument is all too reminiscent of the old — and one would have hoped discredited — language of "true" versus "false", "essential" versus "contingent", "deep" versus "superficial" needs, wants, values, etc. Isaiah Berlin has written eloquently about this language and its implications,[37] and so has Aldous Huxley.[38] Of course people may be mistaken about their values. So might other people about the values of those people. But a democrat has to take what people believe about particular issues seriously, in order to take the people

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32 Id at 361–2.
33 Id at 361.
34 Id at 361.
35 Id at 362.
36 Id at 372.
37 Berlin, I, "Two Concepts of Liberty" in *Four Essays on Liberty* (1969) 118.
38 "'True freedom!' Anthony repeated in the parody of a clerical voice. 'I always love that kind of argument. The contrary of a thing isn't the contrary; oh, dear me, no! It's the thing itself, but as it *truly* is. Ask a diehard what conservatism is; he'll tell you it's *true* socialism. And the brewers' trade papers; they're full of articles about the beauty of True Temperance. Ordinary temperance is just gross refusal to drink; but *true* temperance, *true* temperance is something much more refined. True temperance is a bottle of claret with each meal and three double whiskies after dinner. Personally, I'm all for true temperance, because I hate temperance. But I like being free. So I won't have anything to do with true freedom.... 'What's in a name?' Anthony went on. 'The answer is, Practically everything, if the name's a good one.'" See Huxley, A, *Eyeless in Gaza* (1969) at 122–3.

themselves seriously; that is, in order to treat them with respect. It is one thing to disagree with those who favour capital punishment or oppose affirmative action. It is another to deny the legitimacy of their evaluations of these particular practices, on the pre-emptive grounds that they are unfortunate lapses from what we know their true values to be and which they too would know, were their lives less subject to forces of oppression.

Third, Braithwaite overrates the democratic tendency of his offering in another way. For he works from an impoverished notion of practical reasoning. For him it is a process of derivation from general premises,[39] and since the premises come from the people, so will a well derived conclusion. But, on most views, moral reasoning will always be a matter of oscillation between general conceptions of value and intuitive responses to specific situations, in the search for some "reflective equilibrium" which takes account of both.

Judges engage in this sort of deliberative oscillation all the time. But, compared to philosophers, they are even more concerned with particular cases, their materials are both more restricted and more authoritative than those with which philosophers deal, and they must *decide* the particular issues before them. Yet, apart from the law, Braithwaite's judges only have the people's general values. They themselves will have to provide their own intuitions. And given the generality and contestability of the values Braithwaite recommends, the particularity of the questions with which judges deal, and the assumed indeterminacy of the cases we are discussing, they will have to provide a lot of them. It is a strange form of democracy which denies them access precisely to what the people think about these particular matters.

Our own view is different. We are wary of directing them to begin with popular attitudes when the rules run out, for exactly the *same* reasons we would not direct them to popular values. Parliaments, which are directly responsive to attitudes and values, are democratic institutions, and there are others — prominent among them institutions of civil society, to which Braithwaite rightly refers us. Courts are not democratic in their ways of work, though they are crucial institutions in a democracy. They are (rightly) shielded from lobbying, sacking, and other forms of democratic interference. They should not reach directly to popular attitudes, but then nor should they pretend to defer directly to popular values. They are concerned with the law, with clarifying it, pursuing its intimations, rendering it predictable, and indeed deliberating over values which inhere in it and which might enhance it. This is what partisans of BA1 half-knew, notwithstanding their inadequate understanding of what was possible.

Judges should not, however, consider themselves warranted to apply popular values in any direct or immediate fashion, when for one reason or another the law cannot simply be applied. And this is not because we respect them so, but because for some purposes a democrat should not respect them at all. Judges too are swayed by interest, manipulated by the media, and lacking in expertise, or access to expertise, in very many areas — apart from the law. They too are often unreflective about their attitudes and values, as many people are (though they often have more confidence in them than many people do). To

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39 Above n4 at 352–3, 365, 368–9.

this they add a peculiar *déformation professionelle* identified by Edmund Burke, when he observed that "law sharpens the mind by narrowing it". There is *no* reason to believe that unelected judges are better arbiters of what will serve the people's values than anyone else who is unelected, tenured, adequately paid, learned in some things but not others, etc. That includes us, but we would not recommend ourselves for the job. On some matters of public argument a democrat will prefer democratic institutions to have the last word. This is partly out of respect for the ability and autonomy (in the sense of being the authors of the law which binds them) of ordinary men and women. It is equally out of lack of greater respect for anyone else.