

**IN PRAISE OF COMMON LAW RENEWAL**  
**A Commentary on PS Atiyah's "Justice and Predictability in the Common Law"**

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**I. THE AUSTRALIAN COMMON LAW**

For some years now Professor Patrick Atiyah has been thundering against the perceived rise of pragmatism in the common law and its departure from true legal principle. Julius Stone, in his last book, recorded the way in which Professor Atiyah had used the occasion of his inaugural lecture at Oxford University to denounce the 'pragmatism' of judges, which he saw as a fall from the grace of 'legal principles', menacing the integrity of both the judicial process and of law itself.<sup>1</sup>

Now Professor Atiyah has returned to Australia where he served for a time at the Australian National University and on the National Committee of Enquiry into Compensation and Rehabilitation in Australia.<sup>2</sup> The views expressed in his essay on this occasion are, as the editor of the *Australian Law Journal* noted,

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1 J Stone *Precedent and Law: Dynamics of Common Law Growth* (1985) p 236 citing PS Atiyah *From the Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (1978). Cf J Stone "From Principles to Principles" (1981) 97 *Law Quarterly Review* 224 at 228.

2 Professor Atiyah resigned his appointment and returned to the United Kingdom soon after the inquiry was established.

derived from ideas already stated in a number of earlier publications, one of which, *Form and Substance in Anglo-American Law*, he identifies by name.<sup>3</sup>

The essay is undoubtedly useful as an irritant to current orthodoxy and as a corrective to the more extreme assertions of the scope of judicial creativity. It is useful in demonstrating the link which exists between the element of formality in the law and the degree of its predictability. It is indisputably right to point out that statutes, as the most formal source of law, are relatively more predictable than the rules of the common law which must be derived from judicial opinions. It is also right to point to the elements of English law which enhance the predictability of the law in judicial opinions, especially when that law is contrasted with the law of the United States, or even with the law of Australia.

However, the essay is disappointing in two respects. The first is that, although delivered as a lecture to an Australian audience, in a country with its own developed system of the common law, not a single illustration or reference to Australian legal developments illuminates its pages. Even if not a single Australian judicial opinion had troubled his consciousness in the time he held his chair at Oxford University, Professor Atiyah's service in Australia would have told him that there is, flourishing in the antipodes, a system of law worthy of occasional attention. The Privy Council discovered this long ago, reaching the point during Australia's submission to its authority, that it allowed for the separate development of the common law in Australia. In *Geelong Harbor Trust Commissioners v Gibbs Bright & Co (A Firm)*<sup>4</sup> their Lordships, through the voice of Lord Diplock acknowledged that they had reached a "particular field of law" where there were special factors making it appropriate to defer not to English principles but to the views expressed in the decision of the High Court of Australia:<sup>5</sup>

If the legal process is to retain the confidence of the nation, the extent to which the High Court exercises its undoubted power not to adhere to a previous decision of its own must be consonant with the consensus of opinion of the public, of the elected legislature and of the judiciary as to the proper balance between the respective roles of the legislature and of the judiciary as lawmakers. Even among those nations whose legal system derives from the common law of England, this consensus may vary from country to country and from time to time. It may be influenced by the federal or unitary nature of the constitution and whether it is written or unwritten, by the legislative procedure in Parliament, by the ease with which parliamentary time can be found to effect amendments in law which concern only a small minority of citizens, by the extent to which parliament has been in the habit of intervening to reverse judicial decisions by legislation; but most of all by the underlying political philosophy of the particular nation as to the appropriate limits of the lawmaking function of a non-elected judiciary.

The High Court of Australia can best assess the national attitude on matters such as these. Their Lordships would not regard it as proper for them in the instant

3 Written with RS Summers (1987). See comment (1992) 66 *ALJ* 395.

4 [1974] AC 810. See also Toohey J "Towards an Australian Common Law" (1990) 6 *Australian Bar Review* 185 at 192 ff where the recent divergences of Australian from English common law are categorised.

5 *Ibid* at 820-1.

case to interfere with the decision which the High Court reached to abstain from altering the law of Australia from what it had previously been understood to be.

Now, increasingly, the House of Lords and the other appellate courts of England find it useful to resort to the judgements of Australian courts and particularly the High Court of Australia.<sup>6</sup> Increasingly, since *Cook v Cook*,<sup>7</sup> the Australian courts look on English court decisions as nothing more than a source of comparative law. None of them is now binding on any court in Australia. The gradual realisation of this fact releases the minds of Australian lawyers to revel in the treasure house of the common law as it flourishes in Canada, New Zealand, the United States, India and elsewhere.<sup>8</sup>

Professor Atiyah's essay is basically one addressed to United States lawyers. That country achieves, according to my count, thirty-two mentions, compared to seven references to Australia. More disappointing than this disproportion is the way in which the Australian common law is referred to. It is 'suspected' that the trends eating away at the heart of principle in the United States are also at work downunder. We are lumped in with English and American lawyers of the nineteenth century when true principle held firm. It is 'suspected' that Australia occupies a position "somewhere between England and America" without any exploration of whether that might be so. It is believed that case law is less rigidly binding in the United States than it is believed to be in Australia - but with no reference to any local discussion of the issue. This is, in short, an essay for American lawyers to shock them into the awful realisation that they have strayed from the narrow path of the English common law. It is not really an essay addressed to an Australian audience.

Which seems a shame, because it is a long way to travel to Australia to tell us about the problems of the common law in the United States. Casebooks and textbooks providing a perspective of Australian law are undoubtedly available in the famous library at Oxford University. A professor is not more busy than a Lord of Appeal in Ordinary. It is true that in the global scheme of things our common law is no where near as important as that of the United States or England. By their numbers, commercial importance and their world-wide influence United States and English lawyers still command dominance and provide instruction to smaller jurisdictions. But I suggest that we have passed a point where whatever happens in Westminster or Washington sends ripples which necessarily reach us in far away Australia. So to come to us to lecture about the faults or perceived faults of the American legal system seems, with respect, partly irrelevant and partly embarrassing. It is irrelevant to the extent that we have different problems all of our own. It is embarrassing because we can hardly jump up and rush to the defence of the law of the United States, condemning the words of generality in which the system of law devised for that

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6 See for example *R v Director of Serious Fraud Office: Ex parte Smith* [1992] 3 WLR 66 at 75.

7 (1986) 162 CLR 376.

8 For a recent instance see *Mabo v Queensland* (1992) 66 ALJR 408. But compare *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 666.

great country is criticised. If it was good enough for Lord Diplock in the Privy Council to recognise the peculiar features apt to each nation of the common law, it may be good enough for other commentators to concede the possibility that different times and places bring forth different requirements of the law.

I fully realise the peril which is involved in venturing upon a critique of any country's legal system having only a superficial knowledge of it. The text examined may be out of date. The case cited may have been over-ruled. The judicial dogma castigated may have been overthrown. The academic who expressed an opinion may have overlooked local law or may not be highly regarded on the local scene. For all this, there are readily available discussions of the competition between predictability and creativity in the Australian common law. If Professor Stone's work could be regarded as too argumentative, it would not have been difficult to find in the *Australian Law Journal* the recent illuminating article by Justice Michael McHugh, "The Law-making Function of the Judicial Process".<sup>9</sup> With reference to English, United States and Australian case law, his essay provides a useful conspectus of some of the Australian contributions to this debate. Woven into Professor Atiyah's text, substance could have been substituted for suspicion, case for conjecture and Australian analogies for those of the United States of America. An instant expert in Australian common law one does not expect a visiting professor from Oxford to be. But a passing nod to a developed jurisprudence in a country with ideas of its own is not, perhaps, an unreasonable hope in a lecture of a famous scholar who has come a long way, not across the Atlantic but to the Great South Land.

The foregoing is not meant to be the voice of a passionate nationalist, for I disdain nationalism. Nor does this opinion betray the paranoia that is the obverse of cringing colonial subservience to all things English. Instead, it is a simple observation, self-evident if you like, that a lecture on English and United States law to an Australian audience is, in 1992, only of comparatively minor relevance. Unless made pertinent to Australian legal concerns, it will pass us by like a ship in the night. Time was when decisions on the Strand determined what happened in Australian courts from Broome to Byron Bay. That time has disappeared. Scholars must be in the forefront of the struggle to establish a new relationship within the common law world: one respectful of the contribution which many jurisdictions can make to its formidable treasury. So my first source of disappointment is the failure of a scholar of Professor Atiyah's undoubted distinction and originality of mind, to bring his thesis to bear upon the particular experience of the Australian common law so far as it could be reasonably ascertained in the cloisters of Oxford. For a scholar of international experience with an Australian connection this was, if I may respectfully say so, a disappointing feature of his piece.

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9 (1988) 62 *ALJ* 15 and 116.

## II. COMMON LAW RENEWAL

Much more important is my second source of disappointment. It derives from the extent to which, in this essay, Professor Atiyah tends to stereotype the dichotomy between the practice of the law in the United States and England: painting American judges and lawyers as swashbuckling practitioners of an unpredictable system where virtually anything can happen, and English judges and lawyers as the guardians of the true faith, dwelling in a serene legal temple where rules are clear, always pre-exist decisions and are readily discoverable, waiting only to be applied to facts in order to produce the result which everyone expects. Of course, as in any stereotype, there are elements of truth in the extremes which these vivid images (which I have further overstated) present. It is inevitable that, to some extent, the United States legal system will be less predictable than the English. Working within it are several factors which add inescapably to the unpredictability:

- *The federal factor:* which imports the possibility of a formal law, such as a statute, being declared unconstitutional and, despite its apparent validity, to have no further effect.
- *The human rights factor:* which is derived from the federal and state constitutions of the United States with their Bills of Rights expressed in general language. These basic principles need to be spelt out by the courts. Court opinions about these provisions change over time. The application of such principles adds an element of unpredictability to the constitutional validity of laws and of the activities of numberless public officials and other citizens.
- *The states factor:* In the United States there are fifty-two jurisdictions, just as in Australia there are nine, excluding in each case, the external territories. Each of those separate jurisdictions will have separate laws. Each will have their own courts pouring out decisions. There will be common federal statutes and federal laws. There will be common principles of the common law. But there will also be a great diversity of law and an enormous engine of law-making. From the product, there will be plenty of opportunity to derive analogies and instruction for the solution of apparently like problems. The sheer volume of law-making and its diversity adds an element of uncertainty and even confusion. This is not, however, necessarily a bad thing in the United States any more than in Australia. Each is a continental country. Such large territories cannot be ruled efficiently from a single source of law-making. That is why, together with other large and populous territories, such as Canada, India and Nigeria, the federal system of government has been chosen.
- *The modernist factor:* Neither in the United States nor in Australia is there an organised society with a history of institutions reaching back a

thousand years. Each is a relatively modern society with institutions of government developed in the last two centuries. Like Canada, each has invited large scale immigration from diverse ethnic backgrounds. Each has a multi-cultural society which lacks homogeneity and a monochrome culture. It is inevitable that for such societies there will be different needs from the law and its institutions than would be required to serve a homogeneous community of people largely of the same race, speaking the same language, living in a comparatively small territory. Law serves the community. The community does not have to bend to an ideal of law if that ideal would be inefficient, unjust or otherwise unsuitable to the community served by it. The adaptability and creativity of the law needed to serve modern, diverse communities without the same adherence to tradition, may justify the differences between American (and Australian) ideas of what law is when compared to those held by Professor Atiyah.

The foregoing remarks might justify the suggested disparity in the models of American and English law put forward by Professor Atiyah. But the paradigm can now be applied to England. It begins to look more and more like its former colonial progeny. Of course, its historical traditions cannot be wholly shaken off. It will never be a continental country in terms of size. Wider still and wider England's boundaries will not now be set. But by reference to the same criteria as may explain the different developments of the law in England and the United States (and Australia) it will be seen that England is now coming much closer to the United States and Australia in ways which cannot but alter the predictability of its legal decisions.

- *The federal factor:* Although this word 'federal' is forbidden in official circles in England, the Treaty of Maastricht, indeed the Treaty of Rome establishing the European Community, create a form of federation to which England in the United Kingdom is part. There is now a European Parliament. There is an enormous executive government in Brussels. The European Court of Justice in Luxembourg has powers under the Treaty of Rome to override English legal decisions. To a federalist that sounds awfully like a federation. The reality is already there. Necessarily, European institutions introduce an element of unpredictability into even formal English statutes. This is acknowledged at the very end of Professor Atiyah's contribution. But it is there as a reluctant footnote to the principal observations which generally harken to the past not to the challenge to the content of English law of the future which Europe provides.
- *The human rights factor:* As if this were not enough, there is also the European Convention on Human Rights. It is now having its effect on English case law. England is not a country without a Bill of Rights. Its Charter of 1688 still applies in England, as it does, as part of inherited

imperial law, in Australia.<sup>10</sup> It can still have operation. But in current circumstances, the major stimulus to unpredictability of a human rights kind comes from the impact of the European Convention on English legal decision-making. The English Court of Appeal has recently held that, absent clear statutory provisions or a plainly binding principle of the common law, English courts in developing the common law, should do so in conformity with the European Convention.<sup>11</sup> Still more recently that principle has been accepted in Australian law.<sup>12</sup> There were various judicial decisions including some of my own, which earlier favoured it.<sup>13</sup> So the uncertainty of human rights principles is beginning to flow into the English legal system as judges and lawyers learn to live and work in the new world order which proclaims the universality of basic human rights. Because those basic rights are already, to a large extent, reflected in the common law in England and many of their modern statements are derived from that source, this transition will not be particularly uncomfortable for those brought up in the English legal tradition. The application of the principles will undoubtedly heighten uncertainty and unpredictability. But at a price which many will consider to be perfectly tolerable.

- *The states factor:* England and Wales are governed as one territory. But even in Wales there are now separate language laws. Northern Ireland is governed as a separate province. In Scotland, demands are increasingly made for secession and independence. The future shape of the polity of the United Kingdom is by no means clear. The Isle of Man has its own legislature, as was recently demonstrated when it was obliged to conform to the ruling of the European Court of Human Rights upon the laws against sodomy. The prospect that the United Kingdom in the future, and even England and Wales, will adopt regional arrangements with different laws, is far from fantastic. If such arrangements come about they will, in turn, produce many of the elements of unpredictability which federal states such as the United States, Australia and Canada have learned to live with.
- *The modernist factor:* Nor can the United Kingdom any more be stereotyped as a homogeneous community of mono-lingual Anglophones. In the wake of the fundamental changes wrought by the

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10 *R v AS Smith* (1991) 56 A Crim R 148 at 161.

11 *Derbyshire County Council v Times Newspapers Ltd* [1992] 3 WLR 28. See note (1992) 66 ALJ 382. Cf *R v Secretary of State for the Home Department; Ex parte Brind* [1991] AC 696.

12 See *Mabo v Queensland* note 8 *supra* at 422; Samuels JA in *Jago v District Court of New South Wales & Ors* (1988) 12 NSWLR 558. See also Nicholson CJ in *Re Jane* [1989] FLC 77234 and contrast *Re Marion* [1991] FLC 78,275 at 78,401.

13 See *Daemar v The Industrial Commission of New South Wales & Ors* (1988) 12 NSWLR 45; *S & M Motor Repairs Pty Ltd & Ors v Caltex Oil Australia Pty Ltd* (1988) 12 NSWLR 358; *Jago v District Court of New South Wales & Ors* *ibid*; *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414; *Cachia v Haines & Or* (1991) 23 NSWLR 304 at 312.

Treaty of Rome, fundamental questions are being asked about the organs of government. The new Lord Chief Justice shocked traditionalists by holding a press conference upon his appointment and by holding out the possibility that judges may stop wearing wigs and robes in court. He declared that "the eighteenth century image that hangs over the law generally" was "one of the factors which makes us seem out of touch".<sup>14</sup> These remarks, and others, tend to suggest a more critical approach to the English notions of formality on its home ground than Professor Atiyah is willing to acknowledge.

### III. MYTHS AND FACTS

When we depart from the mythology about English law and look at it in its actuality, it is far from the repository of high predictability and high formality that Professor Atiyah depicts. In fact, it is the genius of the common law of England that it has, within it, high elements of unpredictability fed by appropriate elements of informality. But for this, it would never have developed from a system of law spawned in feudal medieval times to one which now serves a quarter of humanity. It would never have taken root in societies as utterly different as England, Barbados, Guyana, Fiji, Malaysia, Malta, Kenya, Namibia and Grenada. It would not have survived the revolutions that displaced British rule in the United States, Ireland and Burma. Yet it survives in the little court house of the Deccan in India, and on the bench of the Supreme Court of Israel, the fans humming quietly overhead. It does so precisely because it is a highly practical system of law with ever present elements of self-regeneration. In fact, those elements were derived from the very way in which principles of binding rules were elicited not from codes (with their highly formal components) but from decisions made in analogous circumstances by earlier judges. Day by busy day in the courts we plunge into the complex facts of earlier cases, seeking to derive from the solution to the problem there presented the support of legal principles which will be binding, or at least of guidance, in the case instantly before the court.

Sometimes the emerging principle will be clear. The facts will be perfectly analogous. The court which stated the principle will be superior in the hierarchy. The decision then will follow, virtually automatically. But more often than not the applicable principle will have to be derived from a number of judgments. It will be, by no means, clear. The facts of the cases studied will necessarily be somewhat different. The court which stated the rules may no longer be binding in the hierarchy or it may never have been so. Social circumstances may have changed or technology in some way may have overtaken the suggested rule so that it is no longer apt to profoundly different

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14 Noted *The Times* (London) 27 April 1992 p 1.



times. An appeal may be made to a constitution, to basic human rights, to differing state laws or to the inappropriateness and even prejudice inherent in the earlier decision. In such a case, common law judges, in England, the United States, Australia or anywhere else must make choices. Far from being a weakness of the common law system in some jurisdictions (as Professor Atiyah hints with special reference to that of the United States) this is, in fact, the central strength of the common law. It is indeed the source of its success. It is the very reason for its survival and global success.

The very technique of judicial decision-making of the common law encourages uncertainty, the promotion of new ideas and the eventual destruction of binding principle by the eroding thought, voiced by dissenting judgements, that the rule might be wrong. The Privy Council, offering advice to the Sovereign was, until the 1960s, obliged to tender a single opinion which allowed for no dissent. In this respect it conformed to the pattern of judicial decision-making in many civil law countries where dissenting judicial opinions are not permitted.<sup>15</sup> In France, dissenting or minority judgments are looked on with extreme hostility. In other countries they are accepted, particularly in Latin America where they are known as *discordias* or *votos vencidos*. But in Europe they are comparatively rare. Typically they receive no publicity. An exception is in Germany where, by legislation of 1970, judges of the Federal Constitutional Court are permitted to make their dissenting opinions known once the decision is rendered. In the common law world the right to express a minority opinion is a treasured one. It is also exercised, often with effect. It is inherent in our notions of intellectual honesty and judicial independence. Views differ concerning the extent to which dissenting opinions, once expressed, may be repeated.<sup>16</sup> However, the right of judges to dissent in the appellate courts of common law countries is unquestioned. It provides a mechanism to promote alternative ideas about what the law is or should be. It affords the opportunity of the dissenter to appeal to the conscience of other judges, the legal profession and the community. In practical terms, it sometimes plants a seed which later comes to fruit in a reversal of judicial authority; in the expressed preference for the dissenting opinion by those who are not bound by the court holding; or by legislative change which overturns the rule made on the basis of the opinion of the majority.

It is the element of published dissents which infuses the common law with the ready means of changing direction. It is a facility which has been powerful in its effect on the law in England, the United States and Australia. Necessarily, dissenting opinions inject an element of uncertainty into the neat syllogism which Professor Atiyah seems to cherish.

Against this background of recognition of the features of the common law system which are conducive to regular, orderly change and development, I question the statement by Professor Atiyah that the English legal system makes

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15 R David and JEC Brierley *Major Legal Systems in the World Today* (2nd ed, 1978) p 130.

16 *CSR Ltd v Bouwhuis* noted (1992) 66 ALJ 227.

such a virtue of the ideal of predictability that it becomes "almost a fetish". Infatuation with fetishes is generally a sign of psychological illness. I would not myself have diagnosed English law as suffering from such an abnormality. On the contrary, I consider that it is, and has always been, capable of significant change. Furthermore, at least lately, the English legal system has been opened-eye in its recognition of the fact that judges make new law and do not, like Aladdin, discover it in some hidden cave of the common law.<sup>17</sup>

Professor Atiyah says that monstrous infringements of freedom can arise where the law of tyrants contains vague and uncertain crimes. I entirely agree. The highest possible certainty is required in the criminal law. But it is not always attained. And it is not always attained in England.

In *Sykes v Director of Public Prosecutions*,<sup>18</sup> the question arose, ultimately before the House of Lords, whether the offence of misprision of felony was obsolete. Their Lordships found it was not. They looked to American and Australian decisions. Lord Denning was "not dismayed by the suggestion that the offence of misprision is impossibly wide".<sup>19</sup> Indeed, the uncertainty of the application of the law was virtually acknowledged by his Lordship:<sup>20</sup>

Non-disclosure may sometimes be justified or excused on the ground of privilege. For instance, if a lawyer is told by his client that he has committed a felony, it would be no misprision in the lawyer not to report it to the police, for he might in good faith claim that he was under a duty to keep it confidential. Likewise with doctor and patient, and clergyman and parishioner. There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it. For instance, if an employer discovers that his servant has been stealing from the till, he might well be justified in giving him another chance rather than reporting him to the police. Likewise with the master of a college and a student. But close family or personal ties will not suffice where the offence is of so serious a character that it ought to be reported.... The judges have not been called upon further to define the just limitation to misprision, but I do not doubt their ability to do so, if called upon.

Lord Goddard contented himself by suggesting that the offence should be "sparingly prosecuted". Whether or not such an offence should exist in the law, it was by no means certain that it did before the House of Lords pronounced on the subject for England and thereby influenced the operation of the law elsewhere.

There are many other areas where the English criminal law has been less than clear and where, seemingly by judicial decision, the law has been developed and applied with penal consequences. In the Ladies' Directory case, *Shaw v Director of Public Prosecutions*,<sup>21</sup> the House of Lords found that conspiracy to corrupt public morals existed as an offence and could be committed by

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17 Lord Reid "The Judge as Law-Maker" (1972) 12 *Journal of the Society of Public Teachers of Law* 22 at 25 ff.

18 [1962] AC 528.

19 *Ibid* at 564.

20 *Id.*

21 [1962] AC 220.

encouraging conduct which, although not in itself illegal, might be calculated to corrupt public morals as defined by the judges.

After the decision, the *Sexual Offences Act 1957* provided that homosexual conduct between consenting male adults in private was no longer a crime. Yet in *Regina v Knuller (Publishing, Printing and Promotions) Ltd & Ors*<sup>22</sup> a publisher was prosecuted for conspiracy to outrage public decency by publishing on the inside pages of its journal, under a column headed 'males', advertisements inviting readers interested to meet advertisers for the purpose of homosexual relationships. The publisher appealed to the English Court of Appeal against its conviction on the ground that an agreement by two or more persons to insert advertisements did not constitute the offence of conspiracy because the substantive offences of which they were said to have conspired had itself been repealed. But the publisher's appeals were dismissed. *Shaw* was applied. The English court held that the offence of conspiracy to outrage public decency was not limited to the commission of an act performed in public. One can imagine the shock and horror which would be experienced by their Lordships were they to see a local suburban newspaper in Sydney today with page after page of advertisements for every imaginable sexual practice.

These cases do not represent an obsolete area of legal extension. In *Whitehouse v Lemon*<sup>23</sup> a private prosecution was instituted against the appellants who published a piece in *Gay News*. They were charged with publishing a poem purporting to describe, in explicit details, acts of a sexual character on the body of Christ immediately after His death. The charge laid was blasphemous libel. A majority of the House of Lords (with Lords Diplock and Edmund-Davies dissenting) held that the existence of a blasphemous libel did not depend upon the accused having an intention to blaspheme. It was enough that the publication was intentional and that it constituted a matter calculated to shock or outrage the feelings of Christians. With two such noble and learned dissentients, it can scarcely be said that the law invoked against *Gay News* was certain. Yet it was criminal. And the publishers were punished.

Still more recently the English Court of Appeal held that satisfaction of sadomasochistic libido was no defence to a charge of assault. Although the prosecutor had to prove absence of consent in order to secure a conviction, it was held that it was not in the public interest that a person should wound or cause actual bodily harm to another 'for no good reason'. In the absence of 'such a reason', the victim's consent afforded no defence to the charge. The satisfaction of the victim's libido did not constitute such a good reason. The convictions were affirmed.

All of the foregoing decisions involved the imposition of criminal liability where it was by no means clear that it pre-existed. In reaching the several decisions collected, the English courts did not apply mechanically pre-existing standards. They applied reasoning which led to their respective conclusions.

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22 [1971] 3 WLR 633.

23 [1979] 2 WLR 281.

They did not always disclose the policy considerations which led to the choice of one rather than the other conclusion. The notion that these decisions were entirely predictable is as misleading as the suggestion that English criminal law contains no vague and uncertain crimes. I have no doubt that some of those prosecuted and convicted of the criminal offences recorded in the preceding cases would have regarded their conviction as monstrous infringements of freedom and tyrannical interference by a state operating on the principle that 'nanny knows best'.

Professor Atiyah suggests that people should "be able to sleep peacefully in their beds" without worrying about being affected by unforeseen legal liability in tort. Tell that to Mr David Stevenson, whose bottling company had been preparing aerated water for many years before Mrs Donoghue walked into the Wellmeadow Cafe in Paisley, Scotland.<sup>24</sup> In a stroke, a majority of the House of Lords led the common law of England and Scotland to a new level of legal principle in the solution of claims in negligence. Professor Atiyah himself has said "that the case contains probably the most famous dicta in all English case law".<sup>25</sup> Overnight, the multitude of categories for the establishment of liability came to be subsumed in the principle that you should not injure your neighbour:<sup>26</sup>

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This may be the most famous case of the development of a new legal principle by the English courts this century. But there are plenty more. Lord Diplock declared, at the end of his career in the law, that the greatest developments which he had seen were in administrative law. Many of these flowed over to the great benefit of the other countries of the common law, including Australia. Many bold and beneficial decisions have been derived from the decision of the House of Lords in *Ridge v Baldwin*.<sup>27</sup> From this decision, a vast body of common law principle has been built up to the great benefit of the liberty of the citizen. Sometimes it does battle with the apparent language of the formal instrument, an Act of Parliament. On its face, the statute may say nothing about the problem of justice before the courts. Yet the common law will then resolutely fill the crevices of the statute with its beneficial principles. An element of uncertainty is necessarily introduced. But it is one tolerable in a democracy for reasons I endeavoured to explain in *Yuill*

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24 *Donoghue v Stevenson* [1932] AC 562.

25 PS Atiyah and P Cane *Atiyah's Accidents, Compensation, and the Law* (4th ed, 1987) p 66.

26 Note 24 *supra* at 580.

27 [1964] AC 40.

& *Ors v Corporate Affairs Commission of New South Wales*.<sup>28</sup> Although the decision in that case was later reversed, by majority of the High Court, I believe that the reversal concerned the application of the principles in the particular case and not the principles themselves. This is what I said:<sup>29</sup>

[A]lthough Parliaments today have the legitimacy which derives from universal suffrage and modern election law, new and different problems present themselves. They require vigilance on the part of the courts. To some of these problems, attention has been drawn in earlier decisions. Thus, in *Re Bolten; Ex parte Beane* (1987) 162 CLR 514, the danger of legislative oversight was mentioned. Equally dangerous is the loss of attention to basic rights which may accompany the very growth in the quantity and complexity of legislation which is such a feature of our time. Legislatures, both Federal and State, have recognised this problem by the appointment of Parliamentary committees, with terms of reference designed to call to notice such problems whenever they occur. However, it is inevitable that some such problems will escape notice. This is where the assertion by the courts of the rule construction applied in *Baker, Balog* and many other like cases has such a great social utility. It may delay, on occasion, the achievement of the intention which parliament had. It may temporarily interrupt the attainment of an important legislative purpose. It may even sometimes give rise to a feeling of frustration amongst legislators and those who advise them. But the delay, interruption and frustration are strictly temporary. And they have a beneficial purpose. It is to permit Parliament, which has the last say, an opportunity to clarify its purpose where the court is not satisfied that the purpose is sufficiently clear. And that opportunity is reserved to those cases where important interests are at stake, which might have been overlooked and which deserve specific attention.

The notion that parties organise their affairs in life to conform to rules of law, as suggested by Professor Atiyah is, I believe, self-evidently false. In the field of torts, insurance, and often compulsory insurance, relieves the parties of the obligation to do so. Indeed, in Australia at least, the impact of compulsory and common insurance on the development of the law of torts has lately been called to attention.<sup>30</sup> For example, there can be little doubt that the provision of compulsory third-party insurance against motor vehicle accidents has altered the perception of courts, over time, of what constitutes negligence in the driving of a motor vehicle.<sup>31</sup> Similarly, it would be unconvincing to deny that the existence of insurance has affected the definition by courts of the scope of an employer's liability to its employees and the imposition of positive duties of accident prevention such as now exist under the common law of Australia.<sup>32</sup> If, therefore, potential tortfeasors are sleeping peacefully at night in the expectation of the predictability of the outcome of claims against them, it is more because they are insured than because the result of such claims is clear at law. Most cases are decided upon their peculiar facts. Facts are often disputed. Their

28 [1990] 20 NSWLR 386.

29 *Ibid* at 403. See also McHugh note 9 *supra* at 122 ff.

30 See *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511 at 515.

31 *Johnson v Johnson* (unreported, New South Wales Court of Appeal, 10 September 1991); *Mitchell v Government Insurance Office of New South Wales* (unreported, New South Wales Court of Appeal, 1 April 1992).

32 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 307 ff.

resolution is frequently uncertain. But even when the court gets to the law, it too is frequently uncertain. Take *Herrington v British Railways Board*,<sup>33</sup> where the House of Lords reconsidered the responsibility of an occupier towards child trespassers. Take *Papatonakis v Australian Telecommunications Commission*,<sup>34</sup> where the High Court of Australia swept away the categories of rules for the determination of occupiers' liability. In a stroke as bold as *Donoghue v Stevenson*, the court subsumed them all in a simple general principle.

Following *Donoghue v Stevenson* the path has not been an even one, whether in England or Australia. For instance in *Anns v Merton London Borough Council*,<sup>35</sup> Lord Wilberforce imposed a duty by the common law on a local authority in terms which Lord Oliver later pointed out in *D & F Estates Ltd v Church Commissioners for England*:<sup>36</sup>

introduced not only a new principle of a parallel common law duty in a local authority stemming from but existing alongside its statutory duties and conditioned by the purpose of those statutory duties, but also an entirely new concept of the tort of negligence in cases relating to the construction of buildings.

Eventually in *Murphy v Brentwood District Council*<sup>37</sup> the House of Lords struck out on a new direction, demonstrating the considerable distance it had moved from the duty of the care postulated in *Donoghue* and that postulated in *Anns*. My present purpose is not to analyse these differences. It is to rebut the suggestion which runs through Professor Atiyah's essay that all the English judges do, particularly in the tort area where people's sleep patterns must ever be kept in mind, is mechanically to apply a pre-existing principle. On the contrary, as Lord Wilberforce acknowledged in terms in *Anns*, "the court here is involved in the policy area".<sup>38</sup> To pretend that it is a simple matter of applying a verbal formula or that the law is fixed, is to indulge in an endearing but dangerous self-deception.

If it is then said that these features of unpredictability are aspects of the rule-making of the judges but not of statutes, we ignore the function of the courts in exercising the choices that are presented by the ambiguities of legislation. Nowhere has this function of choice been more explicitly recognised than in England itself. In *Jones v Wrotham Park Settled Estates*,<sup>39</sup> Lord Diplock stated that, where the application of the literal or grammatical meaning to statutory language would lead to results which defeated the purpose of the statute, the court was empowered actually to read words into the legislation if three conditions were fulfilled. These were that the court must know the mischief with which the Act was dealing; it must be satisfied that by inadvertence Parliament had overlooked an eventuality which had occurred; and it must be

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33 [1972] AC 877.

34 [1985] 156 CLR 7.

35 [1978] AC 728 at 751.

36 [1989] AC 177 at 212.

37 [1991] 1 AC 398.

38 Note 35 *supra* at 754.

39 [1980] AC 74.

able to state with certainty the words the Parliament would have used if its attention had been drawn to the defect.

This purposive approach to the construction of legislation gained momentum in England with the decision of the House of Lords in *Fothergill v Monarch Airlines Ltd.*<sup>40</sup> The expressions by the Law Lords in that case added impetus to the passage of legislative injunctions to courts, in Australia and elsewhere, to search for the purpose of the legislation and then conformably with its language, to give effect to that purpose. In Australia, the purposive approach in the construction of legislation is now well established. It is enjoined by statutes, Federal and State,<sup>41</sup> and by the common law.<sup>42</sup>

Thus, even where a high formality of statutory language tends to reduce the scope for uncertainty a degree of uncertainty almost always remains. This is because language, of itself, is frequently unclear in its denotation. The English language in particular is unclear. One reason for this is that it represents the marriage of two major language streams, being the original Germanic language of the Anglo-Saxons and the official Latinist Norman French brought to England in 1066 by the Conqueror. As the principal international language, English is now constantly enriched with words bearing ideas derived from many other sources. These features of our tongue add immeasurably to its value in literature. But they add to its uncertainty in the law. They present judges, virtually daily, with choices.<sup>43</sup> Those choices must be worked out by reference to principles which the judges expose. A recognition of the phenomenon of choice reduces the illusion of predictability. The choice is ultimately made after a close study of the statutory language.<sup>44</sup> The number of differences of opinion about the solutions to the problems of statutory construction reaching the higher courts indicate the scope for intelligent people, trained in the legal discipline, to come to different views upon the same formal instrument using precisely the same techniques of statutory interpretation available to the judiciary. This is as much a problem for the judiciary in England as it is in Australia or the United States. It is just part and parcel of this aspect of the judicial function. Inescapably, it reduces the predictability of legal outcomes. Of course, this says nothing of the many cases which never come to court or the cases which do come and in which the result is plain enough. But just as it is a mistake to exaggerate the ambiguity of the law and the opportunities of choice, so it is an error to exaggerate predictability and to say too often of a legal problem that "you are bound to lose [or to win]".

Professor Atiyah praises the self-restraint and self-discipline of the English judges. He pictures them as content to perform a saintly role of self-denial rather than to solve in a novel way the problems before them. To the extent that

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40 [1981] AC 251.

41 *Acts Interpretation Act* 1901 (Cth) s 51AA; *Interpretation Act* 1987 (NSW) s 33.

42 *Kingston & Or v Ke prose Pty Ltd* (1987) 11 NSWLR 404 at 423 ff. See also McHugh note 9 *supra* at 118 ff.

43 See McHugh note 91 *supra* at 117.

44 See *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 519.

they have lacked the stimulus of a national Bill of Rights, this restraint is probably as true of the Australian as of the English judiciary. No judicial decisions appointing judges to run the prison system are found in our casebooks. On the other hand, it is a trifle exaggerated to say that judges in England or Australia have only to identify a legal defect and Parliament will act to correct the problem so called to notice. In the High Court of Australia this self-restraint was, until recently, the approach frequently favoured by the court as the decisions in such cases as *Dugan v Mirror Newspapers Ltd*,<sup>45</sup> *State Government Insurance Commission v Trigwell*<sup>46</sup> and *McInnis v The Queen*<sup>47</sup> demonstrate.

However, more lately in public and private law and sometimes in dramatic ways, the High Court has led the Australian judiciary into a more creative phase. There may be some loss of predictability. But the increase in the relevance and justice of the law more than compensates.<sup>48</sup> Moreover, whereas once the High Court discouraged the final courts of the States and Territories of Australia from legal innovation, now it has recognised the reality that few indeed are the cases with which it can deal.<sup>49</sup> Upon this basis Courts of Appeal and Full Courts of Australia have been enjoined to play their part, where appropriate, in the development of legal principle. Certainly the Court of Appeal of New South Wales has striven to do so.<sup>50</sup> It has done so within the authority and under the supervision of the High Court demonstrating a creativity which, in my respectful view, is an essential feature of the common law system of which it is a part.

More lately, the creative function of the High Court has been explicitly recognised as never before. In *The Queen v McKinney & Judge*<sup>51</sup> the High Court laid down a 'rule of practice' in respect of judicial warnings to be given about uncorroborated confessions to police. It ruled that these should 'apply for the future'. This was the first explicit assertion of a power of prospective overruling of earlier legal authority, although this facility had been hinted at in several earlier decisions.<sup>52</sup> Its application in the particular case has been subject to judicial comment and was severely criticised by Brennan J in his dissenting

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45 (1978) 142 CLR 583.

46 (1979) 142 CLR 617.

47 (1979) 143 CLR 575.

48 See for example *Cullen v Trappell* (1980) 146 CLR 1; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Legione v Hateley* (1983) 152 CLR 406; *Hackshaw v Shaw* (1984) 155 CLR 614; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Cook v Cook* (1986) 162 CLR 376; *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Cole v Whitfield* (1988) 165 CLR 360; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; *McKinney v The Queen* (1991) 171 CLR 468.

49 See *Nguyen and Ors v Nguyen* (1990) 169 CLR 245 at 269.

50 See for example *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1987) 8 NSWLR 270; *Jago v District Court (NSW)* note 12 *supra*; *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26.

51 (1991) 171 CLR 468 at 474.

52 See for example Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 257.



opinion.<sup>53</sup> It is enough to say that, at least in Australia, the decision shows how far we have come from the declaratory theory of the mechanical application of predictable laws to which Professor Atiyah is so attached.

The decision in *McKinney and Judge* may be criticised. But it is open to question whether the 'restraint' and 'self-discipline' of the English judges has produced better law for that society. The crisis in the English criminal justice system is seen in the wrongful convictions of the Birmingham Six and other Irish prisoners. These shocking cases of legal injustice cast doubt on the wisdom of leaving it to Parliament to defend basic liberties in the criminal trial. This may amount to pious Pilate-like washing of hands of difficult problems. To consign the problem of reform to Parliament may be nothing more than self-indulgence or self-deception on the part of the judiciary. This much the High Court of Australia eventually recognised. That recognition helps to explain the extremely stringent standards now being laid down by that court.<sup>54</sup> Those standards, established by judges, may help to defend the Australian criminal justice system from the abuses which are now the subject of the English Royal Commission on Criminal Procedure. It is not enough to say that that Commission will help the legislatures in due course, to solve the problem. In the meantime many people have been wrongfully convicted. Unjustly they spend years in prison. And whether Parliament will ultimately get around to enacting reform remains to be seen. In England, as in Australia, it is easy to call a Royal Commission or to refer a matter to the Law Commission. Much more problematic is the passage of legislation based on such reports. There is a reason why Lord Denning would not wait for Parliament but, using the techniques of the common law, would introduce the principles into the law by judicial creativity. In the light of hindsight, it would have been no misfortune if the English courts had earlier adopted the principles now stated as the common law of Australia by our High Court. The power to do so and the availability of the techniques cannot be doubted. But as I have demonstrated, the judicial creativity of the English courts in matters of criminal law has been selective - often directed at the enforcement of a particular perception of sexual morality.

#### IV. CONCLUSIONS

I realise that at various stages in his essay, as in earlier works, Professor Atiyah has acknowledged that any system of law has elements of uncertainty. Predictability is always a matter of degree. Upon this all sensible people can agree. It is in his repeated laments of about unpredictability, in his asserted "fetish" with formality and certainty, and in his criticism of unidentified components of the creative element of the common law that I beg to suggest

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53 See Brennan J in *McKinney* note 51 *supra* at 481, 485.

54 For a recent example, see the strict rule for warnings on identification evidence laid down in *Domican v The Queen* (1992) 66 ALJR 285; compare *Domican v The Queen* (1990) 46 A Crim R 428.

error. Especially in his criticism of the American legal system and his adulation of the English, I fear that Professor Atiyah betrays the error of intellectual xenophobia which is never far from the surface in the English cultural tradition. The United States legal system may have many faults. But its capacity to solve enormously important and complex problems of that society where Congress has failed to do so, cannot be doubted. It was the courts not Congress which tackled thorny issues such as desegregation, unequal electorates, police violence and oppression, and abortion. No reader who saw the television documentary *Keep Your Eye on the Prize* could fail to have been moved by the courage of lawyers, black and white, who evoked the constitution of the United States and the rule of law to secure equal rights for the citizens of that country regardless of their race, and through the courts.<sup>55</sup> With all due respect, I find the denigration of the United States legal system, expressed in such general terms, inappropriate and unconvincing. But it becomes even less convincing when measured against the praise of the English system. England's judges, of great intellect and integrity, come from a highly uniform social and educational background. They number few women and still fewer persons of minority races. They wear a uniform which even the new Lord Chief Justice acknowledges puts them "out of touch". They are faced with many urgent changes, most of which they have resisted. Even the right of audience of solicitors in the higher courts has been objected to - a privilege enjoyed in Australia these past one hundred and twenty years. Self-satisfaction with a legal system which blocks needed reform merely results, in the long run, in public dissatisfaction with the many instances of individual injustice which then come to notice.<sup>56</sup>

Rules there must be. Analytical reasoning, intellectual honesty and candid opinions are the hallmarks of a judiciary of integrity which observes the rule of law. But so is a frank recognition of the uncertainty of much law and the willingness to expose the policy choices which lead a judge to one decision rather than another. To pretend that the task is purely mechanical, strictly formal and wholly predictable may result in a few observers who love fairy stories sleeping better at night. But it does not enhance the legal system. It is not honest. It is fundamentally incompatible with the creative element of the common law.

Because the law of Australia is the gift of the common law we will always remain interested in, and benefit from, its experience in England. Perhaps because we are (as Professor Atiyah suspects) half-way between the ferment of the United States and the tranquil pond of England, Australian judges and lawyers can probably look on each of these great systems with more realism than those who are closer to them. We should do so drawing upon the strengths

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55 See B Schwartz *The New Right and the Constitution* (1990) p 21 ff.

56 For a classical example in Australia see *Tricontential Corporation Ltd v HDFI Ltd* (1990) 21 NSWLR 689 at 693.

of each. We should do so without illusion or prejudice, without being blinded by immature adulation or stereotyping condescension.

There is much else that one could say in response to Professor Atiyah's essay. But perhaps it is enough to close with a reference to recent decisions of the English courts which have held that the rule of law, long established, that a wife was deemed to have consented irrevocably to sexual intercourse with her husband was no longer the law of England. So it was held - in the face of long standing authority - that therefore her husband could be convicted of rape.<sup>57</sup> The rule of exemption was not new. It went back at least to Sir Matthew Hale's pronouncement in the *History of Pleas of the Crown* published in 1736. It had been repeatedly applied ever since. It had undoubtedly assumed the status of a clear formal rule, to adopt Professor Atiyah's terminology. In other common law jurisdictions, such as in Australia, it had been expressly repealed by statute, being earlier accepted as the common law rule. Did the English courts, with that self-discipline and restraint of which Professor Atiyah writes, mechanically proceed to apply the long established rule? Of course they did not. The Court of Appeal explored the policy issues including by reference to the "literal solution", the "compromise solution" and the "radical solution".<sup>58</sup> It declared that in 1991 the husband's immunity, as expounded by Hale, "no longer exists".

We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.<sup>59</sup>

When the appeal reached the House of Lords, Lord Keith of Kinkel spoke for a unanimous panel.<sup>60</sup> Again, he acknowledged Sir Matthew Hale's instruction of 1736. He listed the texts and cases which had applied the principle that "the husband cannot be guilty of a rape committed by himself upon his lawful wife". He acknowledged that this principle had endured for over a hundred and fifty years. But then he drew on the 1989 decision of the High Court of Justiciary in Scotland. He cited with approval the judgment of the Lord Justice-General, Lord Emslie:<sup>61</sup>

A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule. Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse to all circumstances... whatever the position may have been in earlier centuries...

This new principle was held now to be the law - as valid in England as in Scotland.<sup>62</sup> Lord Keith observed for the House of Lords that it might be taken that the proposition of Hale was generally regarded as an accurate statement of the common law of England. The common law was, however, according to his

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57 *Regina v R* [1991] 2 WLR 1065.

58 *Ibid* 1072.

59 *Ibid* 1074.

60 [1991] 3 WLR 767.

61 *S v HM Advocate* [1989] SLT 469.

62 Note 60 *supra*.

Lordship, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects of the time that it was enunciated. "Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail."<sup>63</sup>

An apparent obstacle was presented to this progressive re-statement of the common law in tune with current notions. The *Sexual Offences (Amendment) Act 1976 s 1(1)* provided for an offence of 'unlawful' sexual intercourse. Against the backdrop of Hale, it was argued that the subject sexual intercourse was not 'unlawful'. Their Lordships did not find this "an insuperable obstacle". By a plain policy decision they passed it by. The word 'unlawful' was to be treated as "mere surplusage".<sup>64</sup> Also overcome was the principle, which doubtless Professor Atiyah would have urged, that 'the court should step aside to leave the matter [of reform] to the parliamentary process'. Their Lordships approved Lord Lane's dictum in the Court of Appeal:

This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.<sup>65</sup>

The husband's conviction was affirmed. Was this a case of judicial indiscipline? The oppressive, tyrannical and retrospective creation of criminal liability? The spread of the American judicial disease across the Atlantic? Or was it rather, as their Lordships asserted, the ordinary function of the common law judge, with authority to do so, developing and adjusting the judge-made law to apply to new and different social circumstances?

By this decision of the House of Lords, the English judges have declared a new rule. It is one applicable not only for the future but retrospectively. This was done by the judges in precisely the way it has been done by their predecessors for centuries. It was done to keep the common law in harmony with the values of the society it serves. It was done with attention to what the judges perceived to be the demands of society. On this occasion, it was done to achieve in the English law the application of basic principles of human rights and equality before the law. The change was not apparently felt to be a matter for embarrassment or apology or even explanation. It was simply part of the exercise by English judges of the judicial function reserved to them by the common law which their predecessors invented and have practised day by busy day in the courts.

The lesson of this case is that, when it suits, the English legal system is not at all old-fashioned and hide-bound. When it is deemed necessary, the English judges are no more self-disciplined or captive to past decisions than their

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<sup>63</sup> *Ibid* at 770.

<sup>64</sup> *Ibid* 776.

<sup>65</sup> Lord Lane in [1991] 2 WLR 1065 at 1074 cited by Lord Keith note 60 *supra* at 777.

American cousins. When they feel the need, English judges will invent or abolish or retrospectively apply criminal law, despite the injunctions against vague and uncertain crimes and crimes retrospectively 'declared' and 'enforced'. *Pace* those who want to sleep peacefully in their beds with certainty about the law of torts, contracts, wills or anything else, the English law on these subjects, like any other common law system, is constantly in a state of development and change.

In this way, the real focus of attention of contemporary lawyers should be upon the extent of legal creativity, its proper occasions and the techniques that may be used to achieve and justify it. It is here that differences may exist both across the Atlantic and on the long journey to the Southern Hemisphere which Professor Atiyah took to deliver his lecture. Perhaps if that lecture had concentrated on these issues it might have afforded a more useful insight and intellectual tools apt for analysing the English and United States common law and drawing lessons from each of them for the legal system which we, in Australia, have developed for ourselves.