

## JULIUS STONE: LEEWAYS OF CHOICE, LEGAL TRADITION AND THE DECLARATORY THEORY OF LAW

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I wish to defend an apparently implausible claim, more implausible indeed among reflective lawyers than unreflective ones. That is, that there is much to be said for the 'declaratory theory of law', understood as the claim that even in hard cases the law governs judicial decisions. I wish to call in aid an eminent but equally implausible ally: Julius Stone. I propose to square these two circles by emphasising the profound *traditionality* of law.

### I. INTRODUCTION

Some apparently simple questions are notoriously difficult to answer. One such is whether in hard cases judges apply the law or go beyond pre-existing law to make new law. Equally distinguished and learned lawyers can be found to argue either that they do (and/or should do) one or the other; or sometimes one and sometimes the other; or ultimately one (usually the latter) after exhausting the possibilities of the other (usually the former). The argument does not appear in danger of ending, even though its subject — judging — is not unfamiliar or novel to most participants. It does seem, as Julius Stone wrote in his final summation of a life's work, that 'the heart of judgment still holds deep mysteries'.<sup>1</sup>

In large part these mysteries are intrinsic. They stem from the complexity of the practices being discussed. However, when generations of wise men find a question so very difficult to answer, one might be forgiven for suspecting the question rather than seeking yet again to answer it. This paper needs such forgiveness. In it I argue that there are important truths in

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1 J. Stone, *Precedent and Law. The Dynamics of Common Law Growth*, (1985) 105.

answers given *both* by those who claim that judges 'declare the law' and those who are convinced that, at least in hard cases, they must make it. There are important falsehoods too. Judges in hard cases are rarely in a position either simply to declare the existing law or to make new law, or even to do distinguishable bits of both. The alternatives presented by the question are false ones. It is thus no accident that particularly those learned in the law find difficulty in choosing between them.

## II. JUDGING AS THE DECLARATION OF THE LAW

According to Sir Owen Dixon, courts such as the one over which he presided:

proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision of the court will be "correct" or "incorrect", "right" or "wrong" as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness...At every point in an argument the existence is assumed of a body of ascertained principles or doctrine which both counsel and judges know or ought to know and there is constant appeal to this body of knowledge. In the course of an argument there is usually a resort to case law, for one purpose or another...for the most part it is for the purpose of persuasion; persuasion as to the true principle or doctrine or the true application of principle or doctrine to the whole or part of the legal complex which is under discussion...The pre-supposition is that there exists a definite system of accepted knowledge or thought and that judgments and other legal writings are evidence of its content.<sup>2</sup>

Dixon was aware that this view of judging was controversial — indeed delivering it at Yale might be considered an example of malice aforethought. But he did not consider it merely a provincial idiosyncrasy. On this, at least, Julius Stone would have agreed. Already in 1946, in *The Province and Function of Law*, Stone observed that "[m]ost British judges and lawyers all the time, and all of them some of the time, do regard judicial decisions as either direct applications of existing law, or logical deductions from some existing principle."<sup>3</sup> His last book, *Law and Precedent*, might be read as a lament that so little had changed, though at the same time, like all his writings on this subject, it is a celebration of the perennially fruitful ways in which the common law belies the views of many of its most eminent practitioners. Thus he writes that

British appellate judges generally are more likely to offer to explain what are in fact their own choices in terms of obedience to logic or language or 'authority', rather than in terms of choicemaking based on value-commitments within legally available leeways. And British commentators tend to take such explanations at face value.<sup>4</sup>

<sup>2</sup> "Concerning Judicial Method", *Jesting Pilate*, (1965) 155-56.

<sup>3</sup> Stone (1946) 168.

<sup>4</sup> *Id.*, 4.

Elsewhere he observes acidly that

[c]omplementary to such traditional attitudes in judges, counsel often still tend to assume that even in cases of first impression they will fare better before appellate courts by citing inadequately reasoned, tenuous dicta, remote or even merely verbal analogies and abstract syllogistic deductions, than by a straightforward argument as to what the rule ought to be, based on the social facts to be regulated and the policies to be applied.<sup>5</sup>

### III. JUDGING, DEDUCTION AND 'LEEWAYS OF CHOICE'

Why do so many lawyers talk this way about judging? One way with the question is uncomplicated: they talk so simply because it is so. The job of the judge is not particularly mysterious. It is to deduce a result from an application of the relevant legal rules to the facts of the case in hand. This, for example, is the view of Mr Justice Brennan of the Australian High Court. His Honour has explained that Kitto J. "feliculously described what is generally involved in a judicial function"<sup>6</sup> in a passage which includes the following sentence: "... 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."<sup>7</sup> With Brennan J.'s gloss, this yields the following robust and straightforward account of this much-contested activity:

The judicial function is essentially syllogistic. The applicable principles — 'the law as it is' — provide the major premise; 'the facts as they are' provide the minor premise; the judgment follows inexorably by applying 'the law as determined to the facts as determined.'<sup>8</sup>

Not everyone agrees. Julius Stone was pre-eminent in Australia among those who have disagreed. For over 40 years, he rejected such accounts of what judges did, at least in the judging that most interests most lawyers — that of appellate decisions on disputed points of law. Not only did these accounts misrepresent what took place in such judgment, but what they claimed *actually* occurred could not even *possibly* occur, given certain central and ineradicable facts about law. In *The Province and Function of Law*, in *Legal System and Lawyers' Reasonings*<sup>9</sup> and in his final restatement and summation of this argument, *Precedent and Law*, Stone relentlessly pursued such accounts, tirelessly seeking to lay them to rest. Nevertheless, while he had no doubt of the power of his criticism, he was well aware of the resilience of his foes. No sooner had he exposed what he took to be their many inadequacies, than they would pop up again and he would have to expose them again.

In these books and in numerous articles, Stone insisted that, in appellate judgments on disputed points of law, legal conclusions were rarely compelled by legal premises. On the contrary, the materials systematically left open

<sup>5</sup> *Id.*, 166.

<sup>6</sup> Brennan J. "Limits on the Use of Judges", (1978) 9 *F.L. Rev.* 1,2.

<sup>7</sup> *The Queen v. Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* 361, 374.

<sup>8</sup> Note 6 *supra*, 3.

<sup>9</sup> Stone (1964) Chs 7, 8 and Project Notes.

'leeways of choice' within which judges *had to* decide, whether consciously or not, by "advertence to factors of justice and social policy, transcending any mere syllogistic relation to or among rules of law formally enounced [sic] in the available cases."<sup>10</sup> Decisions made in these leeways were in no sense compelled by pre-existing law. A choice having been made, new law was created.

Stone provided a formidable and largely unanswerable catalogue of the sources of such leeways in the law. As no one familiar with these works will forget, syllogistic logic is irredeemably 'barren' for it gives the judge nothing he did not have to start with. On its own it cannot tell him how to start. It does not tell him, for example, what premises to begin with; whether these are to be legal or extra-legal; how to choose between competing legal premises or the logical implications of competing lines of authority; which determination of an indeterminate category to prefer; how to break out of a circular category; how to give meaning to a meaningless one; and so on.

Language, on the other hand, is bounteously 'fertile'. Law comes in words and words contain, or can be found to contain, many meanings. This is true at any time and it is increasingly true *over* time, as texts are explored by new readers with understandings, problems, purposes and circumstances different from, and often unimagined by those originally responsible for presently authoritative writings. Nor is this a marginal problem, confined to arcane technical expressions. On the contrary, Stone insists that such expressions are more likely than ordinary language to be precise and have some settled range of reference:

It may indeed be that it is the esoterically technical words of lawyers, like "heriots" and "ademption", which raise the least problems. It appears, paradoxically, that they are more stable in meaning precisely because they do not come much into general usage. And if sufficiently archaic they may become comparatively unambiguous.<sup>11</sup>

The bulk of law is written in ordinary language, however, which is incurably open to indeterminacy. It gains meanings through interpretation, but it cannot dictate which interpretation it will receive. So, and consequently, with law.

If these features of logic and language were not enough, Stone demonstrated, in detail and at length, that the common law is densely populated with 'categories of illusory reference' of various sorts — six in all — from which judges purport to derive decisions. These categories either have no meaning or, more commonly, many meanings. Either way they cannot simply be slotted in as decisive major premises, even if we had an unerring means of picking such premises and drawing legally compelling conclusions from them (which we also do not). A crucial decision remains to be made whenever an illusory category is in play, as to what the category means or should be made to mean, in any particular case. This decision cannot be compelled by the category itself. The persistence and openness of

<sup>10</sup> Stone, *Precedent and Law* note 1 *supra*, 97.

<sup>11</sup> *Id.*, 51.

such categories, Stone believed, were a profoundly important source — were the entrypoints, as it were — whereby the common law accommodated change while it appeared to stay the same. And not merely outsiders but judges themselves are beguiled, by the apparent stability of such categories, to miss their inherent fruitfulness:

When leeways for judicial choice exist...decisions within the leeways are, objectively speaking, creative of law. They may or may not be creative also in the subjective sense that judges are aware of the leeways...When there is no such awareness judges are creating rules, without recognising responsibility for what is created, often believing that they have but decided according to pre-existing legal propositions. It is a deep meaning of the legal categories of illusory reference that they project this belief into and after the climax of decision; and the long dominant theory that judges always merely “discover” the law perhaps generalised and legitimated this fact of *objective* creation *subjectively* unrecognised. The creativeness remains nevertheless evident from the remarkable growth of the common law under judicial cultivation...<sup>12</sup>

Indeed, and decisive in explaining the compatibility of *stare decisis* with constant legal change, the master category of the doctrine of *stare decisis* — the *ratio decidendi* — itself contains a number of illusory categories. These are open to several different, equally authoritative interpretations. How the *ratio* is to be found, which among competing versions is to be preferred and at what level of generality the preferred version is to be taken, are matters on which there are plenty of alternatives. What is to be made of them in a particular case, Stone insists, is in crucial respects up to the judge.

As a result of these characteristic features of law, judges in appeals on disputed points of law are left with ‘no choice except to choose’,<sup>13</sup> whatever it is that they claim to be doing. Nor are these ‘burdens of choice’ occasional. They are normal, endemic, and expanding:

The assumptions that these areas of choicemaking are unimportant, and that their extents are somehow diminishing, are both unwarranted. For the universe of problems raised for judicial choices at the growing-points of law is an expanding universe.<sup>14</sup>

#### IV. WHY DO JUDGES CLAIM TO DECLARE WHAT THEY MAKE?

Julius Stone, then, insisted on the inescapable sovereignty of judicial choice. While he believed that the area of choice was generally greater than Barwick CJ thought it to be, he applauded the latter’s pronouncement that:

where no authority binds or current or acceptable decision compels, it is not enough, nor indeed apposite, to say that the function of the court in general is to declare what the law is and not to decide what it ought to be ...[I]n such a case the two positions of what is and what should be are in reality coincident.<sup>15</sup>

Stone found worthy of applause the contrast between this approach and that of Barwick CJ’s brother judges in the same case. For they:

<sup>12</sup> Stone, *Legal System and Lawyers’ Reasonings* note 9 *supra*, 304.

<sup>13</sup> Stone, *Precedent and Law* note 1 *supra*, 82.

<sup>14</sup> *Id.*, 13.

<sup>15</sup> *MLC v. Evatt* (1968) 122 CLR 556, 563.

struggled through the competing lines of past cases and dicta and the straddling indeterminacies of judicial language, seeking to discover and declare *what the law was* on the instant question... *For all four the assumption was that what led them to their respective decisions was the pre-existing law*, immanent in earlier judgments, rather than any choice of their own. *As opposed to this, Barwick CJ expressly rejected the theorem that the function of the court in such cases was "to declare what the law is, and not to decide what it ought to be".*<sup>16</sup>

Stone's lessons have not gone unheeded and his views find many echoes. Moreover, while few people have sought to illustrate in such detail and with such care the choices open to appellate judges, Stone was not the only one to teach these lessons. They have been widely absorbed. Thus Professor Atiyah claims that there are only two theories of the judge's role that have widespread appeal among English judges: the 'declaratory' theory and the 'realist' one. The former, he writes, has it that 'the judge does not make the law, he merely declares it. If it is unclear, then the judge's task is to "find" the law.' This theory, Atiyah believes, while it has had many supporters, "has never wholly recovered from Bentham's onslaughts, and in recent times it has fallen into serious disrepute among legal thinkers and academics. Even judges frequently repudiate it in public lectures and off-the-bench pronouncements."<sup>17</sup> According to the 'realists', among whom Stone must clearly be included:

when the judge finds the law to be unclear on any point, it is his task to make new law to fill in the gap. He must, whether he likes it or not, act like a legislator. To refuse to innovate is as much a legislative act, as the boldest of decisions. To pretend that the judge can "find" the law is idle: he does not find it, he makes it. And for this purpose, he must consider arguments of policy, and arguments of morality and justice, just as he would if he were a legislator. There is, I think, no doubt that this theory has the support of virtually all academic lawyers, and a great many practising lawyers and judges would also subscribe to it. In the United States, this theory has no serious rival except among a very small group of legal theorists. Even in England, the judges in their off-the-bench pronouncements, usually subscribe to this realist theory.<sup>18</sup>

Why then, do they not say so *on the Bench*? For it remains true, as we have seen, that often they say — and seem to try to do — the opposite. Atiyah's answer is refreshingly simple, if not so bluntly expressed: deceit. English judges, he believes, combine a general acceptance of the realist theory with the belief that it is "preferable that the general public should subscribe to the declaratory theory",<sup>19</sup> "[m]y belief...is that most of the English judges would prefer to seek shelter behind the declaratory theory of the judicial function in public, and to confine discussion of the nature and use of the creative judicial function amongst the *cognoscenti*."<sup>20</sup> Questions remain whether such deceit is nice, wise or likely to work. As an account of what judges do, or even of what judges think judges do, however, the 'declaratory theory' is out the window.

16 Stone, *Precedent and Law* note 1 *supra*, 164.

17 P.S. Atiyah, "Judges and Policy" (1980) 15 *Israel L Rev* 346, 347.

18 *Id.*, 348.

19 *Id.*, 356-57.

20 *Id.*, 360.

Julius Stone takes expressions of 'declaratory' sentiment more seriously. He does not appear to believe that judges are consciously practising deceit. Indeed in *Legal System and Lawyers' Reasonings*, he explains that he has added a chapter on 'reasons and reasoning in judicial and juristic argument' for the sake of those like his 'average' students, who suspect a plot:

The abler students have seen easily enough that when a particular appellate decision is not logically compelled by dint of the use of a category of illusory reference, questions of "policy" or "justice" come into play and that these questions project inquiry forward to the problems of law and justice generally. The average student, however, often reacts in a different manner; he is inclined, as some American realists often were two generations ago, to conclude that a court which purports to be compelled to its decision, and yet is not so compelled, must be guilty of some kind of deception or at least disingenuousness.<sup>21</sup>

Stone does not accuse judges wedded to the declaratory theory, of deceit or disingenuousness. Their belief is false and has long been definitively exploded, but it is their belief. Generations of legal luminaries seem actually to be in the grip of a defective understanding of what they themselves do. Their declaratory pronouncements are, then, not to be interpreted as deceitful palliatives for the masses but as something even more serious: invincible ignorance.

## V. CONSTRAINTS ON JUDICIAL CHOICE

What, then, *do* judges do in hard cases? According to Stone, they necessarily reach beyond the law to their convictions as to justice and social policy. As he explained and endorsed Holmes' famous aphorism, that the 'life of the law has not been logic; it has been experience':

the major premises which appellate judges use at crucial points in the development of the law are not dictated either by pre-existing legal rules or by logical deduction from them, but are rather chosen in the light of experience of the world from propositions, legal or extra-legal, apt for solving the question in hand. Even when choice is ostensibly between competing legal propositions, the reason for choosing one rather than another is inevitably not a legal proposition. The reason, again, is presumably drawn from the experience of the judge in his time and place...what was decisive of the legal conclusions, was the experience-based selection of the major premise.<sup>22</sup>

Nevertheless they did not choose *at large*. Lawmakers they may — indeed must — be but their lawmaking power is constrained. This is a theme less often remarked in Stone's writings, and in truth it was a secondary theme, perhaps assumed to be better understood by lawyers than the novelties of which he was eager to convince them. Further, it does not appear to me that it was adequately brought together — or reconciled — with Stone's account of what was left for judges to draw on, once binding rules ceased to give determinate results. Nevertheless, this theme is perceptively and insightfully developed. Stone, after all, also endorsed "Cardozo's famous aphorisms that appellate choicemaking, creative as it is, is confined from molar to molecular motions, and is interstitial in character."<sup>23</sup>

<sup>21</sup> Note 9 *supra*, 14.

<sup>22</sup> Stone, *Precedent and Law* note 1 *supra*, 98-99.

<sup>23</sup> *Id.*, 167.

In exercising his choice, an enlightened judge would still have regard to precedents, not because he was under the illusion that they were binding but because they afforded him:

a means by which the court can make a rapid review of social contexts comparable to the present, of results thought apt by other learned judges after careful thought for those contexts, and of the available paths of thought already explored by the other judges for reaching one result or the other in those contexts.<sup>24</sup>

Ordinarily in hard cases, precedents will yield a variety of rules. The job of choosing 'within the leeways' will normally be to choose between these rules, rather than to fashion a new rule unrelated to them. The *ground* of choice itself ultimately must be derived from outside the legal alternatives, but the solution actually chosen "must be made from among alternatives (though these may be very wide) arising within the authoritative materials of the law."<sup>25</sup> Precedents are to be regarded as useful materials to be consulted by judges in aid of wise contemporary decision. They have no role greater than that:

At that point when a precedent ceases to be used to illustrate a probably just result in another context for comparison with the present, and is taken as an ultimate formulation, independent of its former context, to be transposed as a premise for deductions to the present context, it ceases to be a rational means towards judgment. It becomes a symbol, and a device which conceals, when it should rather be seen as a guiding light in aid of the process of judgment.<sup>26</sup>

Following his teacher, Roscoe Pound, Stone also acknowledged that law contained elements other than rules to guide judges in their choice of the most just or socially apt solution to the case before them. Thus principles — "facts evaluated by...standards"<sup>27</sup> — were available which:

do not yield in application one and one only possible result for each instant case...[but whose application] involves not merely a matching of observed facts against facts predicated in the precept, but also an evaluation of the circumstances of each case in terms of the predicated values.<sup>28</sup>

There were also to be found in the law what Pound called 'received ideals' which, according to Stone were:

value-preferences or expectations in the community, and especially among lawyers. These, while not in themselves constituting legal precepts, tend to guide and control their application and growth, and even to become incorporated in them.<sup>29</sup>

Putting these various pieces together was not something that could be done by deduction, but it was not for that reason arbitrary. For Stone came to have sympathy with writers such as Perelman who sought to identify and rehabilitate forms of non-stringent reasoning called by Aristotle rhetoric — the conclusions of which, while never compelled or certain, are 'respectworthy'.<sup>30</sup>

<sup>24</sup> *Id.*, 83, 167-68; Stone, *Province and Function* note 3 *supra*, 190; Stone, *Legal System and Lawyers' Reasonings* note 9 *supra*, 282.

<sup>25</sup> Stone, *Legal System and Lawyers' Reasonings* note 9 *supra*, 287.

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

<sup>27</sup> *Id.*, 238.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id.*, 239.

<sup>30</sup> *Id.*, 97-107, and Stone, *Legal System and Lawyers' Reasonings* note 9 *supra*, 325-37.

Moreover Stone occasionally discusses not merely the *sources* which judges have available to them but also the consequences for their modes of reasoning and decision-making of the varied elements of training, pressures and expectations common to them as a professional group. Among them are various 'steadying factors' listed by Karl Llewellyn and endorsed by Stone,<sup>31</sup> which work to produce a common legal culture — indeed a common language<sup>32</sup> — a range of approved techniques, examinable and acceptable reason-giving, and so on. All these protect a legal order dependent upon choice-making judges from dependence upon whim or caprice. They also contribute to those further elements of law identified by Pound, which constitute:

a body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided, and a traditional technique of developing and applying legal precepts whereby these precepts are eked out, extended, restricted, and adapted to the exigencies of administration of justice.<sup>33</sup>

Such ideas, Stone explained:

are not legal precepts; they are modes of looking at and handling and shaping legal precepts. They are mental habits governing judicial and juristic craftsmanship...a traditional art of judicial decision; a traditional technique of deciding...<sup>34</sup>

Elsewhere he noted that:

[t]he traditional techniques of a legal order...can probably not be fully explained *in words* to the novice, any more than words alone can explain how to ride a bicycle. These techniques are learned by operation or watching others operate the requisite apparatus, perhaps with ancillary verbal instructions. They form a part of "the law", understanding of which part is acquired principally in use.<sup>35</sup>

According to Stone, "these techniques are more practised than talked about, and easier recognised than described, yet familiar from training and daily experience to all practitioners and to jurists who handle the products of practice."<sup>36</sup> So they are.

## VI. JUDGING AND LEGAL TRADITION

If, as Julius Stone demonstrated, existing rules cannot compel decisions in most hard appellate cases, is anything left to be said about the 'declaratory' view of judging? After Stone there is certainly little to be said *for* the Brennan-Kitto deductive version of it. This was the major target of Stone's remorseless attack and nothing much survives. The view is neither accurate nor, as Stone shows, *possibly* accurate in hard cases. It is also not enlightening. In particular it in no way enlightens us about all the judge-like things — things that other decisionmakers do not feel constrained to do or say — that judges continually do and say, about the power of the law in their present difficult

31 Stone, *Precedent and Law* note 1 *supra*, 89.

32 Stone, *Legal System and Lawyers' Reasonings* note 9 *supra*, 23.

33 R. Pound, "The Theory of Judicial Decision", (1922-23) 36 *Harv L Rev* 641, 645.

34 *Id.*, 648.

35 Stone *Precedent and Law* note 1 *supra*, 240.

36 *Id.*, 23.

decisions, long after the deductivist account ceases to be plausible. However, there might yet be something of importance left in declaratory accounts once they are stripped of their deductive trappings. If so, then Julius Stone's *criticism* is unlikely to reach it, for that criticism focuses so exclusively on showing the emptiness of deductivism. However his perceptive comments on those elements of law other than rules, and in particular on those things in law 'more practised than talked about...easier recognised than described...yet familiar...', though not taken up by him in this connection, might furnish an important clue.

Let us return to Sir Owen Dixon. Dixon seeks to show his American audience that the common law has much richer resources — both of substance and technique — than might at first sight appear, for the solution of a hard case. He does this by a substantial discussion of a contractual problem, in which the application of a long-settled rule of the common law to a particular set of facts would seem unjustly to favour a creditor. Dixon introduces his substantive analysis thus, after having rejected the option of the court acting "merely on its conception of justice or social convenience":

Suppose that, though enlightened, the court adheres to the traditional conceptions of the judicial method. What course might it legitimately take? The assumption is that it shares the feeling that there is something wrong with the conclusion that the creditor's claim must be enforced. There is much that a court animated by this feeling might do and yet depart not at all from the traditional method of judicial reasoning which has actually developed the law. There would be no such departure if the court proceeded to re-examine the essentials of the formation of simple contract at common law and elements necessarily inherent in the theory of estoppel. It would be in complete accord with orthodox judicial method if the court took such a course with a view of ascertaining whether *in truth*, upon a *correct analysis* of the situation giving rise to the creditor's claim, the objectionable conclusion did inevitably flow from a logical application of principle *truly understood*.<sup>37</sup>

Dixon is clearly not proposing a deductivist account of judging, for all his talk of 'strict logic'. The whole point of his excursus into contract is to show how one might *avoid*, on the basis of the law, a conclusion which would seem to flow inexorably from a valid rule. Nevertheless he does seem to believe that even here the law itself can provide resources for a more satisfactory solution. I imagine that Julius Stone would consider this passage, and the detailed wade through contractual re-analysis which follows it, as a typical example of the self-deception which he so often exposed. Certainly he could rightly claim that it says nothing to the point that Stone was so often at pains to make. After all, given the rule which Dixon is determined to override, where does the court find the 'assumption...that there is something wrong' with directly applying it to dispose of the instant case, if not from an evaluation not dictated by the rule itself? It is, after all, this assumption which drives the whole enterprise. Without it presumably, the court would simply apply the rule. But Dixon says not a word about the source of the assumption. He merely tells us how, having made it, the resources of the law can be bent to a satisfactory solution.

<sup>37</sup> Note 2 *supra*, 161. Italics supplied.

And yet while that is valid criticism, it is not all, and perhaps not the most important thing, that is to be said about this passage in particular or about the significance of declaratory theories in general. For there is another way to interpret the claims which judges repeatedly make that law exerts power over their decisions — even in hard cases — than as deceit or even honest mistake. Something deeper might be going on than the interpreter or even the judges themselves realise. In his critical mode, Stone's assumption is that if a judge's choice is not *determined* by pre-existing rules of law, then it must ultimately be drawn from *outside* the law. But that is not obviously true, particularly if one ponders the significance in appellate judgment of the many elements of law, of which Stone was so well aware, other than binding rules.

For law is a *tradition*. Traditions exist when beliefs, practices, what Wittgenstein called 'forms of life' — which are, or are believed to be, transmitted from the past — retain present authoritative significance in participants' beliefs, practices forms of life and so on. That is to say, traditions exist very often in social life, though they are often not noticed and their elements are neglected as 'obvious', 'natural', or simply without a word. To participate in a tradition is not merely to manipulate its elements, trying them out for size as it were, to suit one's particular, autonomously and externally given or chosen, purposes. Participants in traditions are enveloped by them, usually far more than they know and almost always more than they can easily or adequately express, for as one profound student of traditions has remarked:

[a]ll actual conduct, all specific activity springs up within an already existing idiom of activity...The questions and the problems...spring from the knowledge we have of how to solve them, spring from the activity itself...[rational conduct] is not mere 'intelligence', but *faithfulness to the knowledge we have of how to conduct the specific activity we are engaged in*. 'Rational' conduct is acting in such a way that the coherence of the idiom of activity to which the conduct belongs is preserved and possibly enhanced.<sup>38</sup>

In this respect law is a tradition like any other and 'thinking like a lawyer' is only a particular way of saying 'becoming part of a tradition'. More than many traditions, however, law is organized to preserve, maintain and draw systematically upon the elements of the legal past in its present. Judges are its official interpreters and guardians and they have usually spent a working life within the traditions of law. As leading participants in the tradition — with an eye as much to its future as to its past — they are affected by much more in law than merely its explicit rules, or even than its explicit rules, principles and policies. And they are affected in a way not much evoked either as application or invention.

When a purported rule is inadequate to decide a particular case, that does not automatically mean that the judge can only reach beyond the law. *This*, I believe, is the importance — sometimes obscured — of Ronald Dworkin's contribution to the understanding of 'hard cases'. His insistence on the importance of principles in such cases is not intended to show that, besides

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38 *Id.*, 101-02.

rules judges also have principles to apply, if in a somewhat more slippery fashion. That insistence, like his stress on the peculiar 'gravitational force' which a common law precedent exerts on later decisions "even when these later decisions lie outside its particular orbit"<sup>39</sup> stem from his recognition of the fact that "[t]he institutional constraints they [judges] sense are pervasive and endure to the decision itself".<sup>40</sup>

This is not the same as saying that for every legal problem there is a determinate solution deducible from already posited legal premises. On this point Stone is awesome and unassailable. Rather, as I have sought to argue elsewhere:

Legal traditions provide substance, models, exemplars and a *language* in which to speak within and about law. Participation in such a tradition involves sharing a way of speaking about the world which, like language though more precisely and restrictively than natural language, shapes, forms and in part envelops the thought of those who speak it and think through it. For better or worse (almost certainly for better *and* worse) it is difficult for insiders to step outside it and for outsiders to enter and participate in it untutored. It moulds the thinking of insiders even where, perhaps especially where, they least realise, and evades the grasp of outsiders determined to pin it down.<sup>41</sup>

A judge who claims in a hard case, that his decision is governed by law, *might* just be saying that he is deducing an answer from a deductive combination of a legal rule and the facts before him. If so he is wrong. But he might be expressing, however inarticulately, something more complex: the sense that his decision involves him in giving what Dworkin describes as 'theoretical argument' about what the law requires in the case at hand. Such argument, as distinct from mere empirical argument "about historical or social facts, about what words are to be found in the text of some statute or what the facts were in some precedent judicial decision"<sup>42</sup>, occurs:

when members of particular communities who share practices and traditions make and dispute claims about the best interpretation of these — when they disagree, that is, about what some tradition or practice actually requires in concrete circumstances. These claims are often controversial, and the disagreement is genuine even though people use different criteria in forming or framing these interpretations; it is genuine because the competing interpretations are directed toward the same objects or events of interpretation.<sup>43</sup>

People involved in such theoretical argument customarily seek to offer an *interpretation* of what their tradition amounts to and requires when confronted with a problem. This might result merely in the application of an explicit rule. However to do so in particular circumstances might not be possible because of indeterminacies in the rule, or because, as Dixon might be suggesting, it would seem to clash with the tenor, the point, the implicit understandings, which — as a member of a tradition, formed by it, responsible for it and answerable to other members — one senses underlie the tradition or the relevant part of it. One thing involved in choosing among alternate rulings or

39 R. Dworkin, "Hard Cases" in *Taking Rights Seriously*, (2nd ed. 1978) 111.

40 *Id.* 86-87.

41 M. Krygier, "Law as Tradition", forthcoming in (1986) 5.2 *Law and Philosophy*.

42 Dworkin, *Law's Empire*, (1986) 46.

43 *Ibid.*

in serving such underlying goals — goals which are *internal* to the legal tradition — is to essay a solution which makes sense within, which in Neil MacCormick's term is *coherent* with,<sup>44</sup> the tradition and the values the judge takes to be implicit in it, rather than merely logically consistent with its existing explicit rules. Coherence might require a judge to favour certain options over others which, though logically consistent with existing rules, make no or less sense of the whole or make less sense in light of some underlying principle which gives coherence to the whole. But of course there might be several candidates which could serve such coherence. So a judge will have to stretch his consideration to take in values other than coherence. There is considerable controversy about what values are appropriate for judicial consideration. I do not wish to enter that controversy here, except to note that to acknowledge this is *not* to agree that these 'external' values are the *motor*, the 'inarticulate major premise' of the judge's interpretation in any simple sense. If anything the position is the reverse. The tradition and its participants customarily govern the values which are found appropriate, rather than the other way around. If, for example, we grant that judges usually do and should take into account questions of the consequences of their holdings, we are left with the problem of what consequences — for the parties, for the community, of this holding, or of this holding if it were to be generalized — and of how to choose within the categories of consequences we deem appropriate. One aspect of the lawyers' choice has been well described by MacCormick:

...legal problems arise in legal settings and new rulings in hard cases build out from established bodies of law. Established bodies of law focus on given values or complexes of value. It is against those very values that we test and eliminate rival rulings in hard cases...The values against which we properly test juridical consequences are those which the branch makes relevant.<sup>45</sup>

Making such determinations might be more art than science. It is also an inherently controversial practice, with no guarantees or mechanical criteria of success, and as a result of which new rules continue to appear, as changed values are brought by those within the tradition to bear on it. As Stone well knew and was unsurpassed in letting others know, such a process is caricatured beyond recognition as 'application of the existing law'. It is, however, equally caricatured as one in which the law has run out. In important ways, that does not occur, even in the hardest and most unprecedented case.

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44 See N. MacCormick, *Legal Reasoning and Legal Theory*, (1978) Chs 7 and 8; and "Coherence in Legal Justification" in A. Peczenik (et al. eds), *Theory of Legal Science*, (1984) 235-51.

45 MacCormick, "On Legal Decisions and their Consequences: from Dewey to Dworkin" (1938) 58 *NYUL Rev* 256-57.