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978-0-521-06688-4 - The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles

E. W. Thomas

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THE JUDICIAL PROCESS

In the absence of a sound conception of the judicial role, judges at present can be said to be ‘muddling along’. They disown the declaratory theory of law but continue to behave and think as if it had not been discredited. Much judicial reasoning still exhibits an unquestioning acceptance of positivism and a ‘rulish’ predisposition. Formalistic thinking continues to exert a perverse influence on the legal process.

Written by a practising judge, this book dismantles these outdated theories and seeks to bridge the gap between legal theory and judicial practice. The author propounds a coherent and comprehensive judicial methodology for modern times.

Founded on the truism that the law exists to serve society, and adopting the twin criteria of justice and contemporaneity with the times, a methodology is developed that is realistic and pragmatic and that embraces a revised conception of practical reasoning, including in that conception a critical role for legal principles.

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To my wife, Margaret

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PREFACE

Alexander M. Bickel said:

Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society ...¹

Although unaware of this aphorism at the time, it is nevertheless an exhortation I sought to follow as a judge. Regrettably, the training of a judge is essentially practical, the insulation is imperfect and the leisure is effectively non-existent. As an overworked judge at first instance for five years and a frantically overworked judge of an appellate court for just over six years,² my aspirations at scholarship fell short of the 'ways of the scholar'. But in that estate I am in splendid company.

In 1992, after I had been a Judge at first instance for two years, I presumed to write a Monograph with the long title: *A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy*.³ But the work did not emanate from my two short years on the Bench. It reflected the thinking of a practitioner, only lately a Judge, who had spent some thirty-four years in the practice of the law in and around the courts. An irresistible propensity to observe and analyse the legal process in which I was a participant, and an equally irresistible bent to perceive the reality of that process, dictated the conclusions that I expressed in that Monograph. I suffered, I felt, the self-imposed mantle of the proverbial man from Mars.

The thrust of the Monograph was simple enough. It urged a departure from an overly rigid approach to precedent and its fellow traveller, *stare decisis*, and a deliberate return to a more principle-oriented approach.

¹ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press, New Haven and London, 1962), at 25–26.

² The High Court of New Zealand and the Court of Appeal of New Zealand.

³ (1993) 4 VUWLR Mono. 5 ('Monograph').

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Principles, and not precedent, would be dominant in judicial reasoning. No longer would the past predict the future.⁴ *Stare decisis* would give way to a more flexible approach. Before it would be accorded precedential force the validity and authority of a prior decision would require to be justified as being just, or fair, in the circumstances of the particular case and relevant to the contemporary needs and expectations of the community.

At the same time, the reality of the judicial process would be recognised, principally, the inherent uncertainty and vagueness of the law. This uncertainty vests judges with vast discretion and confronts them with limitless choices in the course of reaching a decision. Judicial autonomy, I urged, is not only inevitable, but also is essential to ensure that justice is done in the individual case and that the law is applied and developed to meet current requirements. I recognised that it is this judicial autonomy that gives the common law its dynamic.

I sought to place this dissertation in a tenable jurisprudential setting based on the truism that the law exists to serve society.

Contrary to what was probably sound scholarly advice, I decided to publish the work rather than allow a draft to be circulated for the valuable comments of those who could be persuaded to read it, and to then let it stand for the benefit of further reflection. Immediate publication, however, did not indicate finality. It was my expressed intention to return to the subject in the fullness of time and to modify and expand my thinking in the light of my added experience, further reflection, any critical observations that the Monograph may have prompted, and the advances made in relevant legal theory. This book seeks to give effect to that intention.

All these factors; further experience and reflection, comments received and current legal theory have caused me to recast much of my thinking. Further articles that I have written on the subject of the judicial process while on the Court of Appeal indicate a progression of thought.⁵

⁴ As my argument has developed, it might be more correct to say that, although the past will no longer predict the future, proper regard for and use of the past will assist in the task of predictability.

⁵ 'Fairness and Certainty in Adjudication: Formalism v Substantialism' (1999) Vol. 9, No. 3, Otago LR 459 ('Fairness and Certainty in Adjudication'); 'The "Invisible Hand" Prompts a Response' [1999] Pt II, NZLR 227; 'The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium', Victoria University of Wellington Law Faculty's Centennial Lecture, (2000) 31 VUWLR 5 ('Centennial Lecture'); 'Judging in the Twenty-First Century' (2000) NZLJ 228; 'The Conscience of the Law' (2000) Vol. 8, No. 1, Waikato LR; and 'A Critical Examination of the Doctrine

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Such is that progression that I cannot be confident further time would not cause me to revise my thinking yet again. But I am satisfied any such revision, while probably inevitable, would be at the periphery of my vision. My core beliefs are firmly held. Indeed, believing that to be the case, I have utilised parts of these earlier writings, with much modification certainly, in this book. Self-plagiarism, I claim, is not plagiarism at all. But the great bulk of the book is new – if not novel! In addition, the opportunity I was given following my retirement from the Court of Appeal decrees that I complete the task that I began in 1992.

I was fortunate to have been awarded a Visiting Fellowship in the Law Program of the Research School of Social Sciences at the Australian National University in Canberra for the year 2002. This book was substantially completed during my visit. My indebtedness to the Program is unbounded.

My time as an appellate Judge revealed that my exhortation to the judiciary to revert to principles in determining cases and my focus on the rigidity of precedent was incomplete. An increasing number of judges, I found, seek to unearth the principle underlying the case or cases cited in argument. The question from the bench to counsel confidently claiming the direct advantage of a precedent: ‘Yes, but what is the principle behind that decision’, or words to that effect, is being voiced more often than in the past. Admittedly, the question is often prompted by the fact that counsel’s confidence that the precedent is directly in point is misplaced. Perceptions of the evident principle may then vary. But however the principle is discerned, it is what the judges choose to do with it that is critical. Some judges will confine or restrain the principle, even to the extent of modifying and redefining its breadth and application. Others will construe and apply the principle liberally, extending it where that is thought necessary to serve the interests of justice or to bring the law into harmony with the current needs and expectations of the community. While, therefore, many judges search for the relevant principle on which to base their decision, only some adopt the approach that I sought to prescribe in my Monograph.

I also found that cases in which the application of a precedent was directly in issue were extremely rare. In my six years on the Court of Appeal, during which time the Court delivered just under 3000 judgments, a binding precedent was directly in issue and reviewed in less

of Precedent’ in Rick Bigwood (ed.), *Legal Method in New Zealand* (Butterworths, Wellington, 2001), at 141 (*‘Legal Method’*).

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than a handful of cases. I realised that it was not the doctrines of precedent or *stare decisis*, as such, that were the problem as I had earlier opined, but a deep-rooted predisposition that those doctrines engender in judges. Certainty is pursued as a goal of adjudication. Without being bound by a precedent, many judges hugged the skirts of the established body of law, or, rather, the body of law that they held had been established. The coercive element in the doctrines continued to exert a dominant influence as a consequence of this latent predisposition.

At the same time, however, I was confirmed in my view that judicial autonomy is an undeniable reality. The scope for choice in judicial reasoning is of mammoth proportions. It is ever-present and all-pervading. These choices are directed by the preconceptions and predilections of the individual judge. Included among these preconceptions and predilections are evident prejudices, which, although perhaps not of the order of the prejudices at times aired on ‘talk-back’ radio, are or should be wholly alien to judicial decision-making. Such preconceptions (in which term I will throughout this book include the judge’s predilections, predispositions, prejudices, vanities, passions, obsessions, preoccupations and biases) frame the value judgements that underlie the judges’ decisions and determine whether they will be more or less formalistic in their approach.

I came to see that it is the lingering judicial penchant for formalism that is the real obstacle to the application of the principle-oriented approach that I had earlier endorsed. The true antithesis in legal reasoning is the tension between formalism, on the one hand, and an approach that favours the reality and substance of an issue, on the other. Contrary to the claims of any number of legal theorists, formalism is far from dead. My experience confirmed that it is very much alive and, indeed, that from time to time it exhibits a vitality capable of exerting a coercive influence on judicial thinking. It harbours its own aberrant logic and distracts its adherents from the realism or realistic approach that must be an early and essential element in any competent legal process. I concluded that it is, in fact, the lingering impact of formalism that has provoked much uncertainty in the law and that impedes delivery of the Justinian precept of rendering to every person their due in the individual case.

Over further time, however, I came to appreciate that even this analysis is incomplete. If judicial reasoning and the value judgements underlying its exposition are driven by the judge’s preconceptions, the formalistic approach is no more than the means by which a given end is

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achieved. Certainly, I have never underestimated the panoramic compass for rationalisation in judicial reasoning. But the formalistic approach is more than a means to an end. Because it is deeply imbedded in their psyche, the value judgements of many judges are directed and shaped by that formalistic methodology. The means infects the end. There is, in other words, an interplay or symbiotic relationship between the preconceptions of a judge and the methodology adopted by that judge.

I also observed that the value judgement that a judge will make in a particular case cannot be divorced from the judge's perception of the function of the law and the role of a judge. For example, a judge who has not escaped the residual influence of formalism will favour leaving a proposed change in the law to Parliament even though, objectively considered, the change could properly be made by the courts, or the judge will decide that a particular outcome would foment uncertainty in the law, even though the judge might never be able to explain how uncertainty would result from that outcome, or the judge will decide the case on a minimalist basis, notwithstanding that the articulation of general principles in the particular case would provide much needed guidance to the community and enhance certainty and predictability in the law, and so on.

It is this lingering judicial commitment to formalism that explains why so much judicial reasoning is still legalistic, strained or mechanical. Formalism, or a formalistic approach, inspires its own laboured or artificial responses to a legal problem. The stilted logic of formalism has both directed the judge's value judgement and dominated or confined his or her thinking. All too often the approach is adopted blindly, as if a creed, in which case the judge's reaction is automatic and prevents a distinction being drawn between the judge's preconceptions and the methodology that he or she has pursued.

I therefore came to accept that the judicial methodology that is adopted is critically important in determining the substantive decisions that are reached. Judges will by nature be more or less conservative, or more or less orthodox, or more or less liberal, or more or less creative, or more or less many other human characteristics, but the adoption of a methodology that is more reasoned, deliberate and transparent than that of the past should, I felt, reduce the disparity between them. The alternative, instinctively unpalatable to even an ardent realist, is that the outcome of legal disputes is dependent solely on the personal preconceptions of the individual judge. It became my view that, if the chains of

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formalism could be finally broken and the vast scope for choice in judicial reasoning accepted, judicial decision-making could be harnessed to an approach that is realistic, pragmatic and yet principle-oriented in its implementation. It is that approach or methodology that is explored in this book.

I am conscious that it could be said that my experience is peculiar to me and the appellate Court of which I was a member. It is true that for the last five years I sat on a notably conservative Court and that a number of the Court's judgments reflect a determined formalism and all that this intuitive commitment entails. But experience as an appellate judge has a universality that cannot be abridged in this fashion. To a greater or lesser extent, appellate courts in all common law jurisdictions are beset by the vestiges of formalism. Formalism, for example, is still readily evident in the judgments of a number of their Lordships in the House of Lords in the United Kingdom. Under the guise of 'legalism' it is the proclaimed wisdom of many, if not most, of the Judges of the High Court of Australia.⁶ It is much less evident, but still present, in the judgments of a number of the Judges of the Supreme Court of Canada. I therefore believe that what I have to say in this book is applicable to judicial reasoning in all common law jurisdictions.

Nor is the judicial methodology that I advance, and the conception of the judicial role that it embraces, restricted to appellate judges. It is directed to all judges, both appellate judges and judges at first instance alike. Nevertheless, I anticipate that the reaction of many will be to seek to restrict what I have to say to judges of appellate courts only. Any such restriction would be unfortunate. Obviously, the methodology will be more pertinent to appellate judges who are higher in the judicial hierarchy and who are called upon to deal with more pure questions of law. They will have more scope to give effect to the recommended approach and conception of the judicial role than judges at first instance. But this does not mean that the methodology is not applicable to judges at first instance. The only reservation that need be made is in connection with the doctrines of precedent and *stare decisis*, which are dealt with in Chapter 6. Where a precedent is directly in point a judge at first instance will need to be more circumspect in re-evaluating the validity of the precedent, particularly if it is a case determined by a higher court within the same jurisdiction. I have, however, included in that chapter a section which may prove of particular value to judges at first instance in

⁶ See Leslie Zines, *The High Court of Australia* (4th edn, Butterworths, Sydney, 1997).

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determining whether they need feel bound to apply a purported precedent.⁷ I may add that, when a judge at first instance, I followed my own advice in this regard, and the world as we know it did not come to an end.⁸

In casting the rethinking in this book at common law jurisdictions generally I do not exclude the United States or any other country that has a written constitution. But my work is not directed at constitutional interpretation. Because of its dominant role in the interpretation of the Constitution, the Supreme Court of the United States is necessarily oriented to the resolution of constitutional issues. Consequently, scholars in the United States, almost to a person, have concentrated on the judiciary's approach to constitutional issues to the exclusion of the vast range and volume of judicial work involving nothing more than the application and development of the common law. Yet, focusing almost exclusively on the judicial process at the level of constitutional interpretation tends to reduce the relevance of legal theory to the bulk of the law and legal practice. Constitutional issues and theories of interpretation that compete for ascendancy create their own particular scholarly domain. It is, for example, much easier to portray the judicial process at that level as a process of interpretation. Dworkin, for one, can describe law as an 'interpretive practice'. But, as I will assert in Chapter 1, the judicial process is much more than an interpretive exercise. It is irrevocably creative. While sections of this book will no doubt be relevant to constitutional interpretation, its primary focus remains the judicial process and the application and development of the common law generally.

I am not therefore directly concerned with statute law. This does not mean that I am unaware of or indifferent to the immense volume of statute law generated in modern parliamentary democracies. I freely acknowledge the extent and impact of statutory law in contemporary society, especially on commercial activity, and that it necessarily overrides and modifies the common law. But I decline to demean the importance of the common law simply because of the emergence of a mountainous body of statutory law. Vast areas of human activity of vital significance to the interests and well-being of citizens who are affected remains subject to the vagaries of the common law and the vicissitudes of the judicial process. Moreover, it must be borne in mind that the approach and principles that guide courts in interpreting statutes is

⁷ See below, Chapter 10, at 251–254.

⁸ See, for examples, Chapter 10, nn. 20 and 22.

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largely the product of the common law. Reference need only be made to a penetrating article by Professor A. T. H. Smith for concrete illustrations of the extensive development of the criminal law in the framework of statutory interpretation.⁹ Formalism has beset the process of statutory interpretation just as much as it has the development of the common law, and the judicial methodology that I advance in this book can be applied to that process with such minimal modification as may be necessary.

Nor have I sought to burden the treatise with references to cases. Where it is helpful to illustrate a point, however, I have seen fit to cite a case and generally to deal with it in some detail. The risk with this economy is that, if the relevance of the case is accepted, it may prompt the response that the case is an exception, and the point it illustrates may then be dismissed with the comment that one swallow does not make a summer. Such a reaction would be unfortunate. Suitable cases to illustrate the various points abound. They reflect the prevailing judicial methodology. Indeed, the exceptions are the rare cases that reflect the approach endorsed in this book. Many more, and probably better, examples of the points that are illustrated can be found in any volume of any law report in any law library. Law students will discover them from day one of their studies at law school.

I have also deliberately refrained from restricting the cases used to illustrate various points to New Zealand decisions and, in particular, decisions in which I was involved as a judge. One exception proved inevitable. But, for the most part, I refer to cases in the United Kingdom and Australia and, to a lesser extent, Canada and the United States. If cases from the United Kingdom loom large it is simply because that jurisdiction provides the most fertile ground for the judicial failings that are censured in this book. The United States, on the other hand, has supplied by far the bulk of the jurists and legal theorists whose work is addressed.

In taking up the Visiting Fellowship at the Law Program in the Research School of Social Sciences for the purpose of writing this book, I initially intended to adopt the style of modern legal theorists. The book would be an essay in jurisprudential theory laden with copious footnotes. It soon became clear, however, that a theoretical dissertation is not what is required and would not lend itself to what I want to say. Although the work has, as it must have, a theoretical perspective, I am

⁹ A. T. H. Smith, 'Judicial Law Making in the Criminal Law' (1984) 100 LQR 46.

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essentially speaking from the standpoint of a working judge. While my target audience is anyone interested in jurisprudence, particularly the judicial process and judicial reasoning, the groups I most want to influence are judges and lawyers, for it is through them that the law is practised and administered. Consequently, and contrary perhaps to my natural inclination, I have sought to write this book in a way that accords with that objective. The possibly over-ambitious desire to redirect judges' approach and reasoning in judicial decision-making is not concealed.

I am, of course, conscious of the fact, as the late Professor Peter Birks, for one, was wont to emphasise, that an increasing source of law are the articles and commentaries of academic lawyers. The epistemology of judicial reasoning is of signal interest to them. For that reason I do not discount the possibility that this book may serve a useful purpose for those academics who seek to influence the substance and development of the law.

Furthermore, because I believe that legal theory is an important adjunct to the judicial process and that, to be effective in practice, judges must acquire a greater knowledge of legal theory, jurisprudence will never be far beneath the surface. At times, no doubt, it will break the surface. This surfacing is to be expected of one who has in the past claimed, perhaps tongue in cheek, that he has always aspired to be a good lawyer, but jurisprudence kept on getting in the way! I therefore hope legal theorists may find the work of some value, even if not quite of the same value as I have obtained from their own writings in the performance of my judicial duties. If nothing else, it may provide an insight into the assumptions, perceptions and philosophy, never wholly perfect, but never, I trust, wholly imperfect, of one working judge.

Finally, I harbour the fond hope that the book may be of real benefit to students. Law students seemingly come to their law schools as putative, if not committed, positivists. Law is about rules and cases, and learning the law is about learning those rules and cases. It is as ingenuous as that. Too often, it seems, this simplistic predisposition is confirmed in the lecture room. All would be well with the world and, in particular, certainty and predictability in the law would be assured and stability and continuity in society enhanced, if only the judges would apply the rules, adhere to precedent, and suppress any urge to be creative. Alas, the legal process is not so simple or straightforward. The fond hope of which I speak, therefore, is that this book will provide students with a more realistic introduction to the judicial process, and one that will stand

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them in better stead in the practice of the law and the service of their clients.

I should add, having referred to students as a desirable class to read this book that it is not written as a textbook. No settled effort is made to expound the various legal theories mentioned in the text. The student must look elsewhere for an exposition of these theories. For the most part, no more explanation is included than is necessary for me to develop the argument being advanced at the time.

I should also add an apology of sorts. At the outset I observed that, as an overworked judge for just over eleven years, my aspirations at scholarship fell short of the 'ways of the scholar'. The same can be said of the time that I was in practice. Before accepting appointment to the Bench I was an overly busy practitioner. I therefore wish to reiterate the disclaimer. Without enjoying the opportunity for the long and deep study, reflection and discussion that an academic environment would have provided, it would be pretentious for me to lay claim to undue scholarship. My knowledge of legal theory has been picked up 'on the run', so to speak, and often when a Le Carré novel lay unopened begging for attention.¹⁰ I can only hope that this lack of scholarship is less evident than I fear; that it does not provoke exasperation, or worse, irritation, in the learned reader; that any shortcomings in my learning will lead to compassion rather than frenzied exposure; and that those shortcomings are more than made up for by my direct experience in the process of which I write.

In writing and completing this book I have received considerable assistance from many learned and able people. First, I am grateful to the inhabitants of the Law Program corridor of the Research School of Social Sciences at the Australian National University; Peter Cane, John Braithwaite, Jane Stapleton, Leslie Zines, Sarah Harding, Carol Harlow, George Christie, Ernst Willheim, Gary Edmond, Christos Mantziaris, Chris Finn, Adrienne Stone, Collin Scott and Imelda Maher for their constant encouragement and support. In truth, I became so fond of them all that I would express such gratitude even if it were not their due. But it undoubtedly is their due. They created for me an environment

¹⁰ The difficulty that I have highlighted is not peculiar to me, and reveals a problem outside the scope of this book. If judges are to obtain a greater understanding of legal theory they must be given the time – what Bickel called 'the leisure' – to acquire the knowledge that will give rise to that understanding. Judicial administration needs to provide that time. If senior judges are treated like 'work horses', with judicial efficiency measured by output alone, judges cannot be held venal for behaving like work horses.

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that I found both stimulating and productive, at times exhilaratingly so. To the names of those wonderful folk I must add Nicola Piper, a sociologist, and Maria Barge, a political scientist, both also from the Research School of Social Sciences. Their refreshing insights were a great benefit to me and a constant reminder that all wisdom in matters legal is not the sole prerogative of lawyers.

Secondly, I thank all those persons who volunteered to peruse and comment on a draft manuscript or who, before they had the opportunity to volunteer, were cajoled into doing so, for their valuable and constructive comments. I am acutely conscious of the task that they confronted and I am overwhelmed by their response. My unbounded thanks (in alphabetical order and without regard to titles) are extended to Sarah Allen, David Baragwanath, Rick Bigwood, John Braithwaite, Peter Cane, George Christie, Gary Edmond, Emma Finlayson-Davis, Rodney Hansen, Stephen Hunter, Daniel Kalderimis, Christos Mantziaris, Simon Mount, Jane Stapleton, Hanna Wilberg, Ernst Wilhelm and Leslie Zines. Quite late in the piece, the comments of an anonymous Cambridge reader proved exceptionally helpful. My friend from University days, Gordon Cruden, deserves special mention for his invaluable encouragement and advice. The depth and force of the comments of another good friend, Robin Congreve, did not surprise me, but the measure of his agreement with my manuscript did.

The fact that I may not have made all the recommended corrections, modifications or deletions or incorporated all the suggested additions that commentators have made does not mean that their recommendations and suggestions were not valid. Those recommendations and suggestions are simply the casualties of the author's ultimate autonomy. Needless to say, none of those worthy commentators are responsible for what remains.

I am particularly indebted to Simon Mount and Emma Finlayson-Davis for their research and help in tying up the remaining bits and pieces of the manuscript that I brought back from Canberra. Prudence dictated that I submit my piece on Richard Wagner's *Die Meistersinger* to Heath and Liz Lees, the President and Secretary respectively of The Wagner Society of New Zealand. Their enthusiastic support was in no way diminished by their surprise that a book on the law could be, to quote them, 'singable'. Katherine Lee is to be mentioned for typing up the bulk of this book. Nor could I have done without the typing assistance of Cynthia Koks after I had returned to New Zealand. Finally, I must thank my daughter, Helen, and her husband, Robert Scott, for

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their determined persistence and tireless patience in assisting me conquer the machinations of my computer when, with a mind of its own, it sought to thwart my reasonable demands.

Just as none of the above persons are to be held responsible for the opinions advanced in this book, so too none are to be saddled with the criticisms that it will provoke. That criticism is for me and me alone. Criticism there will be, and plenty of it, for the shibboleths that I challenge are too deeply ingrained in the psyche of too many judges, lawyers and legal academics for it to be otherwise.

Yet, I must confess that I will be dismayed at much of the criticism. By my own lights, I have done nothing more than bring to the study of the judicial process a determined realism and a relentless determination to pursue that realism through to its logical conclusion. Experienced judges, in particular, will acknowledge, for example, that the law is contentiously vague and uncertain, that judges make and remake the law, that judicial decisions are impregnated with policy considerations, that there is no impersonal or transcendental law to which judges can conveniently defer responsibility, that multiple choices are integral to the process of judicial decision-making, that a rule-bound or 'rulish' approach is inadequate to explain the application and development of the common law, and that resting at the base of much judicial decision-making is the value judgement of the particular judge; but they, no less than practitioners and academics generally, will resolutely decline to press these premises to their logical conclusion. If I am right in what I have written and the reader is about to read, it is only because I have sought to do just that; to take premises that are founded in a realistic appreciation of the judicial process and drive them to their logical destination.