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# BOOK REVIEW

## The Common Law As Cricket

FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW. By Patrick S. Atiyah\* and Robert S. Summers.\*\* New York: Oxford University Press, 1987. Pp. xx, 437. \$69.00.

*Reviewed by David F. Partlett†*

### I. INTRODUCTION

Cricket and baseball are the summer national pastimes of England and America. They both involve players, one of whom propels a hard leather ball toward another with the intent of getting that other "out." The hitter tries to avoid getting out and attempts to hit the ball as far as possible. Umpires preside. Despite all these and other common factors, the games are different. Baseball is brash and dusty, and umpires endure frequent abuse; cricket is restrained and village greenish, and umpires rarely suffer abuse. Both games draw from history and culture. Where transplanted the games assume a different guise. In the West Indies a Caribbean passion possesses cricket. In Central America a Latin bravado inspires baseball.

Much the same can be said of the common law. To the American, cricket and English law seem confined and stodgy. Baseball and American law to the Englishman seem overwrought and brazen. A book to bridge our knowledge gap in sports has not been written. Fortunately, however, Professors Patrick S. Atiyah and Robert S. Summers have written a book that should cure us of our legal ignorance and do much

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to lead us to a deeper understanding of the common law.<sup>1</sup>

The common law is our heritage but the way it is employed differs in each country. English courts would not dare, as their American cousins have, judicially to create strict liability for defective products or to replace the defense of contributory negligence with comparative fault.<sup>2</sup> These tasks are legislative. The role of the courts and their relationship with other lawmaking organs differ distinctly. This difference is a product of history, political philosophy, and culture.

Professors Atiyah and Summers in *Form and Substance in Anglo-American Law* masterfully describe the differences in English and American law. But this work is no blind taxonomy of differences; their description is designed to validate a theory of the law. In this book comparative law informs legal theory. It is a significant contribution to modern jurisprudence.

The state of American law accentuates the timeliness of this contribution. American law is engaged in a frenzy of theoretical navel gazing. The integrity or inner cohesion of the law has been assailed.<sup>3</sup> Although by no means new, the recent attack has a new virulence. At its broadest this attack states that the law is but varnished power: it is politics.<sup>4</sup>

*Form and Substance* allows a wider focus. The American debate may be placed in a broader context—a context which may reveal that the law is autonomous, a separate normative system. The theoretical paradigm employed by Professors Atiyah and Summers reinforces an important movement in the theoretical debate. Formalism in the law often has been derided as an empty or foolish notion: something that Charles Dickens demolished in *Bleak House*.<sup>5</sup> But it now is being taken seriously again. *Form and Substance* will enhance the case of those who argue for formalism. The idea of formalism, although presented in elegant detail in the book, deserves a separate treatment. The evolutionary aspect of the legal theory may cut asunder the paradigms of substantiveness and formalism that are proposed as ideal types of the American and English law.<sup>6</sup> It may be that American law is in a process,

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1. P. ATIYAH & R. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1989) [hereinafter *FORM AND SUBSTANCE*].

2. See *infra* note 97.

3. See Posner, *The Decline of Law As an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 766-77 (1987).

4. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). See generally R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Posner, *supra* note 3, at 765 (stating that "the American intellectual scene in the late 1950s and early 1960s was remarkably free from ideological strife" and in this "period it was natural to think of law not in political but in technical terms"); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

5. C. DICKENS, *BLEAK HOUSE* (1853).

6. See *Tonnies' Use of Ideal Types of Gemeinschaft and Gesellschaft*, in *LAW AND SOCIETY: THE CRISIS IN LEGAL IDEAS* 52 (E. Kamenka, R. Brown & A. Erh-Soon Tay eds. 1978).

under the influence of theorists and pragmatic reformers, of embracing formalism anew. *Form and Substance* will play a part in that reappraisal of formalism. Professors Atiyah and Summers succeed in an avowed purpose "to rehabilitate formal legal reasoning."<sup>7</sup> The authors pursue their mission because they are "convinced that formal reasons are central to law, and that their proper analysis is one of the most neglected topics in the history of modern legal theory."<sup>8</sup> Paradoxically, English and Commonwealth law may well be in a process, influenced by earlier American law and the felt need to protect the citizen against the state, of casting off formalism in favour of substance.

This process carries into an oversight of *Form and Substance*. The authors' treatment of American and English law and theory tends to underrate the growing influence of American law. While English law has been relatively impervious to American influence, forces are at work that will make American law more relevant.<sup>9</sup> Even more interesting is other Commonwealth law, especially the law of those nations with federal constitutions like Australia and Canada, where constitutional habits promote a search for wider principles.<sup>10</sup>

One last point becomes lost in the book's detail. Although Professors Atiyah and Summers probably would say it is implicit, they should have stated explicitly that a large gulf separates American and Commonwealth common law in their respective sources for inspiration and growth. American common law is extremely eclectic. Ideas are welcomed from many quarters. The views of the legal academy are especially potent, particularly those of the faculty in the elite law schools.<sup>11</sup> The institutions of the law schools, the use of judicial clerks,<sup>12</sup> the lack of a specialized bar, the legislative committee systems, and the play of interest groups encourage the rapid transmission of fresh ideas to the

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7. FORM AND SUBSTANCE, *supra* note 1, at 7.

8. *Id.*

9. See *infra* notes 19-40 and accompanying text.

10. See B. STRAYER, *THE CANADIAN CONSTITUTION AND THE COURTS: THE FUNCTION AND SCOPE OF JUDICIAL REVIEW* (2d ed. 1983); see also G. BEAUDOIN & E. RATUSHNY, *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: A COMMENTARY* (2d ed. 1989); Bakan, *Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought*, 27 OSGOODE HALL L.J. 123 (1989). For influence of protections on the New Zealand law, see Richardson, *Judges as Lawmakers in the 1990s*, 12 MONASH L. REV. 35, 38 (1986) (the New Zealand Court of Appeal judge notes that New Zealand is considering such protections and that this activity will "involve the courts in making value judgments with considerable consequences"); see also Gibbs, *Eleventh Wilfred Fullagar Memorial Lecture: The Constitutional Protection of Human Rights*, 9 MONASH L. REV. 1 (1982).

11. See White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2032 (1989) (reviewing R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)).

12. For a discussion of the role of law clerks by the authors, see FORM AND SUBSTANCE, *supra* note 1, at 281-83.

courts and other legal decision makers.<sup>13</sup> With Paul Johnson some may say that intellectuals are villains,<sup>14</sup> while others may relish the rich marketplace of ideas. Whatever one's view, ideas are in the air. They are debated strenuously. The realists have come and gone but find a second life in the critical legal studies movement.<sup>15</sup> Although flourishing, the law and economics theorists are attacked vociferously. Law and literature becomes an area promoted to give a new perspective to the law.<sup>16</sup> In contrast, English and Commonwealth law is established to filter ideas generated by legal academia. The common law—the way it is fashioned—appears as curmudgeonly pragmatic; philosophical pretenses are eschewed.<sup>17</sup> Ideas are generated within the close ranks of the bench and the bar or within the professional ranks of the civil service and the politicians.<sup>18</sup>

Because of the growing influence of American law, the ideas deriving from American legal academics adopted by American courts are transformed into a recognized discourse for consumption by Commonwealth courts. Accordingly, the ideas of American academics may influence Commonwealth law more strongly than the writings of indigenous legal academics. Rounding out the circle, if formalism reclaims theoretical ground it may be expected that it will be internalized within American law through the influence of American legal scholarship.

This Review's thesis is that the common law increasingly will cross-fertilize. While the paradigm of formal and substantive reasoning proposed by Professors Atiyah and Summers is useful for their exposition, its factual basis may be eroding as ideas are absorbed into American and Commonwealth law at different rates. It is a true explication of the past but inaccurate for the future. It does not follow, however, that a grand unification is proceeding. Far from it. English society and culture are much different from their American counterparts. Commonwealth countries are different again. I claim simply that the paradigms will weaken. The counter examples cited by the authors likely will multiply.

The penetration of American law will be discussed in Part II. In Part III the nature of formalism and how *Form and Substance* deepens our understanding of it will be explored. These two sections, along with

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13. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1266 (1981).

14. P. JOHNSON, *INTELLECTUALS* (1988).

15. See White, *The Inevitability of Critical Legal Studies*, 36 Stan. L. Rev. 649 (1984).

16. See White, *supra* note 11, at 2014; *Law, Literature, and Social Change*, 43 VAND. L. REV. (forthcoming Nov. 1990).

17. See *National Ins. Co. of N.Z. Ltd. v. Espagne*, 105 C.L.R. 569, 590 (Austl. 1961) (Windeyer, J.) (quoting Sir Frederick Pollock who sounded the warning that "the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause").

18. See *infra* notes 172-76 and accompanying text.

Parts IV, V, and VI, which convey my observations about the reception of the ideas in the process of law formation, indicate that evolution may erode the factual basis of the ideal types employed by Professors Atiyah and Summers.

## II. THE PENETRATION OF AMERICAN LAW

It is wrong to say that American law has wielded little influence on the minds of the English and Commonwealth lawmakers. Justice O.W. Holmes and Professor Frederick Pollock discussed the universals of the common law, something in keeping with the notion that the principles of law were scientifically rational and could be derived from root principles.<sup>19</sup> Historically, of course, it was English law after the hiatus of the American Revolution, that powerfully shaped American law.

Especially after the turn of the century, examples are found in the common law of American law being a catalyst for change. In the famous *Donoghue v. Stevenson* decision,<sup>20</sup> the House of Lords imposed negligence liability on a manufacturer of products to remote parties, thereby establishing negligence as a separate tort. The House of Lords found that the manufacturer of ginger beer owed a duty to the ultimate consumer who alleged that she was injured when a decomposed snail emerged from her bottle. Lord Atkin drew upon Justice Benjamin Cardozo's opinion in *MacPherson v. Buick Motor Company*.<sup>21</sup> Underscoring the *MacPherson* influences, Justice Evatt of the Australian High Court wrote to Lord Atkin in 1933 in the following terms:

The Snail Case has been the subject of the keenest interest and debate at the Bar and in the Sydney and Melbourne Law Schools: on all sides there is profound satisfaction that, in substance, your judgment and the opinion of Justice Cardozo of the U.S.A. coincide, and that the common law is again shown to be capable of meeting modern conditions of industrialization, and of striking through forms of legal separateness to reality.<sup>22</sup>

In a direct fashion the United States Constitution was the model for the Australian Constitution upon Australian federation in 1900. Consistent with Professors Atiyah and Summers' thesis the Australians eschewed incorporation of the provisions of the Bill of Rights.<sup>23</sup> Moreover, the style of judicial interpretation of the Australian Constitution

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19. See, e.g., G. GILMORE, *THE AGES OF AMERICAN LAW* (1977); C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (2d ed. 1879); see also Posner, *supra* note 3, at 762. See generally 2 *HOLMES-POLLOCK LETTERS* (M. Howe ed. 1961) (reporting their discussion of the scientific nature of legal rules).

20. 1932 App. Cas. 562.

21. *Id.* at 598 (citing *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916)).

22. G. LEWIS, *LORD ATKIN* 67 (1933) (quoting Letter from Mr. Justice Evatt, High Ct. of Australia, to Lord Atkin (Mar. 1933)).

23. See J. LANAUZE, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* (1972).

was more markedly "legalistic" or formal. Australia's greatest High Court Justice, Sir Owen Dixon, was proud of his court's "legalistic" style.<sup>24</sup>

The influence of America became more palpable after the Second World War, especially in the Commonwealth. Many of the presuppositions of British protection were shattered in that war. For example, Australia's foreign policy was aligned with the United States. The law lagged behind political changes, but changes were afoot. Law graduates with outstanding credentials who formerly went to Oxford or Cambridge for postgraduate studies, began attending elite American schools. The excitement and intellectual intensity of American law seized these graduates. Those who returned and taught law were to influence generations of students. Especially influential was Professor Julius Stone at the University of Sydney Law School—a jurist and international lawyer—who previously served on the Harvard faculty. The realists' insights and the sociological jurisprudence of Roscoe Pound were expounded upon, if not always fully appreciated by students.<sup>25</sup>

For all this activity, the law remained firmly hierarchical and formal. The apex of the hierarchy was the Privy Council in London. It is accurate to say there was a uniform common law, tailored somewhat to the conditions of the particular Commonwealth country. The Privy Council principally was composed of Law Lords who usually sat on the House of Lords. Although House of Lords decisions were not binding, the overlapping personnel obviously cleaved to uniformity.<sup>26</sup>

These ties became increasingly anomalous, and after much legal jockeying between the States of Australia and the federal government all appeals to the Privy Council were abolished. The Australian High Court became the final court of appeal. The Australia Act in 1986 effectively created a new grund norm for Australia.<sup>27</sup> The English law be-

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24. See O. DIXON, *JESTING PILATE* (1965); Mason, *The Role of a Constitutional Court in Federation: A Comparison of the Australian and the United States Experience*, 16 *FED. L. REV.* 1, 4 (1986).

25. J. STONE, *THE PROVINCE AND FUNCTION OF LAW* 355-68 (1961); J. STONE, *SOCIAL DIMENSIONS OF LAW & JUSTICE* (1966).

26. In a number of cases the High Court of Australia ameliorated the harsh consequences of the common-law rule that a trespasser was owed no duty of care. See *Commissioner for Rys. v. Cardy*, 104 C.L.R. 274 (Austl. 1960); *Rich v. Commissioner for Rys.*, 101 C.L.R. 135 (Austl. 1959). But this holding was repudiated by the Privy Council in *Commissioner for Rys. v. Quinlan*, 1964 App. Cas. 1054 (P.C.). The *Quinlan* decision was much criticized, the legitimacy of which was confirmed when the House of Lords adopted a new approach in *Herrington v. British Rys. Bd.*, 1972 App. Cas. 877. This decision left the Commonwealth law ruled by an acknowledged unsatisfactory decision, a situation cured only when the Privy Council decided *Southern Portland Cement v. Cooper*, 1974 App. Cas. 623 (P.C.). Eventually the law reverted to a test similar to that enunciated in *Rich* and *Cardy*.

27. The Australia Act, 1986, ch. 2, reflects the positivist vision of the law suggested by the

came less compelling. Australian judges accordingly were faced more urgently and directly than in the past with the need to create a body of law suitable to the needs of the country.<sup>28</sup>

American models were referred to in the legislative sphere. This reference was especially the case when American society already had faced issues that were newly emerging in the Commonwealth. The 1974 Trade Practices Act adopted many of the American antitrust concepts. In securities regulation the American regulatory model inspired the enactment of Commonwealth legislation establishing the National Companies and Securities Commission to perform some of the same functions as the Securities and Exchange Commission. When ethnic and racial diversity loomed as social issues the American record was examined for lessons.<sup>29</sup>

The growing influence of American law occurred at the same time that elements of English law were appearing to be more alien to Commonwealth eyes. In 1972 the United Kingdom entered the European Economic Community and undertook to bring its laws into conformity with those prevailing under European guidelines.<sup>30</sup> For example, English company law was brought within those guidelines.<sup>31</sup> Importantly for the erosion of formalism, adherence to the European Convention on Human Rights injected concepts into English legal discourse that clashed with accepted common-law standards and constitutional conventions.<sup>32</sup>

These influences have fractured the common law. Australian, New

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authors.

28. *The Council of the Shire of Sutherland v. Heyman*, 60 A.L.R. 1 (Austl. 1985) (establishing liability rules distinct from English rules covering the same topic).

29. See, e.g., Evans, *New Directions in Australian Race Relations Law*, 48 AUSTL. L.J. 479, 481 (1974) (noting that Australian racial discrimination laws in part were patterned after United States equal protection laws).

30. See *The Siskina*, [1977] 3 All E.R. 803, 829-930; European Communities Act, 1972, ch. 68, § 2.

31. See Schmitthoff, *The UK Companies Legislation of 1985*, 22 COMMON MKT. L. REV. 673, 674-75 (1985). The causes of the 1985 consolidation of UK company law were thus external, i.e. EEC law, and internal. It should be added that the effect of the EEC Directives relating to company law on English law has been very beneficial. First, it helped to modernize English company law and secondly it completed the UK legislator and act within the time limits stated in the Directives. Company law often has been the Cinderella of UK legislation, as is evident from the failure to implement the recommendations of the Jenkins Report of 1962 after it was published. It is no exaggeration to state that but for the need to implement the EEC Directive there would have been little effective reform of companies legislation in the UK during the last decades. *Id.* at 676; see also Consumer Protection Act, 1987, ch. 43 (implementing European Community Directive (85/374-EEC)); Cardwell, *The Consumer Protection Act 1987: Enforcement of Provisions Governing the Safety of Consumer Goods*, 50 MOD. L. REV. 622 (1987).

32. See *A.M. & S. Europe Ltd. v. Commission of the European Community*, [1983] 3 W.L.R. 17, discussed in Partlett, *Attorney-Client Privilege, Professions and the Common Law Tradition*, 10 J. LEG. PROF. 9, 15 (1985).



Zealand, and Canadian law likely will drift from the English and from one another. No doubt there are costs in this drift. The accumulated wisdom of the English courts in commercial disputes is not as directly available. Lack of scale will oblige these independent systems to search for that wisdom in comparative experiences, the relevance of which must be established. American law accordingly provides a ready made common-law and legislative laboratory because of its scale and responsiveness to problems. The risks, however, of inappropriate transportation due to a want of understanding are present.<sup>33</sup>

One last phenomenon may help establish conditions whereby Commonwealth lawmakers will be more comfortable with American law. A considerable number of English and other Commonwealth legal academics recently have visited American law schools. Professor Atiyah is an outstanding example. He had regular sojourns, inter alia, at Cornell, Duke, and Virginia. Amongst others, Professor Paul Craig of Worcester College, Oxford, has visited at Virginia and Cornell. Craig's American experience has been translated to his impressive writing in the administrative and torts areas.<sup>34</sup> Professor Gareth Jones from Cambridge is a frequent visitor at Chicago. On a permanent basis Professor John Fleming joined the Boalt Hall faculty in 1960 after deaning at the Australian National University and establishing an international reputation as a torts scholar from that base. Fleming's outstanding torts book, *The Law of Torts*, incorporates many American ideas and continues to influence generations of Australian and Commonwealth lawyers and law students.<sup>35</sup> Professor Norval Morris, a former dean at Chicago, has been influential in criminal law and criminology. Morris, an Australian, began her academic career at the University of Adelaide. A recent transplant is Professor A.W.B. Simpson, one of the preeminent English legal historians, who has joined the University of Michigan Law School.<sup>36</sup> This migratory trend has been reciprocated. Perhaps the towering figure of this list is Professor Ronald Dworkin. Dworkin, an American, carried with him an American version of the law<sup>37</sup> when he took his

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33. See Dror, *Law and Social Change*, 33 TUL. L. REV. 787, 802 (1959) (stating that "[t]he high rate of social change prevalent or aimed at in nearly all contemporary societies seriously challenges the skills and abilities of statesmen, lawyers and social scientists"); Watson, *Legal Transplants and Law Reform*, 92 LAW. Q. REV. 79 (1976).

34. See CRAIG, *ADMINISTRATIVE LAW* (2d ed. 1989); Craig, *Negligent Misstatements, Negligent Acts and Economic Loss*, 92 LAW Q. REV. 213 (1976).

35. See J. FLEMING, *THE LAW OF TORTS* (7th ed. 1987).

36. See A. SIMPSON, *LEGAL THEORY AND LEGAL HISTORY; ESSAYS ON THE COMMON LAW* (1987); A. SIMPSON, *HISTORY OF THE COMMON LAW OF CONTRACT* (1978).

37. Dworkin's vision is court centered turning on hard cases. Hart and the English positivists focused upon the central core of legal norms. See Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985). The Australian and Victorian Law Reform Commission's joint Product Liability Report was tabled in the Australian Parliament on August 15, 1989. THE LAW REFORM COMM'N OF AUSTRALIA-

chair at Oxford, the heartland of English positivism.<sup>38</sup>

Closely related to this recent phenomenon of Commonwealth legal scholars visiting American law schools, reciprocal faculty exchanges provide another source for the injection of American legal doctrine. For example, Vanderbilt and Leeds have exchanged faculty. The University of Florida has a flourishing program with Monash University in Melbourne.

It would be possible to catalogue more. Suffice it to say that today there is an extraordinary interchange between lawyers of all stripes in the common-law world. The Australian Law Reform Commission, in its reference on liability for defective products, had its Commissioner in charge, Professor Jack Goldring, travel to the United States to learn firsthand of the American experience. In the reform of defamation law, the American experience under the first amendment and *New York Times v. Sullivan*<sup>39</sup> has been noted.<sup>40</sup> To reiterate, this interchange and the fracturing of the common law likely will infuse American legal doctrines and ideas into the body of Commonwealth law.

For all this exchange, Professors Atiyah and Summers' divide between formal and substantive paradigms holds. I wish to indicate merely that a condition for change is in place. Another condition, a transplantation in American legal conceptions from substantive to formal legal norms, is my next topic in showing the dynamics at work that may undermine the paradigm. Ironically, *Form and Substance* will be a catalyst for this change. This work will promote mutual understanding of the respective systems and afford more sensitive interchange, productive transplantation, and informed practical and theoretical dialogue.

### III. FORMALISM

My elaboration on the formal/substantive paradigm begins with an attempt to explain the paradigm to demonstrate the power of the argument. Then I shall turn to show that formal legal norms are an idea whose time has come in the American context.

Professors Atiyah and Summers set forth succinctly but in illumi-

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LIA REPORT No. 51 AND THE LAW REFORM COMM'N OF VICTORIA REPORT No. 47, PRODUCT LIABILITY (1989). It recommends a novel compensation based model rather than the product safety model that is the base of the American law. For a description, see *The Reform of Product Liability Law: Proposals by the Australian and Victorian Law Reform Commissions*, 63 AUSTL. L.J. 723 (1989).

38. Professor Dworkin's scholarship is overwhelming, but two representative works are R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); R. DWORKIN, *LAW'S EMPIRE* (1986).

39. 376 U.S. 254 (1963).

40. See *Unfair Publication Defamation and Privacy*, A.L.R.C 11 app. F (1978) (discussing the impact of *New York Times v. Sullivan*, 376 U.S. 254 (1963)). The Law Reform Commission did not accept the sweeping change that this proposal would have ushered into Australian law.

nating detail the differences and similarities of American and English law. They attempt the daunting task of analyzing the background of those differences and similarities. In so doing they pinpoint the different jurisprudential traditions and how those traditions have been both influential in, and molded by, the institutions of our law—the courts, the judges, the legal profession, and the law schools—all of which derive from our respective cultures and history.

To explicate these distinctions the authors rest upon the formal/substantive paradigm. They suggest that a different vision of the law prevails in the two countries they examine. The English vision is more formal; the American is more substantive. In terms expressed by the authors this distinction in vision is between the law “as a system of rules” and the law as “an outward expression of the community’s sense of right or justice.”<sup>41</sup>

Other scholars intuitively have arrived at similar conclusions, but to the time this work was published no one had done it as stringently and comprehensively as Professors Atiyah and Summers.<sup>42</sup> No other book has had the benefit of joint creation by doyens of jurisprudence in their respective countries. At bottom the authors contend that the difference between the English and American visions is traceable to the idea of the role of law in society; theory molds the substance and institutions of our law. Professors Atiyah and Summers assert a “strong correlation between the degree of formality in the two systems and the degree to which lawyers and theorists in those systems adhere to more, or less, formal theories of law.”<sup>43</sup>

One of the challenges of *Form and Substance* is that its theoretical premise must be mastered before a full appreciation of its detail can be vouchsafed. A casual reading will leave one befuddled. Although one could read in isolation the book’s law school chapter with interest, it would be much less satisfying and a little puzzling. Therefore, let me set forth the crux of the thesis.

The authors identify four different kinds of formality in legal reasoning. The first is authoritative formality.<sup>44</sup> In terms of legal standards, some principles are high on the formality scale, for example a duly enacted statutory standard. At the other end of the spectrum is a

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41. FORM AND SUBSTANCE, *supra* note 1, at 5.

42. For an excellent comparison of English and American judges, see L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS (1969).

43. FORM AND SUBSTANCE, *supra* note 1, at 35. In another context J.S. Mill saw the English inclination toward rules and hence formality: “England is the country in which social discipline has most succeeded, not so much in conquering, as in suppressing whatever is most liable to conflict with it. The English, more than any other people, not only act but feel according to rule.” J. MILL, SUBJECTATION OF WOMEN III (1869).

44. *Id.* at 12.

judicially invoked moral principle, which will have little formal authority. This principle lies just within the boundary of legal standards. The degree of formality supporting a legal principle largely determines the conclusiveness of the standard in the sense of whether it can be questioned or put against competing standards—the greater its formal authority the greater its authoritativeness.<sup>45</sup>

Authoritative formality is a function of what Professors Atiyah and Summers term “rank formality.” All formal reasons are ruled by priorities. A constitutional provision displaces a conflicting statute, and a statute displaces a contrary contract.<sup>46</sup>

The rule itself may exhibit varying degrees of formality. This type is dubbed “content formality.” Some rules announce blunt standards, such as “keep to the left.” These may be arbitrary in the sense they are under- and over-inclusive. Some rules within their terms introduce leeways for substantive judgment, for example by imposing a reasonableness standard.<sup>47</sup>

Reflecting the current interest in statutes, the authors identify interpretative formality. Methods of statutory interpretation may be more or less formal. The interpretation is highly formal if it seizes upon the literal meanings of words. To the extent that broad underlying intentions are invoked the method is less formal.<sup>48</sup> Although interpretative formality mainly applies to the interpretation of statutes, it has some application to case law.<sup>49</sup>

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45. *Id.* This formalism is not reserved to legal rules; it is well known in the oft heard parental refrain “because I told you so!” It serves the purpose that the authors identify—it puts an end to dispute. That is, unless the child is a natural crit, as I fear many are.

46. The statute may have a strong judicial gloss attached to it. For a displacing example, see *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (interpreting a statute to classify a contract as affecting the public interest overriding contractual waiver of liability).

47. For a comprehensive discussion of leeways of choice in the common-law method, see J. STONE, *PRECEDENT AND LAW: DYNAMICS OF COMMON LAW GROWTH* 123-39 (1985).

48. See *infra* notes 153-54 and accompanying text.

49. Such is the habit of mind of some English courts that common-law perceptions are interpreted on occasion in painstaking and literalistic fashion. For example, Lord Wilberforce, in *Anns v. Merton London Borough Council*, 1978 App. Cas. 728 uttered the dictum:

[T]he position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht case* [1970] App. Cas. 1004, per Lord Reid at p. 1027.

A last category measures the mandatory quality of the formality. This category recognizes that legal rules must be applied. Mandatory formality at the point of application will exclude competing considerations. An example of a rule with high mandatory formality is a statute of limitations.<sup>50</sup>

Different systems will exhibit different mixes of formality. Every legal system must be formal to some extent. Reasons for those various degrees of reliance upon formality rest upon a second level of justification<sup>51</sup>—a level that depends heavily upon general substantive considerations. Many would call it policy or public policy.<sup>52</sup> The formality of first level rules commonly can be justified by reference to those substantive or policy considerations.<sup>53</sup> A formal rule may provide certainty. For example, a concrete property rule will promote efficiency.<sup>54</sup> The rule of law depends upon the existence of rules whereby relations between individuals, corporations, and government may be ordered.<sup>55</sup>

Beyond this obvious justification for formal reasons, Professors Atiyah and Summers present several more functional and pragmatic justifications. The first and foremost pragmatic reason arises out of the necessities of decision making.<sup>56</sup> The authors state that making decisions that have some finality is one of the principal purposes of a legal system.<sup>57</sup> Without formal rules all reasons would be in play all of the time. Rules are necessary to limit, order, and defer institutionally.

In a supplementary way formal rules reduce costs and diminish the risk of errors. Formal rules reinforce our value choices of the appropriate person or institution to make decisions. They put an end to dispute and promote certainty and predictability.

We often are given in our discussion of formalism to attach pejorative labels to it. Those who condemn reasoning not alive to its policy implications call the reasoning formalistic. Professors Atiyah and Sum-

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*Id.* at 751-52. This dictum was interpreted as a rule, which by invocation would establish a duty of care. See *Scott Group Ltd. v. McFarlane*, [1978] 1 N.Z.L.R. 553 (C.A.). However, this statute-like implication was repudiated in *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co.*, [1984] 3 W.L.R. 953, 960 (H.L.) (per Lord Keith), and in *Leigh and Sullivan v. Aliakmon Shipping Co.*, [1985] 2 W.L.R. 289, 305 (C.A.) (Oliver, L.J.). Lord Wilberforce's dictum is redolent of that in *Dillon v. Legg*, 68 Cal. 2d 7428, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

50. See *infra* note 140.

51. FORM AND SUBSTANCE, *supra* note 1, at 21.

52. See J. BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS (1983).

53. FORM AND SUBSTANCE, *supra* note 1, at 23.

54. Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13 (1972).

55. G. BRENNAN & J. BUCHANAN, THE REASON OF RULES (1985); G. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986); see Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

56. FORM AND SUBSTANCE, *supra* note 1, at 24.

57. *Id.* at 24.

mers distinguish between formal and formalistic reasoning, on the one hand, and substantive and "substantivistic" reasoning, on the other. Formal and substantive are neutral terms: they describe without judging. Formalistic and substantivistic are terms that describe inappropriate reasoning, "according to the criteria properly employed by the legal system in question."<sup>58</sup> Although likely, formal reasoning may not always exhibit formalistic reasoning, and substantive reasoning may not always exhibit substantivistic reasoning. This distinction made, it is possible, in neutral terms, for the authors to state their thesis: "the English approach to law is more formal and the American more substantive."<sup>59</sup> This thesis does not imply a value judgment, although the accumulation of evidence marshalled and their appraisal of it inclines to the view that greater formality in the American law may be welcomed.

The remainder of the book is an elaboration of that theme. Laws may clash, in the United States more often than in England.<sup>60</sup> The resolution of the clash is resolved more often substantively in American law. In England "formal rules of hierarchical priority" are employed more frequently.<sup>61</sup> Rules have become a subject of close jurisprudential study.<sup>62</sup> The authors attempt to show that in the English system the rules tend to have higher content, interpretative, and mandatory formality.<sup>63</sup>

Attuned to shifting legal interests, the authors examined the paradigm with respect to statute law.<sup>64</sup> English law is more heavily statute law, and the interpretation of that field of law is more formal. Indeed, most Commonwealth lawyers are surprised by the freewheeling statutory interpretation employed by American courts. The hold of stare decisis,<sup>65</sup> variance in trial process,<sup>66</sup> and attitude to judicial enforcement<sup>67</sup> are examined and found to fit within the paradigm.

With such a comprehensive description, the authors address why

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58. *Id.* at 31 (emphasis omitted).

59. *Id.* at 32.

60. See Posner, *supra* note 3, at 770 (stating that the replacement of mechanical rules (such as the rule of *lex loci delicti*) by "interest analysis" and its many variants has resulted in the destruction of certainty in the field of Conflict of Laws, especially in accident cases). In accordance with the thesis of this Review the High Court of Australia in *Breavington v. Godleman*, 62 A.L.J.R. 447 (Austl. 1988), draws heavily upon American conflicts jurisprudence in avoiding the applicability of the *lex loci delicti* within a federal state with a full faith and credit clause. Mason, C.J., did not find the Canadian experience to be as instructive. *Id.* at 450.

61. FORM AND SUBSTANCE, *supra* note 1, at 42-69.

62. See G. BRENNAN & J. BUCHANAN, *supra* note 55.

63. *Id.* at 70-95.

64. FORM AND SUBSTANCE, *supra* note 1, at 96-112.

65. *Id.* at 115-56.

66. *Id.* at 157-85.

67. *Id.* at 182-221.

this paradigm should be the case. The reasons are theoretical, cultural, historical, and institutional. This concept is not a strong theory of causation, but rather a supported correlation. These themes are fleshed out in the remaining chapters. A broad sweep of the different legal theory legacies are given. Comparisons in the institutions of the courts, legislatures, judges, the legal profession, and legal education are seen to operate in ways that bear out the paradigm.

In the structure of these institutions a theme identified in Chapter one is a most important insight. In my view it deserves more prominence than accorded to it by Professors Atiyah and Summers. Institutions of the law are part of governmental structure. They reflect the degrees to which parts of government distrust each other. American judges, the authors say, do not trust American police to balance properly, whereas English judges have faith in police integrity.<sup>68</sup> Indeed, English judges tend to trust the "legal-political 'establishment'"<sup>69</sup>—governments, legislatures, officials, and police. They distrust grassroots popularism, hence the truncated power of the jury.

The American presumption is to diffuse power because of the dangers of its concentration. Conflicting centers of power, with attendant inefficiencies, are a price paid for avoidance of tyranny.<sup>70</sup> In contrast, the crucible of English conceptions (and of the Commonwealth) can be traced to the nineteenth century and to Jeremy Bentham.<sup>71</sup> Faith in government is a centerpiece for the English. Statutes are the most efficient way of promulgating rules that should govern English society.<sup>72</sup> No checking and balancing should inhibit this function.

68. *Id.* at 39.

69. *Id.*

70. This belief is the basic tenet of the American constitutional scheme of division of powers between the three branches of the government.

71. See J. BENTHAM, *THE THEORY OF LEGISLATION* (C. Ogden ed. 1931).

72. FORM AND SUBSTANCE, *supra* note 1, at 241; J. BENTHAM, *supra* note 71. On the American scene, however, statutes were not traditionally favored in the legal community. See Atiyah, *The Legacy of Homes Through English Eyes*, 63 B.U.L. REV. 341, 350 (1983) (tracing to Holmes the suspicion that legislation is likely to do more harm than good); Gerber, *The Reinterpretation of the Due Process of the Fourteenth Amendment in the Age of Industrialization*, in AMERICAN INDUSTRIALIZATION, ECONOMIC EXPANSION, AND THE LAW 144 (J. Frese & J. Judd eds. 1981). Gerber noted:

The concept that the common law, as the product of the reasoning of centuries, embodied what Roscoe Pound called "the universal jural order" made lawyers and judges suspicious of legislations. Any statute which touched any private action must *prima facie* derogate the common law, and it was a common rule of statutory construction that "statutes in derogation of the Common Law are to be construed strictly." Statutes meddled with eternal common law notions; they innovated; they interfered with the social and legal norms. Hence, as the common law became applied and systematized in American practice, certainly throughout the nineteenth century, it gave sustenance to the advocate of vested rights by undermining legislative enactments in favor of judge-made law.

*Id.* at 152-53.

The authors are less comfortable in categorizing American law.<sup>73</sup> The American system is complex in comparison to the relatively simple English scheme. In the American legal scheme one can find formality for every example of substantive reasoning. This complexity is caused by the diversity of American society. Majorities need to be restrained to protect minorities. States' interests must hold against centralized power. The imperatives of national markets are balanced against regionalism and a state's narrow programs.<sup>74</sup> Constitutional issues penetrate every corner of the law and the states must yield to broad interests.<sup>75</sup>

Only the brave outsider ventures into this Serbonian bog. Professors Atiyah and Summers do so most adroitly. They avoid the exaggerated example that comparativists have used to caricature the American or the English law. The authors are prepared to point to weaknesses in their argument and assiduously avoid claiming too much. Such candor is admirable, although the edge of the thesis consequently is blunted.<sup>76</sup>

#### IV. THE RISE OF FORMALISM IN THE UNITED STATES

The rise of formalism is linked to the decline of faith in substantive reasoning. The United States Constitution is a powerful inducement for courts to engage in substantive reasoning. The Supreme Court and the Constitution were central in social change that came with the New Deal, and later, the Civil Rights movement. The Court played an instrumental role in governance. Obviously with its power of judicial review this role was present, but the issue was how active the Court would be in asserting it.<sup>77</sup>

I recall reading Professor Herbert Wechsler's article, *Toward Neutral Principles of Constitutional Law*,<sup>78</sup> as a graduate student studying American constitutional law for the first time. Equipped only with my knowledge of Australian constitutional law, it seemed to me that Professor Wechsler stated the obvious. I considered the article quite reasonable; it described the way that the Australian High Court went about its interpretation of the Australian Constitution. I soon realized,

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73. See FORM AND SUBSTANCE, *supra* note 1, at 245-49.

74. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (upholding the constitutionality of Indiana's statute regulating takeovers).

75. Stemming from *Brown v. Board of Educ.*, 349 U.S. 294 (1954), and the 1964 Civil Rights legislation, racial equality became a dominant federal imperative.

76. For an example of rule-based law and positivist notions in American law, see FORM AND SUBSTANCE, *supra* note 1, at 261. It is commonplace to observe judges pleading deference to the legislature in admonishing those who would opt for court directed change.

77. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

78. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).



however, the United States Supreme Court was at the vanguard of social change; little room for formalism or "neutral principles" was allowed. The lions were Justices Earl Warren, Hugo Black, and William Douglas, but I recall feeling more comfortable with Justice John Harlan's opinions.<sup>79</sup>

It always can be said that constitutional law inevitably cuts to second-level substantive reasons because it is so intricately connected with the governance of a changing society.<sup>80</sup> Constitutional law is not politics, but it has a great impact on politics. This impact is why we worry about its legitimacy in trumping decisions of the majority. We know, however, that limits exist to judicial exercise of power. The court carries institutional capital that it is ill-advised to expend on political issues. Perhaps the abortion issue is the most germane example. *Webster v. Reproductive Health Services*<sup>81</sup> can be read as a decision that attempts to shore up the integrity of the Court against the corrosive doctrine of *Roe v. Wade*,<sup>82</sup> the substantive reasoning of which ineluctably embroiled the Court in political debate.<sup>83</sup> Even the United States Supreme Court may reach limits when the costs of a hotly contested political matter erode its institutional authority. More representative of the differences between American and Commonwealth law, however, is the common law.

In the common-law sphere the prime example of the victory of substantive reasoning is in the law of torts. It was the formalism of the turn of the century that led Professor Karl Llewellyn to describe the era as the "least happy days of our legal system."<sup>84</sup> That realist view resonated strongly in tort law.<sup>85</sup> Under the constant urging of some academic scholars, the courts turned the law of negligence into a strong remedial engine.<sup>86</sup> The formal rules of negligence either were distin-

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79. See Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 740 (1987). I am in good company in my Harlan feelings. Justice John Harlan's judicial philosophy is stated eloquently in an extrajudicial speech entitled "Thoughts at a Dedication: Keeping the Judicial Function in Balance." Address by Justice John M. Harlan Delivered at American Bar Center, Chicago, Ill. (Aug. 13, 1963), reprinted in part in *THE EVOLUTION OF A JUDICIAL PHILOSOPHY* 289-92 (D. Shapiro ed. 1969).

80. This reason partially explains, as we shall observe, the burgeoning of substantive reasoning in England and the Commonwealth.

81. 109 S. Ct. 3040 (1989).

82. 410 U.S. 113 (1973).

83. No doubt the school busing decisions had the same effect, but racial discrimination may be a unique category in which the court is the only institution possessing the integrity to deal with the issue. Even in this category of racial discrimination too wide a use of judicial power will erode the institutional capital of the court, as in the controversy over affirmative action.

84. See R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 137 (1982).

85. *Id.*

86. See Galanter, *Beyond the Litigation Panic*, 37 PROCEEDINGS OF THE AM. ACAD. OF POL. SCI. 18 (1988) (discussing the litigation myth).

guished or distorted when they frustrated the policy of imposing liability on enterprises that through their activities caused injuries. The function of the law should be to spread losses by transferring the loss to a deep pocket, and to compensate the inevitable class of persons who are injured in social intercourse. This practice was instrumentalism at its strongest. It led to the amazing judicial innovation of strict liability.<sup>87</sup> Commonwealth lawyers had been taught Lord Atkin's aphorism that the common law was not beyond childbearing.<sup>88</sup> Strict liability, however, seemed a miracle birth incompatible with the well-accepted accretion of law that in formalism can lead an innovative judge to leap to a creative stroke.

The substantive nature of judicial decision making also is witnessed starkly in the event of empowering private law to perform public law functions. Reflecting distrust of other branches of governments, the courts have developed doctrines that promote public ends by fomenting private litigation.<sup>89</sup> They have encouraged individual litigation by private attorneys general when public institutions have been perceived as incapable of responding to felt societal needs.<sup>90</sup> Thus by effectively swelling the contingency fee rewards of attorneys, punitive damages have been expanded to situations unimaginable under English or Commonwealth law.<sup>91</sup> In this endeavor the American courts have been encouraged by legislation that utilizes private litigation to promote public policy ends. Antitrust litigation is the well-known example in which treble damages may be awarded. This willingness to use the courts can have adverse repercussions when common-law ideas are upset. By allowing for treble damages and attorney fee awards, congressional enactment of civil RICO has turned on its head carefully crafted judicial doctrines in negligence and deceit.<sup>92</sup>

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87. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

88. See *Donogue v. Stevenson*, [1932] App. Cas. 562.

89. See Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 883-906 (1987); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984). This development has not escaped criticism. See Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681 (1985).

90. See Garth, Nagel & Plager, *The Institution of the Private Attorney General: Perspectives From An Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988).

91. See *Lamb v. Cotogno*, 61 A.L.J.R. 549 (1987); Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741 (1989); Marcus, *Juries Rule Against 'Tort Reform' with Huge Awards*, Wall St. J., Feb. 9, 1990, at A31, col. 3 (reporting that juries in the United States gave out more than \$475 millions in damages to individuals in the ten largest jury awards in 1989, ranging from \$25 million to \$75 million); *infra* note 162.

92. See *Bank of America Nat'l Trust & Sav. v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986).

In liability for personal injuries the American courts moved boldly to base liability directly on second-level substantive reasons. The favoured approach evaluated a number of factors in a rough balance. Important considerations were the extent to which liability would result in loss distribution and compensate victims of accidents.<sup>93</sup> These factors imported a consideration of the presence of insurance. So it seemed that insurance dictated legal doctrine instead of tracking it. English law forbade reference to insurance for fear that it could result in liability's subordination to insurance.<sup>94</sup> Instrumentalism dominated judicial thinking. Corrective justice notions were eschewed.<sup>95</sup>

Sociologists have talked of democratic distemper.<sup>96</sup> This phrase describes the disjunction between popular demand and institutional capacities. Democratic distemper erodes confidence in political institutions. The instrumental approach with its direct appeal to substantive reasons has led in the United States to a judicial distemper. Like democratic distemper, judicial distemper consists of overloaded institutions—the courts—unable to carry through the mission assigned to them. In the case of American courts their sally forth into liability for personal injuries was prompted, as the Atiyah and Summers thesis would suggest, by the fecklessness of other governmental institutions. Not surprisingly, we often may see the courts faced with what they consider desirable social policy initiating reform because of the failure of coordinate branches of government.<sup>97</sup>

Activism necessarily dispensed with rules and obliged the courts to engage in decision making that involved complex "polycentric" issues well beyond the ordinary ken of judicial method.<sup>98</sup> For example, courts in cases of defective designs causing physical injury passed on issues that would condemn entire product lines.<sup>99</sup> In deciding this liability the

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93. See Wade, *On the Nature of Strict Tort Liability for Products*, 44 *MISS. L.J.* 825, 837-38 (1973), cited with approval in *Troja v. Black & Decker Mfg.*, 62 *Md. App.* 101, 488 *A.2d* 516 (1985) and *Voss v. Black & Decker Mfg.*, 59 *N.Y.2d* 102, 450 *N.E.2d* 204, 463 *N.Y.S.2d* 398 (1983); see also J. FLEMING, *THE AMERICAN TORT PROCESS* 188 (1988) (discussing the rise in the use of individualized factors).

94. See *Davie v. New Merton Mills* [1959] *App. Cal.* 604, 627 (Simonds, L.); see also *Caltex Oil v. "Willemstead" Australia*, 136 *C.L.R.* 529 (1976) (Stephen, J.).

95. See Weinrib, *The Insurance Justification and Private Law*, 14 *J. LEGAL STUD.* 681 (1985).

96. Huntington, *The Democratic Distemper*, 16 *PUB. INTEREST* 9-38 (1975).

97. The two famous reforming cases are *Rowland v. Christian*, 69 *Cal. 2d* 108, 443 *P.2d* 561, 70 *Cal. Rptr.* 96 (1968) (occupiers' liability), and *Li v. Yellow Cab Co.*, 13 *Cal. 3d* 804, 532 *P.2d* 1226, 119 *Cal. Rptr.* 858 (1975) (applying comparative negligence principles).

98. See Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 *COLUM. L. REV.* 1531 (1973).

99. *O'Brien v. Muskin Corp.*, 94 *N.J.* 169, 463 *A.2d* 298 (1983) (holding defendant liable for injuries arising out of use of an above-ground swimming pool and stating that for the issue to go to jury it is not necessary for the plaintiff to prove the existence of a safer design but that the risks

court directly addressed the issue of the social utility of certain kinds of products. For example, in *Beshada v. Johns Manville Products Corp.*<sup>100</sup> the New Jersey Supreme Court found that a defendant in an asbestos liability case could be liable even though it had no means of knowing that the product was dangerous at the time the plaintiff sustained the injury.

Rules that appeared to frustrate the goal of compensation and enterprise liability were cast aside. The adoption of the market share rule by some jurisdictions in drug liability cases is a pertinent example. *Res ipsa loquitur* frequently had been utilized to overcome gaps in evidence that would prevent recovery. The English courts use *res ipsa* in this way but not as overtly as the American courts.<sup>101</sup>

The market share cases arose out of the use of diethylstilbesterol (DES).<sup>102</sup> The drug, manufactured almost exclusively by about ten pharmaceutical companies, was prescribed to prevent complications during pregnancy. Epidemiological studies later discovered that the daughters of women who ingested the drug had an enhanced chance of contracting cancer of the cervix.

Traditional methods of proof posed an impossible barrier to recovery. These traditional methods required the plaintiff to prove on the balance of probabilities that her mother ingested the DES manufactured by a particular drug company; such a showing was infeasible. The California Supreme Court accepted an academic suggestion that the dilemma could be overcome by according liability to the manufacturers in proportion to the share of the market they held at the time of ingestion.<sup>103</sup> Any one manufacturer could escape liability by proving that its product was not distributed to the plaintiff and, therefore, could not have been ingested.<sup>104</sup> The New York Court of Appeals recently announced the apotheosis of this approach when it ruled that the manufacturers should be liable on the basis of their share of the national market, regardless of proof by any individual company that its drug was not distributed in the jurisdiction.<sup>105</sup> That liability ought to accord with

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outweighed the utility of the product).

100. 90 N.J. 191, 447 A.2d 539 (1982).

101. Atiyah, *Res Ipsa Loquitur in England and Australia*, 35 MOD. L. REV. 337 (1972); cf. *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948), in which the court was prepared to alter the usual burden of proof in causation to overcome barriers to liability.

102. See, e.g., *Martin v. Abbott Laboratories*, 102 Wash. 2d 58, 689 P.2d 368 (1984); *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 527 N.E.2d 333 (1988).

103. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (relying on Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978)).

104. *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

105. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989).

the risk of harm created by the manufacture and distribution of a product was a logical implication of the basis of these DES cases.<sup>106</sup>

Even as some courts were extending liability by overturning traditional common-law doctrines,<sup>107</sup> a reversal was underway that questions the extent to which the courts have ventured. The *Beshada* case imposing absolute liability remains isolated.<sup>108</sup> The California Supreme Court in *Brown v. Superior Court*,<sup>109</sup> a DES case, discussed in substantive terms the burdens on the production and introduction of drugs imposed by strict liability. The court hence ameliorated the rules and reintroduced a negligence framework.<sup>110</sup> In terms of another product, strict liability with respect to vaccines resulted in undesirable threat of liability. Congress consequently enacted legislation granting compensation as a quid pro quo for an immunity of liability for suppliers of vaccines.<sup>111</sup>

Recall that insurance was viewed instrumentally as the vehicle by which compensation could be delivered. Ironically, this institution demonstrates the limits of liability. In recent years claim frequency, severity in products liability, and medical malpractice in particular have caused a crisis, as insurance rates have exploded or insurance has become unavailable.<sup>112</sup>

The reasons for the insurance crisis are various. The debate about the crisis is not clarified by the heavily tendentious rhetoric that accompanies it. A major reason for the crisis, however, is the rapid replacement of first party insurance by third party insurance under the influence of expansive liability rules. Insurance has been viewed as a loss spreading rather than risk reducing device.<sup>113</sup> Noble purposes of compensation lie at the root of the expansion that perversely disadvantages that class of consumers which can afford least the flat rate of in-

106. See Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982); see also Herskovits v. Group Health Coop., 99 Wash. 2d 609, 664 P.2d 474 (1983) (discussing probalistic causation and English rejection of the idea); Stapleton, *The Gist of Negligence*, 104 LAW Q. REV. 213 (1988).

107. Another example is successor liability. See *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 363 (1984); Roe, *Mergers, Acquisitions, and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 VA. L. REV. 1555 (1984).

108. See FORM AND SUBSTANCE, *supra* note 1, at 49; see also *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983).

109. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

110. *Id.* at 1061, 751 P.2d at 477, 245 Cal. Rptr. at 418.

111. Clayton, *Vaccine Liability* (forthcoming in J. PEDIATRICS).

112. See P. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987) [hereinafter Priest, *Current Insurance Crisis*]; Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497 (1987) [hereinafter Priest, *Puzzles*].

113. See Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1023 (1989); Priest, *Current Insurance Crisis*, *supra* note 112.

insurance notionally levied against products.<sup>114</sup> This process encumbers the precise segmentation of risks, hence diminishing the availability of insurance.

Modern technologies have reduced the everyday hazards that once afflicted everyday life. That very promise, however, has created a consciousness of risk derived from inflated expectations about technology and enhanced loss should the promised good life be shortened.<sup>115</sup> In the United States the courts have responded by creating a framework for mass tort suits.<sup>116</sup> The magnitude of the litigation may require that judges become managers of litigation whose function is to create conditions for settlement rather than adjudication.<sup>117</sup>

In the Agent Orange mass tort litigation Judge Jack B. Weinstein departed from the scrupulously independent role of judges under the adversarial system to cajole the parties to settle the controversial case, a settlement he saw as important to rectify the wrongs of the Vietnam War.<sup>118</sup> Proof of causation was a major stumbling block to the plaintiff veterans' action, but Judge Weinstein swept this impediment aside.<sup>119</sup> In so doing the court can be seen as involving itself directly in second-level substantive matters that go beyond that set of policies usually classified as legal.

Accordingly, we can see the judicial distemper. One can sympathize with Judge Weinstein that other branches of government were feckless when faced with the demands of the Vietnam veterans. Perhaps the courts are attempting to overcome democratic distemper by lending their services. The very process, however, diminishes the courts and leaves them open to two lines of attack.

First, courts have drawn criticism in the torts area for engaging in the political act of redistributing wealth. Although the New Deal and the Great Society also marked periods of wealth redistribution, judicially induced wealth redistribution is more devious because it is off-

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114. Priest, *Current Insurance Crisis*, *supra* note 112.

115. See generally M. DOUGLAS & A. WILAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNOLOGICAL ENVIRONMENTAL DANGERS* (1982); *Risk: Social and Legal Aspects of Risk and Risk Related Behavior*, 11 *LAW & POL'Y* (July 1989) (special issue on risk). The study of choice in the presence of risk and uncertainty has reached some maturity, displacing the simple assumption of rational choice employed by economics. See D. KAHNEMAN, P. SLOVIC, A. TVERSKY, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS & BIASES* (1982); *DECISION MAKING: DESCRIPTIVE, NORMATIVE, AND PRESCRIPTIVE INTERACTIONS* (D. Bell, H. Raiffa & A. Tversky eds. 1988).

116. Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 *HARV. L. REV.* 849 (1989).

117. See P. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986); McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 *U. CHI. L. REV.* 440 (1986).

118. *In re "Agent Orange" Product Liability Litig.*, 597 *F. Supp.* 740 (E.D.N.Y. 1984).

119. *Id.* at 829.

budget. Tort law currently is seen as effectuating the disadvantageous reallocation of resources from the economically active to the economically passive.

Second, critical legal scholars attack the courts for not drawing their principles from a legal domain but from a domain of public policy generally. Accordingly, these theorists perceive the law to be simply a form of politics. Rules, they argue, originate from this wide domain and certainly not as positivists would contend from a restricted domain established by a general rule of recognition.<sup>120</sup> The described distemper allows these critics to point to judicial behavior as a basis for their thesis.

Faith in coordinate branches of government permits the courts to maintain a greater formality in England and the Commonwealth. Australian Vietnam veterans, for example, also claimed that they suffered health problems as a result of exposure to Agent Orange. Some Australian veterans joined the American class action.<sup>121</sup> Within Australia an inquiry—a Royal Commission—was established to investigate the claims and report on actions that should be taken.<sup>122</sup> The Royal Commission determined that no causal link was established between Agent Orange and the health problems of the victims.<sup>123</sup> The debate thereafter was clearly a political one conducted before political institutions. The standing and integrity of the courts were not at issue.

It is true that Parliament has not always been responsive to necessary changes in the law. With the heavy business of government, law reform easily can be shunted to the back of the queue. Partly to overcome this tendency, England and the many Commonwealth countries created law reform commissions that usually take references from the government and report on the need and shape of law reform measures.<sup>124</sup> The courts then may rest upon another institution.<sup>125</sup>

In America we are close to the cusp of change. It is therefore not easy to predict confidently that formalism will be taken seriously again.<sup>126</sup> I rest, however, on some signs. The first indication is the pre-

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120. See H. HART, *THE CONCEPT OF LAW* (1961).

121. See P. SCHUCK, *supra* note 117.

122. ROYAL COMMISSION, *FINAL REPORT ON THE USE AND EFFECTS OF CHEMICAL AGENTS ON AUSTRALIAN PERSONNEL IN VIETNAM* (July 1985).

123. *Id.* Vol. 8, at XV-16.

124. See M. KIRBY, *REFORM THE LAW* 32-39 (1983); see also J. FARRAR, *LAW REFORM AND THE LAW COMMISSION* (1974); *THE LAW COMMISSION AND LAW REFORM* (G. Zellick ed. 1988).

125. In the United Kingdom the English and Scottish Law Commissions have been established. In Australia a federal commission, the Australian Law Reform Commission, reports on matters referred to it by the federal government. The Australian states have established similar institutions. In Canada a parallel arrangement prevails. In New Zealand Parliament created the New Zealand Law Reform Commission. See *supra* note 124.

126. See Shauer, *Formalism*, 97 *YALE L.J.* 509 (1988).

sent distemper affecting American law. The second is the accumulating writing that urges an intelligent embrace of rules and formalism.<sup>127</sup> With this movement positivism, which was viewed as an English legal philosophy,<sup>128</sup> may gain adherents on this side of the Atlantic. The positivist theory will prove an anchor for courts reasserting a reliance on rules to overcome judicial distemper.

As much as some commentators would advocate the change, it is quixotic to believe that formalism will usurp substantive reasoning. A change of attitude, however, may be taking place. Justice Scalia has written about the "Rule of Law" being the "law of rules."<sup>129</sup> He criticizes substantive factor balancing that is at the heart of tort law's march to wider liability.<sup>130</sup>

In the area of statutory interpretation American courts have been at the substantive end of the spectrum.<sup>131</sup> An open-ended use of legislative history as an aid to interpretation has effectuated this posture. Conversely, the formalistic English view firmly restricts interpretation to its literal meaning unless ambiguity appears. If there should be ambiguity the canons of interpretation can be employed, but this construal may not go to Parliamentary debates, which are the equivalent of legislative history. To be sure, the technical precision of English and Commonwealth statutes supports this approach.<sup>132</sup>

Sentiment can be detected for moving to a rule that relies more heavily upon the literal meaning of the statute.<sup>133</sup> This movement is influenced by the judicial distemper described. It places upon other branches of government a responsibility for the way the law operates in

127. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 386 n.199 (1989); see also Schauer, *supra* note 126. Schauer stated: "I do want to urge a rethinking of the contemporary aversion to formalism. For even if what can be said for formalism is not in the end persuasive, the issues should be before us for inspection, rather than blocked by a discourse of epithets." *Id.* at 511. Also militating in favor of such rules is writing that would improve communication between the branches of government. See Kastenmeier & Remington, *A Judicious Legislator's Lexicon to the Federal Judiciary*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 54-89 (R. Katzmann ed. 1988).

128. FORM AND SUBSTANCE, *supra* note 1.

129. See Scalia, *supra* note 55, at 1175.

130. *Id.* at 1186.

131. See FORM AND SUBSTANCE, *supra* note 1. Lord Eldon stated:

I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict greater plain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor's foot.

*Gee v. Pritchard*, 36 E.R. 670, 674 (1818).

132. FORM AND SUBSTANCE, *supra* note 1.

133. See, e.g., *United States v. Monsanto*, 109 S. Ct. 2657, 2664 (1989); see also Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (stating that "[i]n the last decade, statutory interpretation has reemerged as an important topic of academic theory and discussion").



society.<sup>134</sup> In so doing it restricts the domain of second-level substantive reasons that can be used overtly or surreptitiously to arrive at favoured results.

A harbinger is the Supreme Court's interpretation of the civil RICO legislation. Some circuit courts of appeal attempted to import glosses on the statute that would restrict the application of this draconian measure. The Supreme Court in two important decisions has rejected such a limiting importation.<sup>135</sup> The literal words of the provision were taken to provide a very wide remedy, and the Supreme Court invited Congress to examine the application of the law in this light.<sup>136</sup> This invitation signals a desire by the Supreme Court to limit its role and to force other governmental branches to live up to their responsibilities in forming law. Formalism in the courts may improve the performance of coordinate organs of government by proclaiming the courts' bounded wisdom and abilities.

The foregoing represents a departure for those courts accustomed to taking up the cudgel on the assumption of the fecklessness of other governmental organs. Given, however, present day concerns about the overloading of courts and the deprecations of academic critics, any distrust must perforce give way to trust.<sup>137</sup> It may point to the substantive role as being extremely arrogant.

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134. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). This movement perhaps is exemplified best in the creation of implied rights of action under statutes. The courts have engaged in the singularly vacuous task of devining the "intent" of Congress to create a private right of action. This empty casting about has led Justice Antonin Scalia to propose a "flat" rule that "federal private rights of action will not be implied." *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring). Some state courts freed from the *Erie* doctrine have drawn a conclusion more in sympathy with the substantive tradition of American law that direct policy notions should determine the issue of whether an action may be implied. See *Burnette v. Wahl*, 284 Or. 705, 588 P.2d 1105 (1978); Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 Mich. L. Rev. 177, 183, 214-15 (1989) (arguing for more reliance on the constitutional text and resistance to ready overruling of constitutional cases in order to reinvigorate the legislature's role in the amendment process).

135. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989).

136. See generally *Reforming RICO: If, Why, and How?*, 43 VAND. L. REV. 621 (1990).

137. A positive sign is that the process of institutional decision making is now the subject of serious academic scholarship. See G. BRENNAN & J. BUCHANAN, *THE REASON OF RULES* (1985) (discussing the public choice theory). The decision making of courts has not escaped analysis. See Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (applying Arrow's indeterminacy theorem to decision making of the Supreme Court). This analysis should give courts a better understanding of institutional decision making, both its own and that of others that it has viewed with suspicion.

## V. STORMING FORMALISM'S FORTRESS

Let me describe a prime example of formalistic reasoning that contrasts markedly with the prevailing American style. This example deals with the running of the limitation period, a rule of high mandatory formality as classified by Professors Atiyah and Summers. In *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners*<sup>138</sup> the House of Lords addressed an engineering firm's liability for its negligent advice in the construction of a chimney. The refractory inner lining was made partly of a substance unsuitable for the purpose. Cracks developed requiring its demolition and replacement. The defendant pleaded that the action was statute-barred because the damage appeared more than six years before the plaintiff commenced the action.<sup>139</sup> The cracks at the time they first appeared were not reasonably discoverable by the plaintiff. The plaintiff contended that the cause of action accrued at the time when the damage became reasonably discoverable.<sup>140</sup>

The House of Lords in a decision ten years prior decided that a cause of action accrued even though the plaintiff could not have discovered the injury and thus could not have commenced an action.<sup>141</sup> Accordingly, the plaintiff who suffered from a progressive lung disease was barred from recovery when the disease finally manifested itself. The House of Lords saw the injustice in this result yet formalism ruled the day.<sup>142</sup> For the House of Lords, the legislature, not the court, was the proper body to rectify this injustice.<sup>143</sup>

Parliament concurred, and addressed this injustice by extending the time limit for raising personal injury actions for damages when material facts were outside the plaintiff's knowledge.<sup>144</sup> This legislative action, however, proved deficient for the *Pirelli* plaintiff. In *Pirelli* the

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138. [1983] 2 App. Cas. 1.

139. *Id.* at 3.

140. *Id.*

141. *Cartledge v. E. Jopling & Sons Ltd.*, [1963] App. Cas. 758.

142. *Id.* at 772.

143. Note the words of Lord Reid:

It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided. But the present question depends on statute, the Limitation Act, 1939, and section 26 of that Act appears to me to make it impossible to reach the result which I have indicated.

*Id.*

144. Limitation Act, 1963, ch. 47.

House of Lords interpreted the amendment's restricted reach provision to mean that "Parliament deliberately left the law unchanged so far as actions for damages of other sorts was concerned."<sup>145</sup>

Their Lordships concluded that because the damage arose at the time that the undiscoverable cracks appeared the plaintiff was unable to mount an otherwise good cause of action.<sup>146</sup> The result may be "unreasonable and contrary to principle" but "only Parliament can alter it."<sup>147</sup> Lord Scarman, a former Chairman of the English Law Commission, announced that the "true way forward is not by departure from precedent but by amending legislation" and expressed hope that this step would follow by the Lord Chancellor's referral of the problem to "his law reform committee."<sup>148</sup>

The House of Lords did not lack an appreciation of the substantive issues. Mandatory formality, however, had benefits in shifting the formulation of policy from the confines of a particular dispute to another institution that gives the issue a wider range of review.<sup>149</sup> This shift requires a judicial faith in those other institutions.<sup>150</sup>

To many Americans accustomed to reading tort decisions the reasoning in *Pirelli* seems passing strange. American courts recognize, as did the House of Lords, the harshness of the limitation rule. That recognition, however, was but the starting point for the judicial creation of the "discovery doctrine."<sup>151</sup> Formality gives way to the purposes of tort law.

Parliaments have not always been responsive to their court's sup-  
plications. This lack of response has prompted the creation of law re-

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145. *Pirelli Gen. Cable Works Ltd.*, [1983] 2 App. Cas. at 14.

146. *Id.* at 19.

147. *Id.*

148. *Id.*

149. *Miliangos v. George Frank (Textiles)*, [1976] App. Cas. 443, 480 (Lord Simon).

150. See M. KIRBY, *supra* note 124, at 39. Mr. Justice Michael Kirby specifically maintains: [There] are very powerful reasons why the Court should be reluctant to engage in [moulding the common law to meet new conditions and circumstances]. The Court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The Court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The Court does not and cannot carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community, and whether they command popular assent. Nor can the Court call for and examine submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the Court cannot, and does not, engage in the wide-ranging inquiries and assessments that are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature. These considerations must deter a Court from departing too readily from a settled rule of the common law and by replacing it with a new rule.

151. *Id.* For typical reasoning, see *Teeters v. Currey*, 518 S.W.2d 512 (Tenn. 1974).

form commissions that have the time and resources to investigate and gather comparative law, weigh competing views, and report to Parliament on appropriate reform measures.<sup>152</sup>

Reliance on either standing law reform committees or ad hoc commissions obviously has allowed English and Commonwealth courts to do justice while adhering to formality. The courts certainly have developed new doctrines of tort law, but this development has been a careful process.<sup>153</sup> The major thrust of American tort law under the banner of enterprise liability did not resonate in the English or Commonwealth courts. The demands for wider compensation instead found their way to various commissions that recommended reform.<sup>154</sup> The apotheosis occurred in New Zealand when a report was accepted that abolished the right at common law to recover damages for personal injuries.<sup>155</sup> In lieu of the right at common law, injured persons in New Zealand are entitled to claim compensation on a preset scale, from a statutory body.<sup>156</sup> In the issue of strict liability for defective products the English, Canadians, and Australians all have relied upon enquiries recommending legislation.<sup>157</sup>

The hand of Bentham can be seen.<sup>158</sup> The legislative process is accepted as the rational and democratically appropriate means by which society ought to be ordered.<sup>159</sup> As Professors Atiyah and Summers rightly point out, societal resources are devoted to this endeavor. The public service is highly professional and career oriented. The drafting of statutes and regulations takes place with a consistency and precision

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152. M. KIRBY, *supra* note 124, at 6.

153. The English and Australian courts, without fear of jury sympathies, have extended liability for negligent infliction of distress more broadly than many American jurisdictions, but the limits are carefully drawn. See *McLoughlin v. O'Brian*, [1983] 1 App. Cas. 410; *Jaensch v. Coffey*, 155 C.L.R. 549 (1984).

154. See ROYAL COMMISSION, REPORT ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, 1978, CMND. No. 7054 [hereinafter CMND. No. 7054]; NATIONAL COMMITTEE OF INQUIRY, REPORT ON COMPENSATION AND REHABILITATION IN AUSTRALIA (1974).

155. Cf. O'Connell & Partlett, *An America's Cup for Tort Reform? Australia and America Compared*, 21 MICH. J.L. REF. 443 (1988).

156. See G. PALMER, COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA (1979). Geoffrey Palmer, formerly a professor of law at Iowa, is now the New Zealand Prime Minister.

157. For Australian initiatives, see *supra* note 37. For United Kingdom recommendations, see LAW COMMISSION, REPORT ON LIABILITY FOR DEFECTIVE PRODUCTS, 1977, CMND. No. 6831 and CMND. No. 7054, *supra* note 154, at 255-73.

158. He is, of course, a palpable presence and his stuffed body is brought out annually at King's College, London School of Economics.

159. See JEREMY BENTHAM AND THE LAW (G. Keeton & G. Schwarzenberger eds. 1948); Craig, *Bentham, Public Law and Democracy*, PUB. LAW 407 (1959) (Bentham's views about the inner working of democracy); Partlett, *From Red Lion Square to Skokie to the Fatal Share: Racial Defamation and Freedom of Speech*, 22 VAND. J. TRANSNAT'L LAW 431 (1989); POSTEMA, *supra* note 55.

unusual in American statutes.<sup>160</sup> Little basis is given for judges to attack other branches because of lack of competence.

Despite the foregoing, English and Commonwealth courts are likely to turn to second-level substantive reasoning more often than they have in the past. These courts increasingly are being required to protect the rights of the citizen against the other arms of government to which the courts traditionally have deferred. Perforce they are obliged to distrust.<sup>161</sup>

In these developments the Benthamite influence has waned. His withering appraisal of such human rights as nonsense upon stilts is out of kilter with sentiments in modern society that aim at the protection of the individual.<sup>162</sup> The American experience becomes pertinent. The lessons derived from the matching of the citizen against the state is no better exemplified than in the American Constitution experience.<sup>163</sup> But whether or not the substantive principles are grown in America the courts necessarily will resort to substantive principles.

Outside constitutional or public law, English and Commonwealth courts pay heed to American developments. Those courts, however, do not always accept these developments.

American courts developed the informed consent doctrine in order to protect the autonomy of patients in the face of medical decisions. Medical practitioners have a duty of care to warn patients of the material risks associated with medical procedures.<sup>164</sup> Beginning with *Reibl v. Hughes*,<sup>165</sup> a Canadian case, the action was recognized as being grounded upon that autonomy right. Australian and English cases followed.<sup>166</sup> Elsewhere American developments in unconscionability in contracts,<sup>167</sup> probalistic causation,<sup>168</sup> liability in negligence for pure eco-

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160. FORM AND SUBSTANCE, *supra* note 1; see also LORD CHANCELLOR'S DEPT., REPORT ON THE WORK AND ORGANISATION OF THE LEGAL PROFESSION, 1989, CMND. No. 570 [hereinafter CMND. No. 570].

161. The adherence of the United Kingdom to the European Convention on Human Rights imposes on the courts a reorientation toward human rights issues. See *A.M. & S. Europe Ltd. v. Commission of the European Communities*, [1983] 3 W.L.R. 17.

162. See D. LLOYD, INTRODUCTION TO JURISPRUDENCE 712 (4th ed. 1979) (citing J. Bentham, *Anarchical Fallacies* in HUMAN RIGHTS (A. Melden ed. 1970)).

163. See Mason, *supra* note 24, at 28 (noting a "movement away from formal, legalistic interpretations"); Wiehl, *Constitution Anyone? A New Cottage Industry*, N.Y. Times, Feb. 2, 1990, at B6, col. 3.

164. See *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); J. KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT (1984).

165. 114 D.L.R.3d 1 (1980).

166. See, e.g., *Sidaway v. Board of Governors*, [1985] App. Cas. 871; see also Partlett, *Recent Cases*, 59 AUSTRALIAN L.J. 341 (1985) (discussing *Sidaway*).

167. D. GREIG & J. DAVIS, THE LAW OF CONTRACT (1987).

168. See Stapleton, *The Gist of Negligence: Part II*, 104 L.Q. REV. 389 (1988).

conomic losses<sup>169</sup> and for negligent misstatements,<sup>170</sup> and the liability of lawyers for in-court activities<sup>171</sup> have been examined carefully and accepted or discarded.

The ideas usually come packaged as cases. Although some Commonwealth courts have shown a greater propensity to cite academic articles, most articles find little audience before judges. English and Commonwealth legal institutions are structured to limit access by outside ideas. In England and most other important common-law jurisdictions, the bar is de jure or de facto separated from solicitors. Barristers are briefed by solicitors to represent the latter's clients in court. Barristers also are asked to render advice on matters that involve complexities beyond the competence of solicitors. Barristers acquire an expertise in the workings of the courts. Many rules of etiquette are designed to separate the bar from solicitors. Barristers share a closer relationship with the bench than with solicitors. Barristers cannot form partnerships and eschew trappings of commercialism. For court-related work they cannot be sued in negligence.<sup>172</sup> They work together in chambers where cooperation and a clubby atmosphere prevails.

The bar has an intellectual tradition. One's standing in the ranks of barristers turns on success in the ritualistic battles of the courtroom. Abilities readily are apparent and saturnine attributes cannot easily be hidden. Change, however, lurks in the corridors of the courts with the prospect of profound changes in the structure of the legal profession under the aegis of the Lord Chancellor's White Paper. Barristers' practice may be more akin to that of solicitors who, in turn, may forge multinational links.<sup>173</sup>

It should be remembered that university-based legal education is a relatively recent phenomenon. During the early decades of this century many joined the London Bar with a classics background from Oxford or Cambridge.<sup>174</sup> The law was to be learned on the job. With the exception of Dalhousie, Canada had no separate university law schools until after the Second World War. In comparison Australia's Sydney and Mel-

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169. See *Caltex Oil v. "Willemstead"* Australia, 136 C.L.R. 529 (1976).

170. *Hedley Byrne v. Heller*, [1964] App. Cas. 465, 470 (citing with approval § 552 of the Second Restatement of Torts).

171. *Giannerelli v. Wraith*, 62 A.L.J.R. 611 (1988) (distinguishing *Woodruff v. Tomlin*, 616 F.2d 924 (1980)).

172. *Rondel v. Worsley*, [1969] 1 App. Cas. 191; *Saif Ali v. Sydney Mitchell*, [1980] App. Cas. 198.

173. See CMND. No. 570, *supra* note 160; Harper, *Bye, Bye Barrister*, A.B.A. J., Mar. 1990, at 58.

174. An outstanding example of one with a classics background is Lord Denning, long-time Court of Appeal Lord Justice and Master of the Rolls, whose iconoclastic ways greatly influenced the law.

bourne Universities are quite aged.<sup>175</sup>

It followed that legal books and articles were written by barristers. A reputation for intellectual rigor and assiduous legal analysis is regarded as a prerequisite for reaching the higher echelons of the bar (to become a Queen's Counsel) and for elevation to the bench. This reputation is enhanced greatly by the publication of legal scholarship. English and Commonwealth legal scholarship, however, naturally lacks the challenging theoretical edge of works produced by better academic writing. Too often, the scholarly analysis of cases ends in words likely to stir the American substantive blood: "[I]t is idle to dispute its merits, since it is firmly entrenched."<sup>176</sup>

In contrast American writing of the highest caliber is academic and bristles with challenging analysis. Even treatises compare, criticize, and factor in the latest theoretical insights.<sup>177</sup> The dominant ethos is that no legal principle is so sacrosanct that it should escape critical appraisal.

Direct incorporation of substantive ideas is facilitated by a loosely organized bar that has no internal intellectual tradition. Ideas must be garnered externally. These ideas are a valuable commodity in law making. Attorney cost rules and the legitimacy of the contingency fee arrangements stimulate the production of innovative ideas. A novel cause of action can be pressed when a payoff may be handsome.<sup>178</sup> In England and the Commonwealth the injection of innovative ideas is discouraged by several forces, including the separation of the bar, the English cost rule, and the prohibition of the contingency fee. The sanction of an award of costs may dissuade the active pursuit of novel causes of action. It is not always a theory of cultural and social differences that explains these matters. Prosaic reasons often may be usefully considered. Professors Atiyah and Summers tend toward grand schemes and perhaps give short shrift to such prosaic factors.

The American institution of legal education and career patterns indirectly enhance the value of novel ideas. The writers of legal scholar-

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175. See R. DHAVAN, N. KIBBLE & W. TWINING, ACCESS TO LEGAL EDUCATION AND THE LEGAL PROFESSION 85, 114 (1989) (discussing access to legal education and the legal profession in Australia and Canada).

176. R. MEAGHER, W. GUMMOW & J. LEHANE, EQUITY: DOCTRINES AND REMEDIES 477 (1975). While the volume generally is an excellent analysis of this complex and often arcane law; the authors disincline to engage in "academic" debate. In discussing the seminal (as they say, the *fons et origo*) English decision of *Lumley v. Wagner*, [1852] All E.R. Rep. 368, they concede that the case has been subject to extensive academic criticism, but refuse to question the law's validity. *Id.*

177. See F. HARPER, E. JAMES & O. GRAY, THE LAW OF TORTS (1986); see also Atiyah, *American Tort Law in Crisis*, 7 OXFORD J. LEGAL STUD. 279 (1987).

178. See Pritchard, *A Systematic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law*, 17 J. LEGAL STUD. 451 (1988).

ship espouse it in their law school classes. The Socratic or casebook method usually devolves quickly to policy analysis as students are asked to defend old rules against new rules. The substantive debate is framed by the legal issues. Accordingly, in a torts course students explore the moral and ethical foundations of the law.

The best and brightest of students often take up judicial clerkships after graduation. The glittering prize is a United States Supreme Court clerkship. The "substantive" or policy oriented law school experience is taken across into the respective court. Law clerks are active in research and drafting possible analyses for the judges.

Judges are recruited from a wider segment of the profession. Some may be able politicians and successful attorneys without the experience that makes one comfortable on the bench. Clerks may possess power because of their familiarity with the ideas in the law. Judges bring more pragmatic perspectives. Furthermore, it is far more common in America for judges to be selected from the ranks of legal academia. In these instances judges inject ideas directly into the judicial decision making process.

The extent to which English and Commonwealth courts grow more receptive to American case law will determine the extent to which they absorb substantive American ideas. In the areas of public law dealing with the citizens and the state, those substantive ideas, for want of formal alternatives and academic competitors, are likely to find a ready audience. The changing structure of the profession will prove more welcoming to ideas not possessing the old pedigree. Clearly it would be foolish to proclaim the death of formalism in England and the Commonwealth. My more modest point is that substantive reasoning will become more important. The source of that inspiration, especially for the Commonwealth, is likely to be American law. Thus the paradigm proposed by Professors Atiyah and Summers is likely to be contradicted by numerous counter examples.

## VI. CONCLUSION

This book is a rich quarry. In its 432 pages the authors have packed a wealth of theory and practical example. This tight packing, however, may be a drawback.

*Form and Substance* will be used by two kinds of persons. First, there is the dabbler; the person who starts at the index for the immediate purposes of a particular point. The dabbler will be rewarded but is likely to misunderstand. The dabbler will not invest the effort to come to grips with the theoretical premises around which the details are gathered. The second type is the reader. The book will be digested thoroughly by some, mainly by comparativists and theoreticians. The re-



wards are great, but so is the effort at persisting in the task. It is not that the book lacks grace. It is generally happily written, although its authors' different styles are sometimes too evident. Its greatest flaw is a dabbler's delight; its detail obliterates the authors' theme. Except for my comments about Commonwealth law, the arguments that I suggest in this Review are present in the book. But they are hidden as flowers in the Amazon forest. Some pruning back of foliage would have displayed better the blossoms.

*Form and Substance* will become a classic in Anglo-American law. Ironically, however, it will become a classic not so much because of its incisive analysis but because it will spawn a renewed scholarship. This scholarship will owe a great debt to the prodigious effort of Professors Atiyah and Summers. Explorers will uncover the flowers for others to admire. The authors have given us the benefit of a lifetime of distinguished scholarship. Professor Atiyah recently retired from the Chair of English law at Oxford. This work is a singular achievement at the end of his prolific academic career. I suspect, however, he will not reduce his flow of writing just because he formally stepped down.

It is to be hoped that this joint work may be a model for future collaboration between distinguished English, Commonwealth, and American lawyers. Works of this kind require a familiarity with two enormous legal systems—the American and the Anglo-Commonwealth. This task becomes more difficult as the Commonwealth law fractures, but the rewards of bringing to bear various legal experiences are great.

If I am right about our judicial distemper, we may acutely see solutions and we may defend more forcefully the law as an autonomous discipline. If I am right that American law will grow better in importance for changing societies in England and the Commonwealth, the nature of that law can be understood better for successful transplantation.