PART 3

Being

In Part 3 'Being', we are concerned with four personal traits essential to your success as a new lawyer. On completing Part 3 you will appreciate the importance of:

CHAPTER 11

Being realistic

CHAPTER OBJECTIVES

Upon completion of this chapter you should be able to explain:

- the relevance and importance of a 'realistic' understanding of the law and its operation,
- the differences between formalist and realist conceptualisations of legal reasoning, and
- the relationship between law and power as described by various critical legal theories including Marxist legal theory, critical legal studies, postmodern legal theory, feminist legal theory and critical race theory.

Being realistic

The traditional approach to teaching students about the law was to focus upon legal doctrine (case law, legislation and the underlying principles), solving legal problems using legal reasoning, and, to a lesser extent, related topics such as the history of law, legal philosophy and basic legal skills. This provided students with the fundamental knowledge and many of the skills that they needed in order to begin their careers as legal professionals. However, it overlooked some of the realities of legal reasoning and decision making and the operation of the law within society.

A new lawyer needs to have a mastery of legal doctrine and legal theory, and they need to be expert thinkers and communicators, but they also need to be realistic about the way the legal system operates and the effect of the law upon different groups within the community. The law is much more than a system of abstract rules that are applied logically and impartially to solve any legal problem. The law is shaped by politics and by power. Legal decision makers, including judges and politicians, are human beings with limitations, emotions, opinions and biases. The law can be, and is, used to achieve justice … but it can also be misused to promote injustice.

In this chapter we examine the various conceptualisations of the way lawyers and judges think and make decisions, from the formalistic conceptualisations with which you are already familiar (see chapter 8), through the more nuanced theories of Hart, Fuller and Dworkin, to the insights of the legal realists. In the second part of the chapter we consider a range of theoretical perspectives on the relationship between law and power, and the views of those who insist that the claims to equality before the law made within liberal democracies often mask the ways in which the law is used to advantage some groups within the community at the expense of others.

After working through this chapter you will have a much more realistic understanding of the law and its operation, and you will be better placed to participate in efforts to realise law's potential to provide justice for all.

Formalism vs realism

The process of legal reasoning usually taught to law students, as described in chapter 8, is a formalistic one. It is modelled upon a particular notion of judicial reasoning: that is, the process of reasoning used by a judge when deciding a legal question or resolving a legal dispute in a court of law. According to this notion of judicial reasoning, a judge objectively and neutrally applies the relevant legal rules and principles to the facts of the case in order to reach a rational, legally correct decision. They do not rely upon their intuitive or emotional response to the issue, their political views or what they personally think about the parties to the dispute; they do not take into consideration the potential political or practical consequences of their decision; and they do not 'make' new law. They simply apply existing law.

There are those who insist that this conception of judicial reasoning is too simplistic and unrealistic. Some theorists offer more nuanced conceptions of formal legal and judicial reasoning. Others insist that, when judges make decisions, they actually engage in *political reasoning* rather than legal reasoning. Political reasoning takes into consideration the potential practical and political consequences of a decision, it draws upon a wide range of factors including the values of the community, and, most importantly, it can lead to the creation of new legal rules.

Do judges engage in legal reasoning or political reasoning? Is judicial reasoning really the objective and rational application of existing rules to particular situations, or is it a political process involving the creation of new — and perhaps arbitrary — rules in response to particular problems? Is the idea of impartiality, objectivity and rationality in legal decision making a myth or a realisable ideal? These questions are of direct relevance to the judicial process; if there is no objective way of answering legal questions, judges must base their decisions on their own personal political views and moral values, and this would mean that the judicial process is no different from the legislative process. These questions are also of relevance to understanding what it means to 'think like a lawyer'; if legal reasoning is all about anticipating how a judge would solve a conflict or resolve an argument and if judges engage in political reasoning, law students and lawyers have to be able to do so as well.

In this section we will consider the range of perspectives on this important issue, from the orthodox views to the more radical views (see figure 11.1).

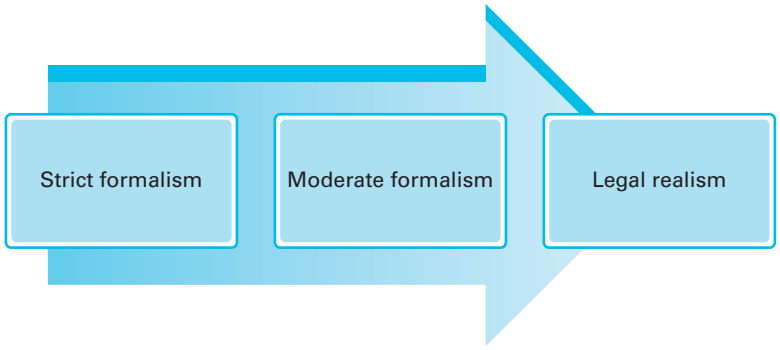

FIGURE 11.1 Perspectives on judicial reasoning

The orthodox view is that there *is* a distinction between judicial reasoning and political reasoning. Judicial reasoning is a distinctive mode of reasoning that is confined to a limited set of characteristic arguments and involves the rational justification of legal outcomes. Judicial reasoning is in important respects *constrained*, whereas political reasoning legitimately takes into account a wide range of political considerations. According to the orthodox view, judicial reasoning involves the application by the judge of pre-existing law rather than the creation of new law. Judicial reasoning must be consistent with past decisions of legislatures and courts. Judicial reasoning must be objective and impartial rather than subjective and partial. When a judge engages in judicial reasoning it is the law that determines the result, not their personal beliefs about what would be a good outcome. Judges must apply the correct legislative provision or a case law rule to the particular dispute before them even if they do not agree with the statute or the precedent. Judges must decide the case according to the *law*, not according to political considerations or their personal values.

More radical legal theorists such as legal realists, on the other hand, insist that there is no such thing as neutral, objective judicial reasoning. It is frequently if not always impossible for a judge to make a legal decision without referring to non-legal considerations

such as their personal values. Judges decide cases in the way that they personally think best in the circumstances and then insist that they have used objective, neutral legal reasoning to make their decision.

Orthodox legal theorists do not deny that the application of pre-existing law has political consequences. Judicial decisions do have political consequences. For example, when the High Court decides that a school owes a duty of care to a student to protect them from bullying, this decision has significant consequences for the ways in which all Australian schools supervise their students. But this does not mean that the High Court should take these consequences into account in deciding whether such a duty of care exists. Orthodox theorists distinguish between making decisions that *happen* to have political consequences and making decisions with their political consequences *in mind*. It is the latter which are incompatible, they say, with proper judicial reasoning.

THINK	Why is it usually considered appropriate for politicians to take into account the political consequences of their decisions but not appropriate for judges to do so?

Strict formalism

Formalism or formal reasoning is a method of reasoning that emphasises the reasoning process over what it is that is being reasoned about. It can be contrasted with substantive reasoning, which is more concerned with the content of the reasoning. The basic idea behind strict legal formalism is that it is possible to apply the law to factual situations as if the law were a self-contained system. A decision maker need refer only to legal rules and should never refer to external considerations such as their own values, social consequences or the justice of the outcome in making a decision. Judges should never make law; they should only declare the law as it is (a view known as *declaratory theory*). The existing rules in legislation and precedent are not to be questioned; they are accepted and applied objectively and, some would say, mechanically. The CIRAC method described in chapter 8 is an example of strict legal formalism.

Formalism is sometimes used synonymously with words such as *legalism* and *literalism*. However, the terms do not actually mean the same thing; legalism is usually regarded as the tendency to reduce relations to rules, and literalism is an approach to the interpretation of rules that favours literal meanings over intended meanings.

Defenders of the notion that judges should engage in strict legal formalism argue that following rules rigidly has a number of advantages over less strict approaches to legal decision making. Legal formalism is, for instance, consistent with the rule of law. The rule of law requires that legal rules be applied objectively and consistently and without reference to the personal views or preferences of the legal decision maker. Applying the 'letter' of the law (the plain and literal meaning of the actual words used) rather than the 'spirit' of the law (the decision maker's views about the purpose or objective of the legal rule) increases the likelihood that those who are subject to the law know what conduct the law permits or prohibits. If judges refer to the law's 'spirit' (which only they can see) rather than its 'letter' (which everyone can see), people are less able to plan their lives and to use the law to achieve their personal objectives.

Strict formalism addresses concerns about potential personal biases on the part of judges. Judges tend to be drawn from a narrow section of the community. If judges attempt to resolve disputes on a case-by-case basis rather than by consistently applying established legal rules, their class, race and gender are likely to contaminate their views about what justice requires in a particular case. A strictly formalist approach requires the judge to disregard their personal biases and to apply the law fairly and uniformly no matter who the parties to the dispute happen to be.

Strict formalism is also consistent with democratic principles. Strict formalists argue that formalism ensures that controversial moral and political choices are made by elected and accountable political representatives rather than unelected and unaccountable judges. Formalism promotes democratic government by insisting that, as a matter of political legitimacy, judges should defer to clear rules of law, even when doing so leads to clearly undesirable results. If the law is, for whatever reason, unsatisfactory it is the responsibility of politicians, not judges, to change the law.

THINK Is strict legal formalism realistic? Why or why not?

Moderate formalism

Most lawyers and judges, if pressed, are likely to admit that judicial reasoning and decision making are not strictly formal. For example, according to Justice Michael Kirby:

> Rules there must be. Analytical reasoning, intellectual honesty and candid opinions are the hallmarks of a judiciary of integrity which observes the rule of law. But so is a frank recognition of the uncertainty of much law and the willingness to expose the policy choices which lead a judge to one decision rather than another. To pretend that the task is purely mechanical, strictly formal and wholly predictable may result in a few observers who love fairy stories sleeping better at night. But it does not enhance the legal system. It is not honest. It is fundamentally incompatible with the creative element of the common law.[1]

In this section we consider the views of legal theorists who consider strict legal formalism to be unrealistic and who offer more nuanced, practical notions of legal and judicial reasoning.

HLA Hart

As a *legal positivist* (see chapter 2), HLA Hart (1907–1992) insisted that there is no necessary connection between legal rules and non-legal values or principles. Hart denied, however, that the role of the judge in deciding a legal dispute involves nothing more than the straightforward application of the law to particular sets of facts, regardless of the judge's own personal beliefs as to what the law ought to be. Strict legal formalism, in other words, is not an accurate description of the process of judicial decision making.

In *The Concept of Law*, Hart insisted that it is a mistake to view the legal system as a closed logical system and judges as mechanical decision makers who simply apply the rules of law to the facts of legal cases. Hart regarded this as one of two 'great exaggerations' about law.[2] The other great exaggeration is the sceptical view that legal rules do not dictate the answer to any legal problems (a view held by many critical legal theorists — see below). Hart described himself as occupying a position midway between the extremes of mechanical jurisprudence and complete indeterminacy. He believed that the objective application of legal rules leads to a clear conclusion in *most* but not *all* cases.

Hart distinguished between a legal rule's core of a clear meaning and what he called its 'penumbra of uncertainty'.[3] Consider a rule that describes the legal responsibilities of an occupier of 'premises'. There is no single, definitive definition of the word 'premises'. There is a core of clear meaning; some things are obviously premises. There are also clear exclusions; some things are obviously not premises. And there is a 'penumbra of uncertainty'; some things may or may not be premises (see figure 11.2).

1. Michael Kirby, 'In Praise of Common Law Renewal' (1992) 15 *University of New South Wales Law Journal* 462, 479.
2. HLA Hart, *The Concept of Law* (Oxford University Press, 1961) 144.
3. HLA Hart, 'Positivism, Law and Morals' in *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983).

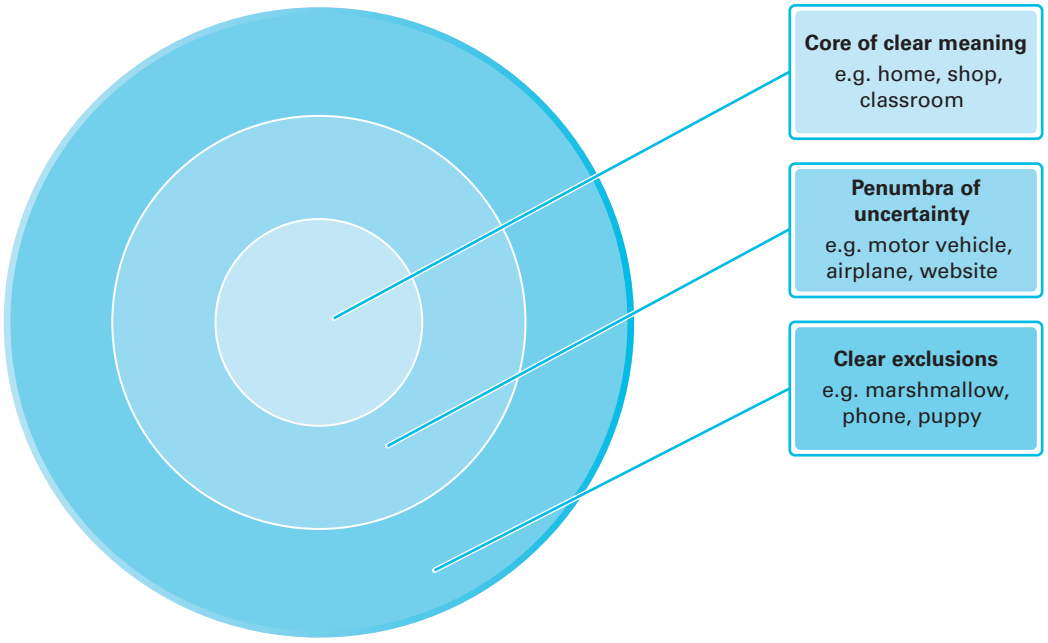

FIGURE 11.2 Example of Hart's penumbra of uncertainty

According to Hart, when a legal rule is clearly applicable, judges should apply it formalistically and without regard to their own personal views as to what the law ought to be. But in the 'hard cases', where it is not clear which legal rule is relevant, what the legal rule means or whether or how the legal rule is to be applied in the particular circumstances, judges can use discretion in deciding whether to apply the rule. In exercising their discretion, judges must rely on considerations that lie outside the currently existing law, such as moral considerations and policy considerations. In hard cases, judges therefore perform a law *making* rather than a law *applying* function.

Consider the examples used in chapter 8 to illustrate legal reasoning. There are numerous precedents confirming the existence of a legal rule to the effect that an occupier of premises owes a duty of care to the persons invited onto the premises. A home, a shop and a classroom are all clearly premises, and in all cases the occupiers (the home occupier, the shop owner, and the school, respectively) owe a duty of care to visitors. But does the owner of a website owe a duty of care to people who visit the website? A website falls within the 'penumbra of uncertainty' around the word 'premises'. Following Hart, if a judge is called upon to decide whether the owner of a website owes a duty of care, they would refer to extra-legal considerations such as morality, policy or the practical consequences of their decision, and they would be *making* new law rather than *applying* existing law.

Hart insisted, however, that judges cannot make arbitrary or haphazard choices when deciding such 'hard cases'. They can make law only in the gaps created by the open texture of legal rules. Judges are not supposed to undertake far-reaching law reform but, within the gaps between existing legal rules, judges can create new legal rules.

THINK	Evaluate the claim that judges can make law within the gaps between existing legal rules, in terms of consistency with the rule of law and the separation of powers.

Lon Fuller

Lon Fuller (1902–1978), a natural law theorist, disagreed with Hart about the nature of judicial reasoning.[4]

Although he agreed with Hart that there are clear and predictable answers to legal questions, Fuller rejected Hart's view that language can be a source of legal determinacy. Fuller insisted that legal rules do not have a core of clear meaning that can be worked out from the language in which they are written. In order to interpret the rule, a judge must *always* refer to the purpose or context of the rule.

To illustrate his point, Fuller offered the example of a legal rule that makes it an offence to 'sleep' at a railway station, and two hypothetical cases:

1. a businessman, waiting for a delayed train early in the morning, who nods off while sitting upright, and
2. a homeless person who has settled down for the night on the platform with blankets and pillows but has not actually fallen asleep.

Who is 'sleeping' at the railway station in contravention of the rule? According to the view that words have a core of clear meaning, the word 'sleeping' means (say) 'not awake'. This means that the businessman is asleep while the homeless person is not. But Fuller argued that the judge must refer to the likely purpose behind the law in order to correctly interpret the word 'sleeping'. Having regard to this likely purpose, Fuller suggested that, in this context, the businessman is not 'sleeping' at the railway station while the homeless person is 'sleeping' at the railway station. In other words, Fuller thought that there is no such thing as context-independent literal meaning. The meaning of words in general, and of legal rules in particular, is always dependent upon the context in which they are used. There are no cases where a judge can mechanically apply a rule to a problem; the judge must always consider the context.

THINK	Come up with your own argument to illustrate the point made by Fuller, using the word 'premises' instead of the word 'sleeping'. Start with a fixed definition of premises, then think of (a) a place that satisfies the definition but is not a premises and (b) a place that does not satisfy the definition but is a premises.

Secondly, Fuller disagreed with Hart that judges should always follow the rules in clear cases. Fuller said that judges should ignore the plain meaning of legal rules when the plain meaning leads to a result that defeats the rule's apparent purpose. Fuller thus advocated a *purposive approach* to the interpretation of legal rules (see chapter 7). When something falls within the letter of the law but not its spirit, the letter should give way to the spirit.

Note that Fuller did not regard a purposive approach to interpretation as *judicial activism* (see below) or as involving the use by judges of non-legal or political reasoning. When he said that the words in which the law is expressed should not be regarded as decisive, this was not because he thought that judges are entitled to ignore the law in favour of extrinsic standards such as morality or justice. Rather, he thought that the words in which the law is expressed should not be identified with the 'real' law. It is the *purpose* that is the source of the real legal rule. Fuller claimed, in other words, that when purposive judges ignore the letter of the law in favour of the spirit of the law they are not making law or departing from it. Instead, they are being faithful to the law, which is latent in the statute but not in its words as ordinarily understood.

THINK	Evaluate Fuller's argument in terms of consistency with sections 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth) relating to a purposive approach and the use of extrinsic materials.

4. Lon L Fuller, 'Positivism and Fidelity to law — A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630.

Ronald Dworkin

Ronald Dworkin (1931–) also criticised Hart's understanding of judicial reasoning.[5]

One of Dworkin's principle criticisms of Hart focuses upon Hart's claim about 'hard cases' that, in cases where it is not clear whether or how a particular legal rule applies, judges must make a decision unconstrained by legal rules. Dworkin agrees with Hart that in hard cases judges have to go beyond the legal rules. He disagrees, however, that the law is indeterminate in these cases and that judges have the discretion to decide them in any way they see fit. Instead, Dworkin insists that even in hard cases there is a correct answer to every legal question. The correct answer is found not by applying legal *rules* but by identifying and applying the underlying *principles*. Even where there is no clear legal rule dictating the answer to a legal question, there is a legal principle (see our explanation of legal reasoning using *policy* in chapter 8).

Dworkin explains that, in practice, judges do not view the nature of their task as depending on whether a case is 'easy' or 'hard'. Even when it is not clear what the relevant law might be, most judges still see themselves as declaring existing law rather than as making new law. It is clear from the way most judges describe the judicial process that they always attempt to *find* the law, no matter how difficult the legal question. Judges can be said to *make* new law every time they announce a principle that has never been officially announced before, but judges see themselves as offering these new statements of law as descriptions of what the law already *is*. It may look like a judge has created a new legal rule but the judge would insist that the rule already existed; it just hadn't yet been expressed.

REPHRASE	What does it mean to say that judges *find* the law rather than *make* the law?

Thus, according to Dworkin there is more to the law than the explicit rules of law. There are also principles within or underlying the law, and when the rules of law are unclear, it is principles that provide the answer. If, for example, a judge has to decide whether the owner of a website owes a duty of care to visitors to that website, and there is no clear statutory rule or precedent, the judge should identify the principles that underlie the existing legal rules, and these principles should determine their decision. In our example, the principles underlying the existing law include the principle that vulnerable persons should be protected from unconscionable conduct, the principle that people should generally take personal responsibility for their own actions, the principle that legal rules should be generally consistent to ensure coherency in the law, and the principle that people should not be exposed to indeterminate liability. Dworkin insists that, despite the complexity and apparent inconsistency of such principles, there is a correct answer to every legal question.

THINK	If Dworkin is correct and there is a correct answer to every legal question, what happens if, in making their decision, a judge gets the answer wrong?

Legal realism

The views of the strict and moderate formalists can be contrasted with those of the legal realists.

Legal realism is based primarily upon the work of a group of US legal theorists from the 1920s, 1930s and 1940s. Prominent realists include Karl Llewellyn (1893–1962), Jerome Frank (1889–1957), Herman Oliphant (1844–1939) and John Chipman Gray (1839–1915). Oliver Wendell Holmes (1841–1935) was a key influence on the realists.

5. Ronald Dworkin, *Law's Empire* (Hart, 1998).

(We are focusing here upon *American* legal realism. There is also a related school of thought known as *Scandinavian* legal realism.)

RESEARCH Who was Oliver Wendell Holmes?

As indicated by their name, the realists endeavour to come up with a realistic (rather than abstract or theoretical) understanding of the nature and operation of law. Instead of thinking about the law and judicial reasoning in isolation from other social phenomena, legal realists see the law as one of many methods of social control. Legal realists also favour an empirical approach to understanding the law, preferring practical studies of how the legal system actually operates, and what judges actually do, rather than more philosophical musings about, say, the relationship between law and justice.

THINK According to realist Roscoe Pound (1870–1964), law is a mechanism for balancing conflicting interests and securing the maximum of existing wants with the minimum of friction. Contrast Pound's definition of law with the positivist and natural law explanations of the nature of law outlined in chapter 2.

Legal realists also have a distinctive approach to thinking about judicial reasoning. Instead of accepting the strictly formalist view, according to which legal rules provide uniquely correct answers to legal problems, legal realists prefer a 'realistic' approach and seek to identify the 'real' determinants of judicial decisions. They focus not on what judges *say* they do when they make decisions but on what they *actually* do.

As we have seen, the orthodox view of judicial reasoning is that it involves the application by a judge of rules of law, as found in case law and legislation, to the facts of a given dispute. The judge is supposed to mechanically reach a legal conclusion without regard to its practical consequences. Legal realists argue, on the other hand, that this notion of judicial reasoning is a myth. Judges do not make decisions on the basis of abstract rules; they instead make decisions on the basis of their instinctive response to the facts of the case and other non-legal factors such as policy or morality.

Legal realists explain that judges do not, of course, openly acknowledge the real basis of their decisions. Judges are reluctant to admit that they make decisions on the basis of non-legal factors because to do so would subvert the rule of law and the notion that judges should be impartial and objective. Instead they take advantage of the fundamental indeterminacy of legal rules (see chapter 8) and locate precedents and statutory provisions that support their instinctive opinions about a case. They pick and choose from the available legal rules and use the rules they select to rationalise the decision they have already reached on non-legal grounds. They then present this decision as if it is a conclusion deduced logically and objectively from clear, pre-existing rules.

THINK If you were to accept the realist understanding of judicial reasoning, how would this affect the way you should argue a case before a judge?

Some legal realists claim that the process of judicial decision making can be studied scientifically. Methods from disciplines such as psychology and sociology can be used to work out how judges really make decisions, which would then make it possible to predict how individual judges and courts will react to the facts of particular legal disputes.

Legal realists also insist that judges should openly acknowledge the legislative nature of judicial decision making. Judges should explicitly acknowledge and focus on the future social and economic consequences of their decisions. Their decisions should be informed

by research in social scientific disciplines such as economics and sociology. If judges were to more explicitly and honestly state the basis for their decisions, it would allow their policy preferences to be scrutinised so that their decision making could ultimately be based on scientifically acceptable propositions. Legal realists do not therefore completely reject the possibility of a rational, scientific approach to law; they merely question the simplistic and unrealistic approach taken by formalists. This is one of the differences between legal realism and some of the more recent critical theories of law.

Many of the insights of the legal realists are now generally accepted by mainstream legal theorists, including the insights relating to the relevance of politics, psychology and sociology in achieving a full understanding of legal reasoning and decision making.

THINK	Read about the life and decision making of UK judge Lord Denning at www.guardian.co.uk/uk/1999/mar/06/claredyer1. To what extent do the points made in the article regarding Lord Denning's decision making affirm the tenets of legal realism?

THINK	Reflect upon the various conceptions of judicial reasoning presented above, from strict formalism to legal realism. Which do you prefer? Why?

Judicial activism

Judicial activism is a term used to describe — usually in a negative sense — the practice of judges reforming the law and overruling legal precedents on the grounds that the existing rules appear to them to be unjust, defective or obsolete. Strict legal formalists would insist that such a practice is completely unacceptable. Moderate formalists would point out that judges often add to and change the law when they make decisions, but ideally they should do so incrementally rather than radically. Legal realists would argue that judges are rarely constrained by precedent, since there is usually a precedent or interpretation in support of any position, so that it is unnecessary for them to overtly change the law. The term 'judicial activism' is used by those who believe that a judge is going too far and changing the law both overtly and radically.

Most lawyers today would acknowledge that judges have always made, developed, reformed and refined the law. As Brennan J stated in *O'Toole v Charles David* [1990] 96 ALR 1, 21:

> Nowadays nobody accepts that judges simply declare the law; everybody knows that, within their areas of competence and subject to the legislation, judges make law. Within their proper limits, judges seek to make the law an effective instrument of doing justice according to contemporary standards in contemporary conditions. And so the law is changed by judicial decision, especially by decisions of the higher appellate courts.

The controversy about judicial activism is one of degree and context. When, why and how should law reform by judges occur? And how much is too much?

Perhaps the most famous example of radical law reform by Australian judges is the decision of the High Court of Australia in the *Mabo* case. In that case (as described in chapter 3) the Court made a dramatic change to the law of Australia by recognising the existence of native title to land. Prior to this decision, native title had not existed in Australia, and the High Court effectively created a new form of property rights. The decision of the High Court in *Mabo* is considered by many to represent a major advance toward social justice. Critics, however, claim that the decision was an example of judicial activism at its worst; the court had engaged in a form of law making that was best left to the

legislature. They claim that the decision changed the common law too radically and was not based on satisfactory precedent.

A court's approach to the interpretation of legislation can also give rise to accusations of judicial activism. Judicial activism is claimed to take place when a court adopts an interpretation of statutory language that goes well beyond the ordinary meaning of the words, either because the court believes that the interpretation gives effect to the true intent of the legislature or (more controversially) because it seeks to thwart or limit an undesired legislative purpose. For example, Parliament sometimes, by means of legislation, seeks to oust (remove) a court's jurisdiction to hear a particular type of case. Legislative provisions like this are typically interpreted quite explicitly by courts in a way that negates their effect.

Progressivism in the interpretation of the Australian Constitution by the High Court has also been labelled judicial activism. 'Progressivism' is an approach to interpretation of the Constitution where the High Court gives the words and passages in the Constitution their contemporary meanings, rather than their literal meanings or the meanings intended by the original drafters of the document. For example, the Court has interpreted the Constitution so as to find an implied freedom of political communication (see chapter 4), something that is not apparent in either the actual wording of the Constitution or the intentions of those who created it. Supporters of progressivism argue that this is necessary in order to keep the Constitution relevant to contemporary conditions, but those opposed to progressivism claim that it is another example of judicial activism.

Critics of judicial activism base their opposition on the following arguments:

- Judicial activism gives the law a retrospective operation. Disputes are resolved according to rules that could not possibly have been known or predicted at the time the dispute arose. This is unfair.
- The judiciary is a second-rate law maker. Judges have little or no experience in policy creation, economics, politics or administration. They lack the capacity to explore the multitude of factors and interests informing policy, to undertake a cost–benefit analysis of competing proposals, to design or predict what systems are needed to translate a policy decision into reality, or to explore the ramifications of their decisions beyond the case.
- Even if judges could make law effectively they should not do so because it is inconsistent with democracy and the separation of powers doctrine. Judges are not elected and are not representative of the people in the way that parliamentarians are.

Some critics argue that judicial activism amounts to judges acting as omnipotent and unaccountable monarchs, laying claim to a greater understanding of the fundamental ideals of society than the people they should serve, and inflicting their personal views about politics, government, religion or any other issue of choice on society without censure.

> Law making is the province of democratically derived power, that is political power, and it ought to be unthinkable that those who make rules cannot readily be sacked. There is, thus, no place for philosopher kings and there ought to be no place for activist, unelected, unrepresentative, law making judges. Law making is controversial but, so long as it resides in the Parliament, the people are protected, albeit imperfectly, by their vote.[6]

Those in favour of judicial law reform, on the other hand, believe that, if Parliament is unwilling to modify the law to achieve just social outcomes, judges should be willing and able to do so. They argue that the courts play an important role in ensuring that the law reflects contemporary standards and values:

> There is a legal counter-reformation under way. It is made up of those who denounce as 'judicial activism' the time-honoured role of judges to adapt and adjust the law to the age of

6. John Hyde, 'Brennan's vision is flawed', *The Australian*, 4 August 1995.

cyberspace, the genome and global human rights. This counter-reformation should not be allowed to succeed. If it does, we will end up with our own disgraceful incidents of judicial witch-hunting, like those that have occurred in the United States. Alternatively, we may see the bullying of judges in an attempt to force them to draw back from honesty in the discharge of their functions, so as to avoid threatened political heat from people who prefer an inert judiciary: one that denies its legitimate creative role in defending justice.

Somewhere between the spectre of a judge pursuing political ideas of his or her own from the judicial seat, irrespective of the letter of the law, and the unrealistic mechanic deified by the strict formalists, lies a place in which real judges perform their duties: neither wholly mechanical nor excessively creative.[7]

The moderate view is that, while judicial law making will always exist, it should be limited to incremental change that is mindful of precedent and the limitations of the judicial process. In relation to statutory and constitutional interpretation, judicial law making must be even more limited. If judges are seen as too activist, they run the risk of losing their credibility as fair and impartial dispensers of justice.

THINK

Go to www.theaustralian.com.au/national-affairs/immigration/high-court-rejects-refugee-swap-deal/story-fn9hm1gu-1226126519782 to read about the High Court of Australia's decision in 2011 regarding the legality of the Federal Government's 'Malaysian solution' to dealing with asylum seekers. Was the decision of the High Court an example of judicial activism? Why or why not?

REVISION

Before proceeding, ensure that you can answer each of the following questions.

1. What is 'political reasoning? What is 'legal reasoning'? What is the relevance of the distinction between legal and political reasoning to the judicial process?
2. According to orthodox legal theorists, how does legal reasoning differ from political reasoning?
3. According to the formalists, what are the three benefits of rigidly following the rules?
4. What are Hart's two 'great exaggerations'?
5. What is Hart's 'penumbra of uncertainty'?
6. What is Fuller's purposive approach to the interpretation of rules?
7. What is the difference between Dworkin's and Hart's views of hard cases?
8. What is 'legal realism'?
9. What is the realist critique of judicial reasoning?
10. According to the legal realists, how do judges decide cases?
11. According to the legal realists, how *should* judges decide cases?
12. What is 'judicial activism'?
13. What are the arguments in favour of judicial law making?
14. What are the arguments against judicial activism?

Law and power

It is difficult to deny that there is a close relationship between law and power. Law takes the form of either legislation or case law. Legislation is made by politicians, who collectively and sometimes individually wield extensive political power. Case law

7. Justice Michael Kirby, 'Judicial power requires some creativity', *The Australian Financial Review*, 28 November 2003.

is made by judges, whose decisions have important implications for the parties who appear before them. The law itself is clearly a mechanism of power, enabling those who make the laws to exercise considerable influence and even control over the lives of citizens.

In this section we consider a range of critical perspectives on the relationship between law and power, on what law 'really' is and on how judges 'really' think. Orthodox legal theorists tend to favour the view that the legitimacy of law is founded upon consistency with extrinsic standards (as natural law theorists believe) or upon some ultimate rule of recognition (as legal positivists believe). Critical legal theorists, on the other hand, insist that the 'legitimacy' of law is founded upon the outcome of contests of power within the community. Some members of the community exercise more power and influence than others, and it is these dominant parties who, through their influence over lawmakers, politicians and judges, determine what shape the law should take and in whose interests the law should be made.

Critical theories of law include Marxist legal theory, critical legal studies (CLS), postmodern legal theory, feminist legal theory and critical race theory, each of which is described below. These critical legal theories are diverse, contradictory and intricate, but each is characterised by a radical scepticism about traditional legal models and their claims to objectivity and universalism. They insist that traditional legal models silently reinforce certain assumptions and covertly communicate certain values. Critical legal theories, on the other hand, deny the possibility of a politically neutral account of law and question the law's hidden assumptions and values.

Critical legal theorists insist that, when you engage with a legal rule, you should not be afraid to ask: Who benefits from this rule, and who is disadvantaged or marginalised by this rule? For example, according to the law of negligence, in deciding whether someone has been negligent, the court compares their conduct with what the court believes that a 'reasonable person' would have done in the same circumstances. The standard of the 'reasonable person' appears to be a neutral and universal standard, but a number of critical legal theorists have pointed out that the standard actually applied by many judges appears to be that of the reasonable, white, well-educated male, a standard that excludes and ignores the perspectives and expectations of women, minority cultures, the less educated and the poor.

Regardless of your personal political views, it is important that you understand the various critical perspectives on law and power. You may even discover that some of these critical perspectives are consistent with or reinforce your own beliefs.

Marxist legal theory

Karl Marx (1818–1883) was a German philosopher, political economist, historian, political theorist, sociologist, communist and revolutionary. His ideas formed the foundation of modern communism. According to Marx, in any society the 'means of production' — the labour power, the materials, and the instruments and tools used in the process of production — and the 'relations of production' — the exploitation of the workers ('the proletariat') by the ruling class ('the bourgeoisie') — are of fundamental importance in explaining everything else about that society, including the legal system. Together, the means of production and the relations of production form the political economy or what Marx called the 'base' of society. The base in turn gives rise to the 'superstructure', which includes social practices and institutions such as education, politics, morality, religion, culture and law. The relationship between these social practices and institutions and the underlying base is reciprocal; the law is shaped by the political economy, and the law, along with politics, religion, education etc., helps to sustain the political economy by legitimising it (see figure 11.3).

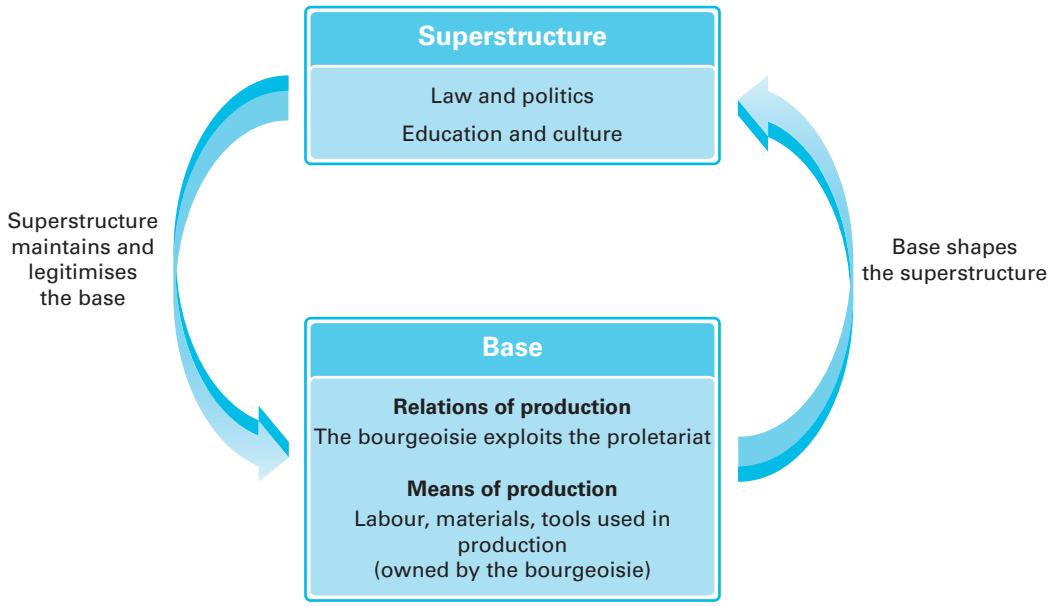

FIGURE 11.3 Base and superstructure of society according to Marxism

Marxists insist that the legal rules and doctrines that prevail in a capitalist society (such as Australia) are those that reinforce the economic interests of the ruling class. In other words, the law ensures that wealth stays in the hands of the wealthy, and legal institutions exist first and foremost to protect the rich from the poor. This is not, however, immediately obvious. Law does not present itself as an instrument of class exploitation and oppression. Instead, it presents itself as an impartial vehicle for everyone's interests. According to Marxists, the rule of law and the liberal notion of equality before the law are myths propagated by the wealthy in order to discourage others from inquiring too deeply about the actual beneficiaries of law's monopoly of force. If it were obvious to everyone that the main beneficiary of the law is the ruling class, members of the exploited classes would be less likely to cooperate. Law instead 'papers over the cracks' and appears non-partisan.

Marxists insist, for example, that workers in a capitalist society are forced to sell their labour for less than its true value: workers are paid much less than the true value of the work that they perform, and the employers — the capitalists — pocket the profits. The liberal legal fiction of 'freedom of contract' obscures this reality by causing everyone to believe that contracts between workers and employers are negotiated freely. Social and economic inequalities are similarly disguised by the liberal legal notion of 'equality'; the notion makes it seem as if everyone enjoys the same rights, but the poor do not benefit from the protection of property law in the same ways as the wealthy. The right to private property is made to appear inevitable and beyond challenge, but in reality it benefits a wealthy minority at the expense of an oppressed majority.

THINK	Can you think of another example of law that makes an unequal or unfair status quo look natural?

According to Marxist legal theory, law is a political tool used by some members of society to impose their dominance over other members of society rather than a neutral and apolitical tool for the resolution of disputes. This is a perspective on law that was embraced by the Critical Legal Studies movement.

Critical legal studies

The critical legal studies (CLS) movement emerged in the United States in the 1970s. It includes among its adherents Roberto Unger (1947–), Duncan Kennedy (1942–), Morton Horwitz (1938–) and Mark Tushnet (1945–).

CLS combined legal realist ideas with Marxist and left-wing politics and a critique of legal liberalism. According to Robert Gordon, the aim of CLS was:

> to unfreeze the world as it appears to common sense as a bunch of more or less objectively determined social relations and to make it appear as (we believe) it really is: people acting, imagining, rationalising, justifying.[8]

A central tenet of CLS was the *indeterminacy thesis*. Traditional understandings of law and legal reasoning assume that the law consists of a stable and consistent body of rules and principles that can be applied logically and objectively in the resolution of legal disputes. Critical legal scholars, however, insisted that this is simply not the case:

- Legal rules and principles contradict each other.
- For every legal rule and every legal principle there are numerous exceptions.
- There are so many different rules potentially relevant to any legal problem that there is virtually always precedential support for both sides in a legal argument.
- There are many ways of interpreting a precedent: it can be interpreted narrowly or broadly, it can be confined to its facts or read as standing for a wider proposition. The same precedent can, in other words, be used to justify opposing outcomes. The same thing is true of the interpretation of statutes.
- Different courts and different judges interpret the same rules and principles in different ways.
- The way legal rules are interpreted change over time; a rule may be interpreted one way by the courts at one time, and then a few years later it is interpreted by the courts in a completely different way.

Clear, fixed, stable interpretations of legal rules simply do not exist, and legal rules and principles are therefore not capable of leading to uniquely correct answers in any of the cases that come before the courts. There is, in other words, no such thing as a 'legally correct decision'.

Like the legal realists (see above), critical legal scholars claimed that judges actually make their decisions on the basis of non-legal factors and that they conceal the real nature of their decisions using elaborate, after-the-fact rationalising exercises, disguising their subjective choices as 'objective' judicial reasoning. In the case of CLS, however, the indeterminacy thesis was part of a radical critique of the entire body of liberal legal theory. The realists were reformists and liberals, who thought that law should be used as an instrument to advance the values of liberal democracy. The critical legal scholars, on the other hand, were opposed to liberalism. They claimed that liberalism's focus upon the relationship between the 'individual' and 'government' disregards (and even legitimises) the influence and dominance of certain groups within society such as the wealthy. They believed that the liberal notions of the 'rule of law' and 'legal rights' — which you may recall as being claimed by liberal theorists to protect individuals from abuses of power (see chapter 2) — are neither coherent nor desirable, and do little more than cover up the fundamental inequalities within society. Critical legal scholars sought to 'delegitimate' law, which they saw as a tool of injustice wielded by the powerful over the powerless. CLS was strongly influenced by Marxist theory (above) and by postmodern theory (below).

8. Robert Gordon, 'Critical Legal Studies as a Teaching Method, Against the Background of the Intellectual Politics of Modern Legal Education in the United States' (1989) 1 *Legal Education Review* 59.

Many critical legal scholars in their writing attempted to expose the contradictions and incoherencies within the law and to demonstrate the impossibility of making any coherent sense out of legal materials. For example, they demonstrated that, on the one hand, the law appears to be committed to the objective and formalistic use of rules as the correct way to resolve disputes and, on the other hand, the law is committed to a case-by-case approach to the resolution of individual disputes. The law is also torn between a utilitarian commitment to maximising overall wellbeing and an individualistic commitment to recognising and protecting individual rights. These fundamental contradictions within the law render the law incoherent — and open to misuse by legal decision makers and by those with the financial and political resources to influence legal decision making by judges and politicians.

If such contradictions are so pervasive in legal doctrine and liberal theory, how did critical legal scholars explain legal cases where the outcome appears to be predictable? They argued that the fact that judicial reasoning can often be predicted and that judges often agree on the answers to legal questions is a result of their shared political commitment to the status quo. Predictability and consistency in the law is the consequence of ideological consensus among the powerful, not of the law's objectivity. Politically biased judges tend to favour outcomes consistent with the judges' own political views.

If the law does not constrain or determine judicial reasoning, what then is its function? Drawing upon the Marxist view of law as ideology, the answer for CLS was that law exists to legitimate the status quo. The law is portrayed as natural or necessary, and this in turn gives the hierarchical power structures of the status quo the appearance of neutrality and legitimacy. The law exists to persuade the majority that the present social hierarchy — with the wealthy and the powerful at the top and the workers, the unemployed, the homeless and everyone else underneath — is not only the best way things can be but also the *only* way things can be.

How can any of this be changed? According to CLS, liberalism and the liberal legal system need to be 'trashed'. Liberalism's contradictions, ideological biases, legitimating functions and injustices must be exposed. This will clear the way for alternative, more egalitarian ways of thinking about law and its role in society. The ultimate aim of CLS was therefore social transformation. However, as many critics pointed out, the critical legal scholars tended to be vague about the nature of the future society they thought desirable and the way to get there:

> [C]ritical legal theorists fundamentally question the dominant liberal paradigms prevalent and pervasive in American culture and society. This thorough questioning is not primarily a constructive attempt to put forward a conception of a new legal and social order. Rather, it is a pronounced disclosure of inconsistencies, incoherencies, silences, and blindness of legal formalists, legal positivists, and legal realists in the liberal tradition. Critical legal studies is more a concerted attack and assault on the legitimacy and authority of pedagogical strategies in law school than a comprehensive announcement of what a credible and realizable new society and legal system would look like.[9]

CLS as a discrete movement within legal scholarship has largely ceased to exist, but the insights produced by CLS scholarship continue to inform more contemporary forms of critical legal theory such as postmodern legal theory, feminist legal theory and critical race theory.

THINK	What are the similarities and the differences between legal realism and CLS?

9. Cornel West, *Keeping Faith* (Routledge, 1993) 196.

Postmodern legal theory

In order to understand postmodern legal theory, you must first understand postmodernism.

Postmodernism is a 'notoriously ambiguous' concept,[10] but it is usually defined in terms of modernism, since *post*modernism seems to refer to something that comes *after* modernism. Modernism is itself an ambiguous concept, but it is usually defined as the ideology of the Enlightenment project. This is the project aimed at achieving a complete understanding of the world using rationality. Modernism presumes that there exists a single correct mode of representation that can be uncovered through scientific and mathematical endeavour. Modernism is an ideology of 'linear progress, absolute truths, and rational planning of ideal social orders.'[11]

Postmodernism, on the other hand, insists that truth is made rather than found, and perceives reality as socially constructed. This doesn't mean that there is nothing 'out there'. The world is out there, but the ideas we form about it, and the things we say about it, are constructed by people. According to Richard Rorty:

> to say that truth is not out there is simply to say that where there are no sentences there is no truth, that sentences are elements of human languages, and that human languages are human creations.[12]

There are some scholars who embrace postmodernism. To them, postmodernism is:

> ... celebrated as an exhilarating moment of rapture. It defies the system, suspects all totalising thought and homogeneity and opens space for the marginal, the different and the 'other'. Postmodernism is ... the celebration of flux, dispersal, plurality and localism.[13]

There are many other scholars, however, who reject postmodernism in favour of modernism. Modernism is sensible and understandable, and the modernists either ignore postmodernism or reject it as irrelevant, insubstantial, impractical or nihilistic. According to Hunter, this is a reflection of the 'culture war' between the impulse toward progressivism and the impulse toward orthodoxy.[14] The ongoing culture war between those who embrace postmodernism and those who ignore or reject postmodernism is a dispute between those who see truth as socially constructed and those who prefer to believe that the truth is 'out there'. From the modernist perspective, attempts by postmodernists to subvert rationalism and social tradition are attacks on the pillars of modern civilisation. From the postmodern perspective, however, these 'pillars' are no more than the ideology that people are forced by the dominant groups in Western societies to accept, and the subversion of modernism is resistance to this unjust dominance. This does not mean that the modernist notions of truth, science and reason should be completely rejected. It means that dogmatic belief in their universality and infallibility, and the imposition of that belief by some people upon others, should be exposed and subverted.

Postmodernism and law

There are four interconnected themes of postmodernism of specific relevance to law (see figure 11.4).

Postmodern lawyers and legal scholars make use of these and other postmodern ideas in order to argue that legal materials can always be interpreted in contradictory ways, that the incoherence of law is concealed by the political context in which judges operate, and that the underlying assumptions within law should be exposed and the suppressed alternative perspectives allowed expression.

10. Costas Douzinas and Ronnie Warrington, *Postmodern Jurisprudence: The Law of Texts in the Texts of Law* (Routledge, 1991) 14.
11. David Harvey, *The Condition of Postmodernity* (Basil Blackwell, 1989) 27.
12. Richard Rorty, *Contingency, Irony, Solidarity* (Cambridge University Press, 1989) 3.
13. Costas Douzinas and Ronnie Warrington, *Postmodern Jurisprudence: The Law of Texts in the Texts of Law* (Routledge, 1991) 15.
14. James Davison Hunter, *Culture Wars: The Struggle to Define America* (Harper Collins Publishers, 1991).

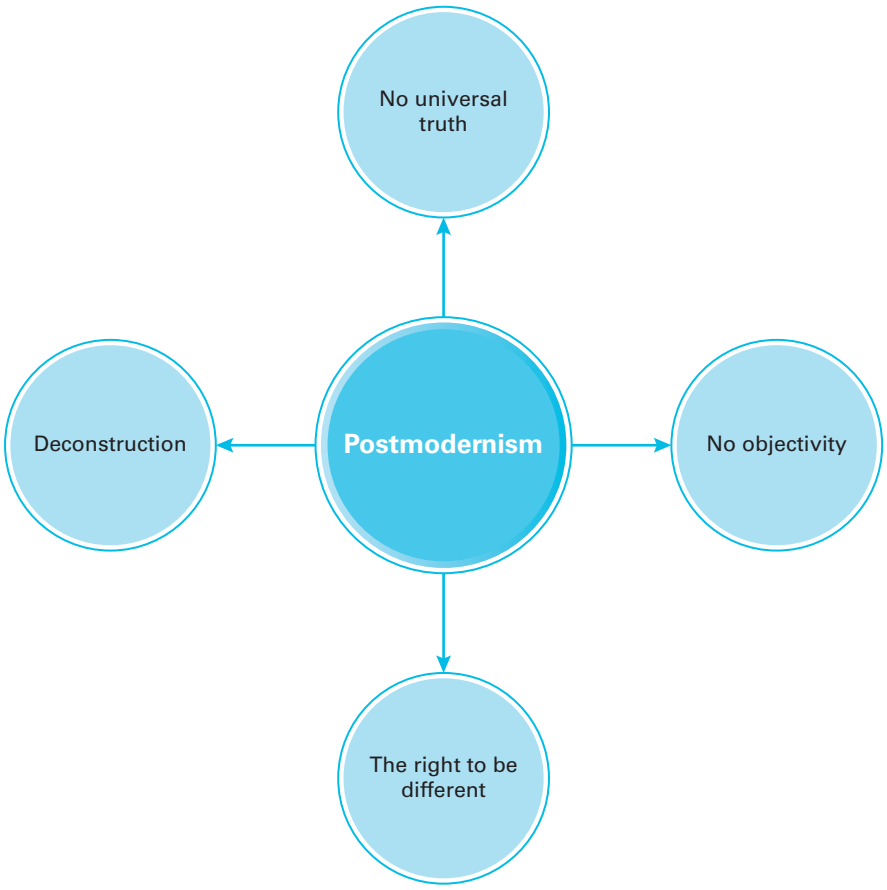

FIGURE 11.4 Themes of postmodernism

No universal truth

Jean-Francois Lyotard (1924–1998) defined postmodernism as 'incredulity toward metanarratives'.[15] Modernism is one example of a metanarrative cited by Lyotard. Others include the Christian religious story of God's will being worked out on Earth and the Marxist political story of class conflict and resolution. Postmodernism insists that there is no single story or theory that can explain the world … or law.

For a postmodern lawyer, there is no single explanation of the nature of law, the purpose of law or the relationship between law and justice. Instead, the most appropriate explanation depends upon the context in which the question is being asked. (Compare this with the explanations offered by orthodox legal theorists such as legal positivists and natural law theorists.)

No objectivity

Postmodernism emphasises the socially conditioned nature of thinking. Everything you think and everything you know is determined by your social conditions. It is, in fact, impossible (according to postmodernists) for you to access 'reality' by transcending your local or partial understandings of the world. There is no independent viewpoint on truth and no way of ensuring that what you say accurately describes an external reality. What you think of as 'truth' is always socially constructed rather than an undistorted reflection of reality.

15. Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota, 1984).

A postmodern lawyer therefore acknowledges that it is impossible for anyone, including judges, to look at a situation 'objectively'. Every claim is made from a particular perspective and is true or false only from that particular perspective. Something that is true or right from one point of view may at the same time be false or wrong from a different point of view. Every statement, no matter how authoritative, is at best a partial, limited truth rather than one that is objective. And postmodern lawyers recognise that their own beliefs and opinions may differ from the equally valid beliefs and opinions of others.

This is a particularly useful insight for those lawyers who engage on a regular basis with people from cultural backgrounds different from their own. It enables the lawyer to recognise their own beliefs and assumptions as being located within a particular cultural context and to more readily accept the differences between their own views and those of their clients.

The right to be different

Postmodernism emphasises difference, multiplicity and fragmentation instead of unity and universality. Rather than trying to come up with theories and explanations with which everyone can agree, it seeks to acknowledge the distinctive perspectives of individuals. This emphasis on difference and uniqueness leads to a distinctive form of politics. Postmodern politics focuses on the way in which those in power marginalise and oppress particular individuals and groups, such as people of colour, women and homosexuals. It promotes 'identity politics', a politics that focuses on the 'right to be different'.

This aspect of postmodernism has been taken up by many critical legal theorists including feminist legal theorists and critical race theorists (see below).

Deconstruction

Postmodernism insists that reality — or at least, reality as it is perceived — is constituted by language. You can see only what you can describe. Further, the language that you use to construct your reality is unstable and fluid rather than stable and fixed. This is a notion that was first touched upon in chapter 7 and one which many lawyers are familiar with; the meanings of words and texts are not fixed but flexible and open to manipulation.

According to Jacques Derrida (1930–2004), all meanings are inherently unstable and contingent, and all texts have many, frequently conflicting meanings, none of which can be said to be more authoritative or more correct than any other. An illusion of stability, however, results from the efforts by dominant groups in society to promote one meaning over alternative meanings. A feminist postmodernist, for example, might argue that certain terms that are capable of multiple interpretations are given a single, masculine interpretation because of the historical dominance of the male perspective.

Consider the following:

> Acting on an anonymous phone call, the police raid a house to arrest a suspected murderer. They don't know what he looks like but they know his name is John. Inside they find a carpenter, a truck driver, a mechanic and a fireman playing cards. Without even asking his name they immediately arrest the fireman. How did they know whom to arrest?

(Think about your answer before continuing.)

The answer is that the police knew that the fireman was John because the fireman was the only man in the room; the carpenter, the truck driver and the mechanic were all women. Did you assume that they were men? This is because, even though those three terms are capable of referring to both men and women, the 'dominant' interpretation of those terms is that they refer to men.

'Deconstruction' is the process of destabilising dominant interpretations of words and texts, exposing their limited perspective and subverting the traditional distinctions on which they rely. This creates a space for the expression and acknowledgement of excluded and marginal views. One could, for example, deconstruct a particular judicial decision to show how judges chose certain interpretations of the law and of the facts over other interpretations, why they did so, and the consequences of their interpretations. Exposing

the ways in which judges have historically favoured certain gendered and cultural viewpoints and disregarded others makes it easier for marginalised groups to have their perspectives acknowledged in the future.

Deconstruction is of particular use to lawyers, who can use its techniques to rebut opposing arguments and overcome opposition to legal and social reforms by exposing the assumptions regarding meaning upon which they rely.

THINK How does Derrida's point about the fundamental instability of language relate to what you have learned about statutory interpretation?

Foucault and law

The French philosopher and social theorist Michel Foucault (1926–1984) wrote about many things: reason and madness, discipline and punishment, medicine, scientific thought, sexuality and ethics. It was, however, his interest in *knowledge* and *power*, and how they work together, that united his wide field of study and for which he is today best known. Foucault famously insisted that knowledge and power are inextricably linked; every expression of knowledge is an exercise of power, and every exercise of power leads to the creation of knowledge.

Law was not one of Foucault's explicit objects of investigation. He preferred to explore the nature of non-legal power. Nevertheless, law did feature in many of his texts. Discussion of the nature of law featured prominently in *Discipline and Punish*[16] and *The Will to Knowledge*,[17] and in the second of his 'Two Lectures'.[18]

Consistent with the postmodern objection to universal truths, Foucault did not view laws as universal rules of behaviour. Rather, all laws are particular, and they claim universal application only in an attempt to justify themselves as being somehow 'normal' or 'right' or 'natural'. For Foucault, a law is a particular expression of power. It is not the most evolved or the most civilised expression of power, but simply power in a particular guise. In 'Nietzsche, Genealogy, History' he wrote:

> Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination.[19]

In *The Will to Knowledge* he acknowledged the historical importance of law as a technology of power:

> Law was not simply a weapon skilfully wielded by monarchs: it was the monarchic system's mode of manifestation and the form of its acceptability. In Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law.[20]

In 'Two Lectures' he acknowledged the importance of law in contemporary society. In modernity, law, along with science, provides a privileged source of truth: 'It's the characteristic of our Western societies that the language of power is law, not magic, religion or anything else'.[21]

For Foucault, however, law is neither the most important nor the most interesting example of an expression of power. In fact, Foucault appeared extremely concerned to emphasise that, in modernity, discipline is the most common and most important form of power, and the view that law is more effective than discipline is dangerously outdated:

> Law is neither the truth of power nor its alibi. It is an instrument of power which is at once complex and partial. The form of law with its effects of prohibition needs to be resituated among a number of other non-juridical mechanisms.'[22]

16. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books, 1991).
17. Michel Foucault, *The Will to Knowledge: The History of Sexuality 1* (Penguin, 1998).
18. Michel Foucault, 'Two Lectures' in Colin Gordon (ed), *Michel Foucault. Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Harvester, 1980).
19. Michel Foucault, 'Nietzsche, Genealogy, History' in Paul Rabinow (ed), *The Foucault Reader* (Penguin, 1984) 85.
20. Foucault, above n 17, 87.
21. Foucault, above n 18, 201.
22. Foucault, 141.

The conventional conception of law is the set of rules commanding behaviour, backed by the threat of coercive sanctions. Foucault treated such a conception as typical of the view of power and the state that he sought to transcend. He sought to displace the equation of 'power' with repression exercised by some unitary agency. He insisted that the persistent focus on sovereignty and centralised law obscures the key importance of disciplinary power. Foucault's conception of law is one of a mechanism that is, in modernity, confined mainly to providing legitimations for the disciplinary technologies and normalising practices established by other mechanisms, such as culture, education and the media. He wrote in *The Will to Knowledge*:

> I do not mean to say that law fades into the background or that institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.[23]

THINK

Reflect upon what you have done today. Think about how your activities were constrained by law. Now think about how your activities were constrained by other 'disciplinary mechanisms' such as your cultural background, your religious views, your family's expectations, the education you have received and what you know about the world from the media. Do you agree with Foucault's point that law is just one of the many ways in which power operates in our lives?

Feminist legal theories

As was the case with postmodern legal theory and postmodernism, in order to understand feminist legal theory you need to understand the meaning of feminism.

The terms 'feminist' and 'feminism' provoke many different responses. Many people assume (incorrectly) that a feminist is a woman who hates men, and that feminism is about blaming men for everything that is wrong with the world.

What a Feminist Isn't

http://bitchitudeblog.com/feminist.

Some time last year, I was having a conversation with a good friend and I ended up saying something like 'Well, yeah, but then again, I'm a feminist.' This is the conversation that followed:

Friend: PJ, I didn't know you hated men! I would have never guessed.
Me: That's because I don't hate men. I love men. … But I just don't believe that women are less than men and I support anything that promotes equality.
Friend: Oh. I think that too. Maybe I'm a feminist, too.
Me: Welcome to the club, honey.

My friend isn't an idiot. She's just no different from anyone else who isn't quite sure what a feminist is. The term 'feminist' gets thrown around so often to fit different agendas that it's kinda lost some of its core meaning. This happens a lot to words. My parents think the word 'Muslim' means blow up a building, even though the overwhelming majority of those who practice Islam are peaceful people. If you listen to the hype, you might think that a feminist is someone who hates men, too. But that's just one of the many things that a feminist isn't. Here are a few more:

- A feminist isn't someone who agrees with every woman on the basis that she's a woman. It XXXXXs me off to no end when someone expects me to support their agenda because we're both women. I can support your rights as a woman and still disagree with your views. …

23. Ibid 144.

- A feminist isn't a lesbian. The idea that feminists hate men so much that they just can't even stomach the idea of having sex with them is ludicrous. …
- A feminist doesn't have to be an atheist, bisexual, combat boot wearing anarchist. You could be. Or you can be a stay at home mom who's been married for 20 years. Or a Christian pastor. Or an ex-Mormon opera singer. Your personal choices for your life have no bearing on whether you believe in women's rights.
- A feminist doesn't want women to rule the world. Women already rule the world. Men just don't know it yet. Ok, I'm kidding. Believing men are incompetent jerks doesn't make you a feminist. Being a feminist means that you believe that women have something very valid to add to the world and shouldn't be discounted on the basis of what grows between their legs.
- A feminist doesn't have to be a woman. Men are just as capable of being feminists if they believe in women's rights. It doesn't make them gay, sensitive or even that great of a guy. He can still be a douche and if he believes in the rights of women, he's a feminist.

Men and women aren't the same. In general, we are made differently, both physically and mentally. Saying that you think a man and a woman are the same is like saying you think apples and oranges are the same. It makes me think you're either blind or have never seen an apple or an orange.

But women are not inferior to men. We have our strengths and weakness, just as they do. That doesn't make us less than they are. We have the right to be heard, to be treated with the same respect and to be given the same opportunities as men do. And if you believe that, then you're a feminist, too. Welcome to the club.

Many legal scholars identify as feminists. These legal scholars focus upon identifying and seeking to address the law's historical failures in acknowledging or responding to the values and experiences of women or according substantive justice to women as a gender. Feminist legal scholars draw on other critical theories, such as Marxism, CLS and post-modernism in their writings, but have modified and redirected them to acknowledge and incorporate the experiences of women.

Feminists have been interested in law and law reform since feminism itself was identifiable as a discrete ideology in the early 19th century. Many feminist campaigns have had the aim of bringing about legal change, including campaigns to give women the right to vote, to reform marriage laws in the 19th century and to prohibit discrimination in employment in the 20th century.

Types of feminism

There are a number of different types of feminism (see figure 11.5). The various types of feminism are united by the beliefs that (1) women should enjoy equal rights and opportunities to men, and (2) the ideal of gender equality is not presently realised and some degree of social change is therefore needed to achieve it. Feminism's earliest opponents rejected the first belief. Today, feminism's opponents are likely to accept the first belief but reject the second belief.[24]

The evolution of feminism since its emergence as a social movement is often described as having occurred in three waves. The *first wave*, which occurred during the 19th and early 20th centuries, was concerned with the granting of basic rights to women such as the right to vote. The *second wave*, which occurred in the 1960s, 1970s and 1980s, was concerned with achieving social equality, such as equality in the workplace. And the *third wave* of feminism, which commenced in the 1980s, is concerned with diversity of women's experiences rather than treating women as a single, homogeneous class of beings.

24. Jonathon Crowe, *Legal Theory* (Thomson Reuters, 2009) 86–7.

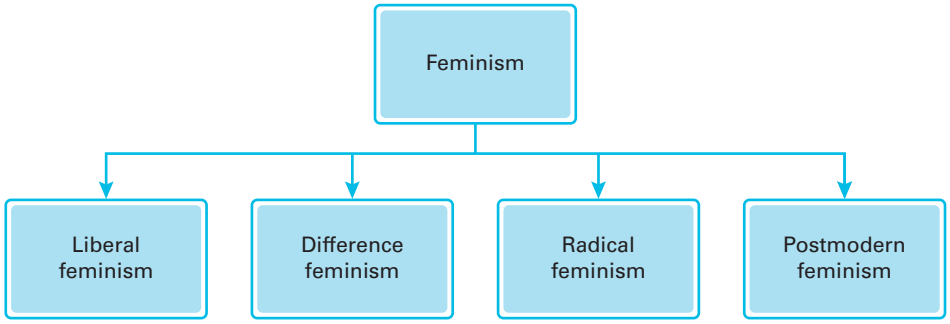

FIGURE 11.5 Types of feminism

Liberal feminism

Liberal feminism is the oldest form of feminism, emerging from the writings of women such as Mary Wollstonecraft (1759–1799). It focuses upon the recognition of women's rights paralleling the rights of men: that is, upon ensuring that the liberal ideal of *equality* extends to women and that the liberal notion of *rights* is gender neutral. It insists that it is possible to have gender equality within a liberal society but that inequality has persisted due to male dominance and control of the lawmaking process. Liberal feminists are generally concerned with the pursuit of *formal* equality, particularly in the public sphere. Women should have the same rights and opportunities as men in relation to voting, property ownership and income.

Within Australia many (but certainly not all) of the objectives of liberal feminism have been achieved. Liberal feminists continue to argue for law reform, but they do not necessarily challenge the idea of 'law'. In other words, liberal feminists seek change within the existing system of law.

Difference feminism

According to difference feminism, there is a distinctly feminine way of approaching moral and legal problems that is different from the way in which established legal theory and practice approach them. Whereas liberal feminism focuses upon the equality of men and women, difference feminism focuses upon the differences between the sexes.

Difference feminism relies upon work by writers such as Carol Gilligan who argue that women have their own specific culture which has inherent value and that their distinctive voice or viewpoint must not be ignored or undervalued in the search for equality. Difference feminism draws upon this and similar work to insist that, if feminism remains solely concerned with equality, women will be aspiring only to a male standard. Feminism must strive for recognition of the unique values and perspectives of women.

Radical feminism

Radical feminism sees the political dominance by men over women ('patriarchy') as the most fundamental source of inequality within society. Oppression on the basis of sex manifests in the form of the existence and maintenance of patriarchal structures including political structures, industrial organisations, religious establishments, educational establishments and so on. Male bias extends to most areas of life and virtually all aspects of law. Women are 'objects' rather than 'subjects' within patriarchal society; their frequently humiliating portrayal in pornography is often referred to as an example.

According to radical feminists, the liberal approach to feminism is flawed because the very goals of liberal feminism — equal rights to property, income etc. — are not gender

neutral but instead established by men. There is a fundamental maleness to law and legal process and, in order to achieve true emancipation for women, alternative, feminist goals must be identified and achieved.

Radical feminists seek more than mere legislative reform; they seek a radical transformation in the relationship between the sexes. They also claim that many women suffer from *false consciousness*; that is, they are unaware of the true extent of their own oppression as a result of having spent their entire lives in a culture where male dominance is the norm. Radical feminism therefore directs much of its efforts towards the practice of *consciousness raising*: making women aware of the reality of their situation.

Postmodern feminism

Postmodern feminism examines the ways in which language and reasoning construct (and not merely reflect or describe) gender and sexual inequality. Gender and gender differences are not inevitable or necessary; they are constructed by language, culture and tradition.

According to postmodern feminists, the other forms of feminism *essentialise* women; that is, they assume that all women share the same experience. They also tend to over-emphasise the perspectives of upper middle class white women. Postmodern feminism instead focuses upon diversity. Gender is socially constructed, but it is not always socially constructed in the same way. There is no single cause for women's subordination and no single approach to dealing with the issue.

RESEARCH	What are (a) eco-feminism, (b) Marxist feminism, (c) moderate feminism and (d) separatist feminism?

Feminism and law

Feminist legal scholarship is concerned primarily with identifying the ways in which the law prevents women from achieving social equality with men. Feminist legal scholarship is also, like other forms of critical legal scholarship, critical of traditional approaches to legal scholarship and legal education — in this case, specifically of the ways they disregard (and even encourage) gender inequality and gender discrimination.

Feminist legal theorists tend to focus their attention upon legal issues that disproportionately or specifically affect women. Such legal issues include:

- civil rights, such as the right to vote, to run for public office and to own property;
- workplace equality;
- domestic labour;
- sexual assault, including rape;
- pornography;
- prostitution; and
- reproductive rights including access to contraception and abortion.[25]

Before proceeding, it is important to note that there are many within legal practice, and even within the legal academy, who do not accept the claim that gender inequality continues to exist within the Australian legal system. Many believe that it is now widely accepted that law is or should be gender neutral, and that a gendered analysis of 'law' is incoherent.

25. Ibid 88–94.

THINK

Reflect upon your own view of feminism and the subordination of women. With which form of feminism do you most agree: liberal, difference, radical, postmodern or one of the other forms of feminism? Or is your view one that denies the existence of widespread gender discrimination in the first place?

Critical race theory

As with feminism, there are a number of different ways in which race and racial discrimination have been theorised by scholars. One of the most important contemporary forms of critical legal scholarship is *critical race theory* (CRT). CRT emerged in the 1970s in the work of Derrick Bell (1930–2011), Alan Freeman (1943–) and other US legal scholars frustrated by the slow pace of traditional approaches to racial reform in their country, such as protest marches and political lobbying. They began to ask why racism and racial discrimination were so entrenched within US culture and what could be done about it. Like those within the CLS movement, they postulated that the law itself played an important role in maintaining the (unjust) status quo and discouraging much-needed reform.

CRT scholarship is concerned with the study of the relationships between law, racism and power. It insists that racism is a widespread phenomenon entrenched within many aspects of Western culture, rather than an occasional aberration from an otherwise egalitarian liberal ideal — to the extent that racist attitudes and behaviours are often accepted unquestioningly as 'normal'. Just as some radical feminists insist that gender discrimination and the dominance of the masculine over the feminine is the principal source of injustice and oppression within society, critical race theorists insist that it is racial discrimination and the dominance of 'white' culture that give rise to most forms of injustice and oppression.

Major themes in CRT writings include:

- the application of insights from social science writing on race and racism to legal problems,
- the intersections of race, sex, and class,
- essentialism and anti-essentialism,
- the participation by minority cultures in legal education and legal practice, and
- the nature of criticism and self-criticism.[26]

Storytelling is a tool emphasised by postmodern legal scholars and other critical legal scholars as a means for creating as well as challenging meaning. 'Counter-storytelling' is a tool that is sometimes used and promoted by CRT scholars to address racist attitudes and beliefs. Counter-storytelling is the practice of telling the stories of those people whose experiences are not often told, including people of colour, women, gay people and the poor.

Counter-stories can be contrasted with narratives of dominance or 'majoritarian stories'. Majoritarian stories privilege whites, men, the middle and/or upper class and heterosexuals by subtly portraying them as 'normal' points of view. (Think about the many films and television programs where the main characters are white and/or male and/or middle class and/or heterosexual.) The dominant groups within the community use these majoritarian stories to rationalise and justify their dominance — both to others and to themselves. When they are exposed to counter-stories describing and exploring the experiences and perspectives of the non-white other, it becomes more difficult for members of the dominant culture to continue rationalising their dominance and ignore the impact of that dominance upon those from other cultural backgrounds.

26. Richard Delgado and Jean Stefancic, 'Critical Race Theory: An Annotated Bibliography' (1993) 79 *Virginia Law Review* 461–516.

Television fans accused of racism

'Television fans accused of racism', *The Courier-Mail*, 2 February 2012 <http://www.couriermail.com.au/ipad/telivision-fans-accused-of-racism/story-fn6ck4a4-1226217685035>.

THE actor set to play an Indian father on Neighbours has hit out at racist fans who say it is 'un-Australian' to cast him in the show.

Sachin Joab — Melbourne born and of Indian descent — is part of the long-running TV soap's attempt to tackle perceptions the show is too white and doesn't represent modern Australia. But yesterday Neighbours staff were forced to remove several racist posts from fans angry a non-Anglo Saxon family would become show regulars.

Joab blamed the racism on a 'lack of education'. 'There is various pockets that will say it is un-Australian to have an Indian or an Indian family on Ramsay St,' he said. 'I faced (racism) myself, from the early years in primary school all the way up to recent times and sometimes it's just blatant. I think having a show that shows different families coming together can only be good for the community.'

COLLABORATE

Critical race theorists insist that the answer to discrimination in terms of political strategy lies not in the construction of grand single theories but in the telling of different stories. Form a small group with your fellow students and together reflect upon *your* various personal stories about the experience of oppression and discrimination: either as the oppressed or the oppressor.

Critical race theorists claim that, although the liberal ideal of equality before the law allegedly seeks to ensure that all people are equally regarded as legal subjects, it in fact reinforces the dominant perspective and dominant values. The attempt to see all people as equal obscures the facts of racism and domination because it permits people to believe in an illusion of equality and to operate in accordance with 'universal' norms that, in fact, favour only part of the community. The insistence that everybody should be, can be or is treated equally by the law denies the unique voices of people from different races and cultures, voices that can and should be heard.

REVISION

Before proceeding, ensure that you can answer each of the following questions.

1. According to Marx, what are (a) the base and (b) the superstructure of society, and how do they relate to each other?
2. According to Marx, what is the purpose of law?
3. What is 'critical legal studies'? How does CLS differ from legal realism?
4. According to CLS, what is the purpose of law?
5. What is postmodernism?
6. List the four themes of postmodernism of relevance to law and lawyers.
7. What is feminism?
8. What are the four main streams of feminist jurisprudence? Briefly explain the differences between them.
9. What do feminist theorists have to say about law?
10. What is critical race theory?
11. What is 'counter-storytelling'?

Checklist

Now that you have worked through the chapter you should be able to explain:

- ❑ the relevance and importance of a 'realistic' understanding of the law and its operation,
- ❑ the differences between formalist and realist conceptualisations of legal reasoning, and
- ❑ the relationship between law and power as described by various critical legal theories including Marxist legal theory, critical legal studies, postmodern legal theory, feminist legal theory and critical race theory.

Exercises

Exercise 11.1

Critically evaluate the following claim: 'Judges should disregard their personal values when making a legal decision'.

Exercise 11.2

Identify and evaluate the central argument in the following article. In conducting your evaluation, draw upon what you have learned in this chapter about the nature of legal reasoning.

Put the brakes on judicial hoons

By Janet Albrechtson

The Australian, 9 February 2008.

J'accuse. I accuse some judges of naked, unvarnished judicial activism. I accuse them of distorting and destroying the democratic framework in Australia. I accuse them of being, as Thomas Jefferson once said, 'a subtle corps of sappers and miners constantly working underground to undermine the foundations' of our system of government.

We are indeed indebted to Jason Pierce for exposing to us for the first time the reality of this process. If you doubted that some judges regard parliament as a bunch of generally slow, incompetent populists whose legislation (or lack of it) needs to be corrected by a more intelligent class of being, look no further than Jason's book, *Inside the Mason Court Revolution — The High Court of Australia Transformed*. Let me give you a small selection from the smorgasbord on offer: 'Mabo … broke a tension (that) the politicians were quite unable to break,' one judge said. 'If the High Court had not ruled against the idea of terra nullius, that would have been a political problem that we would not have been able to resolve through the ordinary democratic process.' Yet another Federal Court judge said the courts needed to step in when parliament 'wimped out … the whole issue is too divisive so it falls to the court to fill in'. Another judge suggested it was the duty of the judiciary to get out in front and educate the masses about the new activist role. He derided critics of Mabo as 'vociferous redneck people' with 'no sympathy for liberalism'.

With a healthy dose of arrogance, and little regard for democracy, judges supposed that their role was to fill in the gaps. One judge described the Court's role as a necessary 'void-filling exercise … In the absence of a bill of rights, there is a void there that from time to time has to be filled'. Another agreed: 'In the absence of a bill of rights, I don't see any problem with the High Court reading by implication some implied rights into the Constitution.'

These are not isolated. They are not accidental. They are deliberate. And dangerous. And there are more where this came from.

We have not yet reached crisis point — as they have in the US — where the very legitimacy of the courts, and thus community acceptance of their rulings, is threatened. But we will move closer to such a crisis if views such as the ones I mentioned prevail.

...

When judges tell us they are acting within their bounds by making law, they should not assume that the wider community agrees. Most people recognise when judges are making political decisions, moving beyond the bounds of the proper role of judges. When that happens, watch out. Political judges will start to be treated as politicians.

And that's why what the wider community thinks about judicial activism matters. By looking to the man in the street, I am not suggesting we engage in a popularity contest for courts and their decisions. It is not whether the man in the street likes or dislikes a decision. It is whether the man in the street thinks that a decision should have been made by the judiciary. It comes down to who should decide basic social and political issues. How many votes should we count? The seven men and women who comprise the High Court or the 16 million or so Australians on the electoral roll?

So my challenge is to get lawyers to think about a definition that takes account of that wider audience. I'll have a go at drafting the 'people's definition of judicial activism'.

It is not unreasonable to ask judges to look to what the man in the street thinks. They do so on a regular basis as part of their judicial role. When they imply terms into contracts, for example, they use a test that the term to be implied must be so obvious that 'it goes without saying'. So here is a start to our people's definition of judicial activism. If we are talking about judges interpreting statutes or the Constitution, the test may be whether a significant majority of Australians believe that it goes without saying that it falls to judges to decide a particular issue in the manner they did.

When it comes to the common law, let's agree that judges do properly make law. At common law, they always have. But as Harry Gibbs has noted, 'to say that because judges make law, they are therefore justified in becoming judicial activists has just as much sense as saying that because motorists drive, they are therefore entitled to drive at an excessive speed.' So the question is at what speed and when should judges make law? Should judges move the common law in small incremental steps or great leaps?

What converts a judge into a common law judicial hoon, transforming acceptable judicial law-making into unacceptable judicial activism, is the pace of change. Incremental change that goes no further than is absolutely necessary to decide a particular case is acceptable. Change which a significant majority of Australians would regard as an unacceptable, accelerated leap in the law should be left to parliament, not the courts, to decide.

Now we get to the political point of the issue. It is important that the measure be a significant majority of Australians. A 51 per cent vote may be fine to get a political party over the line in an election and thereby confer on them legitimacy to govern. But that's because the 49 per cent of voters know that in three years' time, the decision will be thrown open with the government they did not vote for standing for re-election.

You cannot consistently have 49 per cent of the people against you. Similarly, it is untenable that 49 per cent of the people consistently believe that the judiciary is usurping its role without there being serious consequences for the legitimacy of the judiciary. That situation would lead to intense controversy and ultimately to the view that judges ought to have limited terms and be elected.

That's why, in defining judicial activism, judges need to take account of what a substantial majority thinks about its decision-making. To summarise, for judicial lawmaking to be acceptable I submit that it must be so obvious that a substantial majority of Australians regard the change as incremental or reasonable that it goes without saying.

...

Exercise 11.3

In his controversial 1984 article, 'Of Law and the River', Paul Carrington, the Dean of Duke University Law School, argued that the radical questioning of the legal order by the CLS movement, and its loss of romantic innocence and faith in the idea of law and its institutions, meant that its proponents had 'an ethical duty to depart the Law School'.

Carrington even suggested that the cynicism of CLS could result in students learning the 'the skills of corruption: bribery and intimidation'.[27]

Do you think CLS should be taught to law students? Why or why not?

Exercise 11.4

If strict formalism is a 'modernist' approach to legal problem solving, what might a 'post-modern' approach to legal problem solving look like?

Exercise 11.5

Critically evaluate the following claim: 'Australian law students in the 21st century no longer need to be taught anything about feminism or racism'.

Further reading

Bix, Brian, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 2006) chs 3, 17, 19

Bottomley, Stephen and Simon Bronitt, *Law in Context* (Federation Press, 2006) chs 3, 7

Chamallas, Martha, *Introduction to Feminist Legal Theory* (Aspen, 2003)

Coper, Michael, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554

Delgado, Richard and Jean Stefancic, *Critical Race Theory: The Cutting Edge* (Temple University Press, 2000)

Graycar, Regina and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2002)

Heydon, Dyson, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110

Hunter, Rosemary, Clare McGlynn, and Erika Rackley, (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010)

Kirby, Michael, 'Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576

Leiboff, Marett and Mark Thomas, *Legal Theories: Contexts and Practices* (Lawbook, 2009) chs 6, 10, 12, 14

Leiter, Brian, 'American Legal Realism' in Martin Golding and William Edmundson (eds), *The Blackwell Guide to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2003)

Lopez, Ian Haney (ed), *Race, Law and Society* (Ashgate, 2007)

Mason, Anthony, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' (2003) 24 *Adelaide Law Review* 16

Olsen, Frances E (ed), *Feminist Legal Theory* (Dartmouth Publishing, 1995)

Schanck, Peter A, 'Understanding Postmodern Thought and its Implications for Statutory Interpretation (1992) 65 *Southern California Law Review* 2507

Sunder, Madhavi (ed), *Gender and Feminist Theory in Law and Society* (Ashgate, 2007)

27. Paul Carrington, 'Of Law and the River'(1984) 34 *Journal of Legal Education* 222, 226–7.