TWO CHEERS FOR JUDICIAL ACTIVISM

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1. How is this for a headline? 'Judicial activism causes £49bn black hole in HMRC accounts'. Forgive me: I am trying to get you to pay attention after lunch.

2. It goes without saying that I haven't had the time to research this subject thoroughly. I don't have a theory. I am going to talk about one or two cases and about the light they shed, for me, on this topic. Pseudo-scientifically, I shall call these my 'case studies'.

3. My cautious premise is that, whatever we may call it, there is a thing, which, for want of a better label, we can call 'judicial activism'. That premise is supported (if not proved) by that fact that 'judicial activism' has been defined in Wikipedia. As the politicians say, let me be very clear about one thing. I have no first-hand experience of it. My day job is finding facts, trying to understand the relevant law, and then applying it to those facts. And then, being reversed by the Court of Appeal. I am, therefore, very much on the shop floor, on the production line. I don't design the products or the machinery which makes them. Judicial activism is way above my pay grade. Other than necessary correction by the Court of Appeal, I don't think there is much of a case for reining me in. But I would say that, wouldn't I?

4. I have a naïve empirical view about judicial activism. On this issue I can see the arguments both ways. I am a lawyer, after all. Despite Professor Craig's polemic about it, Policy Exchange's Judicial Power Project has drawn, I think, useful attention to the disquiet which judicial activism causes: see its list of 50 problematic cases (which I will call 'the list'). The cases I am going to talk about are not on the list.

5. Judicial activism is not just something which judges get up to in Europe, although the list includes what, many of us would accept, are egregious examples both from Strasbourg (the prisoners' votes cases) and from Luxembourg (*Rottmann v Freistaat Bayern* C-135/08; [2010] QB 761). It is obvious from the list (if not otherwise) that our judges have been activist, in the strongest sense of that phrase, in public law (*R (Evans) v Attorney General* [2015] UKSC 21; [2015] AC 1787, *R (Nicklinson) v Secretary of State for Justice* [2014] UKSC 38; [2015] AC 657). The list, however, gives much less emphasis to judges' activities (to use a neutral term) in developing the common law and principles of equity.

6. The declaratory theory, which I will say more about in a moment, is that the courts never make law, but simply declare what the law always has been. Most sensible people

would agree that, in practice, in our system, judges do 'make' law. There are at least two reasons why. First, the common law is a system which develops in stages. Each time a judge develops the common law, he 'makes law'. Second, statutory interpretation also, in practice, sometimes involves 'making' law. But I don't think my job requires me to 'make law'. I am as careful as I can be to avoid doing that. On the shop floor level, it really isn't a good idea, and it is rarely necessary.

7. 'Judicial activism' is a phrase which people use when they feel judges have made dodgy law, or have made law (dodgy or otherwise) in a dodgy way. It is easy to dismiss this criticism, when it is made, as ignorant, or politically motivated. But I think it should be taken seriously unless it can be shown to be unfounded. If people think judges are not following the rules, or are colouring too far outside the lines, or are making the rules up as they go along, they will ask themselves why. They may conclude that it is because judges are trying to bring their own moral, social or political values to the party. Whether or not that conclusion is justified, generally, or in a specific case, its existence is may undermine the independence and authority of the judiciary, and, in that way, undermine the rule of law. There is an obvious irony in this, as some of the judges who are accused of activism claim that they are doing what they are doing in order to uphold the rule of law.

8. My case studies are examples of what some may see as judicial activism. I will use them to explain how they show the good and the bad sides of judicial law-making. I encourage you to draw your own conclusions, of course, but I will finish with some thoughts about how the examples can help us to recognise some of the temptations which are inherent in judicial law making, and perhaps, having recognised them, to avoid them.

9. So I go back to that £49bn headline, and to case study number one. This is a mis-description, as I am going to consider one decision and its consequences, as they played out in later cases. I will start, anachronistically, with a consequence. On 18 December 2014 the Court of Justice of the European Union ('the CJEU') gave a judgment, without the benefit of an opinion of the Advocate General, in *European Commission v United Kingdom* (Case No C-640/13). The judgment, including the decision on costs, is 46 short paragraphs long. The reasoning occupies about three pages of text. The CJEU decided that provisions of United Kingdom tax legislation infringed the obligations imposed on it by article 4(3) of the Treaty of the European Union. There is detailed reasoning which supports the CJEU's conclusion in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19; [2012] 2 AC 337, and there had been an earlier reference to the CJEU. This decision is one step in a long piece of litigation. I quickly lost count of the number of references which were made to the CJEU in the course of it.

10. The fiscal consequence of these decisions is that the Commissioners are actually, or contingently, liable to repay to the Claimants, and to others in their position, tens of billions of pounds: wrongly paid tax, plus compound interest, going back in some cases to the 1970s. On one view, this is a consequence of judicial activism. I do not suggest that the decision of the CJEU, or that of the Supreme Court in the *FII* case are examples of judicial activism. But those decisions could not have been made unless the House of Lords had previously decided to set aside a very well-settled principle of private law in

particular way. The consequences for HMRC would have been less costly if it had the House of Lords had not, in another case, departed from two of its previous decisions.

11. The first of those decisions, which I will say a bit about, is *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. The second, which I will not, is *Sempra Metals v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 AC 561. *Kleinwort Benson* decided that money paid pursuant to an interest-rate swap which was ultra vires a local authority could be recovered as money paid under a mistake of law, and that the appropriate six-year limitation period ran from the discovery of the [open scare quotes] "mistake" [close scare quotes]. The House of Lords reversed a long-settled principle of the common law. That was, that, with limited exceptions, money paid under a mistake of law could not be recovered from the payee. The House of Lords held that a payment made in accordance with a settled understanding of the law was nonetheless made under a mistake of law.

12. I am not going to say much about the reasoning in *Kleinwort Benson*. It was a decision of a majority. The absence of any findings of fact no doubt contributed to a failure to examine critically the assertion by the banks that they entered into the swaps because of any relevant mistake. That they had done so was the unexamined premise of the decision. That premise was necessary, in order that a supposedly anomalous rule could be changed. The majority decided that whether the payments were the result of a mistake of law depended on whether, viewed objectively (with the benefit of the law as understood at the date of the decision of the House of Lords in *Kleinwort Benson*), the payer made a "mistake" of law when, several years before that decision, he made the payment under the swap which he then thought was valid. Although there is a section of his speech headed '*Was the bank mistaken when it paid money…under…agreements which it believed to be valid'*, Lord Goff did not answer that question, but another one, which was whether a proposal by the Law Commission was part of the common law. His refutation of the supposed theory that a person who pays under a settled understanding of the law does not make a mistake at all does not address the points made by Lord Browne-Wilkinson in his dissent.

13. Lord Browne-Wilkinson took a subjective view of the payer's state of mind at the date of payment. He said that the banks did not make a mistake of law when they made the swap agreements. Everyone thought that they were lawful; they made no mistake. The effect of the declaratory theory is that we know now that they were wrong. The precise question, he said, was whether the fact that a later decision has retrospective effect for the substantive law also requires it to be assumed that at the date of the payment, the payer was acting under a mistake about what the law was. A retrospective change in the law cannot retrospectively change a person's past state of mind. He recognised that the approach of the majority subverted the 'great public interest in the security of receipts and the closure of transactions'. That effect was worsened by the view of the majority that the relevant limitation provision was that provided by section 32(1)(c) of the Limitation Act 1980. The limitation period, if such an approach is right, could be, as the *FII* litigation shows, many decades long. Lord Browne-Wilkinson, appreciating some of the far-reaching implications of such a change by judicial decision, said that it was for Parliament to make such a change, and, at the same time, to legislate for the appropriate limitation period. 'I wish!' I hear HMRC sighing.

14. In *FII*, Lord Sumption acknowledged the formal correctness of the declaratory theory. He referred to Lord Hoffmann's speech in *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2007] 1 AC 558. Lord Hoffmann distinguished between two issues. First, judges change the law, and do not merely declare what it has always been. Second, those decisions, however, have retrospective effect; the unsuccessful party loses, even though the relevant events happened before the law was changed by the court. Lord Sumption's approach is similar to that of Lord Browne-Wilkinson. In the context of the Claimants' legitimate expectation argument in *FII*, he exposed the paradox that, for limitation purposes, they were arguing that they did not discover their "mistake" until a definitive decision of the CJEU, while at the same time suggesting that, during the period before that decision, they had made plans on the footing that they could recover for that "mistake".

15. To be fair to Lord Goff in *Kleinwort Benson*, he did say that there was a distinct basis for recovering, as of right, taxes exacted ultra vires (see *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70). He thought that a case could be made for a rule that such payments, if made in accordance with a settled understanding of the law, should not be recovered. Alas, he did not perhaps anticipate that his successors (in *Deutsche Morgan Grenfell*) would decide that a taxpayer could rely on whichever route (*Woolwich* or mistake of law) was most favourable to him. On the other hand, he could not have been sure that they would not.

16. Now for something completely different. My next case study is from the criminal law. In *R v Jogee* [2016] UKSC16; [2016] 1 Cr App R 31 the Supreme Court overruled *Chang Win-Siu v The Queen* [1985] AC 168 and abolished the doctrine of parasitic accessory liability ('PAL') (a term coined by Sir John Smith). The effect of PAL as applied to murder was that if D1 and D2 set out to commit crime A and in the course of that, D1 committed crime B (murder), D2 was guilty of murder as an accessory if he foresaw that possibility of murder but did not necessarily intend it (see *R v Gnango* [2011] UKSC 59; [2012] 1 AC 829 at paragraph 52, where the rule is summarised, although *Gnango* was not a PAL case).

17. The application of PAL to cases of murder in a gang context caused particular controversy. This controversy even reached the letters pages of the London Review of Books. The application of this doctrine to the law of murder had two apparently anomalous effects: (1) a person who did not kill the victim could be guilty despite not having any relevant intent, but merely foresight of a possibility of murder; and (2) the culpability required for PAL in murder is less than that required for the principal; that is, such foresight, rather than an intention to kill, or to do really serious harm (see paragraph 83 of *Jogee*). A person convicted of murder will receive a mandatory sentence of imprisonment for life, with a minimum term calculated in accordance with Schedule 21 to the Criminal Justice Act 2003. The maximum sentence for manslaughter is imprisonment for life, but sentencing for manslaughter is very flexible, and sentences for manslaughter in a gang context are commonly very significantly shorter than sentences for murder in that context, particularly where the prosecution is able to prove that a knife has been taken to the scene by the killer.

18. We learn from *Jogee* that the nineteenth century cases established that for a person to be guilty as an accessory, he had to share a common purpose with the principal (paragraphs 22-23). Sir Richard Buxton, in a recent article [2016] Crim LR 324,

explains that before *Chang Wing-Siu* the law of secondary liability was 'unsatisfactory in a number of ways' but 'fairly clear'. To aid and abet crime A committed by D1, D2 must have intentionally helped or encouraged D1 to commit the crime.

19. In *Jogee* the Supreme Court was invited to hold that *Chan Wing-Siu*, and later decisions following it, including decisions of the House of Lords, were wrong and should not be followed. According to the Supreme Court, *Chan Wing-Siu* established a new principle (paragraph 62), although not all the commentators (including JR Spencer) agree with that. The Supreme Court's criticisms of *Chan Wing-Siu* are trenchant. The Supreme Court pointed out that the Privy Council judgment elided foresight with authorisation when it said that the principle 'turns on contemplation, or, putting the same idea in other words, authorisation, which may be express but is more usually implied' (paragraph 65). The Supreme Court also attacked the Privy Council for not properly understanding, or analysing, the relevant authorities.

20. As the Supreme Court pointed out, authorisation of crime B cannot automatically be inferred from D2's continued participation in crime A with foresight of crime B (paragraph 66). Such continued participation is evidence, and sometimes powerful evidence, of an intent to assist D1 in crime B. But it is no more than evidence of such an intent (or authorisation), not conclusive proof of it.

21. 'It was, of course, within the jurisdiction of the courts in *Chan Wing-Siu* and *Powell and English* to change the common law in a way which made it more severe, but to alter general principles which have stood for a long time, especially in a way which has particular impact on a subject as difficult and serious as homicide, requires caution; and all the more so when the change involved widening the scope of secondary liability by the introduction of new doctrine (since termed parasitic accessory liability)' (paragraph 74). Hear, hear.

22. Further criticism of the Privy Council follows in paragraph 74:

> 'In Chan Wing-Siu the Privy Council addressed the policy argument for the principle which it laid down in two sentences: see para 46 above. The statement at p 177 "Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they in fact are used by his partner with an intent sufficient for murder, he should not escape the consequences" may be thought to oversimplify the question of what is the enterprise to which he has intentionally lent himself, but it also implies that he would escape all criminal liability but for the Chan Wing-Siu principle. On the facts postulated, if the law remained as set out in Wesley Smith and Reid he would be guilty of homicide in the form of manslaughter, which carries a potential sentence of life imprisonment. The dangers of escalation of violence where people go out in possession of weapons to commit crime are indisputable, but they were specifically referred to by the court in Reid, when explaining why it was right that such conduct should result in conviction for manslaughter if death resulted, albeit that the initial intention may have been nothing more than causing fright. There was no consideration in Chan Wing-Siu, or in Powell and English, of the fundamental policy question whether and why it was necessary and appropriate to reclassify such conduct as murder rather than manslaughter. Such a discussion would have involved, among other things, questions about fair labelling and fair discrimination in sentencing'.

23. In paragraph 78 the Supreme Court continued,

> ‘As we have explained, secondary liability does not require the existence of an agreement between D1 and D2. Where, however, it exists, such agreement is by its nature a form of encouragement and in most cases will also involve acts of assistance. The long established principle that where parties agree to carry out a criminal venture, each is liable for acts to which they have expressly or impliedly given their assent is an example of the intention to assist which is inherent in the making of the agreement. Similarly, where people come together without agreement, often spontaneously, to commit an offence together, the giving of intentional support by words or deeds, including by supportive presence, is sufficient to attract secondary liability on ordinary principles. We repeat that secondary liability includes cases of agreement between principal and secondary party, but it is not limited to them’.

24. At paragraph 79, the Court said that the principle in *Chan Wing-Siu* could not be supported, other than because it had been followed at the highest level. The principle was based on an incomplete and in some respects wrong reading of the earlier authorities ‘coupled with generalised and questionable policy arguments’. The Court expressly recognised the significance of reversing a statement of principle which has been made and followed by the Privy Council and the House of Lords on a number of occasions. The Court gave five reasons why it was right to do so. One was that if a wrong turn had been taken in an important part of the common law it should be corrected (paragraph 82). The Court also decided that it was not satisfactory to disapprove *Chan Wing-Siu*; it was necessary re-state the principles.

25. My third case study is a public law case; the decision of Woolf J (as he then was) in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704. The applicant (as he was in those far-off days) entered the United Kingdom lawfully in 1977 and was given indefinite leave to remain. He was sentenced to imprisonment for two offences of burglary. The Secretary of State then made a deportation order against him. He escaped from an open prison and was re-detained. He continued to be detained after his custodial term expired, pursuant to Schedule 2 of the Immigration Act 1971. By the date of the hearing, he had been detained for more than four months. The evidence, such as it was, suggested that not much was being done to deport him. He had lost his passport, the Indian High Commission was not hurrying to issue him with a travel document, and the Secretary of State did not seem to be chivvying the High Commission. Woolf J would have ordered the applicant’s release immediately, if Secretary of State, represented by Mr Andrew Collins (as he then was) had not persuaded him to give the respondent more time to file evidence. He ordered that unless the Respondent was able to show, in three days’ time, that the applicant would very soon be removed, or that the circumstances were not as depicted in the applicant’s evidence, the applicant should be released.

26. *Hardial Singh* was approved by Lord Browne-Wilkinson in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, 111A–D (PC). In *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888; [2003] INLR 196, Dyson LJ (as he then was) derived four principles from *Hardial Singh*.
    i. The Secretary of State must intend to deport the person and can only use the power to detain for that purpose.
    ii. The deportee may only be detained for a period that is reasonable in all the circumstances.

iii. If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention.
iv. The Secretary of State should act with the reasonable diligence and expedition to effect removal.

27. In *R (WL (Congo)) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 the four principles described by Dyson LJ in *I* were endorsed by the majority of the Supreme Court.

28. Unlawful detention cases are often litigated in the Administrative Court. The *Hardial Singh* principles are simply taken for granted (as, on high authority, they of course should be). They pre-date the commencement of the Human Rights Act 1998 by 16 years. But (other than the *Padfield* constraint) they are difficult to explain in conventional public law terms. The most striking aspect of the decision in *Hardial Singh* as it has been subsequently explained is that it is the court is the primary decision maker. It decides what period of detention is reasonable, rather than reviewing that period on *Wednesbury* grounds. Woolf J did not explain why he took the approach which he did, other than to say that the apparently unfettered power of detention must be subject to some implied limit. A possible justification for making the court, rather than Secretary of State, the primary decision maker is that if the power (however it is circumscribed) is exceeded, the finding that the detention is unlawful means that a tort is has been committed, as well as a public law wrong. Finally, as Sir Nicholas Blake pointed out to me, it is also important to bear in mind that Hardial Singh had applied for a writ of habeas corpus.

29. The principles are, nonetheless, an interesting feature of the decision. Many would agree that it is desirable for an apparently unlimited power of detention to be subject to some control by the courts; but is it necessarily the right thing for the court to do so by reference to a 'reasonable' period? The criterion of reasonableness, of course, sounds very reasonable. But when you start to think about it, you do wonder how a court is equipped to decide what period is reasonable, in anything other than the most arbitrary way. The Court of Appeal has declined to give any guidelines in these cases. It is not easy to know against what objective benchmark reasonableness is to be measured. On one, radical view, it is not reasonable to detain a person for a day longer than is strictly necessary to remove, or, as the case may be, to deport him. But on the authorities, other factors also come into the decision; the risk of absconding, whether the detainee has co-operated with his removal and, in a deportation case, the risk of re-offending. I wonder whether a court is in a good position to balance those, and, in the light of that, decide what period of detention is reasonable.

30. When push comes to shove, it is, at least in part, a question of how much time, money and effort the Secretary of State is willing to devote to removing or deporting the detainee. I wonder also if a court is in a good position to make a rational judgment about that, or to tell the Secretary of State that she should spend a bit more, and, if so, how much. A further difficulty concerns the material the court has to work with. In my - admittedly limited - experience, the material from the Secretary of State can often be voluminous, but by its nature does not give much help on some important issues. Delay is often caused by the need to get travel documents. But it is not easy to get any picture of how long it 'normally' takes to get travel documents from the authorities of any

particular country. There is rarely evidence about what facts, if any, lie behind the inscrutable assertion, which is sometimes seen in a detention review, that removal will be possible in a reasonable time.

31. It is time to draw some tentative conclusions from my case studies. There are powerful arguments against activism in private law for obvious reasons. Legal certainty in private law is very important. It is the foundation of property rights, real and personal, and the basis for the sophisticated commercial transactions which have made the United Kingdom a leading trading nation for centuries. There are many reasons why judges need to be careful about changing a settled understanding of the law, whether that understanding is based on the apparent meaning of the words used in legislation, or on long-recognised authority; and in how they make such changes. Legal certainty about the scope of criminal liability is, if anything, more important, as it is safeguard of our freedom; but the importance of that certainty can be tempered by the need to adapt its scope if, for good reason, confidence in the relevant principles is lost.

32. I have chosen *Kleinwort Benson* because the EU tax litigation shows so clearly that the consequences of changing the law are unknowable and far-reaching. Years ago, Parliament could change the law if it disagreed with a decision of the House of Lords. But the effect of EU law, and of the European Convention on Human Rights, is that that is not always a straightforward solution for the Government of the day. There is scope for debate, I accept, about the causal role of *Kleinwort Benson*. There is no doubt that the decision in *Deutsche Morgan Grenfell*, applying the reasoning in *Kleinwort Benson* to tax cases, is also causally significant. In that case the majority referred puzzlingly, in my view, to a 'retrospective' or 'deemed' mistake. As Lord Sumption JSC, who dissented, pointed out in *FII*, the effect of that reasoning is that a claim for wrongly paid tax could go back indefinitely, so long as it was brought within six years of a judgment definitively exposing the **"**mistake**"**, thus enabling 'past tax accounts to be re-opened without limit of time'.

33. The big point is that the world is infinitely more complicated than the narrow insight given by the facts of the case (as the parties choose to present them) are likely to reveal to a judge. For that self-evident, objective reason alone, judges should just restrain themselves. They are not entrepreneurs, or administrators (for example) and are not well placed to predict the unforeseeable consequences of what they do. In this respect, *Kleinwort Benson* was not the best case in which to make such an important change. No facts had been found at first instance. This means that precisely what is involved in making a payment on the basis of **"**a mistake of law**"** was not explored at all. There is a range of possible states of mind a payer may have, ranging from no thought about the legal position to taking a calculated risk based on legal advice. There were no judgments at first instance or in the Court of Appeal. The Respondents to the appeal did not even resist it (on the mistake of law point) with much enthusiasm. In various ways, the appeal had too much of a following wind, not least from a range of academic experts in the law of restitution.

34. There is a further reason for restraint in private law. This is that the courts have made the principles of equity and common law over many years. They have developed those principles cautiously, case by case, testing them against the facts of new cases, gradually; and adapting them also, case by case. This may not lead to rapid progress, but it is a sensible empirical method. Long-settled rules sometimes express sound

intuitions, sensed, understood, and reinforced over centuries of experience. The lack of rapid leaps is part of legal certainty, and it is valuable. It is tempting for judges to assume, in a Whiggish way, that progress is linear, and that we are wiser and better equipped to make decisions than our fusty old ancestors were. A little humility is needed. It is possible that, in those far-off days before the internet, judges had at least as sound a grasp of what was going on in the world, of legal principle, and of the way in which rules interact, and potentially interact, as we do. Indeed, I would argue that the increasing complexity of our world is an argument for more, not less, restraint.

35. There is a further factor which perhaps did not influence judges so much in the past, although that is not to say that there were no legal theorists in the past. This is the development of legal fads. It is important for judges to know what academics are saying about their decisions. But academics sometimes, necessarily, see the law differently from judges. It would be wrong to compare the enthusiasms of legal academics with the designs seen on the catwalk at London Fashion Week. But sometimes they should be scrutinised carefully. Sometimes they should be resisted. The vogue for fashioning a law of restitution meant that the bases for recovery had to be fitted into various conceptual boxes (mistake, failure of consideration), when it might have been more straightforward (but not systematic enough) to suggest that property might not pass if the transaction is ultra vires one of the parties to it. Using the swaps litigation to change the mistake of law rule, which academics and commentators saw as an anomaly, may be an example of this. The banks did not mind a bit, as it enabled them to profit from a much more favourable limitation period. To paraphrase a point better made by others, it is just possible that the banks were not litigating from an academic love of legal theory, or from a pure desire to develop and elucidate the law of restitution.

36. But I am not wholly negative about judicial law-making. That is why I have three case studies, not one. I want to end on an up-beat note. I have referred to some of difficulties there are in applying the *Hardial Singh* principles to materials which the parties chose to reveal to the court. But I do consider that the courts should have a role in supervising the exercise of unlimited power of administrative detention, in the dark corners of the Immigration Removal Centres where public law and the law of tort intersect. This is particularly important because there are no votes in being humane to foreign national prisoners or to failed asylum seekers. To that extent, I support the judicial activism of which *Hardial Singh* could be said to be an example, and plead guilty to the charge of bringing my own views to the party.

37. What about *Jogee?* I have chosen *Jogee* for two reasons. First, while the academic commentators who are immersed in the history of law of accessory liability may not agree with me, it looks as though (and the Supreme Court has decided as much) the law did take a wrong turn in *Chan Wing-Siu*. Indeed, it could be said that *Chan Wing-Siu* is, itself, a bad example of activism. Here, that wrong turn exposed defendants to a more severe penalty than their intentions merited. It seems to me that the Supreme Court was right to say so. Second, for the reasons given by the Supreme Court, it was a good idea to re-state, or, let's be frank, to change the law, so that it better fits our sense of what the prosecution need to prove in order to get a conviction for murder. In some cases, a properly directed jury will convict defendants under the new law, in circumstances where they would have been convicted under the old law, but those defendants will be convicted because the jury was sure, on the evidence, about their intentions. The difference the new law will make is that where the jury are not sure about the intentions

of defendants, they are likely to be convicted of manslaughter. That seems better all round.

38. The upshot? On this necessarily limited evidence, two cheers for judicial activism!