

# THE WESTERN AUSTRALIAN JURIST

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## The Western Australian Legal Theory Association

The Western Australian Legal Theory Association ('WALTA') is a learned society established by Dr Augusto Zimmermann in October 2010. Dr Zimmermann is also a Vice President of the Australian Society of Legal Philosophy ('ASLP').

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# ARTICLES



# REVISITING DIVINE, NATURAL, AND COMMON LAW FOUNDATIONS UNDERLYING PARENTAL LIBERTY TO DIRECT AND CONTROL THE UPBRINGING OF CHILDREN

WILLIAM WAGNER, NICOLE WAGNER, AND JEREMY MARKS\*

## ABSTRACT

*Notwithstanding scientific evidence showing unfinished childhood brain development in the area of judgment, international law continues a contemporary jurisprudential drift toward bestowing broad rights of decision-making on children. In our article we revisit, therefore, a jurisprudence confirming what perhaps every fit parent already knows; that is, that parents know best what is in the best interest of their children. Historically, divine, natural, and common law traditions all support an underlying legal philosophy recognizing an inalienable parental liberty to direct and control the upbringing of children. We review each of these jurisprudential traditions suggesting perhaps that, at least in the upbringing of children, some jurisprudential regress might be progress.*

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Modern studies demonstrate that the parts of the brain responsible for judgment in decision-making remain underdeveloped throughout the teen years and into early adulthood.<sup>1</sup> Notwithstanding the scientific evidence, international law continues a contemporary jurisprudential drift toward bestowing broad rights of decision-making on children. For example, the United Nations Convention on the Rights of the Child rejects the traditional jurisprudential approach recognizing parental decision-making authority as an inviolable standard limiting government action. In its place the treaty substitutes a system where government is legally obligated to interfere in parental decisions in ways that ensure its own view of what is in ‘the best interest of the child’. Specifically, Article 3(1) provides that ‘*[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*’<sup>2</sup> Replacing the inalienable

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<sup>1</sup> See Nitin Gogtay et al, ‘Dynamic Mapping of Human Cortical Development During Childhood through Early Adulthood’ (2004) 101 *PNAS: Proceedings of the National Academy of Sciences of the United States of America* 8174, 8177; Elizabeth R Sowell et al, ‘In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions’ (1999) 2 *Nature Neuroscience* 859, 860-1 <[http://www.loni.ucla.edu/~esowell/nn1099\\_859.pdf](http://www.loni.ucla.edu/~esowell/nn1099_859.pdf)>; C B Romine and C R Reynolds, ‘A Model of the Development of Frontal Lobe Functioning: Findings from a Meta-Analysis’ (2005) 12(4) *Applied Neuropsychology* 190, 190-201, abstract accessible at <<http://ukpmc.ac.uk/abstract/MED/16422660>>; Jay Giedd, ‘Structural Magnetic Resonance Imaging of the Adolescent Brain’ (2004) 1021 *Annals of the New York Academy of Sciences* 77, 77-85, abstract accessible at <<http://onlinelibrary.wiley.com/doi/10.1196/annals.1308.009/abstract/>>; Sarah-Jayne Blakemore, ‘Imaging Brain Development: The Adolescent Brain’ (2012) 61 *Neuroimage* 397, 397-406, abstract accessible at <<http://www.sciencedirect.com/science/article/pii/S1053811911013620>>. See also John R Best and Patricia H Miller, ‘A Developmental Perspective on Executive Function’ (2010) 81 *Child Development* 1641, 1641-60.

<sup>2</sup> *Convention on the Rights of the Child* art 3(1). It is important to note that traditionally, governments only intervened and made decisions in the best interest of the child after the government proved the parent abdicated the parental role (ie, due to physical or sexual abuse of the child). Now, in any disagreement between a fit parent and child, the treaty puts law-abiding parents in the same position as an abusive



jurisprudential standard that parents are best equipped to control and direct the upbringing of their children, the treaty instead confers upon the child a right to have his or her views be given due weight *in all matters affecting the child*.<sup>3</sup> Other parts of the treaty involve a child's rights in connection with decisions concerning education, religious instruction, and health.

Given the children's unfinished brain development in the area of judgment, we thought it prudent in this article to revisit a jurisprudence confirming what perhaps every fit parent already knows; that is, that *parents* know what is in the best interest of their children better than their children or a U.N. bureaucrat does. Historically, divine, natural, and common law traditions all supported an underlying legal philosophy recognizing an inalienable parental liberty to direct and control the upbringing of children. It is to these traditions that we now turn.

## I DIVINE LAW TRADITIONS

### A *Parental Authority in the Mosaic Covenant*

In the ancient Holy Scriptures, when Moses introduced the Divine Law, God bestowed on parents a duty to provide their children with moral guidance.<sup>4</sup> Moses instructed children: 'Honor your father and your mother, as the Lord your God has commanded you, so that you may live

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parent when the government intervenes in connection with its obligations under the treaty.

<sup>3</sup> *Convention on the Rights of the Child* art 12(1) provides: 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, *the views of the child being given due weight* in accordance with the age and maturity of the child' (emphasis added).

<sup>4</sup> *Deuteronomy* 6:1-9, 11:19 (New International Version).

long and that it may go well with you in the land the Lord your God is giving you.’<sup>5</sup>

Throughout the law and the prophets, spiritual messages passed from parent to child. When God made his transcendent covenant with Abraham he, *inter alia*, instructed Abraham and his offspring to keep the covenant and, in this regard, instructed the parent to direct the upbringing of his children:

Then God said to Abraham, “As for you, you must keep my covenant, you and your descendants after you for the generations to come. ... For I have chosen him, so that he will direct his children and his household after him to keep the way of the Lord by doing what is right and just, so that the Lord will bring about for Abraham what he has promised him.”<sup>6</sup>

## B *Parental Authority in Wisdom Literature*

In many of the chapters in *Proverbs* we find parents sharing sacred wisdom with their children. *Proverbs* 1:8-9 urges ‘listen, my son, to your father’s instruction and do not forsake your mother’s teaching.’ *Proverbs* 4:1-6 implores:

Listen, my sons, to a father’s instruction; pay attention and gain understanding. I give you sound learning, so do not forsake my teaching. For I too was a son to my father, still tender, and cherished

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<sup>5</sup> Ibid 5:16. See also *Ephesians* 6:1-3 (New International Version). Here God also promises a long life and that it will go well for those who follow the Commandment.

<sup>6</sup> *Genesis* 17:9 and 18:19 (New International Version) It should also be noted that in the same way that biological parents spiritually advise their offspring, so do adoptive parents. The Biblical Queen Esther followed the advice of her adoptive father Mordecai and prevented genocide. To read her story, see the *Book of Esther*, especially *Esther* 2:5-7 (New International Version), which clarifies that Mordecai is Esther’s adoptive father; *Esther* 4:6-12, in which Mordecai advises her; and *Esther* 5:1-5, 7:3, and Chapter 8, in which her heroic actions and their results are recorded.

by my mother. Then he taught me, and he said to me, “Take hold of my words with all your heart; keep my commands, and you will live. Get wisdom, get understanding; do not forget my words or turn away from them. Do not forsake wisdom, and she will protect you; love her, and she will watch over you.”<sup>7</sup>

Later in *Proverbs*, God reveals that parents are to use appropriate discipline, that is to say, discipline grounded in love.<sup>8</sup> *Proverbs* 22 advises parents to ‘train’ their children in the way they should go, so that when they grow old they ‘[would] not depart from it.’<sup>9</sup>

### C      *Parental Authority in the Gospels*

In the *Gospel of Luke*, Jesus sought training from both his Father in Heaven and his parents on earth. When he was twelve years old his parents brought him to Jerusalem. There he took the opportunity to abide in the temple (his Father’s house) where he conversed with teachers of the law. While immersed in his father’s business, his caravan left without him. Discovering he was missing, his earthly parents, Mary and Joseph, looked for him first among friends and relatives. Then, not finding him among his earthly kin, they discovered him in the house of God the Father.<sup>10</sup> Once reunited with his earthly parents Jesus travelled back with them to Nazareth and ‘was obedient to them.’<sup>11</sup> There, he ‘grew in wisdom, stature and favor with God and men’.<sup>12</sup> Jesus, in his ministry,

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<sup>7</sup> See also the opening verses of *Proverbs* 2, 3, 5, 6, 7, and 31, and *Proverbs* 8:32 (New International Version).

<sup>8</sup> Ibid 13:24.

<sup>9</sup> Ibid 22:6.

<sup>10</sup> *Luke* 2:41-52 (New International Version).

<sup>11</sup> Ibid 2:51.

<sup>12</sup> Ibid 2:52.

repeatedly reiterated the command to honor one's father and mother, and rebuked teachers of the Law who distorted that command.<sup>13</sup>

#### D *Parental Authority in the Early Church*

The Apostle Paul's letter to the Ephesians encourages parents to bring up their children 'in the training and instruction of the Lord.'<sup>14</sup> It also commands, 'children, obey your parents in the Lord, for this is right'.<sup>15</sup> Obedience to parents is named the 'first commandment';<sup>16</sup> it is naturally the first lesson that any child learns. Thus, the Bible clearly implies that in children's minority, their most important decision-makers are parents. Having established this First Principle in the context of Divine Law, let us examine the Natural Law traditions.

## II NATURAL LAW TRADITIONS

#### A *The Idea of Natural Law*

Sir Edmond Coke defined Natural Law as 'that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction.'<sup>17</sup> Some, who seek to discover the Natural Law, begin their quest with the understanding that God writes it on each human heart. Others, meanwhile, embark on their journey postulating that the Natural Law is hardwired into the human species through instinct and rational

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<sup>13</sup> See *Matthew* 15:4-9, 19:19 (New International Version); *Mark* 7:7-13, 10:18-19 (New International Version); *Luke* 18:19-20 (New International Version).

<sup>14</sup> *Ephesians* 6:4 (New International Version).

<sup>15</sup> *Ibid* 6:1. See also *Colossians* 3:20 (New International Version).

<sup>16</sup> *Ephesians* 6:2. Additionally, compare elsewhere where God delegates to the state the authority to govern other aspects of the world (ie, maintaining order and security, punishing wrongdoing). The purpose of this sphere is articulated in *Romans* 13:1-6 (New International Version).

<sup>17</sup> *Calvin's Case* (1608) 7 Coke Rep 12 (a); 77 ER 392 (Coke), as cited by Augusto Zimmermann, 'Evolutionary Legal Theories – The Impact of Darwinism on Western Conceptions of Law' (2010) 24(2) *Journal of Creation* 108, 113 <<http://creation.com/evolutionary-legal-theories#txtRef49>>.

endowment.<sup>18</sup> Similar ideas flow from both ideological beginnings due to a common philosophical denominator, namely, that the Natural Laws are internal to every human. In the following section we review various matters relating to parents and their children through the jurisprudential lens of the Natural Law.

## B Parental Love and Care

When it comes to parents and children, the Natural Law begins with practical assessment about the natural conditions of childrearing. Francisco Hutchinson observed that the task of bringing up children requires ‘perpetual labor and care,’ and such effort, he thought ‘could not be expected from the more general ties of benevolence.’<sup>19</sup> For humans to be motivated to undertake the task of parenting, they must experience a ‘desire, sufficient to counter-balance the pains of labor, and the sensations of the selfish appetites [because] parents must often check and disappoint their own appetites, to gratify those of their children’.<sup>20</sup>

Generally speaking, Natural Law philosophers teach that such desire is deeply embedded in human nature to surmount the biological challenges

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<sup>18</sup> Compare, for example, Sir Edmond Coke, above n 17, with Beccaria, who defined Natural Laws as ‘those which nature dictates in all ages to all men, for the maintenance of that justice which she (say what they will of her) hath implanted in our hearts.’ Marquis Beccaria, *An Essay on Crimes and Punishments* (Anonymous trans, W C Little, 1764, 1872 ed) 202, accessible at The Online Library of Liberty <[http://files.libertyfund.org/files/2193/Beccaria\\_1476\\_Bk.pdf](http://files.libertyfund.org/files/2193/Beccaria_1476_Bk.pdf)>. Also, Hobbes wrote that ‘[a] law of nature, *lex naturalis*, is a precept or general rule, found out by reason ...’ Thomas Hobbes, ‘Leviathan’ in Sir William Molesworth (ed), *The English Works of Thomas Hobbes of Malmesbury* (John Bohn, first published 1651, 1839-45 ed) vol 3, 75, accessible at The Online Library of Liberty (September 2011) <[http://files.libertyfund.org/files/585/Hobbes\\_0051-03\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/585/Hobbes_0051-03_EBk_v6.0.pdf)>.

<sup>19</sup> Francis Hutcheson, *An Essay on the Nature and Conduct of the Passions and Affections, with Illustrations on the Moral Sense* (Aaron Garrett ed, Liberty Fund, first published 1742, 2002 ed) 39, accessible at The Online Library of Liberty (September 2011) <[http://files.libertyfund.org/files/885/Hutcheson\\_0150\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/885/Hutcheson_0150_EBk_v6.0.pdf)>.

<sup>20</sup> Ibid.

that parents face in raising their offspring up from the helpless state of an infant. Burlamaqui wrote, for example:

Man considered in his birth is weakness and impotency itself, in regard as well to the body, as to the soul. It is even remarkable, that the state of weakness and infancy lasts longer in man than in any other animal. He is beset and pressed on all sides by a thousand wants, and destitute of knowledge, as well as strength, finds himself in an absolute incapacity of relieving them: he is therefore under a particular necessity of recurring to external assistance. Providence for this reason has inspired parents with that instinct or natural tenderness, which prompts them so eagerly to delight in the most troublesome cares, for the preservation and good of those whom they have brought into the world.<sup>21</sup>

Similarly, according to Plutarch, nature bestows in man ‘a kind love and tender affection towards his children.’<sup>22</sup> This love exists independently of the gift of reason and does not depend upon the influences of civilization as evidenced by the parental behaviors of animals, which propagate their species without regard to individual loss or gain.<sup>23</sup>

<sup>21</sup> Jean-Jacques Burlamaqui, *The Principles of Natural and Politic Law* (Thomas Nugent trans, Petter Korkman ed, Liberty Fund, first published 1747, 2006 ed) 61, accessible at The Online Library of Liberty <[http://files.libertyfund.org/files/1717/1347\\_LFeBk.pdf](http://files.libertyfund.org/files/1717/1347_LFeBk.pdf)>.

<sup>22</sup> Plutarch, ‘Of the Natural Love or Kindness of Parents to their Children’ in Ernest Rhys (ed), *Plutarch’s Moralia: Twenty Essays* (Philemon Holland trans, E P Dutton, first published 1717, 1911 ed) 296, accessible at Internet Archive (18 March 2010) <<http://archive.org/details/plutarchsmoralia00plutuoft>>.

<sup>23</sup> Ibid 290-303. Plutarch shared this illustration, among others: Our hens which we keep about our houses so ordinarily, and have daily in our eyes, how carefully do they look unto their young chickens whiles they receive some under their wings, which they spread and hold open ... that they might creep in, others they suffer to mount upon their backs, gently giving them leave to climb and get up on every side, and this they do not without great joy and contentment, which they testify by a kind of clucking and special noise that they make at such a time; if when they are alone, without their chickens, and they have no fear but for themselves, a dog or serpent come in their way, they fly from them; let their brood be about them when

The parental affections, Plutarch theorized, ‘appeareth no less in mankind than in the wild beasts.’<sup>24</sup> He acknowledged that parental love could be ‘blemished and obscured by occasion of vice that buddeth up afterwards.’<sup>25</sup> Yet such vices do not disprove the existence of inborn parental affections, he argued, ‘otherwise we might as well collect and say that men love not themselves because many cut their own throats, or wilfully fall down headlong from steep rocks and high places.’<sup>26</sup> Such vices that render parental instinct ineffectual he classified ‘like as those other passions and maladies of the mind’<sup>27</sup> which ‘transport a man out of his own nature, and put him besides himself, so as they testify against themselves that this is true, and that they do amiss’.<sup>28</sup>

In a similar spirit, Adam Smith taught that love for one’s offspring was entrenched in biological design. He wrote:

Nature in its wisdom has, in most and perhaps all men, installed a much stronger drive towards parental tenderness than towards filial respect. The continuance and propagation of the species depend entirely on the former, and not at all on the latter. The existence and

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such a danger is presented, it is wonderful how ready they will be to defend the same, yea, and to fight for them, even above their own power: at 295.

<sup>24</sup> Ibid 302.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid. In addition, Burlamaqui wrote:

With regard to those who in the most enlightened and civilized countries seem to be void of all shame, humanity, or justice, we must take care to distinguish between the natural state of man, and the depravation into which he may fall by abuse, and in consequence of irregularity and debauch. For example, *what can be more natural than paternal tenderness? And yet we have seen men who seemed to have stifled it, through violence of passion, or by force of a present temptation, which suspended for a while this natural affection.* What can be stronger than the love of ourselves and of our own preservation? It happens, nevertheless, that whether through anger, or some other motion which throws the soul out of its natural position, a man tears his own limbs, squanders his substance, or does himself some great prejudice, as if he were bent on his own misery and destruction. Burlamaqui, above n 21, 141 (emphasis added).

survival of the child usually depends altogether on the care of the parents, whereas parents' existence and survival seldom depend on the care of the child. That's why Nature has made the former affection so strong that it generally requires not to be aroused but to be moderated ... But moralists do urge us to an affectionate attention to our parents, and to make a proper return to them in their old age for the kindness that they showed us in our youth. In the Ten Commandments we are commanded to honour our fathers and mothers; and nothing is said about our love for our children, because Nature had sufficiently prepared us for the performance of this latter duty.<sup>29</sup>

Pufendorf regarded parents' empathy for their offspring as a natural extension of self love.<sup>30</sup> He wrote:

Frequently parents would prefer to have transferred to themselves the pain which they see their children suffering. Thus it is well established that many have met death with equanimity, in order to save others united to them by a special bond. But, in truth, this was done either because, as the result of an intimate relationship, they regarded the good or evil of others as their own, or else because, by that display of affection or fidelity, they were on the way to acquire some special good for themselves. Thus some parents rejoice more effusively in the blessings of their children than in their own blessings, because the blessing which affects equally both themselves and their offspring is in their judgment doubled. Thus we would often be willing to redeem the suffering of one of our

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<sup>29</sup> Adam Smith, *The Theory of the Moral Sentiments* (David Daiches Raphael and Alec Lawrence Macfie eds, Liberty Fund, first published 1759, 1982 ed) vol 1, 169, accessible at The Online Library of Liberty (September 2011) <[http://files.libertyfund.org/files/192/Smith\\_0141-01\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/192/Smith_0141-01_EBk_v6.0.pdf)>.

<sup>30</sup> Samuel von Pufendorf, *Two Books of the Elements of Universal Jurisprudence* (William Abbott Oldfather trans, Thomas Behme ed, Liberty Fund, first published 1660, 2009 ed) vol 1, 206, accessible at The Online Library of Liberty (September 2011) <[http://files.libertyfund.org/files/2220/Pufendorf\\_1495\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/2220/Pufendorf_1495_EBk_v6.0.pdf)>.



loved ones by our own suffering, because the weapon, as it were, which seeks us would be inflicting a more severe wound by passing through so dear a body.<sup>31</sup>

Thus, to Pufendorf, Smith, Plutarch, and Burlamaqui alike, parental love was a basic component of the parent-child relationship. Another ubiquitous component is parental authority.

### C *Parental Authority*

Thomas Hobbes theorized that parental authority emerges out of children's dependence upon their caregivers for survival. He declared that 'preservation of life' is 'the end, for which one [person] becomes subject to another'. Therefore, children must obey the one on whom they depend.<sup>32</sup>

More generally speaking, Hobbes theorized that in order to protect life and the materials that sustain life, humans in the state of nature which he thought to be a state of unlimited license, formed social contracts; that is to say they made collective agreements to lay down a portion of liberty in subjugation to a ruler, to the end that each individual's life and the materials used to sustain it might be secured against violence and theft.<sup>33</sup>

Now, one might observe in the context of established civilization where each person must earn an honest living and respect the property rights of neighbors, the immediate survival of children ceases to be a sufficient end of parenting; if children when they are grown are to enjoy what liberty is retained under contract, and if they are to raise up children of their own, then they must first be equipped to become citizens capable of

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<sup>31</sup> Ibid.

<sup>32</sup> Hobbes, above n 18, vol 3, 115.

<sup>33</sup> Ibid 75-6.

independence. In Pufendorf's view, parental authority arises from the necessity that children should be brought up to become 'fit members of human society'.<sup>34</sup> Conducive to this end, nature endows parents with a proclivity to care for their children. Pufendorf reasons that 'for the exercise of that care there is needed the power to direct the actions of children for their own welfare, which they do not yet understand themselves, owing to their lack of judgment.'<sup>35</sup>

Pufendorf observed that although humans sacrifice some degree of sovereignty when they bow to the authority of the state, parents in almost every civilization retain the power to bring up their children.<sup>36</sup> They first acquire this power when they give their children life, because 'in the way in which it is most natural for him who is the owner of the thing to be the owner of the fruits' so it is natural that 'he who is the master of the body out of which the offspring was generated, has the first place in acquiring sovereignty over offspring'.<sup>37</sup> This sovereignty comes with social responsibility: 'In taking up the infant, the parent in deed declares that he

<sup>34</sup> Samuel Pufendorf, *The Whole Duty of Man According to the Law of Nature* (Andrew Tooke trans, David Saunders and Ian Hunter eds, Liberty Fund, 2003 ed) 179 [trans of: *De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo* (first published 1673)], accessible at The Online Library of Liberty <[http://files.libertyfund.org/files/888/0217\\_LFeBk.pdf](http://files.libertyfund.org/files/888/0217_LFeBk.pdf)>.

<sup>35</sup> Samuel Pufendorf, 'On the Duties of Parents and Children' in *De Officio Hominis Et Civis Juxta Legem Naturalem Libri Duo* (Frank Gardner Moore trans, Oceana Publications, revised ed, 1964) [1]-[2], accessible at Constitution Society <[http://www.constitution.org/puf/puf-dut\\_203.txt](http://www.constitution.org/puf/puf-dut_203.txt)>.

<sup>36</sup> See Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (C H Oldfather and W A Oldfather trans, 1995 ed) vol 2, 923. Pufendorf wrote: 'Parents in societies, where they themselves are subjects, retain a power over their children, and have as much right to their subjection, as those who are in the state of nature.' See also John Locke, *Two Treatises of Government* (Hackett Publishing, first published 1690, 1980 ed) vol 2, 35, accessible at <[http://epublish.biz/pdf/Two\\_Treatises\\_of\\_Government.pdf](http://epublish.biz/pdf/Two_Treatises_of_Government.pdf)>.

<sup>37</sup> Samuel von Pufendorf, *Two Books of the Elements of Universal Jurisprudence* (William Abbott Oldfather trans, Thomas Behme ed, Liberty Fund, first published 1660, 2009 ed) vol 1, 244 accessible at (September 2011) <[http://files.libertyfund.org/files/2220/Pufendorf\\_1495\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/2220/Pufendorf_1495_EBk_v6.0.pdf)>.

will fulfill the obligation laid upon him by nature, and will bring it up well, as far as in him lies'.<sup>38</sup> The infant, who does not yet possess the ability to agree formally, agrees implicitly, because, 'it is presumed that, if the infant had had the use of reason at the time when it was taken up, it would have consented expressly to such sovereignty of its parent over it without which a suitable bringing up is impossible'.<sup>39</sup> Nature bestows on the parent enough power to meet children's needs and guide their behaviors up until the point where they are 'able to look out for themselves and to temper their actions to their wills, and see to it that they become useful members of human society'.<sup>40</sup> Thus, the parent directs the child so that the child might one day become a free agent, capable of moral decision-making and independent living.

John Locke believed that the Creator of both parent and child designed this natural contract to occur. He taught that parents possessed authority because 'God hath made it their business'<sup>41</sup> to care for their children, and 'hath placed in them suitable inclinations of tenderness and concern to temper this power' so that they 'apply it, as his wisdom designed it, to the children's good, as long as they should need to be under it.'<sup>42</sup> He affirmed that parents hold no more power than is necessary 'to give such strength and health to [the children's] bodies, such vigour and rectitude to their minds'<sup>43</sup> so as to 'best fit'<sup>44</sup> them 'to be most useful to themselves and

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<sup>38</sup> Ibid 244.

<sup>39</sup> Ibid 245.

<sup>40</sup> Pufendorf, above n 36, vol 2, 917.

<sup>41</sup> Locke, above n 36, 32.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

others'.<sup>45</sup> Locke believed parents possess a natural right to make decisions for their children for their welfare and education.<sup>46</sup>

Grotius in his writings on the Natural Law likewise affirmed parental authority.<sup>47</sup> Drawing from classical wisdom, he identified three stages where expression of parental authority varies, based on the offspring's stage of life:

The first is that [“] of *imperfect judgment*[”], as Aristotle calls it, while there is a lack of [“]discretion[”], as the same author elsewhere says. The second is the period of *mature judgment*, but while the son still remains a part of the family of the parents, that is [“]so long as he has not separated from it[”], as Aristotle says. The third is the period after the son has *withdrawn from the family*.<sup>48</sup>

## D      *Three Stages of Parental Authority*

### 1      *Parental Authority over Children Who are Not Yet Rational*

In the stage of imperfect reason, Grotius wrote ‘all the actions of children are under the control of the parents’ because ‘it is fair that he who is not able to rule himself be ruled by another.’<sup>49</sup> Similarly, Richard Price wrote that in so long as children cannot find their own way and they have no resources or means of acquiring them, one can infer that ‘the Author of Nature has committed the care of them to their parents, and subjected

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<sup>45</sup> Ibid.

<sup>46</sup> John Locke, *The Second Treatises of Government* (Prentice Hall, first published 1690, 1952 ed) 96.

<sup>47</sup> Hugo Grotius, ‘The Preliminary Discourse’ in *The Rights of War and Peace* vol 1 [15]. Grotius wrote that ‘[b]y [g]eneration, [p]arents, both [f]ather and [m]other, acquire a [r]ight over their [c]hildren...’

<sup>48</sup> Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (Francis W Kelsey trans, James Scott ed, first published 1625, 1925 ed) vol 2, 231.

<sup>49</sup> Ibid.

them to their absolute authority'.<sup>50</sup> Hobbes also wrote about this.<sup>51</sup> This state of parental authority entails that in matters not spoken for in the Natural Law parents may direct their children's upbringing according to their personal consciences. Thomas Aquinas, addressing the question of whether the young people should be indoctrinated and baptized without their parents blessing, wrote:

The son naturally belongs to his father. Indeed at first he is not distinct in body from his parents, so long as he is contained in his mother's womb. Afterwards when he leaves the womb, before he has the use of reason, he is contained under his parents' care as in a sort of spiritual womb ... *it would be against natural justice for a child to be withdrawn from his parents' care before he has the use of reason, or for any arrangement to be made about him against the will of his parents* ... before the use of reason the child is in the order of nature referred to God by the reason of his parents, to whose care he is naturally subject; and it is according as they arrange, that the things of God are to be done upon him.<sup>52</sup>

Reason, according to Montesquieu, 'comes only by slow degrees'.<sup>53</sup> During the period when reason is being developed, young citizens need

<sup>50</sup> Richard Price, *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America* (Edward and Charles Dilly, 9<sup>th</sup> ed, 1776) 23, accessible at The Online Library of Liberty (September 2011) <[http://files.libertyfund.org/files/1781/Price\\_0895\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/1781/Price_0895_EBk_v6.0.pdf)>.

<sup>51</sup> Thomas Hobbes wrote: 'Because the first instruction of children, dependeth on the care of their parents, it is necessary that they should be obedient to them, whilst they are under their tuition.' Hobbs, above n 18, vol 3, 188.

<sup>52</sup> Thomas Aquinas, *Aquinas Ethicus: Or, the Moral Teaching of St. Thomas* (Joseph Rickaby trans, Burns and Oates, 1892 ed) 183 [trans of *Summa Theologica – Prima Secundae, Secunda Secundae* (first published 1274)], accessible at The Online Library of Liberty (September 2011) <[http://files.libertyfund.org/files/1965/Aquinas\\_1015-01\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/1965/Aquinas_1015-01_EBk_v6.0.pdf)> (emphasis added).

<sup>53</sup> Montesquieu wrote of humans: 'Their children indeed have reason; but this comes only by slow degrees. It is not sufficient to nourish them; we must also direct them: they can already live; but they cannot govern themselves.' Charles Louis de Secondat, Baron De Montesquieu, 'The Spirit of Laws' in *The Complete Works of*

the rational oversight of their parents, even as much as they need physical nourishment.<sup>54</sup> Similarly, Locke wrote of the young citizen:

To turn him loose to an unrestrained liberty, before he has reason to guide him, is not the allowing him the privilege of his nature to be free; but to thrust him out amongst brutes, and abandon him to a state as wretched, and as much beneath that of a man, as their's [sic]. This is that which puts the authority into the parents [sic] hands to govern the minority of their children.<sup>55</sup>

## 2 *Parental Authority over Offspring who are Rational, Yet Dependent*

Young adults enter what Grotius terms the second stage of life, 'mature reason,' only after they become competent to make grown-up decisions. Herein they possess 'a moral faculty of action'; they begin to please their parents out of 'filial affection, respect and gratitude' rather than out of moral incapacity.<sup>56</sup> Parents in this stage retain the right to require that their offspring's behavior conform to the interests of the family unit, of which they are still a part.<sup>57</sup> Nevertheless each young adult is free to think for himself or herself. Aquinas observed:

After he begins to have the use of reason, he begins to be his own at last, and can provide for himself in things of divine or Natural Law; and then he is to be induced to the faith not by compulsion, but by persuasion; and he may even consent to the faith against the will of

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Montesquieu (Thomas Nugent trans, T Evans, 1777 ed) vol 2, 111 [trans of: *De l'esprit des Lois* (first published 1748)] accessible at The Online Library of Liberty (September 2011) <[http://files.libertyfund.org/files/838/Montesquieu\\_0171-02\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/838/Montesquieu_0171-02_EBk_v6.0.pdf)>.

<sup>54</sup> Ibid.

<sup>55</sup> Locke, above n 36 at 32.

<sup>56</sup> Grotius, above n 48, vol 2, 232.

<sup>57</sup> Locke, above n 36, 32.

his parents, and be baptized, but not before he has the use of reason.<sup>58</sup>

### 3 *Parents Relationships with Offspring who are Rational and Self Sufficient*

Once adults have physically ‘withdrawn from the family’ and established their own livelihoods, relying on their own reason, they enter Grotius’s third stage. They continue to offer their parents love and gratitude, since ‘the cause remains.’<sup>59</sup> Yet, they are ‘in all things independent.’<sup>60</sup> Pufendorf affirms that parental power ceases once the offspring are able to care for themselves.<sup>61</sup> Likewise, he agrees that there remains a ‘debt of honour and gratitude on the part of children towards parents, which in due course does not cease as long as the latter are among the living ...’<sup>62</sup>

<sup>58</sup> Aquinas, *Aquinas Ethicus*, above n 52, 183.

<sup>59</sup> Grotius, above n 48, vol 3, 231.

<sup>60</sup> Ibid 233. Additionally, Richard Price wrote: ‘There is a period when, having acquired property, and a capacity of judging for themselves, they become independent agents; and when, for this reason, the authority of their parents ceases, and becomes nothing but the respect and influence due to benefactors.’: Richard Price, *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America* (Edward and Charles Dilly, 9<sup>th</sup> ed, 1776) 23 accessible at The Online Library of Liberty (September 2011) <[http://files.libertyfund.org/files/1781/Price\\_0895\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/1781/Price_0895_EBk_v6.0.pdf)>.

<sup>61</sup> Pufendorf, above n 34, 183.

<sup>62</sup> Pufendorf, above n 30, 76. Pufendorf wrote:

Now among adventitious obligations there can be listed here the debt of honour and gratitude on the part of children towards parents, which in due course does not cease as long as the latter are among the living, although it might appear that cases could arise in which that obligation would utterly disappear; that is to say, when parents, without any compulsion of necessity, cast aside all care for the child born to them and expose it destitute of all human aid; or when, in later years, they shamefully neglect its education, or are otherwise heartlessly proceeding to destroy its well-being. For that obligation on the part of children proceeds primarily from the law of gratitude, and this regards antecedent benefactions: at 76-7.

Also, Locke wrote:

Though there be a time when a child comes to be as free from subjection to the will and command of his father, as the father himself is free from subjection to the will of anybody else, and they are each under no other restraint, but that which is common to them both, whether it be the law of nature, or municipal law of their country; yet this

Having established that parents have natural authority over their offspring, which extends to independence, we will now look at what Natural Law says about government's relationship to parental authority.

### E      *Parental vs Government Authority*

Locke, in his *Second Treatises on Government*, recognized an important distinction between the foundations of (1) a parent's right to govern the upbringing of their children, (2) a state's political power to govern for the security of society, and (3) a dictator's despotical power to take for self-enrichment – and raised a caution about the state confounding the categories:<sup>63</sup>

First, then, Paternal or parental power is nothing but that which parents have over their children, to govern them for the children's good ...

The affection and tenderness which God hath planted in the breast of parents towards their children, makes it evident, that this is not intended to be a severe arbitrary government, but only for the help, instruction, and preservation of their offspring ...<sup>64</sup>

And thus, 'tis true, the paternal is a natural government, but not at all extending itself to the ends and jurisdictions of that which is political. The power of the father doth not reach at all to the property of the child, which is only in his own disposing.<sup>65</sup>

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freedom exempts not a son from that honor which he ought, by the law of God and nature, to pay his parents: Locke, above n 36, 33.

<sup>63</sup> Locke, above n 36, 79. Locke wrote: 'Though I have had occasion to speak of these separately before, yet the great mistakes of late about government, having, as I suppose, arisen from confounding these distinct powers one with another, it may not, perhaps, be amiss to consider them here together.'

<sup>64</sup> Ibid 79.

<sup>65</sup> Ibid.



Secondly, Political power is that power, which every man having in the state of nature, *has given up into the hands of the society*, and therein to the governors, whom the society hath set over itself, with this express or tacit trust, that it shall be employed for their good, and the preservation of their property ...<sup>66</sup>

*Nature gives the first* of these, viz paternal power to parents for the benefit of their children during their minority, to supply their want of ability, and understanding how to manage their property ... *Voluntary agreement gives the second*, viz political power to governors for the benefit of their subjects, to secure them in the possession and use of their properties. *And forfeiture gives the third* despotical power to lords for their own benefit, over those who are stripped of all property.<sup>67</sup>

According to Locke, the powers of parents and of the state ‘are so perfectly distinct and separate’ and are ‘built upon so different foundations’ and ‘given to so different ends’ that ‘every subject that is a father, has as much a paternal power over his children, as the prince has over his.’<sup>68</sup> Moreover, ‘every prince, that has parents, owes them as much filial duty and obedience, as the meanest of his subjects do to theirs; and can therefore contain not any part or degree of that kind of dominion, which a prince or magistrate has over his subject.’<sup>69</sup> Hobbes provided a different perspective; unlike Locke, who considered powers separate by nature in accordance with a benevolent design, Hobbes, generally speaking, treated social powers as hierarchical.<sup>70</sup>

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<sup>66</sup> Ibid (emphasis added).

<sup>67</sup> Ibid 80 (emphasis added).

<sup>68</sup> Ibid 35.

<sup>69</sup> Ibid.

<sup>70</sup> Concerning children, Hobbes wrote, ‘[h]e that hath right of governing them may give authority to the guardian.’ Hobbes, above n 18, 93.

It is important to note that Locke's separation between state and parental powers does not preclude government from providing free public education and other programs which could improve the quality of life; for if parents, in a modern context, have the right to direct their children's upbringing, they may choose to enrol them in a public school system. By making this choice, parents do not relinquish parental power to the government any more than business owners relinquish control over their businesses when they delegate book-keeping to their accountants. Natural law writers recognize that parents may delegate portions of their children's upbringing while still retaining authority.

Pufendorf wrote:

[A]lthough the obligation to educate their children has been imposed upon parents by nature, this *does not prevent the direction of the same from being entrusted to another*, if the advantage or need of the child require, *with the understanding, however, that the parent reserves to himself the oversight of the person so delegated.*<sup>71</sup>

We also note that the separation of state and parental powers does not impede government from protecting children from abuse, neglect, or endangerment. Since the state possesses power to secure the liberties and rights protected under the Natural Law,<sup>72</sup> parental rights cannot hinder government from protecting children from parents who violate the Natural Law concerning them.

Regarding discipline, Pufendorf wrote that the Natural Law does not by any contortion of the imagination grant parents the right to abuse or

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<sup>71</sup> Samuel Pufendorf, 'On the Duties of Parents and Children' in *Two Books on the Duty of Man and Citizen According to the Natural Law* [9], accessible at Constitution Society <[http://www.constitution.org/puf/puf-dut\\_203.txt](http://www.constitution.org/puf/puf-dut_203.txt)> (emphasis added).

<sup>72</sup> Locke, above n 36, 79-80.

murder their children.<sup>73</sup> Locke concurred, stating that the parental right to control a child's upbringing should not 'extend to life and death ... over their children ...'.<sup>74</sup> Such physical abuse and endangerment of children would defeat every purpose of parental authority, and break the law on every person's heart.

Furthermore, Pufendorf recognized that in cases of neglect, parental rights might be forfeited. He wrote:

If some parents ... not only violating the law of nature but also overcoming common affection, are unwilling to nurture their offspring, and cast it forth, they cannot longer claim any right over it, nor can they demand from it longer any office due, as it were, to a parent.<sup>75</sup>

Government cannot give or take away parental powers. Rather, when people relinquish their natural powers by rejecting the Natural Law, which requires the care of offspring, government may fill the power vacuum. Just as Plutarch said that deviant individuals who fail to care for their children do not prove that parental affections do not exist,<sup>76</sup> so also those same parents who forfeit or suspend their parental rights through abuse or neglect do not preclude the existence of parental rights for those who embrace their natural calling.

Parental rights *do* exist insofar as parents remain in harmony with the Natural Law and provide their children with upbringings that will one day equip them to live independently and handle that liberty which is their

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<sup>73</sup> Pufendorf, above n 34, 181. Pufendorf wrote: 'this power is not thought to extend to exercising the right of life and death on occasion of some offense, but merely so far as moderate chastisement.'

<sup>74</sup> Locke, above n 36, 79.

<sup>75</sup> Pufendorf, above n 30, 246.

<sup>76</sup> Plutarch, 'Of the Natural Love or Kindness of Parents to their Children' in Ernest Rhys (ed), *Plutarch's Moral Essays* (Philemon Holland trans) 290, 302.

birthright as human beings. Government cannot add to or take away from the authority required to accomplish this task.

### III THE COMMON LAW TRADITIONS: REFLECTING NATURAL LAW AND DIVINE LAW

The common law, reflecting the natural and Divine Law traditions, included protection for parental rights. It embodies a rich history of precedent applying theoretical concepts to practical government. Influential people in the United Kingdom used it to check the powers of rulers and promote human rights for centuries before it was written down.<sup>77</sup> When Sir William Blackstone finally put it on paper, a series of watershed events unfolded. According to Stacey, '[t]he *Commentaries* made the law accessible to ... colonial people who lacked the resources necessary for institutional legal education and apprenticeship.'<sup>78</sup>

When King George III denied the American colonies (who were then part of England) the liberties laid out in Blackstone's *Commentaries*, it incited the Americans to break away<sup>79</sup> and set up an independent government based upon English common law in order to secure the same liberty in the colonies that Englishmen enjoyed.<sup>80</sup> Additionally, around 80 nations, including Australia, New Zealand, Ireland, and India, which looked to England for influence or were once a part of England, later birthed

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<sup>77</sup> Robert D Stacey, *Sir William Blackstone and the Common Law: Blackstone's Legacy to America* (ACW Press, 2003) 47.

<sup>78</sup> Ibid 95.

<sup>79</sup> Ibid 82-4; see especially Table 1, 83-4.

<sup>80</sup> Ibid 80.

independent legal systems from the English common law.<sup>81</sup> Thus, the common law checks the powers of the earth; it is not created by them.

Because of the importance of common law in the foundational fabric of so many nations, those desiring to help the world's children via international treaties might benefit from what it has to say about parental responsibilities.<sup>82</sup> The common law 'deemed 'the most universal relation in nature ... [to be] that between parent and child.'<sup>83</sup> 'At the common law of England, a parent's right to custody and control of minor children was a sacred right with which courts would not interfere except where by conduct the parent abdicated or forfeited that right.'<sup>84</sup>

At common law, the authority and responsibility to direct the upbringing of children rested with their parents. In particular, parents hold the authority and responsibility over the maintenance, protection, and education of their children.<sup>85</sup> Concurrently, according to the common law,

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<sup>81</sup> Central Intelligence Agency, *Field Listing: Legal System*, The World Factbook <<https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>>.

<sup>82</sup> Daniel E Witte, 'People v Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right under the Ninth Amendment' [1996] *Brigham Young University Law Review* 183, 190-3.

<sup>83</sup> Stacey, above n 77, 190-2.

<sup>84</sup> Ibid.

<sup>85</sup> For example, in William Blackstone, 'Of Parent and Child' in *The Rights of Persons* 435-6, 439-42, Blackstone wrote:

[The] duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Pufendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents...

[The] last duty of parents to their children is that of giving them an education suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For, as Pufendorf very well observes, it is not easy to imagine or allow, that a parent has conferred

‘[the] duties of children to [honor and obey] their parents arise from a principle of natural justice and retribution.’<sup>86</sup>

#### IV EPILOG

Parental liberty to direct and control the upbringing of their children rests upon deeply rooted divine, natural, and common law foundations. These traditions articulate a truth, self-evident to any fit parent: parents are vested with the responsibility and authority to decide matters concerning the raising of their children. This is so, at least in part, because they naturally are best equipped to do so. As an objectivist standard, the principle operates as an effective measure which governing authorities can use to evaluate whether their government action improperly interferes with a citizen-parent’s inviolable liberty. It is appropriate, therefore, for contemporary scholars to revisit this deeply rooted liberty as an unalienable limit on the exercise of state power. As government increasingly bestows upon itself ultimate dominion over matters relating to the upbringing of children, the potential for despotic governance logically looms on the jurisprudential horizon.

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any considerable benefit upon his child, by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself.

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Ibid. Blackstone wrote:

For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after; they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by profitive laws.

# TOWARD A MODERN REASONED APPROACH TO THE DOCTRINE OF RESTRAINT OF TRADE

NEVILLE ROCHOW\*

## ABSTRACT

*There are sufficient problems with the doctrine of restraint of trade to warrant its wholesale reconsideration. These problems are seamlessly interconnected. The first problem lies in its jurisprudential history: it provides no clear guide as to the public policy and economic purposes that justify the approach of the courts to contractual clauses subject to the doctrine. If a clause is found to be unenforceable under the doctrine, the purchaser's protection of the goodwill for which they paid valuable consideration is effectively lost. There is no explanation as to why the balance of public policy is so firmly tilted against the purchaser in a case of poor drafting. The second problem flows from the first: the very description 'restraint of trade' obscures the purpose of a valid restraint. It over-emphasises what the clause is intended to prevent rather than the legitimate interest that it is designed to protect. This leads to the third problem of the windfall gain resulting from a clause being struck down and the vendor being able to reclaim the very asset that they had sold and possibly even retaining the consideration paid. The next problem is the advent of the so-called 'ladder clause'. Devised to avoid the harsh consequences of not correctly anticipating what a court may think is reasonable as a restraint despite what the parties have agreed, the intention of the parties has been substituted with a drafting exercise that has nothing to do with intention but everything to do with avoiding the harsh operation of the doctrine. Each of the problems arises because the validity of the clause is an all or nothing proposition. Courts will not generally amend, read down or re-draft a clause. This lays a heavy burden on the shoulders of the draftsman in striking the right balance between protection and restraint and, ultimately, upon counsel in finding in that drafting a reasonable (and thus valid) operation within the parameters of time, distance and subject matter. The time is therefore ripe for a reconsideration*

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*of the doctrine of restraint of trade without a presumption of invalidity by reference to public policy. Not only does commercial life depend upon the existence of such clauses, but the competition policy enshrined in statute assumes that valid clauses are essential exceptions to the prohibitions against horizontal restraint. Once it is accepted that there is strong commercial demand for valid clauses, the doctrine can be reviewed for its legal basis so that it makes modern commercial and economic sense and operates fairly to both parties.*

## I INTRODUCTION

Restraint of trade clauses have an image problem. They suffer bad press like few other contractual terms. Courts label them ‘void’ and ‘contrary to public policy’ and will not enforce them unless ‘special circumstances’ show them to be ‘reasonable’. Added to this is the complication that a clause may, in some instances, be an ‘*exclusionary provision*’<sup>1</sup> prohibited by s 45 of the *Competition and Consumer Act 2010 (Cth)* (‘CCA’). Covenantors, previously happy enough to agree to the clauses, frequently turn on them, trying to exploit the difficulties posed in enforcement. Not the best of starts in life for any contractual term!

With so many hurdles to vault, the question could be asked, why would anyone bother with restraint of trade clauses at all? Should they not be relegated to the same drafting scrapheap as are covenants in furtherance of a crime<sup>2</sup> and contracts with belligerent aliens?<sup>3</sup>

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<sup>1</sup> See *Competition and Consumer Act 2010 (Cth)* (‘CCA’) s 4D.

<sup>2</sup> For nineteenth century examples of the application of the maxim *ex turpi causa non oritur actio*, see *Everet v Williams* (1893) 9 L.Q. Rev. 197 (the *Highwaymen Case*); *Scott v Brown Doering McNab & Co* [1892] 2 QB 724. As to the modern operation of the Australian doctrine of illegality and public policy, see: *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432; *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410; *Nelson v Nelson* (1995) 184 CLR 538; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215. In the context of



Therein resides the irony. The clauses are judicially deprecated as being *prima facie* ‘void’ and ‘contrary to public policy’, and not ‘enforceable’ unless shown to be ‘reasonable’. However, this type of clause is *de rigueur* in contracts for the purchase of shares and businesses, employment agreements and in covenants to protect confidential information, trade secrets and know-how.<sup>4</sup> In fact, commerce considers them so important that the lawyer who fails to advise on and draft an enforceable clause may well be considered negligent. While there are public policy arguments against *invalidating* clauses, there is strong commercial demand for *valid* clauses.

Both the image problem and the irony have various causes.

First, the history of contractual restraint of trade provides an unclear guide as to public policy and economic purposes.<sup>5</sup> Emphasis has too often been on the protection of the rights of the restrained party. There has not been sufficient focus on the rights of the party seeking to restrain<sup>6</sup>. In a business sale case, for instance, the balance of ‘reasonableness’ may be against the purchaser of the business because the restraint is too long or geographically too broad. An opportunistic vendor may invoke the

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the particular statutory prohibitions under the CCA, see ss 4L, 4M and 87; see also *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516.

<sup>3</sup> See *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] AC 260; *Hirsch v Zinc Corp Ltd* (1917) 24 CLR 34.

<sup>4</sup> At common law, the restraint of trade doctrine applies to contracts. Contrast the position under the CCA, where the statutory prohibitions apply to contracts as well as “arrangements or understandings”. See the discussion below as to the application and exemptions imported by s 51 (2) (b), (d) and (e) under which provisions the notion of reasonableness is imported to protect restraints in certain contracts, arrangements and understandings relating to service, sales of business and to protect goodwill.

<sup>5</sup> As Heydon notes, judicial development of the restraint of trade doctrine has not always been consistent: John Dyson Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2008) 2.

<sup>6</sup> See Michael J Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (The Carswell, 1986) 142–51.

doctrine if the clause is either temporally or geographically excessive. Refusal to enforce is not on terms of doing equity. It is an absolute. If the clause is found to be unenforceable, the purchaser's protection of the goodwill is effectively lost. The vendor would be free to spirit away customers.

The second cause flows from the first: the very description '*restraint of trade*' obscures the purpose of a valid restraint by emphasising what the clause prevents rather than the legitimate interest that it is designed to protect. Whether that is goodwill, client lists, confidential information or a trade secret,<sup>7</sup> the purchaser will usually have paid substantial sums for the commercial advantages that exploitation of that asset or right brings when it is to the exclusion of the vendor or covenantor.

Thirdly, the confusion as to history and purpose is often reflected in the drafting, resulting in clauses being struck down and the vendor being able to reclaim the very asset that they had sold and possibly even retaining the consideration paid.

At common law, as mentioned, the validity of the clause is an all or nothing proposition. Courts will not generally amend, read down or re-draft a clause. This lays a heavy burden on the shoulders of the drafter in striking the right balance between protection and restraint and, ultimately, upon counsel in finding in that drafting a reasonable (and thus valid) operation within the parameters of time, distance and subject matter.

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<sup>7</sup> The capital comprising goodwill will not necessarily have been paid to the party to be restrained. In the case of an employment contract, the employee will be granted access to material essential to the building and maintenance of goodwill. In this regard, there may be both express covenants and implied obligations of loyalty that prevent dealing in certain types of information after termination. See *Faccenda Chicken v Fowler* [1987] 2 Ch. 117; Robert Dean, *Employers, Ex-Employees and Trade Secrets* (Lawbook Co, 2004) 4; Heydon, above n 5, 114.

The '*all-or-nothing*' approach of the common law has contributed to the innovation in the so-called '*ladder clause*', which presents a cascading set of variables in time, distance and subject matter. Properly drafted, this type of clause may present a range of options that the parties consider reasonable, but which can be severed to the extent that the court considers necessary. Poorly drafted, they may present too many variables and permutations to be capable of being reasonable, or may be considered to be so vague as not to represent any agreement on restraint at all. If a ladder clause is drafted so that it presents a single restraint, it will be considered uncertain and be struck down. If it contemplates a combination of separate restraints, severing those that are unreasonable, then it is less likely to be struck down.

There has been much written on restraint of trade in an effort to present a comprehensive and rational treatment. It has been the subject of entire volumes dedicated to its unravelling, not to mention many articles and judicial considerations of various aspects of its operation. While no single paper could present the doctrine of restraint of trade in any manner that could be considered to be comprehensive, the current purpose is to present some insights into its history, rationale and the basic elements of its modern operation that will assist those called upon to draft, defend or attack a clause.

## II MODERN DOCTRINE

The image problem surrounding restraint of trade clauses is evident in the seminal case expressing the modern doctrine, *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company*.<sup>8</sup> *Nordenfelt* involved the sale of a worldwide armaments business, pursuant to which the defendant

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<sup>8</sup> (1894) AC 535.

had agreed not to compete with the plaintiff anywhere in the world for a period of 25 years. Interestingly, the covenant was held to be reasonable and enforceable. Customers of the company were situated throughout the world. The worldwide restraint covenant was found to be reasonably necessary for protection of goodwill.<sup>9</sup> Despite this finding, in *Nordenfelt*, Lord Macnaghten<sup>10</sup> expressed the modern doctrine in negative terms, stating that:

The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by special circumstances of a particular case.<sup>11</sup>

This statement of principle attempts to balance freedom of contract and the freedom of trade, two of the interests in conflict in the context of restraint of trade. *Nordenfelt* represents the modern articulation of the doctrine: rather than prohibiting clauses outright, it justifies judicial interference with freedom of contract where a restraint is unreasonable. If a restraint of trade clause is found unreasonable, it will be found to be contrary to public policy; freedom of contract will be trumped by the overriding freedom to trade.<sup>12</sup>

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<sup>9</sup> See David M Meltz, *The Common Law Doctrine of Restraint of Trade in Australia* (Blackstone Press Pty Ltd, 1995) 31.

<sup>10</sup> [1894] AC 535.

<sup>11</sup> (1894) AC 535, 565 (Lord Macnaghten).

<sup>12</sup> David M Meltz, *The Common Law Doctrine of Restraint of Trade in Australia* (Blackstone Press Pty Ltd, 1995) 4, 157. In *Peters American Delicacy Co Ltd v Patricia's Chocolates and Candies Pty Ltd* (1947) 77 CLR 574, 590, Dixon J (as his Honour then was) noted how *Nordenfelt* removed the tendency of 'placing the public policy of securing an ample freedom of contract and enforcing obligations assumed in its exercise in opposition to the public policy of preserving freedom of

Lord Macnachten's statement of the principle may be regarded as encapsulating the doctrine as it had developed in English authority up to that point. The situation is more nuanced. Earlier authorities, with their origins in attempts by guilds to establish monopolies and increase barriers to entry for 'foreigners' or guild non-members, the interference with food supplies by middlemen, or royal grants of monopolies, were reconciled under the rubric of reasonableness.<sup>13</sup> Reasonableness introduced an avenue by which properly drawn restraints could survive. Despite what may appear in *Nordenfelt* to have been a softening of the position that previously obtained, it can be said that previous authority at least had the hallmark of predictability. Monopolies were *prima facie* bad, even if the economics of protectionism justified them. Parties were not able to contract away the right to trade freely without pointing to an established custom that permitted the creation of a monopoly.<sup>14</sup> It was only later in the development of the doctrine that reasonableness began to find favour. Examples include:

In *Dyer's Case*,<sup>15</sup> the defendant, Dyer, had entered into a bond not to ply the trade of dyer in a certain town for six months. Hull J held that the

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trade from unreasonable contractual restriction'. Discussed in *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126, [37] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

<sup>13</sup> Although Lord Macnachten's statement provides the modern articulation of the doctrine of restraint of trade, the common law developed similar principles prior to *Nordenfelt*, including for the preservation of access to necessary goods and facilities. Such access was protected by the doctrine of prime necessity, which has since been codified in *Sherman Antitrust Act* (USC) (1890), §§ 1 and 2; *Clayton Antitrust Act* (USC) (1914), §§ 14 and 18; *Trade Practices Act 1974* (Cth) ss 45-46; and now CCA, Part IIIA (access to services/essential facilities) (are you sure that this does not include Part IV CCA?). See Philip Clarke and Stephen Corones, *Competition Law and Policy: Cases and Materials* (Oxford University Press, 1999) 6-8. See also Heydon, above n 5, 1-9.

<sup>14</sup> Heydon, above n 5, 5.

<sup>15</sup> 2 Hen 5, f 5, pl 26 (1414).

obligation was illegal and thus void,<sup>16</sup> as the common law at that time prohibited *all* contracts in restraint of trade.<sup>17</sup>

*Davenant v Hurdis*, (*The Merchant Tailor's Case*),<sup>18</sup> involved a dispute between two guilds over control of the cloth-finishing trade. Sir Edward Coke argued on behalf of the plaintiff that 'by-laws that establish monopolies are against common law and void'.<sup>19</sup> The Court, accepting the argument, held that 'a rule of such nature as to bring all trade and traffic into the hands of one company or one person to exclude all others is illegal'.<sup>20</sup> The decision was against the monopolistic power of the guilds.<sup>21</sup>

In *Darcy v Allen*<sup>22</sup> (*The Case of Monopolies*),<sup>23</sup> Queen Elizabeth had granted Darcy, her groom, a patent for a monopoly over the manufacture and importation of playing cards. Allen infringed the grant by making, importing and selling playing cards. The Court extended the principle in *Davenant v Hurdis* regarding corporate by-laws to a Crown grant<sup>24</sup> and invalidated a royal grant by patent, both at common law and under statute. Popham CJ held that the monopoly conferred by grant was

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<sup>16</sup> Trebilcock, above n 6, 8.

<sup>17</sup> Philip Clarke and Stephen Corones, *Competition Law and Policy: Cases and Materials* (Oxford University Press, 1999), 2.

<sup>18</sup> (1598) Moore KB 576. See also *Gowbry v Knight* (1601) Noy 183; *The Ipswich Tailors' Case* (1614) 11 Co Rep 53a.

<sup>19</sup> Trebilcock, above n 6, 7.

<sup>20</sup> (1598) Moore (KB) 576, 591. See also Michael J Trebilcock, *Historical Evolution of Common Law of Restraint of Trade* (Carswell, 1986), 7.

<sup>21</sup> However, Heydon, referring to *Hutchins v Player* (1663) O Bridg 272 and *City of London's Case* (1610) 8 Co Rep 121b, notes that the general rule which developed in the 17<sup>th</sup> century was that by-laws in restraint of trade were valid if based upon a valid custom and beneficial to the public, though not if they rested on a royal grant: Heydon, above n 5, 5.

<sup>22</sup> Referred to by Philip Clarke and Stephen Corones as *Darcy v Allein*, but by Heydon as *Darcy v Allen*.

<sup>23</sup> (1602) 11 Co Rep 84b.

<sup>24</sup> Heydon, above n 5, 7.

contrary to common law as it deprived other existing or potential card manufacturers of their living and prejudiced the public generally by raising the price of the cards and lowering their quality.

A different approach began to emerge in *Mitchel v Reynolds*.<sup>25</sup> Reynolds agreed to assign a bakehouse to Mitchel for a period of five years, and agreed to refrain from engaging in the trade of baking within the same parish for that five year period. Parker CJ, in reconciling the earlier ‘jarring opinions’ regarding restraint of trade,<sup>26</sup> identified three kinds of involuntary restraints: Crown grants, which were generally void; restraints contained in customs, which were valid when they benefited persons who traded for the advantage of the community; and restraints contained in by-laws, which were valid when supported by a reasonable custom to the same effect and where it bettered government and regulation of it or improved the commodity.<sup>27</sup> Further, Parker CJ discussed voluntary restraints, finding that while ‘general restraints are all void’, where a restraint of trade ‘appears to be made upon a good and adequate consideration’, so as to make the restraint reasonable and useful, it was enforceable.<sup>28</sup> In the circumstances, the Court found that the restraint was reasonable and did not prejudice the public interest, and therefore held that it was valid. Thus, restraints of trade were found not to be prohibited by the common law where they were reasonable. This approach laid the foundation for what is essentially the position of the common law under the modern doctrine of restraint of trade.

The English line of authority was considered in the United States only a few years prior to *Nordenfelt* being handed down. United States common

<sup>25</sup> [1558 – 1774] All ER Rep 26.

<sup>26</sup> *Mitchel v Reynolds* (1711) 1 P Wms 181, 182-4 (Parker CJ).

<sup>27</sup> Heydon, above n 5, 11-2.

<sup>28</sup> *Mitchel v Reynolds* (1711) 1 P Wms 181, 185-6 (Parker CJ).

law, which had developed similarly to the common law in England,<sup>29</sup> had proved insufficient to regulate the anti-competitive conduct of the railways and the ‘monolithic’ trusts<sup>30</sup> that were regularly employed by monopolists and oligopolists.<sup>31</sup> As a consequence, the US courts took a more rigorous approach, particularly after the introduction of the *Sherman Antitrust Act* 1890, ss 1 and 2 of which illegalised monopoly and restraints of trade.

Under the antitrust legislative regime, J D Rockefeller’s empire, the pinnacle of which was Standard Oil, was dismantled by the US Supreme Court in *Standard Oil Co of New Jersey v United States*.<sup>32</sup> To ameliorate the unyielding impact that the legislation might have, in *Standard Oil* the Supreme Court adopted what has become known as the ‘rule of reason’: namely, that restraints of trade would only violate the *Sherman Act* if they reduced competition to an unreasonable extent.<sup>33</sup>

Under the antitrust legislative regime, Standard Oil, along with sixty-five companies under its control, and a number of individuals including J D Rockefeller, were charged before the Supreme Court with ‘monopolizing the oil industry and conspiring to restrain trade through a familiar litany of tactics: railroad rebates, the abuse of their pipeline monopoly, predatory pricing, industrial espionage, and the secret ownership of ostensible competitors’.<sup>34</sup>

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<sup>29</sup> Heydon, above n 5, 22.

<sup>30</sup> Namely, an arrangement whereby shareholders transferred securities to trustees in return for the entitlement to a share of pooled earnings: see Clarke and Corones, above n 17, 6.

<sup>31</sup> Clarke and Corones above n 17, 6.

<sup>32</sup> 221 US 1 (1911).

<sup>33</sup> Clarke and Corones, above n 17, 6 – 7.

<sup>34</sup> Ron Chernow, *Titan: The Life of John D Rockefeller, Sr* (Vintage, 2<sup>nd</sup> ed, 2004), 537.



Previously in an exposé that would be used as the template for the antitrust legislation, Ida Tarbell, one of Rockefeller's most ardent critics, denounced 'the deceit of an organisation that operated through a maze of secret subsidiaries in which the Standard Oil connection was kept secret'.<sup>35</sup> Tarbell had chronicled Standard Oil's collusion with the railroads, the 'intricate system of rebates and drawbacks', and suggested that the rebates violated the common law.<sup>36</sup> She exposed many abuses of power by the Standard Oil pipelines, which used their monopoly to favour the Standard Oil refineries,<sup>37</sup> and recorded the means by which Standard Oil's subsidiaries induced retailers to exclusively stock their products.<sup>38</sup>

The *Sherman Act* was later followed in the US by the more comprehensive *Clayton Antitrust Act 1914* (US). The *Sherman Act* influenced legislative regulation of restraints of trade and competition in Australia from an early time. With the *Australian Industries Preservation Act 1906* (Cth), ss 4, 5, 7 and 8 the federal parliament attempted to implement the proscriptive approach of the *Sherman Act*.<sup>39</sup> This early imitation of the *Sherman Act* failed. The High Court found parts of the *Australian Industries Preservation Act 1906* (Cth) unconstitutional.<sup>40</sup> Ultimately,<sup>41</sup> provisions, now well-known to Australian competition lawyers, in Part IV of the CCA and its predecessor, the *Trade Practices Act 1974* (Cth), together with Part IIIA of each of those Acts, were

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<sup>35</sup> Ibid 444.

<sup>36</sup> Ibid 443.

<sup>37</sup> Ibid 444.

<sup>38</sup> Ibid.

<sup>39</sup> Clarke and Corones, above n 17, 8.

<sup>40</sup> *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330; see also Clarke and Corones above n 17, 8.

<sup>41</sup> Clark and Corones observe that TPA 1974 adopts a proscriptive approach of the US and the *Australian Industries Preservation Act 1906*, rather than following the more prescriptive UK position: Clarke and Corones, above n 17, 10.

introduced to give effect to what has been a workable competition policy in Australia that has operated and developed since 1974.<sup>42</sup>

As a matter of Australian common law, *Nordenfelt* has subsequently been followed by a line of Australian cases.

In *Peters American Delicacy Co Ltd v Patricia's Chocolates & Candies Pty Ltd*,<sup>43</sup> Peters and Patricia's Chocolates entered into an agreement for Peters to supply Patricia's with ice-cream to be sold at Patricia's premises for a period of sixty months. The contract included a clause whereby Patricia's agreed not to sell, serve, supply or vend any ice-cream other than the ice-cream manufactured by Peters at Patricia's premises or within a distance of five miles from that premises during that sixty month period. The High Court found that the restraint imposed by the clause was reasonable in the interests of both parties and not injurious to the public, and therefore held it to be valid.

*Buckley v Tutty*<sup>44</sup> involved a footballer who was a member of the NSW Rugby Football League. The rules of the League contained provisions regarding the retention and transfer of players. As the plaintiff had been placed on the club's 'retain list', under the rules the plaintiff was prohibited from playing for another club without the consent of his club. This prohibition was effective for as long as the plaintiff was on the 'retain list', and applied whether or not he continued to play for the club. The High Court found that the club's retain and transfer rules went further than necessary to protect the reasonable interests of the League, particularly given the lack of time limit and the applicability of the rules regardless of how short the player's employment with the club and how

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<sup>42</sup> See Clarke and Corones, above n 17, 8.

<sup>43</sup> (1947) 77 CLR 574.

<sup>44</sup> (1971) 125 CLR 353.

much time had expired since that period of employment. Therefore, the High Court held the rules to be void as an unreasonable restraint of trade.

Another such case is *Amoco Australia Pty Ltd v Rocca Bros Motor Co Engineering Pty Ltd*.<sup>45</sup> In *Amoco*, an owner of land entered into an agreement with a petrol company to erect and operate a service station on the land, which would be leased to the petrol company for a period of fifteen years. Under this agreement, the petrol company was also to grant the owner an underlease for fifteen years. The underlease contained a covenant which required the owner to exclusively purchase petrol and oil from the supplier, and to sell only the supplier's products at the service station, except in special circumstances. The High Court found that it had not been shown by the supplier that the restrictions imposed on the owner were reasonably necessary to protect the supplier's interests, and thus the covenant was held to be void.

The modern approach to the doctrine in Australia is illustrated in a recent High Court decision and a single Judge decision of the Supreme Court:

In *Peters (WA) Ltd v Petersville Ltd*,<sup>46</sup> a restraint was imposed in connection with the rights to use the brand name '*Peters Ice Cream*'. The Western Australian company covenanted away its right to sell or supply ice-cream in Western Australia entirely. The High Court held that the restraint, which applied for 15 years, was broader than necessary to protect the goodwill acquired by the recipient of the restraint, sterilised the capacity to trade,<sup>47</sup> was unreasonable, and therefore unenforceable.

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<sup>45</sup> (1973) 133 CLR 288.

<sup>46</sup> (2001) 205 CLR 126.

<sup>47</sup> See discussion regarding the Court's take on *Esso* in *Peters v Petersville*, below in franchise discussion.

In *Hydron Pty Ltd v Harous*,<sup>48</sup> Bleby J considered three restraints (in separate agreements) that were to operate on the covenantor defendant in different capacities. One was as vendor of shares under a share option agreement; one was as director of the company selling its business; and another was as an ongoing employee of the purchaser of the shares and business. Because of the breadth and diversity of the restraint of trade clauses, all three were held to be invalid for being unreasonable.<sup>49</sup>

Whilst the *Nordenfelt* test operated to invalidate restraint of trade clauses, the cases turn very much upon their own facts and, of course, the terms of the contract containing the restraint. Asking what is in the interest of public policy may in fact show that there are also strong economic reasons in *favour* of restraint of trade clauses. The original expression of the doctrine in *Nordenfelt* accepts as a silent premise that restraint of trade clauses are essential for allowing purchasers and covenantees to protect their interests. Just how that balance is to be struck is not clearly articulated in the oft-cited dictum and has rarely been the subject of detailed abstract analysis. But their justification in protection of legitimate interests goes almost without saying. Without such clauses, vendors could continue to exploit a client base and covenantors could capitalise on the confidential information of their previous employer, rendering the business of the covenantee ineffectual.

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<sup>48</sup> (2005) 240 LSJS 33.

<sup>49</sup> Other cases also applying the restraint of trade doctrine as established in *Nordenfelt* include *Cream v Bushcolt Pty Ltd* [2002] WASC 100; *Labouchere v Dawson* (1872) LR13Eq 322; *Trego v Hunt* [1896] AC 7; *Geraghty v Minter* (1979) 142 CLR 177; *Bridge v Deacons* [1984] 1 AC 705; *Crouch v Shields* (1984) ATPR 40-481; *Optical Prescriptions Spectacle Makers Pty Ltd v Vlastaras* (1991) ATPR 41-150; *Fisher v GRC Services Pty Ltd (No 1)* (1988) ATPR (Digest) 46 – 180; *Synavant Astralia Pty Ltd v Harris* [2001] FCA 1517; *Maggbuty Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181.

In a subsequent decision Lord Macnaghten explored these types of questions through the prism of contractual principles. In *Trego v Hunt*,<sup>50</sup> his Lordship considered regarding goodwill by reference to the implied obligation not to derogate from the grant:<sup>51</sup>

‘A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of goodwill, that the vendor does not solicit the custom which he has parted with: it would be a fraud on the contract to do so ... It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own’.<sup>52</sup>

As such, the modern restraint of trade doctrine, which aims to encourage competition and preclude monopoly,<sup>53</sup> requires a balancing between the employee’s right to work and the employer’s right to protect trade secrets and know-how, the vendor’s right to trade and the purchaser’s right to goodwill. In the context of post-employment covenants, Trebilcock recognises that to enforce a broad covenant may risk ‘inflicting injustice on the employee’, whereas to refuse to enforce the covenant at all may

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<sup>50</sup> [1896] AC 7.

<sup>51</sup> NB: Lord Macnaghten also defined ‘goodwill’, a definition which has been widely accepted: ‘It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start’: *I R Comrs v Mller & Co’s Margarine Ltd* [1901] AC 217, 223-4 (Lord Macnaghten). ‘It is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money’: *Trego v Hunt* [1896] AC 7, 24 (Lord Macnaghten) Quoted in Heydon, above n 5, 191-2.

<sup>52</sup> [1896] AC 7, 25 (Lord Macnaghten).

<sup>53</sup> Meltz, above n 9, 165.

‘risk inflicting injustice on the employer’.<sup>54</sup> However, as the court’s role in moderating such covenants is at common law restricted to severance where possible, the onus lies on the drafter to steer the correct, or ‘reasonable’, path between balancing the rights of covenantor and covenantee. Striking the correct balance can only be achieved if the drafter understands the rationales behind restraint of trade clauses, both historical and economic.

And thus there is a need to reconceptualise this balance without the opprobrium of *prima facie* invalidity as a matter of public policy. Surely the reference to public policy in this context of the common law is anachronistic when such clauses are considered so essential to the protection of proprietary and commercial interests. Instead, the emphasis needs to be upon a valid restraint of trade clause protecting a legitimate interest: such clauses should be perceived to be valid. It should be a burden for the objecting party to point to an excess sufficient to invalidate. Certainly there will still be a balancing: as long as they are reasonable in the interests of both parties, it need not be struck down as void. But to start from the position that all clauses are contrary to public policy except where special circumstances so require must be regarded as an artifice, if not a fiction. Restraint of trade clauses should be regarded as the protection of intangible proprietary interests (in the form of goodwill or the value of shares transferred), as covenants not to use or disclose confidential information or trade secrets or know-how, or as provisions to prevent former employees or contractors from deriving an unfair advantage from a contract.

It should not be understood from the foregoing that the poorly drafted restraint, perhaps borrowed from precedents without regard to the instant

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Trebilcock, above n 6, 145.

commercial needs should be permitted to pass muster without careful scrutiny. But that is true of any contractual clause. But a bespoke clause drafted with the actual parties and transaction in mind should not have to start from a position of presumed invalidity.

In light of these observations, it is now useful to survey recent authority on the operation of the doctrine of restraint of trade at common law. First, particular focus will be given to the concept of '*reasonableness*'. Secondly, it is useful to address the manner in which courts approach severance and reading down provisions, particularly in light of recent authorities. Thirdly, the paradigm shift required in relation to restraint of trade clauses will be illustrated by reference the franchise model of clauses to protect interests. Fourthly, the problem of uncertainty which results from the misconception of restrictive trade clauses will be addressed. Finally, this paper deals with the interaction between the common law doctrine of restraint of trade and the operation of ss 4D and 45 under s 51 of the CCA.

### A *Reasonableness*

There are of course threshold issues as to whether there is, in fact, a restraint at all and<sup>55</sup> whether it is a restraint of trade<sup>56</sup> to which the doctrine applies.<sup>57</sup> The following observations from Clark and Corones and Meltz point out the need for these considerations:

‘Most commercial contracts restrain trade to some degree. Consequently, the courts have distinguished between restraints of trade that should come within the doctrine of restraint of trade and

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<sup>55</sup> See Heydon, above n 5, 51.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

those which should not.<sup>58</sup> However, there are many categories which remain uncertain as to whether they fall within the restraint of trade doctrine or not'.<sup>59</sup>

‘...in effect all trading agreements are really restraints of trade; however only those which the Courts perceive as containing a fetter outside normal commercial arrangements should be subject to the doctrine’.<sup>60</sup>

As is clear from the preceding discussion, the modern doctrine of restraint of trade is premised on the test of reasonableness: that all restraints on trade are contrary to public policy and void unless they can be justified as being reasonable.<sup>61</sup>

Lord Macnaghten’s test in *Nordenfelt*, expressed above, may be broken down into two propositions:

Restraints of trade are presumed ‘void’ as being contrary to public policy;

Yet this presumption can be rebutted, and the restraint enforced, where the restraint is reasonable in the interests of the parties and in the public interest.<sup>62</sup>

As Lord Macnaghten continued:

‘It is sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the

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<sup>58</sup> Clarke and Corones, above n 17, 19.

<sup>59</sup> Ibid 19–20.

<sup>60</sup> Meltz, above n 9, 159, citing J G Collinge ‘The Modern Doctrine of Restraint of Trade’ 41 *Australian Law Journal* 410, 418.

<sup>61</sup> *Nordenfelt v Maxim Guns and Ammunition Co Ltd* [1894] AC 535, 565 (Lord Macnaghten); *Amoco Australia Ltd v Rocca Bros Motor Engineering* (1973) 133 CLR 288, 315 (Gibbs J); *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126, 139 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

<sup>62</sup> Clarke and Corones, above n 17, 32–3.



interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public'.<sup>63</sup>

Therefore, '*reasonable*' means that the restraint affords no more than adequate protection to the covenantee while at the same time not being injurious to the public interest.<sup>64</sup>

As a result, a restraint of trade that is more than is required is void as a matter of public policy because the deprivation of liberty to trade is detrimental to the public interest.<sup>65</sup>

Yet despite the emphasis in the test on 'public policy' or the 'public interest', various authors have suggested that in practice this element is lacking.

According to Heydon, the public interest does not have a large role to play in restraints on employees, the sale of goodwill by owners or partners in a business. However, it may play a more predominant role in trade association cases, sole supply (exclusive dealing) agreements and the like.<sup>66</sup>

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<sup>63</sup> *Nordenfelt v Maxim Guns and Ammunition Co Ltd* [1894] AC 535, 565 (Lord Macnaghten).

<sup>64</sup> *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 307 (Walsh J).

<sup>65</sup> *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 307 (Walsh J); *Peters WA v Petersville* (2001) 205 CLR 126, 139 (Gleeson CJ, Gummow, Kirby and Hayne JJ). See also *TW Cronin Shoes Pty Ltd v Cronin* [1929] VLR 244.

<sup>66</sup> Heydon, above n 5, 34–5.

On the other hand, Clark and Corones argue that courts have been reluctant to examine the economic impact of a restriction to determine whether it is contrary to the public interest.<sup>67</sup>

Similarly to Clark and Corones, Meltz recognises that the courts have largely ignored the second limb of *Nordenfelt*, regarding public policy.<sup>68</sup>

On this basis, it may be better to articulate the test of reasonableness as it has alternatively been described: ‘reasonableness’ entails a balancing act between the situations of both the covenantor and covenantee, so as to ensure that the restraint of trade is justified as reasonable in the interests of both parties, according to the respective situations that they occupy.<sup>69</sup>

The validity of the restraint must be decided as at the date of the agreement imposing it.<sup>70</sup> Nevertheless, facts occurring after the date of the restraint may be relevant if they throw light on the circumstances existing at the date of the restraint.<sup>71</sup>

Similarly, the reasonableness of a restraint must be tested not by reference to what the parties have actually done or intend to do, but by what the restraint requires or entitles the parties to do.<sup>72</sup>

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<sup>67</sup> Clarke and Corones, above n 17, 52, 69. As discussed in *Texaco Ltd v Mulberry Filling Station Ltd* [1972] All ER 513.

<sup>68</sup> Meltz, above n 9, 6, 91.

<sup>69</sup> *Peters American Delicacy Co Ltd v Patricia’s Chocolates & Candies Pty Ltd* (1947) 77 CLR 574, 590 (Dixon J); see also Russell V Miller, *Miller’s Australian Competition and Consumer Law Annotated* (Thomson Reuters (Professional) Australia, 34<sup>th</sup> ed, 2012) 700.

<sup>70</sup> *Hydron Pty Ltd v Harous* (2005) 240 LSJS 33, [86] (Bleby J); *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 318.

<sup>71</sup> *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 318 (Gibbs J).

<sup>72</sup> *Adamson v NSWRL* (1991) 31 FCR 242.

Trebilcock has suggested that this may not be the best approach, and that the actual breach of the covenant, rather than the covenant's hypothetical limits, should be the focus of the court.<sup>73</sup>

Under the current doctrine, espousing the opprobrium of public policy mentioned above, the party seeking to maintain the benefit of the covenant has the onus of establishing reasonableness.<sup>74</sup>

Notionally, the party contesting enforceability then has the onus of showing the restraint is not in the public interest<sup>75</sup> (where the public interest is a relevant consideration).<sup>76</sup> By 'notionally' what is meant is that there is a distinction in onus between '*reasonable*' and '*public interest*' which is becoming less clear and harder to justify.

In practical terms, the court looks at the agreement as a whole and its surrounding circumstances.<sup>77</sup>

The question of reasonableness is a question of law for the court,<sup>78</sup> although it involves mixed elements of facts and law, and ultimately depends upon '*a judgment the reasons for which do not admit of great elaboration*'.<sup>79</sup>

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<sup>73</sup> Trebilcock, above n 17, 144–6.

<sup>74</sup> *Buckley v Tutty* (1972) 125 CLR 353, 377 (Barwick CJ, McTiernan, Windeyer, Owen and Gibbs JJ).

<sup>75</sup> *SA Petroleum Co. Ltd v Harper's Garage (Stowport) Ltd* [1968] AC 269, 319; see also *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, 733, 741; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 700, 706–7 and 715; Heydon, above n 5, 33.

<sup>76</sup> Heydon, above n 5, 34–5.

<sup>77</sup> See *Hydron v Harous* (2005) 240 LSJS, 50, [80], citing *SA Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 and *Herbert Morris v Saxelby* [1916] 1 AC 688.

<sup>78</sup> *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 317 (Gibbs J).

<sup>79</sup> *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 308 (Walsh J).

Put another way, the question for the Court is whether it is satisfied, the onus being on the covenantee, that the restraint provides no more than adequate protection.<sup>80</sup> Thus, the party wishing to rely on the restraint of trade clause will need to prove the special circumstances from which reasonableness can be inferred by the judge as a matter of law.<sup>81</sup>

Additionally, while reasonableness is a question of law, courts have regard to agreements that are current in the relevant industry and evidence from persons active in that industry to assist in determining what level of protection is reasonably necessary to protect the interests of covenantees and others having regard to the nature of the relevant industry.<sup>82</sup>

Covenants of restraint to protect goodwill receive different treatment depending upon whether they are found in contracts of:

1. Employment; or
2. Sale of business;<sup>83</sup>
3. The Courts treat them as follows:<sup>84</sup>

In contracts of employment, the restraint on an ex-employee will be construed strictly so as to favour the employee's liberty to pursue his vocation, and to exploit what may be their only asset, without unreasonable impediment. That translates into restraints being held to be

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<sup>80</sup> See *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 308 (Walsh J).

<sup>81</sup> Heydon, above n 5, 35.

<sup>82</sup> *Haynes v Doman* [1899] 2 Ch 13, 24, (Lindley MR), cited in Heydon, above n 5, 41, note 50. See also *Hydron v Harous* (2005) 240 LSJS 33, [8]-[9], 34; [123]-[125], 58-9 (Bleby J).

<sup>83</sup> In *The Restraint of Trade Doctrine*, (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2008), Heydon adds two categories: vertical and horizontal non-ancillary restraints: Chapter 9.

<sup>84</sup> See *Hydron v Harous* (2005) 240 LSJS 33, 51, [85] (Bleby J), citing *Lindner v Murdock's Garage* (1950) 83 CLR 628, 653.

invalid unless they are reasonably necessary to prevent disclosure of trade secrets or in connexion with customers of the business;<sup>85</sup>

In the case of a sale of business, restraints are construed less strictly. They are enforced to the extent that is reasonably necessary to protect the goodwill of the business sold.

In cases where there is an employment or services contract *and* ownership of part of the business, such as partnership<sup>86</sup> or shareholding,<sup>87</sup> the courts first characterise the restraint by asking whether it is directed to the protection of goodwill or the restraint of employment.<sup>88</sup> The clause is then examined for its enforceability by ascertaining what legitimate interests the clause seeks to protect<sup>89</sup> and then to see whether the restraints were more than adequate for that purpose.<sup>90</sup>

Bleby J in *Hydron Pty Ltd v Harous* said:

The courts in general take a stricter and less favourable view of covenants in restraint of trade entered into between an employer and an employee than of such covenants entered into between a vendor and a purchaser. This is probably because there are different interests to protect. In the case of sale of a business, the purchaser is entitled to protect himself against competition on the part of the vendor, in order to observe, for a reasonable time, what it is that he has bought. With an employee, the emphasis is not so much on restriction of the activities for which the employee is trained and which might be competitive with those of the employer, but on the

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<sup>85</sup> Heydon, above n 5, 86, 91-4.

<sup>86</sup> Ibid 91-4. See, eg, *Bridge v Deacon* [1984] AC 705.

<sup>87</sup> Heydon, above n 5, 91-4. See e.g. *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535.

<sup>88</sup> *Hydron v Harous* (2005) 240 LSJS [92] (Bleby J).

<sup>89</sup> *KA & C Smith v Ward* (1998) 45 NSWLR 702, 722.

<sup>90</sup> *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 301.

use of information obtained about the employer's business which would be of subsequent use to the employee or to the employee's new employer.<sup>91</sup>

It should further be noted that employee restraints also entail a certain difficulty in distinguishing between protectable proprietary interests, such as trade secrets and customer connections, and the personal skills of the employee, which cannot be protected.<sup>92</sup>

The concept of reasonableness in a restraint involves a balancing of the competing considerations of, on the one hand, the quantum of benefit received by the covenantee for the restraint and, on the other hand, the effect of the restraint on the covenantor.<sup>93</sup>

In considering the protection afforded to the covenantee by the restraint and the effect of the restraint on the covenantor in determining if the restraint is excessive, it is well established that it is relevant to have regard to: the period of the restraint; the geographic scope of the restraint; and the subject matter of the restraint or the activity to be restrained.<sup>94</sup>

The more onerous the restraint, the more difficult it is for the covenantee to satisfy the Court that it was no more than reasonably necessary for the protection of the covenantee's interests.<sup>95</sup> Indent this para back one?

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<sup>91</sup> (2005) 240 LSJS 33; [2005] SASC 176, [85] (Bleby J).

<sup>92</sup> Trebilcock, above n 6, 146. See also Heydon, above n 5, 115.

<sup>93</sup> *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 306 (Walsh J), 316 (Gibbs J); *Adamson v NSWRL* (1991) 31 FCR 242, 266 (Wilcox J); see also John Dyson Heydon, *The Restraint of Trade Doctrine*, (LexisNexis Butterworths, 2<sup>nd</sup> Edition, 1998), 166.

<sup>94</sup> Extends beyond the context of the sale of a business to employee covenant (in relation to customer connection and trade secrets/confidential information/know-how) and to goodwill: Heydon, above n 5, 147, 148–72, 202–13.

<sup>95</sup> *Adamson v NSWRL* (1991) 31 FCR 242, 266 (Wilcox J).

The fact that the parties have agreed that the restraint was reasonable is not conclusive.<sup>96</sup> Thus, in assessing validity, the court is not constrained by the fact that the restraint is consensual.<sup>97</sup>

Further, the amount paid for goodwill may be relevant to reasonableness, although it is not decisive.<sup>98</sup> Furthermore, there is no requirement that promises be commensurate or proportionate to the restraint.

Heydon suggests that there is no doctrine of ‘*commensurateness*’ or ‘*proportionality*’ which would call for substantial equivalence between the reach of the restraint and what the covenantor received for entering it.<sup>99</sup>

Heydon summarises that ‘it would seem that the safe course is to assume that the primary test on reasonableness remains what it has been for many

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<sup>96</sup> *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288.

<sup>97</sup> See *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 307 (Walsh J), 315-8 (Gibbs J).

<sup>98</sup> *Cream v Bushcolt* (2004) ATPR 42-004. Note that even where a substantial amount is paid under a contract by way of consideration, the covenantee bears the burden of demonstrating that a component of the consideration was to purchase the restraint: *Hydron v Harous* (2005) 240 LSJS 33, 51-53, [87] to [97], at 58, [120]-[124] (Bleby J). See also Walsh J in *Amoco* at 306: ‘a restraint will not be enforceable, unless it affords no more than adequate protection to the interests of the covenantee in respect of which he is entitled to be protected. If the court is not satisfied on that question it is immaterial, in my opinion, whether the covenantor has received much or little by way of benefits from entering into the transaction. ... Nevertheless, I am of the opinion that the quantum of the benefit which the covenantor receives may be taken into account in determining whether the restraint does or does not go beyond adequate protection for the interests of the covenantee.’ See also Gibbs J in *Amoco* at 316: ‘it is established that the court is not entitled to inquire into the adequacy of the consideration for a restraint, that is, the court may not weigh whether the consideration is equal in value to that which the covenantor gives up or loses by the restraint’.

<sup>99</sup> Heydon, above n 5, 183, citing *Allied Dunbar v Weisenger* [1988] IRLR 60, 65 (Millet J).

years, namely, whether the restraining is no more than reasonably necessary to protect the interests of the covenantee'.<sup>100</sup>

Heydon notes that there is one statement which would suggest otherwise, which was enunciated by Lord Diplock in *A Schroeder Music Publishing Co Ltd v Macauley*.<sup>101</sup> Lord Diplock stated that:

The test of fairness is ... whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor.<sup>102</sup>

Meltz, when considering Lord Diplock's statement in *Schroeder*, does not dispute Heydon's approach to proportionality. Rather, Meltz refers to Lord Diplock's comment to argue a different point, based on its first limb. Meltz contends that disparate bargaining power between the parties must be taken into account in determining whether a restraint is reasonable and thus valid, or tainted by oppression and 'possible unconscionability'.<sup>103</sup>

While the involvement of a party (or lack thereof) in negotiating a restraint may influence the court,<sup>104</sup> it is unlikely under the current law that any inequality in bargaining power would lead to a restrictive clause

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<sup>100</sup> Heydon, above n 5, 183, quoting *Brightman v Lamson Paragon Ltd* (1914) 18 CLR 331, 335.

<sup>101</sup> [1974] 3 All ER 616.

<sup>102</sup> [1974] 3 All ER 616, 623-4 (Lord Diplock).

<sup>103</sup> Meltz, above n 9, 8, 160. Meltz seems to use the word 'unconscionability' in the broader sense of the term. At 165, he states that: 'If, in the current version of the doctrine, one must consider the question of 'oppression', in looking at the reasonableness of a restraint, it must be inferred in the context that 'oppression' seems more akin to 'unfairness' than 'unconscionability'. Support for this view is found in Lord Diplock's judgment where, despite his use of the word 'unconscionable', the test he lays down looks at the fairness of the contract, opening the door to the argument that he has used the term 'unconscionability' in the wider sense'.

<sup>104</sup> Clarke and Corones, above n 17, 38.



being rendered void, unless the oppression was of such gravity as to be unconscionable.

Heydon considered that, if Lord Diplock's approach were to be defended not on restraint of trade grounds but on the basis that the bargain was unconscionable:

'Unconscionable conduct could not be found merely in a lack of commensurateness between the restrictions on the covenantor and the benefits secured for the covenantor: a gross disparity would be necessary before conscience would be shocked'.<sup>105</sup>

Finally, in determining reasonableness, the courts look carefully to see which business is being protected.<sup>106</sup> The protection of *other* businesses owned by a purchaser or companies associated with the purchaser will *not* be a legitimate interest to be protected by a covenant in restraint of trade.<sup>107</sup>

Various remedies exist for where a covenant is found to be unreasonable at common law. In the case of an employment restraint, one remedy which exists is damages for disclosure or abuse of confidential information.<sup>108</sup> Alternatively, an account of profits may be made.<sup>109</sup> However, damages may be more appropriate than an account of profits where the damage to the employer extends beyond the profits obtained by

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<sup>105</sup> Heydon, above n 5, 182-3.

<sup>106</sup> See *Hydron v Harous* (2005) 240 LSJS 33.

<sup>107</sup> *Cream v Bushcolt* (2004) ATPR 42 -004. See also Heydon, above n 5, 148.

<sup>108</sup> Heydon, above n 5, 108; *Robb v Green* [1875] 2 QB 315; *Greenwood and Batley Ltd v West* (1951) 69 RPC 268; *Nicrotherm Electrical Co Ltd v Percy* [1957] RPC 207, 213-4; Robert Dean, *The Law of Trade Secrets and Personal Secrets* (Thomson Lawbook Co, 2<sup>nd</sup> ed, 2002), 322-37.

<sup>109</sup> Dean, *Employers, Ex-Employees and Trade Secrets*, above n 7, 64; Dean, *The Law of Trade Secrets and Personal Secrets*, above n 109, 335.

the former employee.<sup>110</sup> Another available remedy is an injunction (which may be permanent, interlocutory or temporary) against future breaches.<sup>111</sup> Yet injunctive relief is an ill-suited sledgehammer, the application or non-application of which substantially burdens the losing party.<sup>112</sup> As such, a more nuanced approach is necessary. The principal problem surrounding employment restraints is converting suspicion of a breach of a covenant into evidence. Certain possibilities to achieve this include *Anton Piller* orders, pre-action discovery, remedies under the *Copyright Act* and cognate legislation.

The reasonableness test has been applied in a number of recent cases.

In *Hydron v Harous*,<sup>113</sup> the three restraints considered by Bleby J were expressed as ladder clauses. As mentioned above, all three restraints were held to be invalid because they were unreasonable. Although the covenantor received a substantial sum in consideration for the sale and purchase of shares, that was not sufficient to justify the restraint as reasonable. The covenantee did not demonstrate separate consideration for the covenant. The extent of the sale and purchase covenants could not be justified in their temporal or geographical aspects. Further, the employment restraint was held to be unreasonable because it commenced its operation from the indeterminate date of cessation of employment without being tied necessarily to the protection of interests that would then fall to be protected.

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<sup>110</sup> Heydon, above n 5, 109; Dean, *Employers, Ex-Employees and Trade Secrets*, above n 7, 64; Dean, *The Law of Trade Secrets and Personal Secrets*, above n 109, 335, 337–41.

<sup>111</sup> Heydon, above n 5, 109; *Yovatt v Winyard* (1820) 1 Jac & W 349; *Merryweather v Moore* [1892] 2 Ch 518; *Lamb v Evans* [1893] 1 Ch 218; *Robb v Green* [1895] 2 QB 314; Dean, *The Law of Trade Secrets and Personal Secrets*, above n 109, 296–322.

<sup>112</sup> Trebilcock, above n 6, 148.

<sup>113</sup> (2005) 240 LSJS 33.

*Peters (WA) Ltd v Petersville Ltd*<sup>114</sup> was also decided upon the issue of reasonableness. The High Court adopted and accepted the approach of Walsh J in *Amoco v Rocca Bros*;<sup>115</sup> endorsed *Nordenfelt*,<sup>116</sup> subject to the observations of Walsh J;<sup>117</sup> endorsed the approach that restraints of trade are *prima facie* unenforceable; and accepted that the onus was on the covenantee to show that the restraint was reasonable.<sup>118</sup> The High Court found that the covenant ‘sterilised’ capacity to trade,<sup>119</sup> and therefore held

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<sup>114</sup> (2001) 205 CLR 126.

<sup>115</sup> (1973) 133 CLR 288.

<sup>116</sup> [1894] AC 535, 569.

<sup>117</sup> Gleeson CJ, Gummow, Kirby and Hayne JJ in *Peters v Petersville* at [27]: Walsh stated that ‘at the root of the rule that agreements in restraint of trade are, *prima facie*, unenforceable lies public policy. His Honour referred to the well-known formulation by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* respecting, first, reasonableness in the interests of the parties and, secondly, the absence of injury to the public. Walsh J saw considerations of public policy in both branches of the *Nordenfelt* formulation. His Honour said:

[I]f a restraint is imposed which is more than that which is required (in the judgment of the court) to protect the interests of the parties, that is a matter which is relevant to the considerations of public policy which underlie the whole doctrine, since to that extent the deprivation of a person of his liberty of action is regarded as detrimental to the public interest.

Referring to *Buckley v Tutty* at 306: ‘a restraint will not be enforceable, unless it affords no more than adequate protection to the interests of the covenantee in respect of which he is entitled to be protected’.

‘If [a] restraint does not exceed what is reasonably adequate for the protection of the covenantee, then it may be regarded as reasonable so far as the interest of the covenantor is concerned’: 306.

There are two branches of test: ‘the restraint must be reasonable in the interests of the parties in that it affords no more than adequate protection to the covenantee “while at the same time it is in no way injurious to the public”: 307.

<sup>118</sup> See *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Company* [1894] AC 535, 565 (Lord Macnaghten); and *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 305-8 (Walsh J) and 315-8 (Gibbs J, as he then was).

<sup>119</sup> See discussion re the Court’s take on *Esso* in *Peters v Petersville*, below in franchise discussion.

that the covenant was unreasonable and thus unenforceable under the doctrine as laid down in *Nordenfelt*.<sup>120</sup>

### III ALL OR NOTHING: SEVERANCE AND READING DOWN

In considering the discussion below regarding ladder clauses, it is useful to bear in mind the common law principles relating to severance. Where a restrictive clause is found to be unreasonable or uncertain, (as is discussed below), there is little scope at common law for the courts to rewrite the clause. A fundamental principle under the modern doctrine is that it is for the parties to agree the terms and extent of any restraint. Thus, the Court will not amend a restraint to conform with what it considers to be reasonable.<sup>121</sup> It follows that a restraint is an all or nothing proposition. Where a clause is rendered invalid, there will be little that a covenantee can do to prevent the covenantor from taking or using the asset sought to be protected by the clause.

Even where there is an agreement to read down an offending clause, the expression of the restraint may appear to give little scope for a court acting conformably with principle as enunciated at common law.

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<sup>120</sup> (2001) 205 CLR 126, 141-143 [34]-[39] (Gleeson CJ, Gummow, Kirby and Hayne JJ). Further examples of particular applications of the principles discussed above include: *Aussie Home Loans v X Inc Services* (2005) ATP R 42-060; [2005] NSWSC 285; *Hankinson v Brookview Holdings Pty Ltd* (2005) ATPR (Digest) 46-262; [2004] WASCA 279; *Cream v Bushcolt Pty Ltd* (2004) ATPR 42-004; [2004] WASCA 82; and *Idamenco (No. 123) Pty Ltd v Ticco Pty Ltd* (2004) ATPR (Digest) 46-257; [2004] NSWCA 329. Other South Australian authorities, not specifically discussed here, include *Rentokil v Lee* (1995) 66 SASR 301; *Avellino v All Australia Netball Association Ltd* [2004] SASC 56; *M E Perry Ltd v Judge* [2002] SASC 312; *Hahndorf Golf Club In. v John Nitcshke Nominees Pty Ltd* [2003] SASC 280; *Kerol Pty Ltd v Eldic* [2002] SASC 181; *NP Generation Ptyh Ltd v Feneley* [2000] SASC 240; *Dunning v Slimtone Spa International* [2002] SASC 12.

<sup>121</sup> *Peters Ice Cream (Vic) v Todd* [1961] VR 485, 490 (Little J), cited with approval in *Hydron v Harous* (2005) 240 LSJS 46, [63] (Bleby J). See also *Lindner v Murdock's Garage* (1950) 83 CLR 628, 658-9. See also Walsh J in *Amoco*, 306-7: 'The court will not readily substitute its own views as to what is reasonable for those of the contracting parties'.

An exception applies where a restraint may be severed, which is particularly the case with ladder or cascading clauses. A clause may be severed where its severance does not materially change the intent of the contract, where the offending provision does not go to the heart of the contract, and where the court can infer an intention of the parties that the agreement remains valid in the absence of the offending provision.<sup>122</sup>

Heydon recognises two conditions that must be satisfied before a restrictive covenant may be severed at common law.<sup>123</sup>

The first condition is compliance with the ‘blue pencil’ test. That is, severance may only occur where the amendments are made by running a blue pencil through the offending parts.<sup>124</sup> In the words of Sargant J in *S V Nevanas & Co v Walker and Foreman*, severance is only possible in ‘cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants’.<sup>125</sup> Thus, the blue pencil test is particularly applicable to ladder clauses which are presented as a combination of separate restraints. The second condition is that severance must not alter the nature of the original contract,<sup>126</sup> as recognised above.

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<sup>122</sup> Paterson, Robertson and Duke, *Principles of Contract Law* (Thomson Reuters (Professional) Australia, 3<sup>rd</sup> ed, 2009) [6.05], [6.65]; see also *Carney v Herbert* [1985] AC 301; *McFarlane v Daniell* (1938) 38 SR (NSW) 337; See also Miller, above n 70, 329.

<sup>123</sup> Heydon, above n 5, 285-6. Heydon goes on to discuss the desirability of these rules, and the arguments for and against a narrow or wide approach to severance: see 285-96.

<sup>124</sup> Ibid 285.

<sup>125</sup> [1914] 1 Ch 413, 423 (Sargant J), approved by Lord Sterndale MR in *Attwood v Lamont* [1920] 3 KB 571, 578.

<sup>126</sup> Heydon, above n 5, 286.

However, where the construction of the clause allows no scope for severance, the court is left with no option but to render it unenforceable, due to the all or nothing approach.

Thus, at common law, it would appear that a contract containing a taint of illegality or statutory prohibition would be '*illegal, void and unenforceable*',<sup>127</sup> unless a severance clause could be found valid work to do.<sup>128</sup>

Heydon summarised the position that, 'where an unenforceable promise is contained in a contract and is severed from it, the rest of the contract remains in force and either party can rely on its terms'.<sup>129</sup>

However, under the CCA, the position is quite different where clauses offend the prohibitions contained in s. 45.

Miller explains that 'where s 4L applies, having regard to the above construction, the second part of the section (that s 4L only applies if the making of the contract contravenes the Act) becomes relevant. That central proposition is the direct opposite of the ordinary rule that a contract whose making is illegal will not be enforced.'<sup>130</sup>

In *SST Consulting Services*<sup>131</sup> it was explained that central proposition (under s 4L, that nothing in this Act affects the validity or enforceability of the contract) is the direct opposite of the ordinary rule that a contract

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<sup>127</sup> *Yango Pastoral Co. Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 430 (Jacobs J).

Mason J in *Yango* distinguishes between a statutory intent to render void an illegal contract, and a statutory intent merely to penalise the individual.

<sup>128</sup> *Carney v Herbert* [1985] AC 301.

<sup>129</sup> Heydon, above n 5, 304.

<sup>130</sup> Miller, above n 70, 329.

<sup>131</sup> *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516, [34].

whose making is illegal will not be enforced. As was said in *Yango Pastoral*:

When a statute expressly prohibits the making of a particular contract, a contract made in breach of the prohibition will be illegal, void and unenforceable, unless the statute otherwise provides either expressly or by implication from its language.<sup>132</sup>

The majority in *SST* cited from *McFarlane* the dictum from Jordan CJ as to the applicable rule as being: 'If the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable.'<sup>133</sup>

But, as noted in *SST*, different circumstances may arise in cases of *illegality* from those that fall for consideration when the enforcement of certain provisions is *contrary to public policy*. That is why it is necessary to distinguish between cases in which a promise made by a party to a contract is void or unenforceable, but not illegal, and cases in which the contract or the performance of a promise would be illegal'.<sup>134</sup>

On illegality, Heydon expresses the view that: 'sometimes the covenant is described as 'illegal or 'unlawful'. However, the covenant is not illegal or unlawful in the sense of being criminal or tortious'.<sup>135</sup> However, he does not go on to discuss whether restraints are merely contrary to public policy. He does, however, note that restraints of trade are not 'void at common law but merely unenforceable at law'.<sup>136</sup>

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<sup>132</sup> *Yango Pastoral Co. Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 430 (Jacobs J).

<sup>133</sup> *McFarlane v Daniell* (1938) 38 SR (NSW) 337, 345 (Jordan CJ).

<sup>134</sup> *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516, [48].

<sup>135</sup> Heydon, above n 5, 278.

<sup>136</sup> *Ibid* 279.

Clark and Corones express the view that '[t]he common law doctrine of restraint of trade makes illegal, and hence unenforceable, contractual or other provisions that impose a restriction upon a person's freedom to trade or engage in employment, unless that restriction can be shown to be 'reasonable'.<sup>137</sup> 'If a restriction consists of severable parts, it may be possible to enforce those parts that are reasonable while leaving the remainder void'.<sup>138</sup>

Where the CCA applies, s 4L automatically operates to sever the elements of a contract that contravene the CCA, but to otherwise preserve the subject matter of the contract.<sup>139</sup> Yet, as is discussed below, s 4L also has an additional, unique, operation, whereby it not only allows the court to amend an offending provision of a contract, but mandates it – the opposite of the position at common law. Further, s 4L operates subject to any order made under s 87 CCA. Therefore, the common law rules regarding severance have no application where s 4L applies.<sup>140</sup>

#### IV THE FRANCHISE MODEL

A covenant taken from a franchisee against competition when the franchise agreement is terminated is similar to the employment, goodwill and partnership covenants discussed above.<sup>141</sup>

The franchise model provides an example of the ideal approach to restrictive clauses, illustrating the paradigm shift which is necessary in respect of restraint of trade generally. Rather than presenting restraint of

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<sup>137</sup> Clarke and Corones, above n 7, 18.

<sup>138</sup> Ibid 57.

<sup>139</sup> Miller, above n 70, 328.

<sup>140</sup> *SSL Consuling Services Pty Ltd v Rieson* (2006) 225 CLR 515, [24], [40]–[51] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); see also Miller, above n 70, 329.

<sup>141</sup> See also Heydon, above n 5, 93.



trade clauses as 'void' and 'contrary to public policy' unless reasonable, in favour of the covenantor, the courts consider restraint of trade clauses in the light of the franchisee's, or covenantee's, legitimate right to protect their business.

The traditional approach has been to view franchise agreements as '*very different to an agreement by the owner of a business*'.<sup>142</sup>

However, under the modern view, demonstrated in *Prontaprint PLC v Landon Litho Ltd*,<sup>143</sup> the relationship of franchisor and franchisee was described as being closer to that of vendor and purchaser of a business than to that of employee and employer.

The circumstances of *Prontaprint* were that the defendant decided not to exercise an option to renew and then argued that restraints which became operable upon the expiry of the term were unenforceable. Whitford J considered that:

Quite plainly, if a covenant of this kind is unenforceable, as soon as they have managed to get going on the expertise, advice and assistance given to them by the plaintiffs, other franchisees are going to either withdraw or not renew their agreements and franchising will, effectively, become inoperable. That is the position of the plaintiffs. They say that this is a perfectly reasonable restriction to protect the interest which they legitimately have in running a franchising business because, without a restraint of this kind, effectively running a franchising business is going to become impossible.<sup>144</sup>

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<sup>142</sup> *Budget Rent a Car International Inc v Mamos Slough Ltd* (1977) 121 Sol Jo 374 (Lord Denning MR).

<sup>143</sup> [1987] FSR 315, 324; *Dyno-Rod PLC v Reeve* [1999] FSR 148, 153; *Convenience Co Ltd v Roberts* [2001] FSR 625.

<sup>144</sup> *Prontaprint PLC v Landon Litho Ltd* [1987] FSR 315 (Whitford J).

Further support for the modern approach that a franchise agreement is to be treated in a way similar to that of a vendor and purchaser of a business, rather than an employer and employee, comes from *Kall Kwik Printing (UK) Ltd v Rush*:<sup>145</sup>

One way perhaps of looking at a franchise agreement is that this is a form of lease of goodwill for a term of years, with an obligation on the tenant, as it were, to retransfer the subject matter of the lease at the end of the lease in whatever state it is. To that extent there is an obligation to transfer goodwill in a particular form which is much more akin, I think, to the goodwill cases than to the servant cases.

As to the duration of the restraint in a franchise agreement, Austin J in *K A & C Smith Pty Ltd v Ward* stated that:<sup>146</sup>

In my opinion the restraint clause is not unreasonable by virtue of its duration, as such ... to preserve the franchisor's 'goodwill' (referred to above as an interest in the patronage of the franchised business and the confidentiality of products and processes), a franchisor needs time to obtain a substitute franchisee to work the franchise area, and the new franchisee needs time to become established. Direct competition by the former franchisee would be likely to damage the transition process. Given the nature of the business and the expertise which needs to be acquired by tuition or self-teaching or both, a two year restraint is appropriate.

The capacity to continue to operate may not be 'sterilised' in the sense of what Lord Pearce said in *Esso Petroleum v Harper's Garage (Stourport) Ltd*.<sup>147</sup> That is, that Lord Macnaghten in *Nordenfelt* 'did not intend the

<sup>145</sup> [1996] FSR 114, 119.

<sup>146</sup> (1998) 45 NSWLR 702, 723G–724A (Austin J).

<sup>147</sup> [1968] AC 269, 328 (Lord Pearce). See also *Peters (WA) Ltd v Petersville Ltd* (2001) 205 Ch R 126, 141–3, [34]–[39] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

words ‘restraints of trade’ to cover ‘any contract whose terms, by absorbing a man’s services or custom or output, in fact prevented him from trading with others’. Rather, ‘it was the sterilising of a man’s capacity for work and not its absorption that underlay the objection to restraint of trade’.<sup>148</sup>

Thus, as these cases recognise, the franchisee, or covenantee, has every right to protect their business interests by way of a reasonable restraint of trade clause in the face of the franchise being rendered ‘inoperable’ by the conduct of an opportunistic franchisor.

The modern doctrine of restraint of trade would be enhanced by the adoption of such an approach to restraint of trade generally. The franchise model presents restraint of trade as a positive doctrine which exists to protect the legitimate interests of the covenantee, rather than a negative doctrine in protection of the covenantor and the public interest. Such an approach to the modern doctrine would balance the rights of covenantor and covenantee as effectively as under the current position, yet such a reframing would significantly assist the drafter in comprehending what exactly is being protected by a restraint of trade clause.

## V UNCERTAINTY

Having understood the doctrine of severance, it is critical that the drafter understand that the doctrine of restraint of trade as the positive protection

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Yet *Peters* at 39 criticises sterilisation ‘test’ in *Esso*: ‘The “test” upon which Peters WA relies should not be accepted in Australian common law’. Heydon also notes the various criticisms of the *Esso* ‘sterilisation’ test in *The Restraint of Trade Doctrine*, and refers to *Peters*, including the HC’ declined to accept Lord Pearce’s test as part of Australian law: see Heydon, above n 5, 67–76. He also noted that a narrower version of Lord Pearce’s test was rejected by Gibbs and Walsh JJ in *Amoco*: Heydon, above n 5, 76.

<sup>148</sup> *Esso Petroleum v Harper’s Garage (Stourport) Ltd* [1968] AC 269, 328 (Lord Pearce).

of the covenantee's legitimate interests will only protect what is certain. These interests may be protected by a set of variables in time, space, and subject matter in a ladder clause. Properly drafted, a cascading clause may present a range of such variables that the parties consider reasonable, which may be severed to the extent that the court considers necessary and the rest preserved.

Yet one of the major consequences of the failure to understand restraint of trade as the right of covenantees to protect their legitimate interests is the drafting of ladder clauses which attempt to achieve the widest possible number of combinations, in hope that one will be held to be reasonable. Zealous attempts to draft cascading clauses to offer the widest possible protection of the covenantee's right often result in clauses which are not only unreasonable, but also uncertain.

Further, in such clauses, the parties cannot be said to have come to a true agreement. The clause is not so much an expression of the parties' intent, but a multiple choice quiz. Where this becomes an exercise in multiple choice for the courts, or where the parties have 'left to the court the task of making their contract for them',<sup>149</sup> the courts are reluctant to rewrite the clause and are likely to render it unenforceable for uncertainty. The more permutations, the more likely a clause will be held to be uncertain under regular contractual principles.<sup>150</sup>

Clark and Corones summarise the position:

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<sup>149</sup> *Peters Ice Cream (Vic) Ltd v Todd* [1961] VR 485, 490 (Little J), referred to in *Hydron v Harous* (2005) 240 LSJS 33, [63] (Bleby J).

<sup>150</sup> Under general contractual principles, if a contract is so vague, imprecise, or uncertain that the court cannot attribute a meaning to the contract, it is unlikely to be enforced. This is particularly the case where the uncertainty goes to the heart of the agreement: Paterson, Robertson and Duke, *Principles of Contract Law*, (Thomson Reuters (Professional) Australia, 3<sup>rd</sup> ed, 2009) [6.05], [6.40].

If a ladder clause is drafted so as to contemplate a single restraint, it is liable to be struck down on grounds of uncertainty unless it provides a means by which to choose which of the combinations is to apply. On the other hand, if the clause contemplates all of the combinations applying, with severance of those found to be unreasonable, no uncertainty exists. Therefore, the clause will not be at risk on that ground.<sup>151</sup>

In *Seven Network (Operations) Limited & Ors v James Warburton (No 2)*,<sup>152</sup> Pembroke J stated the following regarding cascading clauses:

Restraint of trade clauses, with an ever diminishing and cascading series of restraints based on different restraint periods and geographical areas, have become a modern phenomenon. This is evident from a consideration of recent decided cases, most of which are collected in *Hanna v OAMPS Insurance Brokers Ltd* ... the legal doctrine of uncertainty does not depend on mere complexity. Nor is opacity, obscurity or vagueness sufficient by themselves. There must be such a lack of clarity that the clause is unworkable: that it cannot be given effect in a meaningful way. Lord Denning once said that before a clause is held to be void for uncertainty, it must be ‘utterly impossible’ to put a meaning on the words: *Fawcett Properties Ltd v Buckingham County Concil* [1961] AC 636 at 678.<sup>153</sup>

Yet His Honour concluded that:

There may be a case, as Allsop J observed in *Hanna v OAMPS*, where a complex and difficult restraint of trade clause, with multiple

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<sup>151</sup> Clarke and Corones, above n 17, 58–9.

<sup>152</sup> [2011] NSWSC 386.

<sup>153</sup> *Seven Network (Operations) Limited & Ors v James Warburton (No 2)* [2011] NSWSC 386, [36]–[37] (Pembroke J).

combinations and permutations, is so impenetrable as to lack coherent meaning. But this is not such a case.<sup>154</sup>

In *Hanna v OAMPS Insurance Brokers Ltd*,<sup>155</sup> two arguments were raised in the Court of Appeal as to the uncertainty of a particular ladder clause.

The first of these arguments was the ‘one covenant’ argument. That is, on a proper construction, the restraint clause was a single covenant which contained mutually inconsistent obligations.

Allsop P (Hodgson JA and Handley AJA agreeing) referred to what is a relatively common clause in the document which stipulated that the various periods and areas were part of separate and independent provisions, and stated that:

Thus there were nine restraints, from the widest (15 months in Australia) to the narrowest (12 months, in Mr Hanna’s case, in the metropolitan area of Sydney). All were binding. Taken as individual covenants, all capable of being understood by the use of clear words and all being capable of being complied with without breaching any of the others, the one covenant argument must fail.<sup>156</sup>

The second argument was that of the ‘hierarchy argument’ – that even if the restraint deed contained more than one covenant, it was uncertain because it was not stated which one applied or in what order they applied.

Yet Allsop P stated that:

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<sup>154</sup> Ibid [40] (Pembroke J).

<sup>155</sup> [2010] NSWCA 267.

<sup>156</sup> *Hanna v OAMPS Insurance Brokers Ltd* [2010] NSWCA 267, [11] (Allsop P).

It may be that if multiple obligations on the same subject matter so conflict that a contracting party cannot know what it is to do, such clause, or the contract in which it is found, is uncertain and void.<sup>157</sup>

Allsop P went on to say that:

No such difficulty arises here. Compliance with any relevant clause will not lead to breach of any other clause. All bind, but at one level of practicality the most relevant is the widest. Nevertheless, all are binding.<sup>158</sup>

Their Honours also raised a third argument, regarding the public policy behind complex ladder clauses. They held that:

...clauses between employer and employee should exhibit a reasonable attempt to identify a clear and agreed reach for any post-employment constraint. Clauses which seek to establish a multi-layered body of restraints are complex (even if certain) are against public policy.<sup>159</sup>

Allsop P went on to find that ‘complexity and repetition, if unreasonable, are against public policy...’ However, ‘this restraint deed is not capable of being so characterised. The operation of the clauses is tolerably clear... The restraint deed is not against public policy by reason of the multiple and several operation of cll 2 and 4’.<sup>160</sup>

The issue of uncertainty in the context of ladder clauses was also dealt with by Bleby J in *Hydron Pty Ltd v Harous*.<sup>161</sup>

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<sup>157</sup> Ibid [12] (Allsop P).

<sup>158</sup> Ibid.

<sup>159</sup> Ibid [16] (Allsop P). This argument was addressed in the context of the *Restraints of Trade Act 1976* (NSW).

<sup>160</sup> Ibid [17] (Allsop P).

<sup>161</sup> (2005) 240 LSJS 33.

In his reasoning, His Honour referred to the judgment of Little J in *Peters Ice Cream (Vic) Ltd v Todd*<sup>162</sup> in the Supreme Court of Victoria.<sup>163</sup> *Peters v Todd* involved a covenant (which was not a ladder clause) not to sell certain products ‘within a reasonable distance’ from the defendant’s present place of business for a period of five years. Little J held that:

The parties have not, in my opinion, by the use of the imprecise language employed, defined the promisor’s obligation, or defined it in such a way that the court can determine whether it exceeds or does not exceed the protection to which it may find the promisee was in fact entitled. They have, I think, left to the court the task of making their contract for them, and of carving out from time to time a distance which, within the restraint of trade doctrine, is reasonable. It is not for the court, however, to determine what protection could have been validly agreed upon between the parties. The function of the court is to determine whether a protection agreed upon between the parties is in law valid. The clause is, therefore, in my opinion, void.<sup>164</sup>

Bleby J refused to find the relevant ladder clauses in *Hydron v Harous* void for uncertainty, as he found that they were not inconsistent and were cumulative. His Honour found that the agreements expressly stated that the respective clauses were to have effect as if they were separate covenants consisting of the several combinations, and indicated an intention for all combinations to apply, subject to severance of any combination which became invalid or unenforceable. Further, His Honour found that the clauses agreed to by the parties did not leave to the court the ‘task of making their contract for them’,<sup>165</sup> but rather appeared

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<sup>162</sup> [1961] VR 485.

<sup>163</sup> *Hydron v Harous* (2005) 240 LSJS 33, 63 (Bleby J).

<sup>164</sup> *Peters Ice Cream (Vic) Ltd v Todd* [1961] VR 485, 490 (Little J).

<sup>165</sup> *Hydron v Harous* (2005) 240 LSJS 33, 74 (Bleby J) quoting Spender J in *Lloyd’s Ship Holdings Pty Ltd v Davros Pty Ltd*.



to be a genuine attempt to define the covenantee's need for protection. Therefore, the severance provisions could be seen as a precaution against the 'all or nothing' nature of the reasonableness test, and were not void for uncertainty.<sup>166</sup>

Thus, framing the modern doctrine of restraint of trade in positive terms, namely in protecting the covenantee's legitimate interest to protect goodwill, client lists, confidential information or trade secrets, will greatly assist the drafter in creating a clause which is reasonable and certain in the interests of both parties (and in the public interest), and therefore valid. For a clause is only unenforceable inasmuch as it is unreasonable or uncertain.

## VI CCA AND ITS INTERACTION WITH THE COMMON LAW

There is a divergence between the approach to restraint of trade at common law and that which is enshrined in the CCA. Whilst the relevant provisions in the CCA have been held to encapsulate the common law position,<sup>167</sup> the image problem haunting restraint of trade at common law has been eschewed under the CCA.

Sections 45(1) and (2) CCA prohibit the making of, giving effect to, or enforcement of a provision of a contract, arrangement or understanding if that provision is either an exclusionary provision or has the purpose or has or is likely to have the effect of substantially lessening competition.

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<sup>166</sup> (2005) 240 LSJS 33, 73, 75–6 (Bleby J).

<sup>167</sup> *IRAF Pty Ltd v Graham* [1982] 1 NSWLR 419, (Rath J). See Millers, above n 70, 700.

<sup>168</sup> Similar prohibitions apply by operation of s 75B of the CCA and under the equivalent provisions of the *Competition Code* with respect to natural persons.

A contract has been taken to have the ‘ordinary meaning of something that is enforceable at law’.<sup>169</sup> This includes formal and informal contracts, both express and implied.<sup>170</sup> However, it does not include contracts that are void, voidable or unenforceable.<sup>171</sup> However, the CCA modifies the meaning of ‘contract’ for the purposes of s 45 by means of s 4H, which provides that ‘contract’ includes a reference to a lease or licence in respect of land or a building, and s 45(5)(a) and (b), which provide that ‘contract’ is not to include covenants affecting land that are within the scope of s 45B.<sup>172</sup>

An ‘arrangement’ or ‘understanding’ is an agreement which is less formal or imprecise than a contract. For an ‘arrangement’ or ‘understanding’ to exist, there must be a meeting of the minds of the parties.<sup>173</sup> (In *Morphett Arms Hotel Pty Ltd v TPC* (1980) 30 ALR 88, the Full Court held that mutuality of obligation is not required for an understanding to exist).

An exclusionary provision is defined in s 4D CCA as one arrived at between persons who are competitive with each other which in a contract, arrangement or undertaking has the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons.<sup>174</sup>

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<sup>169</sup> *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10, 32 (Toohey J).

<sup>170</sup> Clarke and Corones, above n 17, 200.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> In such a case, the issue of markets in which they would have been competitive does not arise: *News Ltd v Australian Rugby Football League* (1996) 64 FCR 410. See also *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126; *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1. Note that *SST Consulting Services Pty Ltd v Riesen* (2006) 80 ALJR 1190 only criticised *News Ltd* on the construction of s 4L. See also discussion on s 4D in See also Russell V Miller, *Miller’s Australian*

However, s 51(2) CCA carves out certain exceptions to various provisions in Part IV, including s 45. Of particular relevance are ss 51(2)(b), (d) and (e), which provide exceptions in the case of employees, partnerships and goodwill.<sup>175</sup> Section 51 provides that, in considering whether a contravention of s 45 has been committed, regard shall not be had to these exceptions. Thus, as we will see below, they fall to be determined by the common law doctrine of restraint of trade.

S 51(2)(b) provides an exception to s 45 in the case of an agreement relating to restrictions of employment during or after the termination of a contract of employment.

S 51(2)(b) contains three requirements:

- 1) That the restraint is directed at serving the legitimate interests of the employer;
- 2) That those interests are in restraining competition by an employee after termination of the employment contract; and
- 3) That the restraint is to protect the employer against the employee using the connection with customers and clients that the employee might acquire by reason of the employment.<sup>176</sup>

Section 51(2)(d) relates to an agreement between partners relating to the partnership, or to competition with the partnership during or after a partner ceases to be a partner. It provides an exception to s 45 where provisions of a partnership relate to the terms of the partnership, the

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*Competition and Consumer Law Annotated* (Thomson Reuters (Professional) Australia Limited, 34<sup>th</sup> ed, 2012), 303-8.

<sup>175</sup> Philip Clarke and Stephen Corones, *Competition Law and Policy: Cases and Materials* (Oxford University Press, 1999), 24-6.

<sup>176</sup> *Lindner v Murdock's Garage* (1950) 83 CLR 628; *Synavant Australia Pty Ltd v Harris* [2001] FCA 1517; *Rentokil Pty Ltd v Lee* (1995) 66 SASR 301. See also Miller, above n 70, 698-9.

conduct of the partnership business, or restrictive covenants on partners while they are members of the partnership or after they cease to be a partner.

Section 51(2)(d) does not apply to incorporated partnerships or bodies corporate. The partnership must be determined in accordance with the definition in the *Partnership Acts*, to mean ‘carrying on a business jointly with a view to profit’.<sup>177</sup>

Section 51(2)(e) provides that, in considering whether a contravention of s 45 has been committed, regard should not be had, in the case of a contract for the sale of a business or shares in the capital of the body corporate carrying on a business, to any provision of the contract that is ‘*solely for the protection of the purchaser in respect of the goodwill of the business*’.

If a restraint is outside a s 51(2)(b), (d) or (e) protection, it falls to be interpreted as an exclusionary provision under s 4D and is prohibited by, and hence unenforceable under, s 45. In such a case, the conduct is amenable to remedies under Part VI of the CCA, including declaratory relief,<sup>178</sup> injunctive relief<sup>179</sup> and recessionary remedies.<sup>180</sup> Damages may also be awarded.<sup>181</sup>

Thus, on its face, the CCA also relies upon common law notions of public policy. The CCA mirrors the common law by specifying that, in the determination of whether a contravention of s 45 has occurred, regard ‘shall not be had’ to the exceptions in ss 51(2)(b), (d) and (e). In doing so,

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<sup>177</sup> Miller, above n 70, 701.

<sup>178</sup> CCA s 163A.

<sup>179</sup> Ibid s 80.

<sup>180</sup> Ibid s 87.

<sup>181</sup> Ibid s 82.

it leaves those matters enumerated in ss 51(2)(b), (d) and (e) to be determined by the common law. Thus, restrictive clauses that fall outside of the prohibitions are, broadly those permitted under the common law when they are found to be reasonable and certain.

Miller explains that s 51:

has been drafted carefully to ensure that the exemptions it provides for are not interpreted as having a broad application. For that reason, the drafter has adopted the technique of stating that for the purpose of determining whether or not a contravention has occurred the specific matters enumerated in s 51 shall not be regarded, as opposed to the broader drafting style of providing general exemptions.<sup>182</sup>

However, upon closer consideration, it is clear that the CCA provides a positive expression of the doctrine. It does so in that ss 51(2)(b), (d) and (e) is framed as protecting the legitimate interests of employers, partners and ‘the purchaser in respect of the goodwill of the business’, thus expressly recognising those matters which are ignored by the common law. The effect of ss 51(2)(b), (d) and (e) is that this protection is available where reasonable, for these exceptions are ultimately dealt with under the common law, yet the test is articulated in a positive sense, expressly recognising the legitimate rights of the covenantee that require protection.

In positively protecting the legitimate rights of the covenantee, the CCA contemplates an additional issue of public policy that has been overlooked by the common law doctrine: the public policy behind economic outcomes under competition policy.

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<sup>182</sup>

Miller, above n 70, 695-6.

This public policy is reflected in the object of the CCA, contained in s 2, to ‘enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’.

By the promotion of competition, what is meant is ‘a process of rivalry in a market for goods or services whereby firms strive to meet the needs of consumers through constantly improving the price, quality and service of their products’.<sup>183</sup>

This competition is enhanced where the legitimate interests of the covenantee are recognised and upheld: the employer can protect trade secrets, confidential information and know-how; the partner can protect the partnership; and the purchaser can protect the goodwill of the business – just as the franchisee can ensure that their franchise is not rendered ‘inoperable’ by an opportunistic franchisee at common law.

Thus, although the CCA is founded on the common law doctrine, it has the benefit of positively protecting the legitimate interests of various covenantees. It recognises the purchased interests that require protection if they are to confer any commercial advantage on the covenantee, and, in doing so, circumvents the image problem which afflicts the common law doctrine of restraint of trade.

The CCA also operates differently from the common law in one other important respect.

Under the CCA, s 4L acts as an exception to the general rule that the courts will not amend or read down a restrictive clause. It not only endorses the amendment of a restrictive clause in a contract by the courts,

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<sup>183</sup>

Clarke and Corones, above n 17, 116.

but mandates it. Further, s 4L operates subject to any order made under s 87.<sup>184</sup>

Section 4L was introduced to the *Trade Practices Act 1974* (Cth) (now CCA) in 1977<sup>185</sup> following the Swanson Report, which suggested that s 4L was intended to harmonise the operation of the CCA and the common law rules of severance of void provisions in a contract.<sup>186</sup> However, it is now clear that the common law rules regarding severance have no application where s 4L applies.<sup>187</sup>

In *SST Consulting Services Pty Ltd v Rieson*,<sup>188</sup> the High Court held that s 4L, as enacted and in the overall context of the CCA, went further than the common law. The High Court held that s 4L required, rather than merely permitted, severance of offending provisions when CCA jurisdiction was enlivened and that ‘severance’ in this context really meant a form of ‘reading down’.<sup>189</sup>

This interpretation has the potential to impose on a court the impossible task of doing the parties’ work of rewriting a restraint clause within acceptable limits, a task which courts adjudicating upon restraints at

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<sup>184</sup> *Fadu Pty Ltd (ACN 007 815 090) v ACN 008 112 196 Pty Ltd as Trustee of the “International Linen Service Unit Trust”* [2007] FCA 1965, 11, 16, 134 (Finn J). See also *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516, [51] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>185</sup> See *ACCC v Baxter Healthcare* (2007) 237 ALR 512, 519 [17].

<sup>186</sup> See *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516, [38] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also Australia, Trade Practices Act Review Committee, *Report to The Minister for Business and Consumer Affairs*, August 1976 at 18-19, pars 4.31-4.33.

<sup>187</sup> *SSL Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 515; See also Russell V Miller, *Miller’s Australian Competition and Consumer Law Annotated* (Thomson Reuters (Professional) Australia Limited, 34<sup>th</sup> ed, 2012), 329.

<sup>188</sup> (2006) 80 ALJR 1190.

<sup>189</sup> *SSL Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 515, 52 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

common law will not do, due to the all-or-nothing approach discussed above.

However, *ACCC v Baxter Healthcare*<sup>190</sup> imposed an important qualification on the decision in *SST Consulting* and the operation of s 4L. The High Court held that ss 87 and 87A qualified s 4L.<sup>191</sup> In other words, if a court finds that a provision contravenes s 45, if the provision is in a contract, and if the court decides ‘severance’ within the terms of s 4L is simply not possible, then the court may simply declare the provision void pursuant to s 87.

In *Fadu Pty Ltd (ACN 007 815 090) v ACN 008 112 196 Pty Ltd as Trustee of the ‘International Linen Service Unit Trust’*,<sup>192</sup> Finn J applied s 4L and the reasoning of the High Court in *SST Consulting Services*. His Honour similarly held that s 4L on its proper construction mandates the severance or reading down of offending provisions,<sup>193</sup> and also found that s 4L operates subject to any order made under s 87.<sup>194</sup>

Under s 4M CCA, the common law relating to restraints of trade continues to operate to the extent that it is capable of operating concurrently with the CCA. Thus, the common law doctrine of restraint of trade is capable of operating side by side with, or being superimposed

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<sup>190</sup> (2007) 237 ALR 512.

<sup>191</sup> *ACCC v Baxter Healthcare* (2007) 237 ALR 512, [22].

<sup>192</sup> [2007] FCA 1965.

<sup>193</sup> *Fadu Pty Ltd (ACN 007 815 090) v ACN 008 112 196 Pty Ltd as Trustee of the “International Linen Service Unit Trust”* [2007] FCA 1965, 11, 16, 134 (Finn J); referring to *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516 at [51] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>194</sup> *Fadu Pty Ltd (ACN 007 815 090) v ACN 008 112 196 Pty Ltd as Trustee of the “International Linen Service Unit Trust”* [2007] FCA 1965, 11, 16, 134 (Finn J). A slightly more nuanced approach is contained in *Restraints of Trade Act 1976* (NSW), which also departs from the common law all-or-nothing position, yet in a less radical way in granting the court the option to rewrite offending restrictive clauses.



on, the CCA prohibition in s 45, limited as that prohibition is by the exception in s 51(2)(e).

Clark and Corones explain:

The scope of the restraint of trade doctrine is preserved, but significantly curtailed, by s 4M CCA. However, the operation of the restraint of trade doctrine in the three areas in which it has been most often used is given primacy under the CCA by ss 51(2)(b), (d) and (e).<sup>195</sup>

Subject to s 51, the effect of s 4M is to preserve the doctrine, but only insofar as it is 'capable of operating concurrently' with the CCA. This means that restrictions involving conduct that is prohibited by the CCA will be illegal, regardless of whether they would have been so at common law' ... Yet the legality of restrictions not caught by the CCA remain governed by the restraint of trade doctrine, under which they will be held valid if they are reasonable and certain.<sup>196</sup>

Although the doctrine of restraint of trade has a notional operation in other areas, it is primarily limited to the three kinds of restrictions listed in ss 51(2)(b), (d) and (e). These are restrictions binding employees, partners and sellers of goodwill. Restrictions of this kind are exempt from the operation of the competition law provisions of the CCA, other than s 48, and thus fall to be determined under the common law doctrine of restraint of trade.<sup>197</sup>

In *Peters (WA) Ltd v Petersville Ltd*,<sup>198</sup> the High Court held:

First ... developments in the common law will not affect the interpretation of the [now CCA]. Secondly, the common law is free

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<sup>195</sup> Corones and Clarke, above n 17, 24.

<sup>196</sup> Ibid 25.

<sup>197</sup> Ibid 26.

<sup>198</sup> (1999) 205 CLR 126.

to develop independently of the statute, provided always that the common law is capable of operating concurrently with the statute. Thus, the common law may strike down a restraint which falls outside the operation of Pt IV.<sup>199</sup>

Thirdly, the High Court noted that in the independent development of the common law, the courts may have regard to the CCA and ‘what the Parliament had determined to be the ‘appropriate balance between competing claims and policies’.<sup>200</sup>

The High Court also held that:

The Full Court collectively held that there had been no error by Carr J in his decision that the restraint imposed by Art 7.1 was one to which the common law doctrine applied. That being so, the decision that the restraint is void stands. That outcome makes it unnecessary to determine in this Court a further point raised by Peters WA. If the restraint survive the application of the common law doctrine, then it would be necessary for Peters WA to withstand the attack sought to be made upon it under ss 45 and 47 of the [now CCA]. For that attack, Peters WA had pleaded an answer under part (e) of s 51(2) of the [now CCA]. Given the outcome of this litigation with respect to the common law doctrine the occasion in this Court for any determination respecting the construction of this provision falls away.<sup>201</sup>

In *ACCC v Baxter Healthcare*,<sup>202</sup> the High Court said nothing to indicate that the CCA pre-empted the common law in a case where the applicant

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<sup>199</sup> *Peters v Petersville* (2001) 205 CLR 126, 141 [32] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

<sup>200</sup> *Peters v Petersville* (2001) 205 CLR 126, 43,228, 43, 229. See also Miller, above n 70, 329.

<sup>201</sup> *Peters v Petersville* (2001) 205 CLR 126, 146 [46]–[47] and [49] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

<sup>202</sup> (2007) 237 ALR 512.

had sought relief at common law and it was possible that both the common law norm and a Part IV norm had been contravened.

If a restraint of trade provision is capable of being held to be unreasonable at common law, and in contravention of s 45, there is no reason to accord the CCA some kind of precedence in a case where both contraventions are properly agitated and before the Court.

## VII CONCLUSION

It would seem that the time is ripe for a reconsideration of the doctrine of restraint of trade without a presumption of invalidity by reference to public policy. Not only does commercial life depend upon the existence of such clauses, but the competition policy enshrined in the CCA assumes that valid clauses are essential exceptions to the prohibitions against horizontal restraint. The very description '*restraint of trade*' obscures the purpose of a valid restraint by emphasising what the clause prevents rather than the legitimate interest that it is designed to protect. The common law has developed without the benefit of an overall view being taken on the continued necessity for the presumption of unenforceability on public policy grounds. Instead, clauses that improperly drawn can be shown not to warrant the status afforded legitimate clauses, placing the burden on those who attack them rather than those who seek to enforce. Once it is accepted that there are public policy arguments against *invalid* clauses, but strong commercial demand for *valid* clauses, the doctrine can be reviewed for its legal basis so that it makes modern commercial and economic sense.



# GOVERNMENT REGULATION: FROM INDEPENDENCE TO DEPENDENCY, PART II

STEVEN ALAN SAMSON<sup>\*</sup>

## ABSTRACT

*What Robert Bellah calls 'expressive individualism' has led to unprecedented social legislation in America and expanded government employment since the 1960s, helping to produce a generous supply of public services, policy entrepreneurs, and clientele groups. The legal scholar Lawrence M Friedman notes that 'the right to be 'oneself,' to choose oneself, is placed in a special and privileged position.' As a consequence, 'achievement is defined in subjective, personal terms, rather than in objective, social terms.' When the claims of expressive individualism are considered in tandem with the increasing reach of the modern social service state, a case may be made for their mutual dependency.*

*Today, the regulatory operations of central governments impinge upon virtually all areas of life, leading to widespread efforts by interest groups to have their vision of the good life implemented through law and regulatory oversight. Much of the resulting fiscal, educational, and social intervention is largely invisible to the electorate but has led to greater dependency. It also led the economist George J Stigler to offer a theory of regulatory capture when he observed that clientele groups develop a mutually beneficial relationship with the agencies that regulate their activities. Indeed, when this becomes business as usual, few will call it corruption. Thus, when examining laws and public policies, it is always wise to ask: Cui bono? Who benefits? As the Watergate whistle-blower, Mark Felt, put it: 'follow the money.'*

*This article is drawn from a series of eight introductory lectures and readings for a course on government regulation. Part II is a revision of the last four lectures.*

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## I THE REFORMIST IMPULSE AND PROGRESSIVISM

The first part was devoted to an examination of the proper sphere and scope of the law in a free society, two very different conceptions of liberty, the principles of limited government that the framers designed into the Constitution, and the economic dynamism that has been one of the fruits of western Christianity.

Let us now consider the factors that have led to a greater and greater state of dependency. A speech attributed to Congressman David Crockett of Tennessee, like the later writings of Frederic Bastiat on legal plunder and Francis Lieber on Anglican liberty, bears witness to a constitutional world that even in the late 1820s was beginning to pass away.<sup>1</sup> James Kurth ascribes this breakdown of traditional political forms to a misapplication of the original rejection by the Protestant Reformation of what reformers believed to be the misuse of hierarchy and community in matters relating to salvation. What Kurth calls the Protestant Deformation is a more general stripping of hierarchy and community, traditions and customs, from every area of life.<sup>2</sup> His thesis complements Ralph Raico's attribution of 'The European Miracle' to the influence of Christianity, as discussed in the previous section, while also accounting for its decline.<sup>3</sup>

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<sup>1</sup> Foundation for Economic Education, 'Not Yours to Give' <<http://www.fee.org/library/detail/not-your-to-give-2>>. This speech, sometimes entitled 'Not Yours to Give,' which was published only decades following Crockett's death, is most likely a conflation of fact and folklore: American Memory, 'A Century of Lawmaking for a New Nation: US Congressional Documents and Debates, 1774-1875' <<http://memory.loc.gov/cgi-bin/ampage?collId=llrd&fileName=006/llrd006.db&recNum=308>>.

<sup>2</sup> Kurth identifies six stages in this process of declension, culminating in a highly individualistic idea of universal human rights defined to the exclusion of hierarchy and community, tradition and custom: James Kurth, 'The Protestant Deformation' (December 2005) *The American Interest* <<http://www.the-american-interest.com/articles/2005/12/1/the-protestant-deformation/>>.

<sup>3</sup> See Liberty University, 'Selected Works of Steven Alan Samson' <[http://works.bepress.com/steven\\_samson/133/](http://works.bepress.com/steven_samson/133/)>.

Indeed, these and innumerable other works provide a historical context for understanding both the Christian contribution to the rise of the West as well as its transition away from its specifically Christian character.<sup>4</sup> In light of this history, Stephen Moore raised an interesting question in a *Wall Street Journal* editorial some time ago: how is it that America, ‘sweet land of liberty,’ has become a nation of takers rather than makers?<sup>5</sup>

Such problems are not unique to our day and age. Joshua 9 describes Jotham’s resistance to Abimelech’s tyranny and is noteworthy for its story of the trees and the bramble. Psalm 73 warns of the slippery places where the wicked are brought to destruction. In ‘Heart of Darkness,’ Joseph Conrad characterized civilization as a thin veneer. It is a resource that must be renewed every generation. How each generation is educated may be a truly a matter of national security, but does that make it the unique and specific responsibility of the state? The paradox is that the state must depend upon virtues that it is not well-equipped to instill. As the Christian political philosopher J Budziszewski puts it: ‘through *subsidiarity*, the government honors virtue and protects its teachers, but

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<sup>4</sup> Especially recommended are M Stanton Evans, *The Theme Is Freedom* (Regnery Publishing, 1996) which is also cited in David Gress, *From Plato to NATO: The Idea of the West and Its Opponents* (Free Press, 2004). Recent scholars who have reflected on the diverse elements that brought western civilization into being include Remi Brague, Pierre Manent, Philippe Nemo, Christopher Dawson, Roger Scruton, and Rodney Stark.

<sup>5</sup> Stephen Moore, ‘We’ve Become a Nation of Takers, Not Makers’ (April 2011) *The Wall Street Journal*  
<<http://online.wsj.com/news/articles/SB10001424052748704050204576219073867182108?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052748704050204576219073867182108.html>>; See also Nicholas Eberstadt, *A Nation of Takers: America’s Entitlement Epidemic* (Templeton Press, 2012) 23: ‘[B]oth political parties have, on the whole, been working together in an often unspoken consensus to fuel the explosion of entitlement spending in modern America.’

without trying to take their place.’<sup>6</sup> A healthy civil society that nurtures a variety of institutions, including the voluntary associations noted by Alexis de Tocqueville, does not require a vast regulatory apparatus to take care of every need.

Let us now examine some of the ways and the reasons why the heritage of our civilization has been placed at risk. In the fourth section we focused on the religious underpinnings of the West’s dynamic economic growth. In this section we will consider the religious and intellectual sources of a shift toward greater intervention and regulation by the state. Although these trends long predated the Progressive movement of the early twentieth century, it was during the Progressive period of a century ago that many of them reached their first great flowering.

Marc Allen Eisner has identified four major attributes of Progressivism: a heavy emphasis on scientific expertise, an immersion into evolutionary theory, a celebration of democracy, and a rejection of constitutional formalism.<sup>7</sup> Let us begin by considering each factor.

First, the post-Civil War period saw, beginning in 1876 with the founding of Johns Hopkins University, the advent of the German-style scientific research university, culminating in the Ph.D. In fact, Francis Lieber, who spent a year in England, was one the earliest German-educated scholars to emigrate to the United States, which he did in 1827. Before the end of the nineteenth century, higher education was in the grips of an intellectual revolution that transformed public education and led to the creation of science-based professions and professional associations in such field as

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<sup>6</sup> J Budziszewski, *The Revenge of Conscience: Politics and the Fall of Man* (Spence Publishing Company, 1999) 70.

<sup>7</sup> Marc Allen Eisner, *The American Political Economy: Institutional Evolution of Market and State* (Routledge, 2011) 42-4.



law, medicine, education, and theology. During the same period, the United States became the largest investment market in the world as it entered the Second Industrial Revolution with the subsidization of transcontinental railroads, the electrification of cities in the 1880s, the development of new steel-making processes, innovations in precision instruments, a growing emphasis on heavy industry, and the advent of the telephone, the automobile, and the airplane – all in less than four decades.

All of this was accompanied, second, by the intellectual revolution inspired by the theory of evolution. Francis Lieber may have remained unconvinced by Darwin's thesis, but the social sciences began taking on evolutionary coloring in the 1850s and a new generation of scholars took to it swimmingly. By the late nineteenth century, a paradigm shift had occurred throughout academic circles. The Idealist philosophy of Hegel and other German philosophers had already made the earlier New England Transcendentalists receptive to progressive ideas. Following the Civil War, constitutional interpretation began to be transformed. Ronald Pestritto contends that Woodrow Wilson, contrary to James Madison, believed that 'the latent causes of faction are *not* sown in the nature of man, or if they are, historical progress will overcome this human nature.'<sup>8</sup>

Third, the Progressive reform movement pioneered many specific Progressive and democratic practices. The so-called Wisconsin Idea placed the university at the center of advice about public policy. Through the efforts of Governor Robert M LaFollette, Sr., one of the 'heroes of insurgency,'<sup>9</sup> Wisconsin came to be seen as a 'laboratory for democracy.' This early progressive program as a whole was influenced by a growing

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<sup>8</sup> Ronald J Pestritto, *Woodrow Wilson and the Roots of Modern Progressivism* (Rowman & Littlefield, 2005) 6-7.

<sup>9</sup> Thomas Dreier, *Heroes of Insurgency* (Human Life Pub Co, 1910).

German immigrant population inspired by social welfare system established under Otto von Bismarck. Among the innovations associated with Wisconsin were a progressive state income tax, primary elections, workers' compensation, regulation of utilities, university extension services, and the direct election of senators. In Oregon, William S U'Ren's Direct Legislation League promoted the Oregon System, which included the initiative, referendum, direct primary, and recall. Throughout the country, Progressives promoted new forms of city government, such as the commission system and use of city managers, and pushed for the income tax and direct election amendments, along with anti-trust legislation, new regulatory laws, and the Federal Reserve System. At the end of the First World War Progressives were also instrumental in the ratification of the prohibition and women's suffrage amendments.

Finally, the most revolutionary aspect of the Progressive movement was its reinterpretation of everything according to a process philosophy that arose out of the historicism of Hegel and the evolutionary biology of Darwin. A leading academic Progressive, Woodrow Wilson, who earned his Ph.D. at Johns Hopkins, served for many years as the president of Princeton. In quick succession, he was elected governor of New Jersey (1910) and president of the United States (1912) before publishing a book, *The New Freedom* (1913), that expressed the Progressive credo:

All that progressives ask or desire is permission – in an era when 'development,' 'evolution,' is the scientific word – to interpret the Constitution according to the Darwinian principle; all they ask is

recognition of the fact that a nation is a living thing and not a machine.<sup>10</sup>

Thus was born the notion of a 'living Constitution' that responds to fluidly to changing circumstances. Gone was the language of binding the government with the chains of the Constitution. Thus was a so-called relic of horse and buggy days relegated to the intellectual and institutional scrap heap.

Support for Progressivism crossed party lines. So it should not be surprising that a broad-based middle class movement which inspired the allegiance of three very different presidents – Theodore Roosevelt, William Howard Taft, and Woodrow Wilson – was guided more by the pragmatism of William James and John Dewey than by a coherent ideology. The New Nationalism promoted by Herbert Croly and Theodore Roosevelt was designed to convert the national government into a countervailing force that could regulate business practices on behalf of the public interest.<sup>11</sup> In other words, Big Government was necessary to control Big Business. In the end, Progressives were more successful at converting the central government into a major power broker than in breaking up the centers of financial and industrial power. A powerful government bureaucracy grew but not as an independent force. Instead, a pragmatic partnership tied business and government together.

What shall we make of such a transformation in which the twin forces of evolution and revolution leapfrog into an endlessly progressive future? In

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<sup>10</sup> Woodrow Wilson, *The New Freedom* (Doubleday, Page, and Co, 1921) 48.

<sup>11</sup> See Sidney M Milkis, 'Why the Election of 1912 Changed America' (15 February 2003) Claremont Review of Books <<http://claremont.org/index.php?act=crbArticle&id=1247>>.

*The Republic of Choice*, the legal scholar Lawrence M Friedman maintains that:

the right to be ‘oneself,’ to *choose* oneself, is placed in a special and privileged position; in which *expression* is favored over *self-control*; in which *achievement* is defined in subjective, personal terms, rather than in objective, social terms.<sup>12</sup>

Where once society favored the inner-directed personality type associated with the Protestant Ethic, now it ironically favors the other-directed personality described by David Riesman and his co-authors of *The Lonely Crowd*.

What Robert Bellah termed ‘expressive individualism’ in *Habits of the Heart* has led to unprecedented social legislation since the 1960s and expanded government employment while helping produce a generous supply of public services, policy entrepreneurs, and clientele groups presided over by national political and administrative agencies.<sup>13</sup> As the political scientist James Kurth notes:

The ideology of expressive individualism thus reaches into all aspects of society; it is a total philosophy. The result appears to be totally opposite from the totalitarianism of the state, but it is a sort of totalitarianism of the self. Both totalitarianisms are relentless in breaking down intermediate bodies and mediating institutions that stand between the individual and the highest powers or the widest forces. With the totalitarianism of the state, the highest powers are

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<sup>12</sup> Lawrence W Friedman, *The Republic of Choice: Law, Authority, and Culture* (Harvard University Press, 1990) 3.

<sup>13</sup> Robert Bellah et al, *Habits of the Heart: Individualism and Commitment in American Life* (University of California Press, 1985).

the authorities of the nation state; with the totalitarianism of the self,  
the widest forces are the agencies of the global economy.<sup>14</sup>

The imperial self, like the imperial state, opportunistically seizes whatever advantages it can. The economist George J. Stigler helped develop the theory of regulatory capture, one of the mainsprings of public choice theory, in which clientele groups develop a mutually beneficial relationship with the agencies that regulate their activities. Writing somewhat tongue-in-check, Stigler observed:

The first purpose of the empirical studies is to identify the purpose of the legislation! The announced goals of a policy are sometimes unrelated or perversely related to its actual effects, and the *truly intended effects should be deduced from the actual effects*.<sup>15</sup>

Let that barbed hook work its way down for a moment. *Cui bono?* Who benefits? Follow the money. Stigler is saying in effect that if you want to know the real purpose of a law, look at its actual effects, not the reasons given for public consumption. *Q.E.D.*: That is as close to an empirical demonstration of legislative intent as you are likely to get. Bastiat's analytical model of legal plunder is here once again substantiated.<sup>16</sup>

What is common to both totalitarian tendencies is the subordination of the citizenry and rivals to some sort of Rousseauan sovereign 'general will' –

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<sup>14</sup> Kurth, above n 2.

<sup>15</sup> George J Stigler, *The Citizen and the State: Essays on Regulation* (University of Chicago Press, 1975) 140. Stigler's comment anticipates the remark by then Speaker of the House Nancy Pelosi before passage of the Affordable Care Act in 2010 that 'we have to pass the bill so that you can find out what's in it.'

<sup>16</sup> Peter Schweizer uses the term 'legalized extortion' and examines the 'shake-down' not only of individual businesses but also of entire industries in *Extortion: How Politicians Extract Your Money, Buy Votes, and Line Their Own Pockets* (Houghton Mifflin Harcourt, 2013); Hughes refers both to rent-seeking and protectionism: Jonathan R T Hughes, *The Government Habit Redux: Economic Controls from Colonial Times to the Present* (Princeton University Press, 1991) 11, 16, 220; for features of cronyism around the United States see Chrony Chronicles, 'What is Cronyism' <<http://cronychronicles.org/>>.

something reminiscent of the old Leninist conceit of ‘democratic centralism.’ By contrast, an earlier scholar, Francis Lieber, coined the term ‘institutional liberty’ to refer to a healthy interaction among various self-governing social, occupational, and religious institutions that historically undergirded political pluralism. The devolution and distribution of power has traditionally been upheld and protected by such constitutional ideas and forms as ‘federalism’ (Heinrich Bullinger and James Madison), ‘sympiotics’ (Johannes Althusius), ‘sphere sovereignty’ (Abraham Kuyper and Herman Dooyeweerd), and ‘subsidiarity’ (Leo XIII and Hilaire Belloc).

Kurth contends that both these tendencies – state-sovereignty and self-sovereignty<sup>17</sup> – take us far afield from the sovereignty of God, which was the banner under which the Protestant reformers launched what Eugen Rosenstock-Huessy and his student Harold Berman called one of a series of secular revolutions. From the viewpoint of a thousand years of history, Rosenstock’s insight is that our major institutions arose *Out of Revolution*, to borrow the title of his 1938 treatise, which is subtitled *Autobiography of Western Man*. ‘The Truce of God, the free choice of a profession, the liberty to make a will, the copyright of ideas—these institutions are like letters in the alphabet which we call Western civilization.’<sup>18</sup>

Guilds, universities, endowments and trusts, police forces: these are among the fruits of a dynamic Christian civilization that spawned great reform movements as well as revolutions. Rosenstock-Huessy, a historian

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<sup>17</sup> See also Jeane Bethke Elshtain, *Sovereignty: God, State, and Self* (Basic Books, 2008).

<sup>18</sup> Eugen Rosenstock-Huessy, *Out of Revolution: Autobiography of Western Man* (William Morrow, 1938) 30.

and professor of law who left Germany about the time Hitler took power, wrote five years later:

Our contemporaries are asking for institutions to protect the child, the labourer, the mill hand, against exploitation. The character of the legislation and of the institutions are now under discussion, and as always the problem is how to go forward and take the next step without losing the gains secured by previous institutions.<sup>19</sup>

This is always the danger given the utopian and revolutionary tendency of what Lieber called Gallican liberty—as expressed through the French and Russian revolutions—to throw the Anglican/Protestant baby out with the bathwater.

Analyzing the culmination of the last half millennium of social change, James Kurth notes:

Expressive individualism -- with its contempt for and protest against all hierarchies, communities, traditions, and customs -- represents the logical conclusion and the ultimate extreme of the secularization of the Protestant religion. The Holy Trinity of original Protestantism, the Supreme Being of Unitarianism, the American nation of the American Creed have all been dethroned and replaced by the imperial self. The long declension of the Protestant Reformation has reached its end point in the Protestant Deformation. The Protestant Deformation is a Protestantism without God, a reformation against all forms.<sup>20</sup>

Here again we see the intellectual provenance of the Progressives' attack on constitutional formalism in the name of a living and breathing

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<sup>19</sup> Ibid 31.

<sup>20</sup> Kurth, above n 2; both Harold Berman, Lawrence Friedman, and Herbert W Titus are among the legal scholars who have discussed the impact of this 'revolt against formalism.'

Constitution. While serving as governor of New York, Charles Evans Hughes remarked, long before he became Chief Justice: ‘the Constitution is what the judges say it is.’ A later Chief Justice, Fred Vinson, added:

Nothing is more certain in modern society than the principle that there are no absolutes.... To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.<sup>21</sup>

It appears that logic was not their strong suit. A disregard for constitutional standards has subsequently spread through the system.

## II THE RISE OF THE REGULATORY STATE

Three quarters of a century ago, Garet Garrett opened his meditation on the New Deal political revolution with this striking sentence: ‘A time came when the only people who had ever been free began to ask: What is freedom?’ With the language of a bedtime story—‘Once upon a time’—Garrett ushers us into a mythological dimension that should give us pause. In the Foreword to *The People’s Pottage*, Garrett posed some leading questions:

Why should people not be free to say they would have less freedom in order to have more of some other good? What other good? Security. What else? Stability. And beyond that? Beyond that the sympathies of *we*, and all men as brothers, instead of the willful *I*, as if each man were a sovereign, self-regarding individual.<sup>22</sup>

Note the way he describes the framing of the issue: How freedom has been redefined as selfishness. Garrett, who was for many years the editor of the *Saturday Evening Post*, understood that a successful revolution in

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<sup>21</sup> *Dennis v United States*, 341 US 494, 508 (1951).

<sup>22</sup> Garet Garrett, *The People’s Pottage* (Caxton Printers, 1953) 5 <<http://mises.org/books/pottage.pdf>>.



the name of reform had occurred. As early as 1938 when he wrote a booklet entitled 'The Revolution Was,' he could describe the revolution in a single sentence: 'Executive power over the social and economic life of the nation was increased.'<sup>23</sup>

Decades after Garrett wrote, the legal historian Harold J. Berman described a spirit of lawlessness that had spread through the land:

The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. Thus the historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse. ... Almost all the nations of the West are threatened today by a cynicism about law, leading to a contempt for law, on the part of all classes of the population.<sup>24</sup>

Perhaps this breakdown of discipline is connected with the increase of executive power in the same way as a vacuum is to whatever fills it.

We should note that the problem Garrett and Berman have described is not simply a matter of public administration but also displays a loss of loyalty to longstanding legal and political traditions. James Madison made a profound observation in *Federalist 57*:

I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together.

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<sup>23</sup> Ibid 16.

<sup>24</sup> Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University, 1983) 39.

It creates between them that communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny.

If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.<sup>25</sup>

In that last phrase, Madison seems to anticipate the rise of a political messianism<sup>26</sup> that pursues high-minded goals through high-handed means by corrupting the tradition of limited government and thus contributing to the failure of the legislative, executive, and judicial branches to honor constitutional limitations. ‘[W]hat is to prevent discretionary justice,’ Berman later asked, ‘from being an instrument of repression and even a pretext for barbarism and brutality, as it became in Nazi Germany?’<sup>27</sup> He added:

Cynicism about the law, and lawlessness, will not be overcome by adhering to a so-called realism which denies the autonomy, the integrity, and the ongoingness of our legal tradition. In the words of Edmund Burke, those who

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<sup>25</sup> James Madison, ‘The Federalist No 57: The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation (2013) Constitution Society\  
<<http://www.constitution.org/fed/federa57.htm>>.

<sup>26</sup> J L Talmon, *Political Messianism: The Romantic Phase* (Secker & Warburg, 1960); see also Rosenstock-Huessy, above n 18, 217.

<sup>27</sup> Berman, above n 24, 40-1.

do not look backward to their ancestry will not look forward to their posterity.<sup>28</sup>

The Bible, which is at the base of this tradition,<sup>29</sup> provides for the rule of law, which, after all, is designed to regulate behavior. The Ten Commandments summarize the law and the Great Commandment summarizes the essence of the law. But punctilious attention to the external signs of the law can cause it to become hidebound and, well, legalistic. Jesus answered one group of hair-splitting theologians that sought to test him by replying that they neither knew the Scriptures nor the power of God (Matt. 22:29). Today's revolt against legal formalism has promoted a similar disrespect for law.

The historical influence of the preaching of the Gospel shows both the Scriptures and the power of God at work in the development of Western civilization. The English legal tradition makes a distinction between law and equity that carries over into the United States Constitution. With the rise of commerce during the Middle Ages,

rules governing business activities multiplied. The separate justice [for commerce] developed into equity proceedings in the courts of Chancery, the laws of bailment grew, and if the sea was involved, the courts of Admiralty applied laws derived from the Hanseatic League, which in turn were based upon the ancient rules of the sea, the laws of Oleron [Eleanor of Aquitaine] and Wisby. Business developed within a corset of law that defined acceptable rules of behavior.<sup>30</sup>

The creative interplay between law and equity provided a spawning ground for the development of Anglican liberty and, later, American

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<sup>28</sup> Ibid 41.

<sup>29</sup> See John C H Wu, *Fountain of Justice: A Study in the Natural Law* (Sheed and Ward, 1955).

<sup>30</sup> Hughes, above n 16, 38.

liberty. During the Protestant Reformation, a new mass medium—the printing press—contributed to the intellectual ferment that resulted from the circulation of new translations of the Bible into the vernacular languages. In *The Book That Made Your World*, the Indian philosopher Vishal Mangalwadi describes the intellectual atmosphere of sixteenth century England:

Alehouses became debating societies as people interpreted and applied the Bible differently to the intellectual and social issues of the day. Some were content to let the church settle their disputes. Others realized that the only way to determine which interpretation was correct was to read the Bible with valid rules of interpretation. This was a bottom-up revolution. It infused the minds of all literate Englishmen—not just those in universities—with a new logical bent. It took no time for that movement to spread into other aspects of people’s lives. . . . [O]nce the English people began using logic to interpret the Bible, they acquired a skill that propelled their nation to the forefront of world politics, economics, and thought.<sup>31</sup>

It should be noted that self-governing Americans, who were the heirs of that period of Protestant ferment, later showed themselves to be capable of systematizing laws both formally through the codification movement led by David Dudley Field in New York and informally through the development of mining laws during the California gold rush to which his brother, the future Justice Stephen Field, devoted some of his early efforts. Insights into this period may be gleaned from Hernando de Soto’s *The Mystery of Capital* and the work of another legal historian, J Willard Hurst, who attributed nineteenth century industrialization in part to a

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<sup>31</sup> Vishal Mangalwadi, *The Book That Made Your World: How the Bible Created the Soul of Western Civilization* (Thomas Nelson, 2011) 87-8.

‘release of energy’ that resulted from a preference shown ‘for dynamic over static property.’<sup>32</sup>

Given this intellectual vitality, it should be evident, however, that protecting the integrity of the state, the law, the economy, and all other institutions is an even greater challenge when literacy becomes almost universal. As Mangalwadi observed:

Influenced by William Tyndale’s book *The Obedience of a Christian Man* (1528), Henry [VIII] thought that reading the Bible would make Englishmen docile and obedient. He was furious when just the opposite happened.<sup>33</sup>

Centuries later, Madison thought it necessary to use ‘ambition to counteract ambition’ because of the release of so much pent-up intellectual and entrepreneurial energy within the dynamic American society.<sup>34</sup> The energy released by the Glorious Revolution and subsequent Industrial Revolution was partially rooted in an English Reformation modeled, as noted by Eric Nelson, on *The Hebrew Republic*.<sup>35</sup>

Alongside this intellectual ferment, there is another factor to consider. The English system of land tenure helps explain the rise of the regulatory state, which the economic historian Jonathan R. T. Hughes traces back to the colonial period:

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<sup>32</sup> James Williard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (University of Wisconsin Press, 1956) 28.

<sup>33</sup> Mangalwadi, above n 31, 87.

A <sup>34</sup> James Madison, ‘The Federalist No 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments’ (2013) <<http://www.constitution.org/fed/federa51.htm>>.

<sup>35</sup> See Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (Harvard University Press, 2010); see also Gai Ferdon, ‘The Political Use of the Bible in Early Modern Britain’ (2013) The Jubilee Centre <<http://www.jubilee-centre.org/political-use-bible-early-modern-britain-dr-gai-ferdon/>>.

The essence of American capitalism was transplanted from England in the mainland American colonies. . . . For in the ancient English land tenure of free and common socage lay the seed of American capitalism as it would be in future, a powerful right of private ownership of land and natural resources, which in time was generalized to other forms of private property. In socage tenure the owner had the full rights to exploit, as he pleased, both surface and subsurface resources. Rapid alienation meant selling, buying, and settling land as fast as men and women were willing to take up new territories. . . . Fee socage ensured that land, once it was open to private purchase, would be settled at maximum speed. It also meant that, if society at large was to be protected from the adverse spillover effects of private economic activity, government power would ultimately have to be imposed and private right controlled.<sup>36</sup>

But there was also an important stipulation in this arrangement: Taxes had to be paid or else the land reverted to the donor, which during the colonial period meant the Crown and which today is the people of the United States. This arrangement virtually guaranteed that land would not be left idle as it is in some parts of the world.

The regulatory state that has grown up for more than a century meets some very real needs but has also encouraged long-standing expectations within society. Although American economists typically criticize government regulations as something incompatible with a free market, Hughes argues they are retained because the public considers them desirable. But, at the same time, Hughes illustrates and underscores Bastiat's main point:

The country's form of government not only lends itself to favoritist legislation, but *depends* upon it. A history of American government limited to those laws that sprang

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<sup>36</sup>

Hughes, above n 16, 20.

pure from the brains of the nation's politicians with no special interests as their objects would be a very short history indeed.<sup>37</sup>

The historical precedent for such intervention is the use of the police powers that date back to the Middle Ages to protect public health, safety, peace, and morals:

Controls over business activity at the state and municipal levels were primarily by license to limit entry, to raise tax revenues, to control morals, and to regulate the quality and prices of franchised public-service enterprises.<sup>38</sup>

Another scholar, Robert Kagan, has noted:

Many regulatory programs have been extremely effective, even if relatively little is spent on enforcement. Regulations to prevent anthrax in cattle herds virtually eradicated that deadly disease. ... Safety regulations have sharply reduced deaths in coal mines.<sup>39</sup>

On the other hand, Kagan believes that some regulatory skepticism is justified: 'banking regulations did not prevent disastrously large numbers of overly risky loans by American savings and loan organizations in the 1980s or by their Japanese equivalents half a decade later.'<sup>40</sup> The question can even be raised whether a particular regulatory regime creates certain expectations that permit or even encourage risky business. Kagan continues: 'An example of widespread noncompliance or wholly inadequate enforcement can be found to match almost every regulatory success story.'<sup>41</sup>

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<sup>37</sup> Ibid 17.

<sup>38</sup> Ibid 37-8.

<sup>39</sup> Robert A Kagan, 'How Much Do National Styles of Law Matter?' in Robert A Kagan and Lee Axelrod (eds), *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (University of California Press, 2000) 6.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

The problem may have less to do with the jurisdiction that creates the regulations than with the larger purposes pursued by those with vested interests and the compatibility of these interests with traditional expectations. As Hughes notes:

What was controlled traditionally were four crucial points in the flow of economic transactions: (1) number of participants in a given activity, (2) conditions of participation, (3) prices charged by participants either for products or services, and (4) quality of the products or services. . . . This social control matrix is the subtle and complex economy of controls we have experienced historically, and with a few exceptions (for example, output control over crude-oil extraction, or production by permit only, as in the case of peanut farming) still do.<sup>42</sup>

What does such intervention signify? It is protectionism of one sort or another: first, last, and always. As the economic historian Douglass North has commented: ‘A continuing dilemma of regulatory agencies is that they can become vehicles whereby the regulated regulate the regulators, in the interest of the regulated—rather than that of the public.’<sup>43</sup>

What has changed since the Progressive era is the growth of the administrative apparatus itself and its increasing use as an instrument of political favors and favoritism.<sup>44</sup> Perhaps the single most important and lasting innovation of Franklin Delano Roosevelt’s New Deal era was the

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<sup>42</sup> Hughes, above n 16, 16.

<sup>43</sup> Ibid 97.

<sup>44</sup> Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (Yale University Press, 1982) 65. Mancur Olson drew out several implications from the prevalence of what Theodore J. Lowi in *The End of Liberalism* called ‘interest group liberalism,’ which is commonly called ‘clientelism’ today. Olson’s seventh implication has considerable bearing on this discussion: ‘Distributional coalitions slow down a society’s capacity to adopt new technologies and to reallocate resources in response to changing conditions, and thereby reduce the rate of economic growth.’ The implications for responsiveness to any sort of international or domestic emergency situation should also be evident.



Executive Reorganization Act of 1939, which, as Sidney Milkis has noted,

enhanced the [president's control of the expanding activities of the executive branch. As such, this legislation represents the genesis of the institutional presidency, which was equipped to govern independently of the constraints imposed by the regular political process. ... Patronage appointments had traditionally been used to nourish the party system; the New Deal celebrated an administrative politics that fed instead an executive department oriented to expanding liberal programs. As the administrative historian Paul Van Riper has noted, the new practices created a new kind of patronage, 'a sort of intellectual and ideological patronage than the more traditional partisan type.'<sup>45</sup>

As a result of this so-called Third New Deal, the Democratic party was transformed into an incumbency party—'a way station on the road to administrative government'—for the generations that followed and thus became the means of 'embedding progressive principles (considered tantamount to political rights) in a bureaucratic structure that would insulate reform and reformers from electoral change.'<sup>46</sup>

The myth of Progressivism held that 'good government' (once mocked as 'goo-goo') would guide society along the paths of progress. The reality, however, returns us to Bastiat's problem of false philanthropy, which may be seen in conjunction with Hughes's governmental habit. Bastiat detected a contradiction at the heart the socialism of his day:

Here I encounter the most popular fallacy of our times. It is not considered sufficient that the law should be just; it must be

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<sup>45</sup> Sidney M Milkis, 'The Presidency and Political Parties,' in Michael Nelson (ed), *The Presidency and the Political System* (CQ Press, 4<sup>th</sup> ed, 1995) 353.

<sup>46</sup> Ibid 353-4.

philanthropic. Nor is it sufficient that the law should guarantee to every citizen the free and inoffensive use of his faculties for physical, intellectual, and moral self-improvement. Instead, it is demanded that the law should directly extend welfare, education, and morality throughout the nation.<sup>47</sup>

As Sheldon Richman has noted:

If philanthropy is not voluntary, it destroys liberty and justice. The law can give nothing that has not first been taken from its owner. He applies that analysis to all forms of government intervention, from tariffs to so-called public education.<sup>48</sup>

In Bastiat's own words:

As long as it is admitted that the law may be diverted from its true purpose—that it may violate property instead of protecting it—then everyone will want to participate in making the law, either to protect himself against plunder or to use it for plunder. Political questions will always be prejudicial, dominant, and all-absorbing. There will be fighting at the door of the Legislative Palace, and the struggle within will be no less furious. To know this, it is hardly necessary to examine what transpires in the French and English legislatures; merely to understand the issue is to know the answer.<sup>49</sup>

But Bastiat was also careful to use such terms as 'legal plunder' and 'false philanthropy' analytically rather than moralistically:

I declare that I do not mean to attack the intentions or the morality of anyone. Rather, I am attacking an *idea* which I believe to be false; a *system* which appears to me to be unjust; an injustice so

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<sup>47</sup> Frederic Bastiat, *The Law* (The Foundation for Economic Education, 1998)

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<sup>48</sup> Sheldon Richman, 'Bastiat, Liberty, and The Law' (1996) *The Freeman* <[http://www.fee.org/the\\_freeman/detail/bastiat-liberty-and-the-law/](http://www.fee.org/the_freeman/detail/bastiat-liberty-and-the-law/)>.

<sup>49</sup> Bastiat, above n 47, 14.

independent of personal intentions that each of us profits from it without wishing to do so, and suffers from it without knowing the cause of the suffering.<sup>50</sup>

Thus Bastiat's argument is offered at the level of a public philosophy and draws upon a long tradition of Christian realism. Consider a passage (no. 358) from *Thoughts* by the seventeenth century mathematician and Christian apologist Blaise Pascal: 'Man is neither angel nor brute, and the unfortunate thing is that he who would act the angel acts the brute.'<sup>51</sup> Now consider the full force of Pascal's observations in light Bastiat's observation: 'We must remember that law is force, and that, consequently, the proper functions of the law cannot lawfully extend beyond the proper functions of force.'<sup>52</sup>

We need to be reminded that force potentially brutalizes whatever it touches. This is nowhere more passionately or memorably argued than in Simone Weil's *The Iliad, or the Poem of Force* (1940).<sup>53</sup> Political compulsion is a blunt instrument to which people must have the freedom to adjust their expectations and actions if they are to avoid being broken upon it. As a means of delivering an ameliorative social reform agenda, political compulsion at best offers only a more diffuse and anonymous outlet for philanthropic impulses rather than a surgical tool for correcting society's defects. In the absence of a political consensus about means and ends, it can only sow endless discord.

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<sup>50</sup> Ibid 23.

<sup>51</sup> Charles W Eliot (ed), *The Harvard Classics* (Collier & Son, 1909) vol 48, 122.

<sup>52</sup> Bastiat, above n 47, 24. Law is force and is thus, as Bastiat acknowledged, the power to kill.

<sup>53</sup> Simone Weil and Rachel Besspaloff, *War and the Iliad* (New York Review Books, 2005).

The regulatory state inaugurated by the Roosevelt's Third New Deal may be sharply contrasted with the decentralized federal republic and the public philosophy with which the American experiment began. Before the Great Depression, Calvin Coolidge restated an earlier vision of America that had been memorialized at Independence Day celebrations for 150 years. In 'The Inspiration of the Declaration,' Coolidge noted what shaped the thinking of the ordinary people who agreed together to separate from imperial Britain. 'They were a people who came under the influence of a great spiritual development and acquired a great moral power.' More specifically, the President stated: 'No one can examine this record and escape the conclusion that in the great outline of its principles the Declaration was the result of the religious teachings of the preceding period.' Coolidge concluded with the following observation:

No other theory is adequate to explain or comprehend the Declaration of Independence. It is the product of the spiritual insight of the people. We live in an age of science and of abounding accumulation of material things. These did not create our Declaration. Our Declaration created them. The things of the spirit come first. Unless we cling to that, all our material prosperity, overwhelming though it may appear, will turn to a barren scepter in our grasp. If we are to maintain the great heritage which has been bequeathed to us, we must be like minded as the fathers who created it. We must not sink into a pagan materialism. We must cultivate the reverence which they had for the things that are holy. We must follow the spiritual and moral leadership which they showed. We must keep replenished, that they may glow with a more compelling flame, the altar fires before which they worshipped.<sup>54</sup>

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<sup>54</sup> Calvin Coolidge, 'The Inspiration of the Declaration' (1926) *Vision and Values*  
<[http://www.visionandvalues.org/docs/VanTil\\_2010\\_March\\_Coolidge\\_DoI.pdf](http://www.visionandvalues.org/docs/VanTil_2010_March_Coolidge_DoI.pdf)>.

### III THE POLITICAL ECONOMY OF REGULATION

Let us for a moment think back to the first section at the beginning of this essay when we briefly noted Henry Hazlitt's *Economics in One Lesson*. The lesson was simply this:

The art of economics consists in looking not merely at the immediate but at the longer effects of any act or policy; it consists in tracing the consequences of that policy not merely for one group but for all groups.<sup>55</sup>

Hazlitt asked, for example: does deficit spending stimulate the economy? During the New Deal era, deficit spending by the government was likened to 'priming the pump' with water to get it moving again. The assumption was that we could spend our way right back to prosperity if the government were to take the lead and assume much of the risk and expense by taxing and borrowing. Is this so different from the idea that Bastiat noticed nearly a century earlier when he observed how some people assumed that damage caused by a storm could benefit a community?

In order to understand where such an idea leads, Bastiat suggested that we look at the matter on a small scale. When a homeowner or storekeeper has a broken window replaced, the purchase of a new window may appear to be a boon to the local economy. In his essay 'That Which Is Seen, and That Which Is Not Seen,' Bastiat noted that what we see is the benefit to the glass manufacturer and the window installer. What we miss seeing is what economists call the *opportunity cost*—the other transactions that might otherwise have been made. The loss of a window may mean that the homeowner or storekeeper must forego some other

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<sup>55</sup>

Henry Hazlitt, *Economics in One Lesson* (Arlington House, 1979) 17.

purchase that might have benefited the clothier or a furniture maker instead.<sup>56</sup>

Let us now remove the lenses that narrow our field of vision and, once again, enlarge the scope of our thinking. The fourth section cited Francis Lieber's analysis of an early experiment with totalitarianism in France: 'The advance of knowledge and intelligence,' he wrote, 'gives to despotism a brilliancy, and the necessity of peace for exchange and industry give it a facility to establish itself which it never possessed before.'<sup>57</sup> What needs to be asked here is: How did the advance of knowledge that preceded the despotism happen in the first place?

'Why Europe?' asks James Nickel in *Mathematics: Is God Silent?* He answers by quoting the physicist and philosopher of science, Stanley Jaki:

the history of science with its several stillbirths and only one viable birth, clearly shows that the only cosmology, or view of the cosmos as a whole, that was capable of generating science was a view of which the principal disseminator was the Gospel itself.<sup>58</sup>

David Landes asks the same question in *The Wealth and Poverty of Nations*: 'Why Europe? Why Then?' Landes focused on two factors: *buildup*, the accumulation of knowledge and knowhow; and *breakthrough*—reaching and passing thresholds.' He then emphasizes three considerations:

- 1) the growing *autonomy* of intellectual inquiry;

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<sup>56</sup> Frederic Bastiat, 'That Which is Seen, and That Which is Not Seen' Committee to Preserve the Works of Frederic Bastiat <<http://bastiat.org/en/twisatwins.html>>.

<sup>57</sup> Francis Lieber, *Miscellaneous Writings. Vol. I: Reminiscences, Addresses, and Essays* (J B Lippincott, 1880) 383-4.

<sup>58</sup> James Nickel, *Mathematics: Is God Silent?* (Ross House Books, 2001) 143.

- 2) the development of unity in disunity in the form of a common, implicitly adversarial *method*, that is, the creation of a language of proof recognized, used, and understood across national and cultural boundaries; and
- 3) the invention of invention, that is, the *routinization* of research and its diffusion.<sup>59</sup>

These considerations are the fruits of the Christian cosmology cited by Father Jaki. They help account for the accumulated mass of intellectual and material capital that produced what Ralph Raico called ‘The European Miracle.’ The question to ask today is how we are squandering that capital. Long before James Kurth answered by describing the stages of a Protestant Deformation, Erik von Kuehnelt-Leddihn did much the same in a short story. Like one of the characters in the story, the Kuehnelt-Leddihn suggests that a nominally Christian civilization is heedlessly ‘living from the whiff of an empty bottle.’<sup>60</sup> Have we been casting our seed on rocky ground? Are we eating our seed corn rather than planting it? Or, as the theologian Cornelius Van Til put it, living on ‘borrowed capital’ without replenishing it? Do we thoughtlessly risk draining the wellsprings of our civilization’s creativity?

Questions such as these make the study of economics, politics, ethics, law, and history so vital for getting our bearings. Let us turn to field of political economy for a few concepts that may help clarify the impact of what James Burnham called the ‘managerial revolution’ which has restructured our customary habits as well as our expectations. It may help

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<sup>59</sup> David Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (W W Norton, 1998) 200-1.

<sup>60</sup> Francis Stuart Campbell, ‘The Whiff from the Empty Bottle’ (1945) 62 *Catholic World*, 20-7.

lead, first of all, to an understanding of how government regulation operates; secondly, an appreciation of the values, priorities, and stakes that are involved; and finally, insight into the ways the political agendas, ideologies, and special pleading of various interest groups shape public policy.

Like Sidney Milkis, Jonathan R. T. Hughes reached back to the Third New Deal that resulted from restructuring the administrative apparatus in 1939.

In Executive Order 8248 Roosevelt set this country on a completely uncharted course. Other presidents were happy enough to follow his charismatic lead, and from 1939 to the present, great and infamous events alike have stemmed from this power, including fundamental contributions to our burgeoning apparatus of nonmarket control over economic life.<sup>61</sup>

A concept that is especially relevant here is *rent-seeking*, which is discussed by Michael Munger: ‘In politics you try to move money around and take credit for it. In markets you try to create value and make profits.’

<sup>62</sup> Adam Smith identified three forms or sources of income: profits, wages, and rents. What is called rent-seeking involves the extraction of something of value from others without compensation and without enhancing productivity. Rent-seeking often involves the acquisition of special monopoly privileges through legislation or regulation by a government agency. A privilege, the Roman term for a private law, is a

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<sup>61</sup> Hughes, above n 16, 181.

<sup>62</sup> Michael Munger, ‘Rent-Seek and You Will Find’ <<http://www.econlib.org/library/Columns/y2006/Mungerrentseeking.html>>. The costs of rent-seeking are incalculable, as the Competitive Enterprise Institute’s annual Crews Report, ‘Ten Thousand Commandments,’; see Howard Swartz, ‘The Hidden Tax: Regulation’ <<http://pajamasmedia.com/blog/the-hidden-tax-regulation/?singlepage=true>>.



kind of property that exists at the pleasure of the state. Such a monopoly may allow its holder, for example, to charge high fees or else restrict entry into a market in order to reduce competition.

An example of rent-seeking would be the high fee for purchasing a taxicab medallion and the resulting restraint of trade. Walter Williams, who was once a taxi driver himself, has written on this phenomenon for decades.

Perhaps the most egregious form of licensure involves New York City taxicabs. The municipal government requires a medallion for each operating cab. The code also provides for regulation of taxi fares and other conditions of operation. The medallion system stemmed from the Haas Act of 1937. Under the act, the city sold medallions for \$10 to all persons then operating taxis.<sup>63</sup>

Since that time, no new medallions have been issued except for 54 awarded for operating wheel-chair accessible vehicles. What has happened in the three-quarters of a century since that date tells the rest of the story. In 1947, the medallion price rose to \$2,500. By 1960, it was \$28,000; 1970, \$60,000; 1998, \$200,000; and in May 2007, a taxi medallion sold for \$600,000. . . . In 2007, Medallion Finance Corporation had \$520,000,000 outstanding in taxi-medallion loans. As Williams describes it, the bottom line is simple: ‘the value of the medallion shows what the buyer is willing to pay for government protection from free-market competition.’<sup>64</sup> If a free market were introduced, the rent would disappear and the market value of the medallions would plunge.

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<sup>63</sup> Walter E Williams, *Race and Economics: How Much Can Be Blamed on Discrimination?* (Hoover Institution, 2011) 2.

<sup>64</sup> Ibid 2.

Another illustration of rent-seeking may be found in the Book of Acts, chapter 19, when Paul and his companions were caught up in a riot by a guild of silversmiths who sought to have them thrown out of town for hurting their idol business. But political institutions also provide foundations for cooperative enterprises and the liberty that enables us to pursue our vocations. Ancient Roman *collegia* and medieval guilds, including roving bands of college students, were predecessors of craft unions like the American Federation of Labor and modern universities.

Unfortunately, the distance between legitimate and illicit extractions – taxes as opposed to mere brigandage – is often not very great. In *The City of God*, St Augustine recounted the story of a pirate leader captured by Alexander the Great: ‘When that king asked the man what he meant by infesting the sea, he boldly replied: ‘What you mean by warring on the whole world. I do my fighting on a tiny ship, and they call me a pirate; you do yours with a large fleet, and they call you “Commander.”’<sup>65</sup>

Another and related concept is that of the *free rider*. A free rider is the beneficiary of some collective good for which he does not pay the costs. When this sort of benefit takes the form of a privilege it is a variation on what Bastiat called legal plunder. What separated Alexander and the pirate was a difference of scale – ‘wholesale’ rather than ‘retail’ – but not of kind. Alexander may have considered the pirate a poacher, but both had larceny in their hearts.

A black market presents a different case. New York has a large and flourishing illicit and semi-legal gypsy-cab business that operates almost side by side with the licensed cabs. Free markets often reassert themselves when the expense and inconvenience of monopolies creates a

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<sup>65</sup> Saint Augustine, *City of God* (426) bk 4, ch 4.

demand for alternatives. This is a vast phenomenon that arises in all sectors of the economy. In the area of education, for example, alternatives to state schools run the gamut from charter schools to home schools. The means of financing these options also varies widely.

In *The Government Habit Redux*, Jonathan R T Hughes sets forth his major findings in a set of ten general propositions. Together they help us recognize the magnitude and difficulty we face if we wish to bring public spending back down to more manageable levels. The first proposition is the key to understanding the rest:

1. Regulation creates economic rent. This is really a truism. Regulation is interference with normal market outcomes. Someone loses, someone gains. The gains are economic rents---returns in excess of competitive returns. Resources flow to the highest returns and therefore to the rents. The economy adjusts accordingly. It becomes a different economy because of the rents—the regulation.<sup>66</sup>

What this means is that regulation is, by definition, something that removes a portion of the economy from the free market sector. The connection of the next proposition with Bastiat's legal plunder, which is logically connected to the first, should be even more evident:

2. The rents made available by regulation encourage free-riding by stretching the rules or ignoring them. If most people are held in check by regulation, it will pay, potentially, for individuals to violate the regulations, getting a free ride at the expense of the rest.<sup>67</sup>

But Hughes is perhaps being too generous here. New York's system of awarding taxi medallions might be regarded by an ordinary citizen as

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<sup>66</sup> Hughes, above n 16, 10.

<sup>67</sup> Ibid 11.

‘highway robbery.’ The result is the growth of an underground economy that keeps a wide variety of transactions off the books. When this black market becomes commonplace, government revenue sources dry up. Unless taxes are raised, then governments are likely to turn to other tools at their disposal, such as borrowing and inflation. Their costs of such alternatives are even more difficult to calculate.

The remaining propositions should bring the story of Alexander and the Gordian Knot to mind:

4. Rent-seeking is socially wasteful. ... 5. It pays special-interest coalitions to manipulate the power of the state to create rent. ... 6. Dominant groups will tend to use the state to redistribute wealth to themselves. ... 10. It pays those inside the government regulatory establishment to push for expansion of regulation. The more regulation, the greater the career opportunities for experienced hands in the regulatory game.<sup>68</sup>

Thus through the wonders of genetic engineering we have created something akin to Dr Dolittle’s pushmi-pullyu.

What began in the Progressive era as a desire for a living Constitution, matured during the New Deal into the desire for a permanent administrative state, and erupted in the 1960s as a continuing cultural revolution in the name of a quest for social justice. This has led us to Kurth’s sixth stage of the Protestant Deformation, expressive individualism, and a massive debt in the United States of more than \$100 trillion in future obligations. Unfortunately, the dollar amount of our mortgaged future may be the least part of the cost. Plunder may not be systematic, as Bastiat feared, but it has taken on a life of its own, like an old Roman-style corporation. Legal plunder has, as Bastiat expected,

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<sup>68</sup>

Ibid 11-2.

become ‘universal legal plunder.’<sup>69</sup> Perhaps Mammon is the proper word for it.

The New Testament uses the language of Roman law, however, to describe a rather different corporation: the Church. Its leavening influence continues to shape history after two millennia. Vishal Mangalwadi concludes *The Book That Made Your World* with a provocative observation:

Rome’s collapse meant that Europe lost its soul—the source of its civilizational authority—and descended into the ‘Dark Ages.’ The Bible was the power of revived Europe. Europeans became so enthralled with God’s Word that they rejected their sacred myths to hear God’s Word, study it, internalize it, speak it, and promote it to build the modern world. At the dawn of the twenty-first century, the West is again losing its soul. Will it relapse into a new dark age or humble itself before the Word of the Almighty God?<sup>70</sup>

#### IV THE STATE OF DEPENDENCY: LIFE, LIBERTY, AND PROPERTY

As we noted at the beginning of this essay, its subject, government regulation, is contested terrain. It is a busy intersection in a bustling center of commerce where law, economics, property rights, and ethics converge and often conflict. It is a place where interests and boundaries are often fluid and confused, where an honest surveyor or an impartial judge may be difficult to find, where any determination of what is at stake—costs and benefits, private as well as public—is part of what is in dispute. Our best efforts to get the lay of the land are too easily derailed or sidetracked as a result.

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<sup>69</sup> Bastiat, above n 47, 20.

<sup>70</sup> Mangalwadi, above n 31, 401.

During the Great Depression and before the outbreak of the Second World War John Maynard Keynes wrote *The General Theory of Employment, Interest, and Money* (1936). The best known lesson that he imparted was simply this:

The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.<sup>71</sup>

This is why we seem so often to reach a dead end in our efforts. We hear the wrong words and heed the wrong voices. As the Apostle Paul put it: ‘For now we see through a glass, darkly’ (1 Cor. 13:12 KJV). And so we too often conclude that, since we live in the country of the blind, the one-eyed man is king. That must mean we should follow . . . Cyclops?

As J Budziszewski notes in *The Revenge of Conscience*: ‘the Tower of Babel is a very ancient tale, and just as many voices, sects, and doctrines quarreled in pre-modern times as today.’<sup>72</sup> It is still incumbent upon us to do ‘due diligence’ and engage in critical reasoning. The Apostle Paul directs us along a better path: ‘Be diligent to present yourself approved to God, a worker who does not need to be ashamed, rightly dividing the word of truth’ (2 Tim. 2:15 NKJ). Even though the path we have been following has the appearance of inevitability, we need to understand that with this managerial revolution we are dealing with political strategies

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<sup>71</sup> John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (Palgrave Macmillan, 1936) 383.

<sup>72</sup> Budziszewski, above n 6, 7.

and choices rather than eternal verities. Jonathan R T Hughes concludes his 1992 book on a sobering note:

The problems for which the controls were invented are to be managed in perpetuity, not solved. The ruling paradigm was established by the first federal nonmarket control agency, the ICC. We may well now have the controls *because* they reduce economic efficiency; the controls are seen to save us from the uncertainties of the free market just as civil government is seen to save us from the uncertainties of anarchy. Professors of economics may not like the parallel, but they do not make laws.<sup>73</sup>

Writing shortly after the introduction of Lyndon Johnson's Great Society programs, America's longshoreman philosopher, Eric Hoffer, made some astute observations about the general practical-mindedness of Americans that, in his judgment, made them largely immune to the appeals to abstract ideas of social and economic justice by intellectual elites nestled in academia, the media, and the bureaucracy. 'Up to now,' Hoffer wrote in 1964:

America has not been a good milieu or the rise of a mass movement. What starts out here as a mass movement ends up as a racket, a cult, or a corporation. Unlike those anywhere else, the masses in America have never despaired of the present and are not willing to sacrifice it for a new life and a new world.<sup>74</sup>

But decades later, the economist Thomas Sowell remarked on a transformation that by 1995 had already taken place. Having written earlier about *A Conflict of Visions* at a time when the 'constrained' or 'tragic vision' still had articulate defenders, Sowell now intensified his critique of the now prevailing 'vision of the anointed':

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<sup>73</sup> Hughes, above n 16, 231.

<sup>74</sup> Eric Hoffer, *The Temper of Our Time* (Harper & Row, 1969).

What is seldom part of the vision of the anointed is a concept of ordinary people as autonomous decision makers free to reject any vision and to seek their own well-being through whatever social processes they choose. Thus, when those with the prevailing vision speak of the family—if only to defuse their adversaries' emphasis on family values—they tend to conceive of the family as a *recipient* institution for government largess or guidance, rather than as a *decision-making* institution determining for itself how children shall be raised and with what values.<sup>75</sup>

Like Hughes, Sowell has been especially trenchant in analyzing the enormous damage that a secular clerisy of do-gooders has inflicted upon the civil body politic:

In order that this relatively small group of people can believe themselves wiser and nobler than the common herd, we have adopted policies which impose heavy costs on millions of other human beings, not only in taxes but also in lost jobs, social disintegration, and a loss of personal safety. Seldom have so few cost so much to so many.<sup>76</sup>

Let us turn to Sowell's friend Walter Williams who has time and again proven himself willing to 'speak truth to power.' Williams, who wrote a powerful memoir entitled *Up from the Projects* (2010),<sup>77</sup> more recently released another book: *Race and Economics*. In the preface he writes:

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<sup>75</sup> Thomas Sowell, *The Vision of the Anointed: Self-Congratulation as a basis for Social Policy* (Basic Books, 1995) 122.

<sup>76</sup> Ibid 260. See also a classic treatment of the subject: Julien Benda, *The Treason of the Intellectuals (La Trahison des Clercs)* translated by Richard Aldington (W W Norton, 1969).

<sup>77</sup> Walter E Williams, *Up from the Projects: An Autobiography* (Hoover Institution Press, 2010).



As a generality, if one is a member of a minority, he is less likely to realize his preferences if decisions are made in the political arena, particularly if they are made at the national level.<sup>78</sup>

In these words we may sense the quality of thought that Madison, Hamilton, and Jay instilled into the *Federalist Papers*. The excerpt that follows could serve, along with some of our readings this term, as a manifesto for a renewed constitutionalism:

Consider another comparison between market- and political-resource allocation. If one tours a low-income black neighborhood, he will see people wearing some nice clothing, eating some nice food, driving some nice cars, and he might even see some nice houses—but no nice schools. Why? The answer relates directly to how clothing, food, cars, and houses—versus schools—are allocated. Clothing, food, cars, and houses are allocated through the market mechanism. Schools, for the most part, are parceled out through the political mechanism. If a buyer is dissatisfied with goods distributed in the market, the individual can simply ‘fire’ the producer by taking his business elsewhere. If a buyer (taxpayer) is dissatisfied with a public school, such an option is not, in a black neighborhood, economically viable to him. He has to bear the burden of moving to a neighborhood with better schools.<sup>79</sup>

George Stigler made a similar point when he wrote:

Until the basic logic of political life is developed, reformers will be ill-equipped to use the state for their reforms, and victims of the pervasive use of the state’s support of special groups will be helpless to protect themselves.<sup>80</sup>

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<sup>78</sup> Williams, above n 63, 2.

<sup>79</sup> Ibid.

<sup>80</sup> Stigler, above n 15, 132.

It is a vicious circle that, once again, locks everyone into preordained failure, into the proverbial race for the bottom. An old Soviet-era saying applies here: ‘We pretend to work, they pretend to pay us.’ Our own variation on this theme is: ‘We have got the best tunnel vision money can buy.’ Instead, we need to stop looking at our feet and start inspecting the road ahead.

Government regulation is the old problem of monopoly all over again—for which antitrust laws and regulations were intended to be the solution. But instead of just private corporations vested by the state with such special privileges as limited liability, these overweening monopoly powers are now also vested in agencies of the government itself. When tax burdens and other problems mount, residents of various cities, states, and countries tend to ‘vote with their feet’ and take their time, talents, and treasure elsewhere. As a result, many countries, states, and communities must contend with a shrinking tax base.<sup>81</sup>

The late Roman Empire faced a similar problem and ‘solved’ it by making office-holding hereditary and continued service in office mandatory. Still, this did not stop a great many Roman families from exiting the empire before it crumbled. To rephrase an old line: A lot of good people came from Rome, and the better they were, the faster they came. The question we face today is: How can we keep our own entrepreneurs down home when we have made emigration such an

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<sup>81</sup> For several years Walter Russell Mead has written numerous articles on what he calls ‘the Blue Social Model’ derived from the earlier New Deal. See Walter Russell Mead, ‘American Challenges: The Blue Model Breaks Down’ (2010) *The American Interest* <<http://www.the-american-interest.com/wrm/2010/01/28/american-challenges-the-blue-model-breaks-down/>>. Another side of the same coin is the excessive level of indebtedness that results from the lack of political will to live within a budget. Niall Ferguson’s *The Great Degeneration* shows where this has led.

attractive option? How do we get our economy and our political priorities back into fighting trim?

Resistance may take many forms and those forms are most effective that can convey their lessons with a smile. An entertaining piece that supports this concluding section is a rap video entitled ‘Keynes vs. Hayek, the Second Round.’ Along with its predecessor, which may also be found on the web, it should remind us of something else the Apostle wrote: ‘For we wrestle not against flesh and blood, but against principalities, against powers, against the rulers of the darkness of this world, against spiritual wickedness in high places’ (Eph. 6:12). Lord Keynes was correct in discerning some of the economic consequences of the Peace of Versailles and, later, some of the problems with unemployment during the Great Depression. But the video should remind us that the acclaim that the Keyneses of their day show how difficult it is to defend against what Erik von Kuehnelt-Leddihn called ‘clear but false ideas.’ We need to keep our eye on the ball at all times and learn not to be distracted by the crowd.

Perhaps there are a few things the frenzies of academic scribblers can teach us. Let us now end where we should wish to have started and then work our way toward a conclusion. The Keynes vs Hayek rap video linked in the footnote has some great lines and even some wisdom to impart for those who are prepared probe more deeply. Western civilization has been deeply cleft by the old dilemma of the One and the Many, the age-old battle of the universals. Consider these lines about the economy the video assigns to Keynes:

It’s just like an engine that’s stalled and gone dark. To bring it to life we need a quick spark. Spending’s the life blood that gets the flow going. Where it goes doesn’t matter. Just Get Spending Flowing.

The positivists and other reductionists who steer the ship of state say we human beings are nothing but sophisticated machines. Jeremy Bentham could scarcely have made the point plainer. But Hayek's reply cuts to the heart of the matter:

The economy's not a car. There's no engine to stall. No expert can fix it. There's no 'it' at all. The economy is us. We don't need a mechanic. Put away the wrenches. The economy is organic.<sup>82</sup>

Meeting the challenges of the day requires cultivation of clear-sighted public philosophy. Adam Smith's invisible hand, Bastiat's 'unseen,' Michael Polanyi's tacit dimension, Hayek's spontaneous order, the doctrines of subsidiarity and sphere sovereignty—these are ideas that we ignore at our peril. Indeed, 'ideas have consequences,' as Richard Weaver put it in the title of an American classic. We may not understand how these notions work, but, as Shakespeare put it in another context in *Hamlet*: 'There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy.' By the way, Shakespeare's valedictory meditation on his career and the arc of his life in *The Tempest* repays an occasional rereading for those who wish to better understand the trajectory of their own lives.

In diversity there is strength where trust and community prevail, where we are open to a free exchange of ideas and where we commit ourselves to a constitutionally limited government. Using the state to impose a 'one-size-fits-all' solution to every problem is a breach of trust and a recipe for strife. Legal plunder has a chilling effect by making us

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<sup>82</sup> Keynes vs Hayek, the Second Round may be found at various sites, including <<http://hayekcenter.org/?p=4804>> and <<http://www.forbes.com/sites/erikkain/2011/04/29/keynes-vs-hayek/>>. Michael Munger, who is cited in the last section, played the role of security guard in the rap video.

complicit in pulling the rug from under other people's feet and violating our own consciences. Americans still have a First Amendment that is not yet encased in glass – to be broken only in an emergency. To be a citizen means being a sentinel against all that threatens our lives, liberties, and property. The founders never intended that 'We the People' be replaced by a more compliant army of invertebrates.

So let us conclude our examination of the political economy of law, property, and regulation by returning to Kenneth Minogue's *Politics: A Very Short Introduction*, which is a meditation on the tension within the state between politics, the art of persuasion, and despotism, the technology of coercion. Despotism takes many forms and often comes presented in the tempting coloration of a counterculture. In our times it comes in the guise of what Minogue calls political moralism, which may begin as false philanthropy but, once it rules, tends to exhibit some degree of what Polanyi calls moral inversion and Roger Scruton calls the culture of repudiation.

Reaching back analytically to the period following the French Revolution, Minogue observes:

In the course of the nineteenth century ... as the suffrage broadened, welfare came to be as interesting to rulers as war had always been. Foreign enemies, on the one hand, and the poor on the other, were interesting politically because they constituted a reason for exercising dazzling powers of government and administration. The poor became so interesting, in fact, that they could not be allowed to fade away, and whole new definitions of poverty, as relative to rising levels of average income, were constructed in order not only to keep the poor in being but actually to increase their numbers. Simultaneously, new classes of supposedly oppressed members of

contemporary society began to use poverty leverage to extract benefits in redistributive states.

This is how the state in the twentieth century discovered dependence, which had previously occupied no more than a small patch in the sphere of morality. One moral virtue, charity, in a politicized form, expanded to take over politics.<sup>83</sup>

This is the power of legal plunder. It converts a sweet land of liberty into a perpetual squabble between tax drudges and free riders who are so blended together that it is difficult to tell the difference.

Yes, some kind of tutelary power has its place in the larger scheme of things but as the Apostle Paul also put it: ‘Now I say that the heir, as long as he is a child, does not differ at all from a slave, though he is master of all, but is under guardians and stewards until the time appointed by the father’ (Gal. 4:1-2). We are all always under authority but, politically, we are not made for a state of perpetual dependency. In fact, a ‘politics’ of dependency is a contradiction in terms. Once you leave the political realm of independence you enter that of despotism and submission.

As the Apostle indicates, there is a time appointed ‘by the Father’ to take our place at the table. Let us choose to be self-governing, to be politically mature, to freely and conscientiously take our stand. Indeed, we have nothing to lose but our chains. We may choose, as Jesus depicted in a parable, to become fellow-laborers in the vineyard of the Lord (Matt. 20:1-16).

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<sup>83</sup> Kenneth Minogue, *Politics: A Very Short Introduction* (Oxford University Press, 2000) 108.

The concluding paragraph to Kenneth Minogue's little book on politics is a fitting way to wrap up this meditation on the political economy of regulation:

This introduction ends, then, with an example of political theory, an argument likely to provoke disagreement, perhaps even a bit of outrage. And if it does do that, it will have succeeded in illustrating one more aspect of the many-sided thing we have been studying. Farewell.<sup>84</sup>

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<sup>84</sup> Ibid 111.





# CONSTITUTING A 'CHRISTIAN COMMONWEALTH': CHRISTIAN FOUNDATIONS OF AUSTRALIA'S CONSTITUTIONALISM

AUGUSTO ZIMMERMANN\*

*'The Commonwealth of Australia will be, from its first stage, a Christian Commonwealth.'*

– Sir John Downer.<sup>1</sup>

## ABSTRACT

*The purpose of this article is to trace and evaluate the Christian influences upon the Australian legal system. This is contrary to the growing trend of suppressing and denying the Christian heritage of law in Australia. There is however strong evidence of this religious influence in the interpretation of the Australian constitutional history, even though the inclusion of freedom of religion clause in the Commonwealth Constitution may be mistakenly argued as indicative of constitutional secularism. As this article intends to demonstrate, nothing could be further from the truth.*

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<sup>1</sup> Col Stringer, *Discovering Australia's Christian Heritage* (Col Stringer Ministries, 2000) 103.

## I INTRODUCTION

While the Australian legal tradition cannot lay claim to the historical depth of America and England, it too was built on solid foundations derived from the Christian worldview. These foundations were largely inherited through Australia's reception of the English common law, as well as in addition to the adoption of the American system of federalism. As with the American and English examples, Christianity was embedded in Australian society during its major movement of legal reform – namely, Federation – and Christian ideology penetrates both the legal and governmental customs that were developed. As this article also indicates, many of these Christian legal traditions have endured till the present day.

## II AUSTRALIA'S COLONISATION

Australia has had Christian influences since its early colonization—starting with the first English fleet departing for Australia in 1787, when Captain Arthur Phillip was instructed to take such steps as were necessary for the celebration of public worship.<sup>2</sup> More substantively, Australia's governor from 1809 to 1821, Lachlan Macquarie, encouraged Christianity in a number of significant ways. Macquarie believed that New South Wales should be a land of redemption where “convicts would be transformed into citizens”.<sup>3</sup> He is said to have begun the nation's transformation from a ‘dumping ground for convicts into a model British colony’.<sup>4</sup> Because of his honest and efficient government, the objective

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<sup>2</sup> Charles Francis, ‘Why Australia's Christian Heritage Matters’, *News Weekly*, March 1 2008 <<http://www.newsweekly.com.au/articles/2008mar01a.html>>.

<sup>3</sup> Niall Ferguson, *Empire: How Britain Made the Modern World* (Penguin, 2003) 105.

<sup>4</sup> Macquarie's mausoleum in Mull, Scotland, describes him without exaggeration as ‘the Father of Australia’.

was considerably achieved and, late in life, Macquarie could accurately claim: 'I found New South Wales a gaol and left it a colony.'<sup>5</sup>

Under Governor Macquarie's benign rule the Christian religion made considerable progress in Australia. In 1815, he personally appointed clergymen to every district of the new colony, ordering that all convicts attend Sunday church services.<sup>6</sup> On the first Sunday of compulsory church service, Macquarie himself made sure he was in attendance.<sup>7</sup> As Manning Clark<sup>8</sup> noted, he believed that Christian principles could render the next generation 'dutiful and obedient to their parents and superiors, honest, faithful and useful members of society'.<sup>9</sup> Further, Macquarie attempted to educate children in these principles through the schools he established.<sup>10</sup> He considered these principles 'indispensable both for liberty and for a high material civilisation',<sup>11</sup> and 'hoped to give satisfaction to all classes, and see them reconciled.'<sup>12</sup>

Christian traditions also came to this nation through the English legal system. At the time of English settlement in Australia, Christianity formed an integral part of the theory of English law and civil

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<sup>5</sup> Ferguson, above n 3, 105, 107.

<sup>6</sup> See Elizabeth Rogers Kotlowski, *Stories of Australia's Christian Heritage* (Strand Publishing, 2006) 42; Francis Nigel Lee, *The Christian Foundations of Australia* (August 2000) <<http://www.dr-fnlee.org/docs6/cfa/cfa.html>>.

<sup>7</sup> Lee, above n 6, 10.

<sup>8</sup> Manning Clark (1915-1991) was the author of *A History of Australia*, a six-volume work on the general history of Australia published between 1962 and 1987. Opinionated and prolific, Clark is broadly recognised as 'Australia's most famous historian.' See Graeme Davidson et al, *Oxford Companion to Australian History* (Oxford University Press, 1998) 128.

<sup>9</sup> Manning Clarke, *A History of Australia* (Melbourne University Press, 1997) 280-1.

<sup>10</sup> Ibid. See also Kotlowski, above n 6, 42.

<sup>11</sup> Ibid 16.

<sup>12</sup> Lee, above n 6, 10.

government.<sup>13</sup> Published between 1903 and 1966 and eventually comprising 17 volumes, in his seminal ‘A History of English Law’ Sir William Holdsworth expressed the traditional view of the close relationship between Christianity and English law:

Christianity is part and parcel of the common law of England, and therefore is to be protected by it; now whatever strikes at the very root of Christianity tends manifestly to dissolution of civil government.<sup>14</sup>

Holdsworth did not make his terminology up out of thin air. In a 1649 case, an English court declared that ‘the law of England is the law of God’ and ‘the law of God is the law of England.’<sup>15</sup> In a 1676 case, Chief Justice Lord Hale stated: ‘Christianity is parcel of the laws of England, therefore to reproach the Christian religion is to speak in subversion of the law.’<sup>16</sup> Lord Hale’s statement achieved an almost axiomatic status, and retained this status throughout the nineteenth century, so that Holdsworth contended that the ‘maxim would, from the earliest times, have been accepted as almost self-evident by English lawyers.’<sup>17</sup> Chief Justice Raymond, for instance, paraphrased Hale by arguing that ‘Christianity in general is parcel of the common law of England.’<sup>18</sup> And

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<sup>13</sup> David Mitchell, ‘Religious Tolerance Laws Are Not Only a Challenge to our Freedom of Speech but Also to the Under-Girding of our Historic Legal System’ (Paper presented at Religious Tolerance Laws: A Challenge to Our Freedom of Speech? Christian Legal Society of Victoria, Melbourne, June 2 2005).

<sup>14</sup> William Holdsworth, *History of English Law* (Methuen, 3<sup>rd</sup> ed, 1932) 410-6.

<sup>15</sup> John Lilburne’s treason trial [1649] Quoted in Stuart Banner, ‘When Christianity was Part of the Common Law’ (1998) 16 *Law and History Review* 27, 29.

<sup>16</sup> *Rex v. Taylor*. Vent 293. 3 Keb. 607 (K.B. 1676); Ibid; see also Steven B Epstein, ‘Rethinking the Constitutionality of Ceremonial Deism’ (1996) 96 *Columbia Law Review* 2083, 2102–3.

<sup>17</sup> Quoted in Banner, *supra* note 14, at 29–30.

<sup>18</sup> *Rex v. Woolston*, 64, 94 Eng. Rep. 655 (K.B. 1729), cited in Banner, above n 15, 29.

Sir William Blackstone matter-of-factly remarked that ‘the Christian religion ... is a part of the law of the land.’<sup>19</sup>

### III THE INHERITANCE OF ENGLISH LAW IN AUSTRALIA’S COLONIAL HISTORY

When the penal colony of New South Wales was established in 1788, the laws of England were transplanted into Australia in accordance with the doctrine of reception. The reception of English law into Australia was statutorily recognised by the *Australian Courts Act 1828* (Imp.). Section 24 of this Act stated that, upon enactment, all laws and statutes in force in England at that date were to be applied in the courts of New South Wales and Van Diemen’s Land, so far as they were applicable.<sup>20</sup> The supreme courts of the colonies were empowered to decide what English laws were applicable to the Australian situation, and to also develop the law thereafter.<sup>21</sup> This doctrine was authoritatively explained by Blackstone in his famous *Commentaries*:

...if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonies carry with them only so much of the English law, as is applicable to their own situation and the conditions of an infant colony...<sup>22</sup>

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<sup>19</sup> William Blackstone, *Commentaries on the Laws of England* (1765-1769), Ch

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<sup>20</sup> Patrick Parkinson, *Tradition and Change in Australian Law* (Thomson Reuters, 2<sup>nd</sup> ed, 2001) 119; Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2005) 29.

<sup>21</sup> Cook, above n 20, 29.

<sup>22</sup> Blackstone, above n 19, 106-8.

As a result, the legal socio-political institutions of Australia found their primary roots in the legal and socio-political traditions of England. Indeed, the reception of English law into Australia was explicitly re-affirmed by the Privy Council in the case of *Cooper v Stuart* (1889),<sup>23</sup> where Lord Watson stated:

The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a very great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract or territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class... In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail...<sup>24</sup>

When English law was transplanted to Australia according to the doctrine of reception,<sup>25</sup> the supreme courts of the colonies were empowered to decide which English laws were applicable to the Australian situation.<sup>26</sup> Christianity was included in the law of the land applicable to the situation of the colonists. This being so, the early disregard of Aboriginal customary law was based on a combination of established common-law principles and a traditional interpretation of the 'Divine Law'. This is evident in the Supreme Court of New South Wales decision of *R v Jack Congo Murrell* (1836), where Justice Burton expressed his view that Aborigines 'had no law but only lewd practices and irrational

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<sup>23</sup> (1889) 14 App Cas 286.

<sup>24</sup> *Cooper v Stuart* (1889) 14 App Cas 286, 291.

<sup>25</sup> See Blackstone, above n 19. The reception of English law into Australia was statutorily recognised by the Australian Courts Act of 1828: see Parkinson, above n 20, 119.

<sup>26</sup> Cook, above n 20, 29.

superstitions contrary to Divine Law and consistent only with the grossest darkness.’<sup>27</sup> This reception of Christian legal principles was perhaps best encapsulated in Justice Hargraves’s famous comment for the Supreme Court of New South Wales in *Ex Parte Thackeray* (1874):<sup>28</sup>

We, the colonists of New South Wales, “bring out with us” . . . this first great common law maxim distinctly handed down by Coke and Blackstone and every other English Judge long before any of our colonies were in existence or even thought of, that ‘Christianity is part and parcel of our general laws’; and that all the revealed or divine law, so far as enacted by the Holy Scripture to be of universal obligation, is part of our colonial law....<sup>29</sup>

As can be seen, Christianity’s embedment in the common law was not only acknowledged, but unconditionally adopted by the court in *Thackeray*. The pronouncement exemplifies the judicial recognition of the Christian heritage of the common law. The court took the major step of declaring the supremacy of Christian legal principles—namely, that the divine or revealed law is applicable, and superior, to colonial laws – and that ‘all the revealed or divine law, so far as enacted by the Holy Scripture to be of universal obligation’, are applicable, and superior, to colonial laws. Further, Justice Burton’s characterisation of Aboriginal laws as ‘irrational superstitions’ by virtue of their contradiction of ‘Divine Law’ constitutes a direct recognition of Christian legal doctrine as extending to Australian law. The colonial courts thus overtly recognised the Christian foundations of legal principles that were founded in the common-law system.

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<sup>27</sup> (1836) Legge 72; see also Parkinson, above n 20, 107.

<sup>28</sup> *Ex parte Thackeray* (1874) 13 SCR 1.

<sup>29</sup> Ibid.

#### IV CONSTITUTING A CHRISTIAN COMMONWEALTH

The Constitution of Australia Bill was passed by the Imperial (British) Parliament on 5 July 1900. Queen Victoria assented four days later, and in September proclaimed that the Commonwealth of Australia would come into existence on the first day of the twentieth century (1 January 1901). On the occasion, one of the Constitution's most distinguished co-authors, Sir John Downer, declared: 'The Commonwealth of Australia will be, from its first stage, a Christian Commonwealth'.<sup>30</sup>

Like Downer, many other leading writers of the Constitution had strong views on the importance of Christianity to the Australian Commonwealth. For instance, Sir Henry Parkes, known as 'the Father of Australia's Federation', believed that Christianity comprised an 'essential part' of Australia's common law.<sup>31</sup> In a column published in the *Sydney Morning Herald* (26 August 1885), Sir Henry stated: 'We are pre-eminently a Christian people—as our laws, our whole system of jurisprudence, our Constitution... are based upon and interwoven with our Christian belief.'<sup>32</sup>

Similar views were found among the drafters of the Constitution Bill in 1897. Among these were Edmund Barton, who entered politics under the influence of his Presbyterian Minister, as well as the leading federalist and statesman Alfred Deakin.<sup>33</sup> On the day following the referendum concerning the draft of the Constitution, which was held in New South Wales, Victoria and Tasmania on 3 June 1898, Deakin humbly offered a prayer of thanksgiving for all the progress that had been made, asking for

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<sup>30</sup> Stringer, above n 1, 103

<sup>31</sup> Lee, above n 6, 17.

<sup>32</sup> Ibid.

<sup>33</sup> Kotlowski, above n 6, 152.



Christ's blessing on the endeavour: 'Thy blessing has rested upon us here yesterday and we pray that it may be the means of creating and fostering throughout all Australia a Christlike citizenship.'<sup>34</sup>

All of these statements are far more than just rhetoric. Indeed, the Christian belief of the Australian Framers made its way directly into the preamble of the Commonwealth Constitution: 'Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, *humbly relying on the blessing of Almighty God*, have agreed to unite in one indissoluble Federal Commonwealth ...'<sup>35</sup> As Helen Irving points out, the preamble is that part of the constitution laying out 'the hopes and aspirations of the parties involved,'<sup>36</sup> and, indeed, the reference to God received the strongest popular support of *any* part of the Constitution. According to Professor Irving:

During the 1897 Convention delegates have been inundated with petitions . . . in which the recognition of God in the Constitution was demanded. The petitions, organized nationally . . . asked for the recognition of God as the 'supreme ruler of the universe'; for the declaration of national prayers and national days of thanksgiving and 'humiliation'. But, the essence of their petition was that the Constitution should include a statement of spiritual—specifically Christian—identity for the new nation.<sup>37</sup>

The insertion of an acknowledgment of God into the Preamble of the Australian Constitution occurred in response to overwhelming public support, which came, among other things, from countless petitions

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<sup>34</sup> Deakin's Prayer 223, 4 June 1898, quoted in Stringer, above n 1, 104.

<sup>35</sup> *Constitution of the Commonwealth of Australia 1900* (Cth) Preamble (emphasis added).

<sup>36</sup> Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) 196.

<sup>37</sup> Ibid 166.

received from the citizens of every single colony in Australia. Overall, these petitions reflected the general sentiments of the people for ‘some outward recognition’ of the Divine Providence, so that the work of the Australian Framers should ‘fix in our Constitution the elements of reverence and strength, by expressing our share of the universal sense that a Divine idea animates all our higher objects, and that the guiding hand of Providence leads our wanderings towards the dawn.’<sup>38</sup>

In the same way, the Parliaments of Australia also demanded the inclusion of this acknowledgement of God into the Preamble. In the process of popular consultation, which took place during the constitutional drafting, the legislative assemblies of Western Australia, Tasmania, New South Wales, and South Australia, all submitted proposed wordings for the preamble acknowledging God.<sup>39</sup>

In this sense, the Legislative Assembly of Western Australia proposed that the preamble should declare that the Australians are ‘grateful to Almighty God for their freedom, and in order to secure and perpetuate its blessings.’<sup>40</sup> Similarly, the Legislative Assembly of Tasmania suggested that the constitution’s preamble should ‘duly acknowledge Almighty God as the Supreme Ruler of the Universe and the source of all true Government’.<sup>41</sup> Likewise, both the legislative assemblies of New South Wales and South Australia, as well as the Legislative Council of Western Australia, proposed a preamble ‘acknowledging Almighty God as the Supreme Ruler of the Universe’.<sup>42</sup> As such, John Quick (one of the drafters of the Constitution) and Robert Garran (who played a significant

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<sup>38</sup> Ibid.

<sup>39</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 283-4.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

role in the Australian Federation movement) wrote in their standard commentary on the Australian Constitution:

This appeal to the Deity was inserted in the Constitution at the suggestion of most of the Colonial Legislative Chambers, and in response to numerous and largely signed petitions received from the people of every colony represented in the Federal Convention.... In justification of the insertion of the words stress was laid on the great demonstration of public opinion in their favour, as expressed in the recommendations of the Legislative bodies and in the petitions presented.<sup>43</sup>

It may well be argued that the overwhelming public support for a reference to God in the Commonwealth Constitution reflected the view that the validity and success of an Australian Federation was dependent on the providence of God. Speaking at the constitutional convention, Patrick Glynn of South Australia explained this precisely to be so and that it was to Australia's credit that the new nation would have '[t]he stamp of religion ... fixed upon the front of our institutions.'<sup>44</sup>

## V SYMBOLIC ACKNOWLEDGEMENTS OF THE CHRISTIAN FAITH

Christian practices deeply permeate Australia's legal traditions. Religion is still taught in Australia's public schools, and the Bible is still present in every court of the land. Furthermore, prayers are conducted prior to opening proceedings at both state and federal Parliaments. Standing Orders for the House and Senate determine that the Speaker must read a

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<sup>43</sup> Ibid 287.

<sup>44</sup> 5 *Official Record of the Debates of the Australasian Federal Convention* 1733 (1898) (proceedings of March 2, 1898).

prayer for Parliament,<sup>45</sup> which is followed by the Lord's Prayer before calling for the first item of business.<sup>46</sup> With all Parliamentary members remaining standing, the Speaker concludes the opening proceedings with this prayer:

Almighty God, we humbly beseech Thee to vouchsafe Thy blessing upon this Parliament. Direct and prosper our deliberations to the advancement of Thy glory, and the true welfare of the people of Australia.

The relevance of Christianity is likewise observed in the current legal system by reference to the powers of the Governor-General.<sup>47</sup> The Governor-General,<sup>48</sup> who is authorised to exercise the executive power given by the Australian Constitution as the Queen's representative,<sup>49</sup> swears allegiance to the Queen under section 42 of the Constitution, binding himself to the principles expressed in the Queen's oaths of office.<sup>50</sup> These oaths include significant Christian undertakings. The strong religious connotation of the coronation ceremony is explained by British historian Nick Spencer:

The coronation has its origins in a service first used in 973. Although modified greatly since then, it retains the same basic structure, being located in a Christian church, presided by a Christian minister and based on the service of the Eucharist.<sup>51</sup> According to the most recent precedent ... the service, which is held

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<sup>45</sup> 'Almighty God, we humbly beseech Thee to vouchsafe Thy blessing upon this Parliament. Direct and prosper our deliberations to the advancement of Thy glory, and the true welfare of the people of Australia.'

<sup>46</sup> Senate Standing Order 50, House Standing Order 38.

<sup>47</sup> Mitchell, above n 13.

<sup>48</sup> Ibid.

<sup>49</sup> Section 61 of the Australian Constitution gives the Queen executive power over Australia.

<sup>50</sup> Ibid.

<sup>51</sup> Nick Spencer, *Freedom & Order: History, Politics & the English Bible* (Hodder & Stoughton, 2011) 2.

in Westminster Abbey, begins with the choir singing an anthem based on Psalm 122. Once seated, the monarch promises, among other things, to 'maintain the Laws of God and the true profession of the Gospel' and to uphold the cause of law, justice and mercy. She is presented with a copy of the Bible ('the most valuable thing that this world affords') by the Moderator of the Church of Scotland, who says to her, 'Here is Wisdom; this is Royal Law; these are the lively Oracles of God.'

The Communion Service then begins with the words of Psalm 84. It proceeds along familiar lines (prayer, readings, creed) but is interrupted by the anointing, at which the hymn 'Veni, Creator Spiritus' is sung. The queen is anointed with oil just as 'Zadok the Priest, and Nathan the Prophet anointed Salomon the King', in the words of Handel's anthem 'Zadok the Priest', which has been sung at every coronation since 1727. She is presented with the orb, with the words, 'Remember that the whole world is subject to the Power and Empire of Christ our Redeemer.' She is invested with the coronation ring, with the words, 'receive the ring of kingly dignity, and the seal of Catholic Faith ... may you continue steadfastly as the Defender of Christ's Religion'. She receives the sceptre with the cross, the ensign of kingly power and justice'. And she is given the rod of 'equity and mercy', marked by the dove, the symbol of the Holy Spirit.

At the coronation itself the Archbishop of Canterbury says, 'God crown you with a crown of glory and righteousness, that having a right faith and manifold fruit of good works, you may obtain the crown of an everlasting kingdom by the gift of him whose kingdom endureth forever'. Following this, there is the Benediction, Enthroning and Homage, after which the ceremony returns to the Communion Service, with the queen receiving the bread and wine,

the archbishop pronouncing a blessing and the choir singing ‘Gloria in Excelsis’ and finally, *Te Deum*.<sup>52</sup>

As can be seen, at her enthronement Queen Elizabeth II solemnly promised to ‘maintain the Laws of God and the true profession of the Gospel’ and to ‘continue steadfastly as the Defender of Christ’s religion’.<sup>53</sup> The monarch also committed herself ‘to the utmost of [her] power maintain the Laws of God and the true profession of the Gospel.’<sup>54</sup>

Whatever one might think of all this, it is simply not possible to understand it without reference to Christianity. As the Governor-General is bound by the Queen’s oaths to ‘maintain biblical principles and Christianity as the law of Australia’,<sup>55</sup> it is, therefore, evident that Christianity continues to play a symbolic role in contemporary Australian law. Of course, this also demonstrates that, at least on a symbolic level, Australian law is still governed with regard to the advancement of the Christian religion.

## VI HISTORICAL BACKGROUND OF AUSTRALIA’S CONSTITUTIONALISM

Historians have highlighted the fact that the Australian Constitution originated at the Constitutional Conventions in the 1890s, which featured strong competition between different interests, including clashes ‘between free-traders and protectionists, nationalists and imperialists, and big and small colonies.’<sup>56</sup> These differences of perspective on nation-

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<sup>52</sup> Ibid 2-3.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Mitchell, above n 13.

<sup>56</sup> John McMillan, Gareth Evans and Haddon Story, *Australia’s Constitution: Time for Change?* (George Allan & Unwin, 1983) 40.

building issues such as roads, rivers, railways, and revenue distribution fostered sharp disputes during the proceedings.

An overriding concern among the Australian framers was the implementation of a system that prevented monopolization of economic life by the new Commonwealth government.<sup>57</sup> Consequently, within the Constitution the principle that ‘government, and particularly the national government, should be modest and unobtrusive was clearly evident. The prevailing view of delegates to the 1890s Conventions . . . was that governments existed essentially to hold the ring for a laissez-faire economy: their job was to provide a stable and peaceful environment for the operation of free market forces.’<sup>58</sup>

This anti-monopolistic attitude also guided the founding fathers as they drafted section 116, the part of the Constitution that deals with Australian religious life. The Australian Constitution originated in a socio-political environment in which different branches of the Christian church competed strongly for cultural influence within the new nation. It is likely that a majority of the framers maintained at least a formal affiliation with major Protestant groups, although the views of Catholics and Jews were also included.<sup>59</sup> It is against this historical background that section 116 must be interpreted. This section, obviously inspired by the American First Amendment, states:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be

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<sup>57</sup> Ibid 47.

<sup>58</sup> Ibid 47.

<sup>59</sup> See Geoffrey Blainey, *A Shorter History of Australia* (Random House, 1994) Ch 11.

required as qualification for any office or public trust under the Commonwealth.<sup>60</sup>

This section has several elements. It prohibits: the establishment of any religion (in other words, the creation of an official religion); the imposition of any requirement to engage in religious observance; any law prohibiting the free exercise of religion; and the imposition of religious qualifications for public office.

While section 116 restricts only the federal Parliament with respect to religion, the areas of federal legislative power are listed in sections 51 and 52 of the Constitution. They grant legislative power over 39 specific areas ranging from areas such as marriage to quarantine to defence, but not over religion. So far as the application of the guarantee is concerned, section 116 binds *only* federal legislation which is enacted by the Commonwealth Parliament under sections 51 and 52.

In contrast to the American legal doctrine of incorporation, section 116 does not apply to the Australian states.<sup>61</sup> However, the High Court held in *Kruger v Commonwealth*<sup>62</sup> that section 116 applies to the territories when the Commonwealth exercises its section 122 ‘territories power’.<sup>63</sup> A bid

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<sup>60</sup> *Constitution of the Commonwealth of Australia 1900* (Cth) s 116.

<sup>61</sup> Gabriël A Moens, ‘Church and State Relations in Australia and the United States: The Purpose and Effect Approaches and the Neutrality Principle’ (1996) 4 *Brigham Young University Law Review* 787, 788.

<sup>62</sup> (1997) 190 CLR 1.

<sup>63</sup> *Australian Constitution* s 122: ‘The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.’



to make section 116 applicable to the States was attempted (as one of the four questions presented) in the 1988 referendum, however this failed.<sup>64</sup>

The Australian Framers never intended to achieve a ‘true separation’ between religion and state at all levels of government. Instead, their intention was to reserve the power to make laws with respect to religion to the Australian states.<sup>65</sup> As evidence of this, during the 1898 convention debates, draft clause 109, which later became Section 116, provided: ‘A State shall not make any law prohibiting the free exercise of any religion’.<sup>66</sup> The draft provision came up for debate on 7 February 1898, when delegate Higgins who had drafted the clause proposed that the constitution should not interfere with the right of the states to do whatever wanted in regard to the matter.<sup>67</sup> He argued that it should be the Commonwealth, not the States, the specific tier of government to be prevented from enacting any laws to prohibit the free exercise of religion, or to establish religion, or to impose any religious observance. It is a point which Higgins made at several times during the convention debates. All he wanted therefore was a clause to prevent the Commonwealth from imposing religious laws and observations. Higgins explained:

The point is that we are not going to make the Commonwealth a kind of social and religious power over us. We are going into Federation for certain specific subjects. Each state at present has the power to impose religious laws. I want to leave that power with the state; I will not disturb that power. But I object to giving to the

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<sup>64</sup> Reid Mortensen, ‘The Unfinished Experiment: A Report on Religious Freedom in Australia’ (2007) 21 *Emory International Law Review* 167, 177.

<sup>65</sup> Jared Clements, ‘Section 116 of the Constitution and the jurisprudential pillars of neutrality and action-belief dichotomy’ (2008) 11 *International Trade and Business Law Review* 236, 239.

<sup>66</sup> Quoted in Quick and Garran, above n 39, 951.

<sup>67</sup> Richard George Ely, *Unto Caesar: Religious Issues in the Emerging Commonwealth, 1891-1906* (Melbourne University Press, 1976) 60.

Federation of Australia a tyrannous and overriding power over the whole of the people of Australia as to what day they shall observe for religious reasons and what day they shall not observe for that purpose.<sup>68</sup>

In this sense, the establishment clause in Section 116 does not apply to the six State-members of the Australian Federation. Indeed, the provision does not prohibit State governments from enacting laws either restricting or establishing a religion. Since section 116 operates only as a fetter upon the exercise of federal legislative power, this raises the question whether section 116 applies to executive and administrative acts of the federal government.<sup>69</sup> Commenting on the establishment clause, the then Chief Justice Garfield Barwick argued that although section 116 is directed only at the legislative power of the Commonwealth, if a federal executive act comes ‘within the ambit of the authority conferred by the statute, and does amount to the establishment of religion, the statute which supports it will most probably be a statute for establishing a religion and therefore void as offending s 116’.<sup>70</sup>

## VII ESTABLISHMENT CLAUSE IN AUSTRALIA

Section 116 of the Australian Constitution precludes federal Parliament from making laws for establishing any religion, imposing any religious observance, or prohibiting the free exercise of any religion. Section 116 also provides that no religious test shall be required as a qualification for any office or public trust under the Commonwealth. In their authoritative

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<sup>68</sup> Official Record of the Debates of the Australasian Federal Convention, vol 5 (March 2, 1898) 1736: quoted in Clements, above n 65, 239.

<sup>69</sup> Moens, above n 61, 788.

<sup>70</sup> *Attorney-General of Victoria ex rel. Black v Commonwealth* (1981) 146 CLR 559, 551 (‘*DOGS Case*’). Although this statement has been made in the context of the establishment clause, ‘there appears no reason why his observation should not equally apply to the free exercise guarantee of s 116’: Moens, above n 61, 788.

commentary on the Australian Constitution, Quick and Garran elucidated the purpose and effect of the nation's establishment clause:

By the establishment of religion is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others. It is not intended to prohibit the Federal Government from recognizing religion or religious worship.<sup>71</sup>

The statement entirely dispels any possible claims that the Australian Constitution established secularism by virtue of section 116. Rather, Quick and Garran further elaborated upon the implications of section 116 to Christianity:

The Christian religion is ... recognised as a part of the common law. There is abundant authority for saying that Christianity is part and parcel of the law of the land... Consequently the fundamental principles of the Christian religion will continue to be respected, although not enforced by Federal legislation. For example, the Federal Parliament will have to provide for the administration of oaths in legal proceedings, and there is nothing to prevent it from enabling an oath to be taken, as at common law, on the sanctity of the Holy Gospel.<sup>72</sup>

Section 116 was drafted with careful consideration of the American example. During the Australian constitutional conventions, it was noted that in America, Christianity continued to be a major influence in federal legislation regardless of the First Amendment. The example was given that federal legislation relating to Sunday observance had been enacted in

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<sup>71</sup> Quick and Garran, above n 39, 952.

<sup>72</sup> Ibid.

America simply on the basis that America was a Christian nation.<sup>73</sup> This enactment was in spite of the fact that there was no constitutional recognition of America as a Christian nation, with no mention of God, let alone Christianity, in the U.S. Constitution. The Australian framers feared that if ‘such Federal legislation could be founded on a Constitution which contained no reference whatever to the Almighty ... [it would be very likely] that the federal Parliament might, owing to the recital in the preamble, be held to possess power with respect to religion’<sup>74</sup> in the absence of a provision to the contrary.

Recognising the potential for exploitation of the new federal system by individual religious bodies, section 116 guards against a situation in which members of one denomination might dominate federal Parliament, thus introducing legislation to establish their own body as the National Church, or introducing religious tests to favour admission of individuals from their own body to the Commonwealth bureaucracy, etc. And yet, this does not amount to a complete rejection of the people’s religious sentiments, because the Australian Constitution itself expressly recognises the legitimacy of religion in the public square when, in its Preamble, it declares that the Australian people are ‘humbly relying on the blessings of Almighty God.’

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<sup>73</sup> Referring to the preamble of the Commonwealth Constitution, which recites that the people of the colonies who were about to form Federation, were ‘humbly relying on the blessings of Almighty God, have agreed to unite in one indissoluble Commonwealth’, ‘it was stated by Mr Higgins that, although the preamble to the Constitution of the United States contained no such words as these, it had been decided by the court in the year 1892 that the people of the United States were a Christian people; and although the Constitution gave no power to Congress to make laws relating to Sunday observance, that decision was shortly afterwards followed by a Federal enactment declaring that the Chicago Exhibition should be closed on Sundays. This law, he said, was passed simply on the ground that among Christian nations Christian observances should be enforced (Conv Deb, Melb, 1734)’: Quick and Garran, above n 39, 952.

<sup>74</sup> Ibid.

It is therefore erroneous, although increasingly popular, to assert that the establishment clause in the Australian Constitution was aimed at enshrining secularism. Far from seeking to banish religion from Australian government and society, its framers intended a laissez-faire environment that ensured no particular religious body would enjoy unfair advantage on account of federal government endorsement. An accompanying benefit is that section 116 also protects religious bodies in Australia against unwanted intrusions of the federal government. Thus the inclusion of section 116 was aimed at establishing a limitation only on the powers of the federal government to legislate with respect to religion. This was expressed by the High Court in the *Jehovah's Witnesses Case* in 1943, where Chief Justice Latham stated: 'The prohibition in § 116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion. No *federal law* can impose any religious observance.'<sup>75</sup>

The main object of this guarantee is to preserve individual liberties, including religious freedom, from federal encroachment. This is quite different, for example, from expressly prohibiting the promotion of Christian values by the Australian government. Indeed, this section could not be used to prohibit federal laws to assist the practice of religion, or to provide financial support to religious schools. To fall afoul of section 116, the Commonwealth Parliament would have to go so far as to effectively establish an official religious denomination, or to value one denomination over the others. Indeed, what the guarantee really means is that the Commonwealth Parliament is not authorised to set up a state religion on the lines of the Church of England. This is after all an anti-

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<sup>75</sup> *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 123 (emphasis added).

establishment clause. But section 116 clearly does not inhibit the federal government from identifying itself with the religious impulse as such or from authorizing religious practices where all could agree on their desirability.

Unfortunately, the plain meaning of section 116 did not prevent Justice Dunford of the New South Wales Supreme Court to incorrectly argue in *Harkianakis v Skalkos* (1999)<sup>76</sup> that this provision makes religion ‘irrelevant’ to government and politics in Australia.<sup>77</sup> The case involved a defamation case in which defamatory matters had been published ‘pursuant to an implied or express right of freedom of speech concerning religious matters.’<sup>78</sup> Dunford J heard the application and assumed that the defence had ‘no prospect of success, ’because, among other things, section 116 would have ‘nothing to do with the essential nature’ of the system of representative government established by the Australian Constitution. Instead, he asserted that section 116 ‘excludes religion from the system of government’ so that any religious considerations would be irrelevant to our system of representative government, hence adopting the provision ‘a particular perspective about the relationship between religion and politics which would exclude religious speech entirely from political discussion – and in this sense, to privilege secularism over religion.’<sup>79</sup> Of course, such a position is entirely against the original intent or purpose behind the elaboration of the section. Indeed, the argument provided by

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<sup>76</sup> *Harkianakis v Skalkos* (1999) 47 NSWLR 302.

<sup>77</sup> Ibid.

<sup>78</sup> The controversy in *Harkinakis* involved actions for defamation and contempt of court initiated by the Archbishop of the Greek Orthodox Archdiocese of Australia, regarding articles published in two Greek language newspapers that contained imputations concerning the plaintiff’s personal conduct and fitness of ecclesiastical office.

<sup>79</sup> Nicholas Aroney, ‘The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation’ (2006) 34 *Federal Law Review* 287, 302.

Dunford J is unsustainable on both legal and historical grounds. According to Nicholas Aroney, such an understanding has *never* been supported by the High Court and it directly contradicts all decisions provided by this court on the scope of section 116.<sup>80</sup> As a matter of fact, noted Professor Aroney:

[T]he High Court has very explicitly affirmed that the non-establishment clause does not prohibit governmental assistance being given to religious bodies, and it certainly has never held that s 116 somehow prohibits the enactment of federal laws or the execution of government policies that are supported, either in whole or in part, on the basis of religious considerations or reasons... In the United States, the equivalent provision contained in the First Amendment has been interpreted, at times, to prohibit virtually all forms of state assistance; but in Australia, state aid to religious schools has been upheld. To suggest that the non-establishment principle makes religious considerations entirely irrelevant to federal law-making and policy-formation is simply beyond the pale—particularly in Australia, but even in the United States.<sup>81</sup>

## VIII JUDICIAL INTERPRETATION OF THE ESTABLISHMENT CLAUSE

In 1981, the High Court offered its first significant decision construing Australia's establishment clause in the so-called *DOGS* case.<sup>82</sup> The case involved the validity of federal financial support for religious schools by means of a series of grants to the States. Most of the private schools benefiting from this aid were religious schools, and the Australian Council for the Defence of Government Schools (DOGS) challenged the

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<sup>80</sup> Ibid 301-2

<sup>81</sup> Ibid.

<sup>82</sup> *A-G (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559 ('*DOGS Case*').

grants, arguing that government funding of church schools amounted to an “establishment” of religion.

The argument was rejected in a six-to-one decision. First, the majority emphasized the differences between the U.S. and Australian establishment clauses and refused to follow the lead of the U.S. courts. The majority then held that section 116 does not prohibit federal laws to assist the practice of religion, or to provide financial support to religious schools on a non-discriminatory basis. The Court made it clear that the federal government can indirectly give benefits to religion as long as the purpose is not to establish an official state church. To fall afoul of section 116, the Court said, the Commonwealth would have to go so far as to effectively establish an official church or to value one particular Christian denomination over all the others.

In his majority ruling Wilson J contended that a “narrow notion of establishment” is necessary not only to preserve traditional practices and legal provisions, but also to make sense of other legal provisions that are contained in section 116.<sup>83</sup> As he put it, if the establishment clause were to be read so broadly as to require “strict separation” between church and state, then it is hard to see what room would be left for the operation of traditional practices such as the coronation oath and the opening prayers at the several of our nation’s State and Federal Parliaments, not to mention the explicit acknowledgment of “Almighty God” in the Preamble of the Constitution.

Justice Mason took a similar view. He argued that establishment required only ‘the concession to one church of favours, titles and advantages [that] must be of so special a kind that it enables us to say that by virtue of the

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<sup>83</sup>

Ibid 653 (Wilson J).



concession the religion has become established as a national institution, as, for example, by becoming the official religion of the State.’<sup>84</sup> Justice Stephen concurred with him, noticing that the precise language of section 116 precludes a wide interpretation of the word ‘establish.’ Justice Stephen said:

The very form of s 116, consisting of four distinct and express restrictions upon legislative power... cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state... On the contrary by fixing upon four specific restrictions of legislative power, the form of the section gives no encouragement to the undertaking of any such distillation.<sup>85</sup>

Justice Gibbs concurred with the majority and explained that the establishment clause simply requires the Commonwealth to ‘not make any law for conferring on a particular religion or religious body the position of a state (or national) religion or church.’<sup>86</sup> According to Gibbs J, ‘the natural meaning of the phrase *establish any religion* is, as it was in 1900, to constitute a particular religion or religious body as a state religion or state church.’<sup>87</sup> Chief-Justice Barwick agreed that the word *establishment* ‘involves the identification of the religion with the civil authority so as to involve the citizens in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronise, protect, and promote the established religion.’<sup>88</sup> Thus Barwick CJ concluded that

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<sup>84</sup> Ibid 612 (Mason J).

<sup>85</sup> Ibid 609 (Stephen J).

<sup>86</sup> Ibid 604 (Gibbs J).

<sup>87</sup> Ibid 597 (Gibbs J).

<sup>88</sup> Ibid 582 (Barwick CJ).

‘establishing religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth ‘establishment’.<sup>89</sup>

Justice Murphy was the only Justice to disagree in that six-to-one decision. He based his dissent on U.S. Supreme Court decisions which have required a “wall of separation” between church and state. In particular, he explicitly referred to the opinion of Justice Hugo Black in the landmark American Establishment Clause case, *Everson v. Board of Education*.<sup>90</sup> In that decision Black J stated: ‘No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.’<sup>91</sup> Such opinion was premised on Justice Black’s personal view that ‘the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.’<sup>92</sup>

Relying on Justice Black’s opinion in *Everson*, Murphy J argued that section 116 of the Australian Constitution should be interpreted accordingly so as to prohibit any financial assistance by the federal government to religious schools.<sup>93</sup> In contrast, the majority opted for disregarding such American precedent as irrelevant for Australia. Given the differences in wording between the American and Australian constitutional guarantees (“Congress shall make no law respecting an establishment of religion” as against “the Commonwealth shall not make any law for establishing any religion”), the majority held that only a law

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<sup>89</sup> Ibid.

<sup>90</sup> *Everson v. Board of Education*, 330 US 1 (1947).

<sup>91</sup> Ibid 16.

<sup>92</sup> Ibid 18.

<sup>93</sup> *DOGS Case* (1981) 146 CLR 559, 565 (Murphy, J)

for the establishment of religion violates section 116. As Chief Justice Barwick stated:

[B]ecause the whole expression is ‘for establishing any religion’, the law to satisfy the description must have that objective as its express and, as I think, single purpose. Indeed, a law establishing a religion could scarcely do so as an incident of some other and principal objective. In my opinion, a law which establishes a religion will inevitably do so expressly and directly and not, as it were constructively.<sup>94</sup>

The meaning and scope of church-state separation was again addressed by the High Court in a challenge to the constitutional validity of the National Schools Chaplaincy Program (NSCP).<sup>95</sup> The program had been created by the Commonwealth in 2006 as a voluntary program under which schools seek financial support from the Commonwealth to establish or enhance chaplaincy services for school communities.<sup>96</sup> Schools chose the chaplains best meeting their needs, with the position being supported by a funding agreement. In the course of handing over its decision in *Williams v Commonwealth* (2012), the High Court refused to do what the plaintiffs expected: to rely its decision on section 116 and to declare the chaplaincy program a violation of church-state separation. Instead, by a six-to-one majority the Court ruled that the executive power found in section 61 of the Constitution<sup>97</sup> does not authorize federal

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<sup>94</sup> Ibid 559 (Barwick CJ).

<sup>95</sup> See *Williams v Commonwealth* (2012) 288 ALR 410.

<sup>96</sup> Under NSCP, chaplains offered ‘general religious and personal advice to those seeking it;’ and would ‘[work] in a wider spiritual context to support students and staff of all religious affiliations and not [seek] to impose any religious beliefs or persuade an individual toward a particular set of religious beliefs.’: *Williams v Commonwealth (No 1)* (2012) 288 ALR 410, [305] (Heydon J, citing the NSCP guidelines).

<sup>97</sup> Section 61 reads: ‘The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative,

officials to enter into funding agreements, or to authorize payments for it from the Consolidated Revenue Fund.<sup>98</sup> In sum, the Court invalidated any funding for all such programs initiated by the Commonwealth government without explicit statutory authorization, and not because there is a violation of the establishment clause.<sup>99</sup>

As a result of this case, the federal government rushed through new legislation to ensure the program (and more than 400 programs that amount to as much \$37 billion, or up to 10 per cent of all federal expenditure) could continue. Still, the plaintiff in the first case further challenged the government's authority to draw money from consolidated revenue funds in relation to matters that are beyond the powers of the Commonwealth.<sup>100</sup> The matter now is not about church-state separation but a federalism case concerning the ability of the federal government to fund programs where they do not have the legislative power to do so.

As can be seen, the new challenge is not if the chaplaincy program has breached the establishment clause, in particular, section 116. Such argument failed when the chaplaincy scheme was first challenged in the High Court. Rather than dealing with church-state separation, this case is about the power of the federal government to fund programs under particular legislation. More specifically, the case involves the validity of

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and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'.

<sup>98</sup> *Williams v Commonwealth* (2012) 288 ALR 410 ('*Williams*'). See also the case notes: Benjamin B Saunders, 'The Commonwealth and the Chaplains: Executive Power after *Williams v Commonwealth*.' (2012) 23 *Public Law Review* 153; Amanda Sapienza, 'Using Representative Government to Bypass Representative Government' (2012) 23 *Public Law Review* 161.

<sup>99</sup> In response to *Williams*, the Commonwealth enacted emergency legislation in the form of the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), which purports to validate all such expenditures by it and which allows the NSCP to continue.

<sup>100</sup> See *Williams v Commonwealth (No 2)* (2014) 309 ALR 41.

a statutory law that was rushed through both houses of Parliament to give the stamp of approval to funding schemes in one piece of federal legislation.<sup>101</sup> In a unanimous decision, the Court held that certain aspects of the legislation are constitutionally invalid. Rather than striking it down as totally invalid, the Court opted for the invalidity of certain aspects of the funded programs which were not constitutionally attached to a Commonwealth head of power. Accordingly, the federal government can still continue the chaplaincy program by providing grants to the state governments rather than directly to the schools.

## IX CONCLUSION

This article has discussed the Christian roots of Australia's constitutionalism. As mentioned, the inclusion of the words 'humbly relying on the blessing of Almighty God' in the Australian Constitution exemplifies the country's religious, and specifically Christian, heritage. It can, at the very least, be said that Judeo-Christian values were so embedded in Australia so as to necessitate the recognition of God in the nation's founding document. When considered alongside the development of colonial laws, the adoption of the English common-law tradition and American system of federation, it is evident that the foundations of the Australian nation, and its laws, have discernible Christian-philosophical roots.

It has also been said that a people without historical memory can easily be deceived by the power of foolish and deceitful philosophies. Although undeniably diminished and rarely acknowledged, Christianity has an enduring role in the Australian legal system. Despite the best efforts of

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<sup>101</sup> The legislation allowed for funding of a wide range of programs that comprise up to 10 per cent of federal expenditure, including accommodation for asylum seekers offshore, the national counterterrorism committee.

radical secularists and historical revisionists, the Australian legal system has a distinct Judeo-Christian tradition that has prevailed till the present day. In these days of political correctness and moral relativism, it is always important for us to be reminded of the Judeo-Christian heritage of the Australian people, which still permeates most of the laws and socio-political institutions of Australia. To state this is not to be ‘intolerant’ but to stress an undeniable historical truth.

# CALVINIST NATURAL LAW AND THE ULTIMATE GOOD

CONSTANCE YOUNGWON LEE\*

## ABSTRACT

*Calvin's natural law theory is premised on the sovereignty of God. In natural law terms, the 'sovereignty of God' doctrine prescribes that the normative standards for positive law originate from God alone. God is the sole measure of the 'good'. This emphasis allows for a sharp separation between normative and descriptive dimensions. In this context, it would be a logical fallacy to maintain that anything humanly appointed can attain the status of self-evidence. However, in recent years, new natural law theorists have been guilty of conflating the normative and descriptive dimensions – a distinction that is critical to the discipline of natural law. This may stretch as far back to Aquinas who set human participation in the goods ('practical reason') as the rightful starting place for natural law. This paper explores Calvin's natural law theory to show how his concept of 'the ultimate good' harnesses the potential to restore natural law theory to its proper order. By postulating a transcendent standard in terms of 'the ultimate good' – God Himself – Calvin's natural law provides a philosophical framework for compelling positive laws in the pursuit of a higher morality.*

## I INTRODUCTION

*"There is but one good; that is God. Everything else is good when it looks to Him and bad when it turns from Him".*

C S LEWIS, *The Great Divorce*<sup>1</sup>

*"What comes into our minds when we think about God is the most important thing about us".*

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<sup>1</sup> C S Lewis, *The Great Divorce* (HarperCollins, 1946) 106.

*A W TOZER, The Knowledge of the Holy*<sup>2</sup>

The ‘good’ represents the normative destination for all positive laws. It characteristically bears the potential to compel laws to their legitimate moral ends. The good(s) is a central component of both Calvinist and Thomist accounts of natural law. Nonetheless, once this apparent congruence is stripped back, their conceptions differ considerably. Calvin conceives of the good by reference to two central themes – the *sovereignty of God* and *humanity’s inherent depravity*.<sup>3</sup> According to Calvin, moral laws derive their legitimate authority from a proper understanding of the dynamics between these two themes. This follows only from a proper understanding of God and human nature. In this context, only one of these, God or human, can determine what constitutes the good. Calvin’s philosophy does not vacillate on this point. At the outset, he affirms the idea that the latter is only explained by the former; the former transcends explanation. In doing so, he squarely confronts the perennial misconception reflected in statements like the following:

If God were good, He would wish to make His creatures perfectly happy, and if God were almighty He would be able to do what He wished. But the creatures are not happy. Therefore God lacks either goodness, or power, or both.<sup>4</sup>

From a flawed human perspective, this type of contradiction is ‘reasonable’. Notwithstanding such an obvious contradiction, practical

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<sup>2</sup> A Tozer, *The Knowledge of the Holy* (Authentic Media Publishers, 2013) 1.

<sup>3</sup> Better known as the doctrine of ‘total depravity’. The reason for my slight variation of the term was the fact that ‘total depravity’ seemed a misnomer in the sense that depravity is inherent but not complete. As Calvin would himself concede, God left human conscience intact to a limited degree by His grace. However, it is total in the sense that humans are entirely incapable of self-redemption. See John Calvin, *Institutes of the Christian Religion*, II.viii.1.

<sup>4</sup> C S Lewis, *The Problem of Pain* (HarperCollins, 1940) 16.



reasoning has become an essential component of natural law theories.<sup>5</sup> The contradiction is that in the same breath that we demand a transcendent and independent standard of morality, we still attempt to measure it by reference to our own inferior standards. In other words, we reduce the measurement of the good to manageable terms. Whether this type of reasoning is overlooked in natural law scholarship deliberately or carelessly, we must concede that whatever speaks to a flawed *human* condition must first be questioned.

For this reason ‘nothing mattered more to Calvin than the supremacy of God over all things.’<sup>6</sup> And for this reason, Calvin postulates the self-evident nature of the good in terms of God alone. God is the ‘ultimate good’ because He is the only entity capable of being both the means to the ends and the end in itself. As Novatian puts it, ‘God has no origin’ and this self-existence is what distinguishes God from whatever is not God.<sup>7</sup> The pursuit of our origin of things must begin with the acceptance that everything was made by a Being who was Himself not made.<sup>8</sup> The question of self-evidence is only resolvable by such a statement.<sup>9</sup> In order to work, a moral good must be self-evident.<sup>10</sup> In other words, the basic good(s) must be characteristically *indemonstrable* and *underived*.<sup>11</sup> Further to this, the good(s) must be capable of exhaustively encompassing the entire stratum of morality.<sup>12</sup> Nothing distinguishes pagan theism as sharply from Christianity as the idea that the good can

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<sup>5</sup> Vincent Luizzi, ‘Practical Reasoning in Natural Law Theories’ (1982) 3(2) *Vera Lex* 1, 19-20.

<sup>6</sup> John Piper, *The Legacy of Sovereign Joy* (Good News Publishers, 2005) 115.

<sup>7</sup> A W Tozer citing Novatian in Tozer, above n 2, 33.

<sup>8</sup> Ibid 32.

<sup>9</sup> Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2<sup>nd</sup> ed, 2014) 74.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 97.

somehow be derived from the created as opposed to the Creator.<sup>13</sup> The ‘ultimate good’ involves a process of inquiry which bears this in mind.

Thomist thinkers accept that humans were created by God and yet it is puzzling that they attempt to derive the ‘good’ from human reason.<sup>14</sup> It is true we have an ignoble habit of defining everything in terms of ourselves; the invariable result of which is the conflation of the normative and descriptive dimensions. As a fundamentally ontological discipline, natural law requires a clean separation between the ‘is’ and the ‘ought’.<sup>15</sup> To this extent, grounding the content of moral rules entirely or even substantially on human reason, despite its severe impairment, is to tempt fate. The order of Calvin’s natural law remedies this conflation. Calvin posits that what we devise of as ‘natural’ is substantially impaired by the fall. Accordingly, natural law is only conceivable through common grace. It is by virtue of God’s common grace that all humans retain the ability to discriminate right from wrong.<sup>16</sup> The moral laws written on our hearts are universal and atemporal by virtue of our essential humanity. This also means that the measure of the proper good or the content of moral law exists entirely independent of human reasoning. In this way, the good is first implanted in the sovereign nature of God.

Conversely, a ‘multiplicity of goods’ exists at the heart of the new natural law discourse.<sup>17</sup> This panoply of goods is in turn is derived from

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<sup>13</sup> Lewis, *The Problem of Pain*, above n 4, 27; see Anselm, *De Divisione Naturae* (On the Division of Nature) 1, 10: ‘God alone, for only he is understood to create all and yet is himself without any beginning or source.’

<sup>14</sup> Finnis, above n 12, 322.

<sup>15</sup> David Hume, *A Treatise of Human Nature* (1739) III-I § 1.

<sup>16</sup> Irena Backus, ‘Calvin’s Concept of Natural and Roman Law’ [2003] 38 *Calvin Theological Journal* 7, 12; For more comprehensive discussion of Calvin’s views on ‘common grace’ see Herman Kuiper, *Calvin and Common Grace* (Smitten Book Co, 1928).

<sup>17</sup> Finnis, above n 12, 23.

‘practical reasonableness’<sup>18</sup> and by reference to human standards. The *ad hoc* nature of the determination of what constitutes a good is just one out of a range of concerns borne out of this formulation.<sup>19</sup> The greater the diversity of human goods, the greater is the difficulty to sustain the argument for self-evidence, especially when that self-evidence is itself grounded in flawed human reason. This is the vexed question for new natural law. Criticism of Finnis’s basic goods<sup>20</sup> frequently centres upon his failure to accommodate for the diverse range of human experiences. This kind of criticism flags a fissure that runs to the very core of the theory. The deeper issue is that new natural law theorists, like their Thomist predecessors, are guilty of ignoring a foundational principle of natural law – its definitional need for a transcendent moral norm. The issue lies in identifying self-evident goods by reference to human participation and then setting them up as the navigational core of natural law. Such a misconception renders new natural law problematic from the moment it leaves the platform to the endpoint for which it departs.

Priority should *not* be afforded to natural law’s potential to capture the oscillation between two points: between the subject and the object; between positive realities and natural norms; between humans’ flawed participation and the perfect good. Rather, I contend that the value of a particular theory of natural law is affirmed by the extent to which it is capable of reflecting how descriptive and normative components constitute vastly different and inherently hierarchical dimensions. Conflation begins before the boundary lines of content are drawn. It begins at the point of the original formulation, where human reason is considered *before* the attributes of God. As far as Aquinas’s and

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<sup>18</sup> Ibid 88.

<sup>19</sup> Luizzi, above n 5, 19-20.

<sup>20</sup> Ibid.

Finnis's framing of the goods are concerned, a consideration of 'practical reason' or 'practical reasonableness' precedes divine revelation. In this way, flag-bearers of the Thomist tradition of natural law – including Aquinas and his modern successors, most notably Finnis – are guilty of both downplaying and overlooking God's sovereignty as the basis for natural law.<sup>21</sup> This method invariably has the effect of conflating normative and descriptive dimensions.<sup>22</sup> Indeed, given our natural propensities, if our account of natural law prioritises human reason and sets it up as the starting point, it is bound to fail to be an authoritative source of law.

That is not to say that Aquinas and his followers deny God's sovereignty but the particular way that the Thomist tradition divides the normative realm into distinct fields and then defines them in human terms contrasts sharply with the unity Augustine and Calvin derive from God's supremacy as the source of all norms. If we accept that human beings are united by an intuitive self-love, we must also accept that the Thomist order magnifies the risk of distorting the good. By holding God as the normative ends for a descriptive position that warrants absolute humility, Calvin succeeds in bringing cohesion to all forms of wisdom.<sup>23</sup> In this respect, the unity of value originates from God and maintains a clear separation from human reasoning. T.H.L Parker describes this as the:

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<sup>21</sup> The natural law jurisprudence of Finnis classified substantially the same as that of the Catholic Church: see Peter M Cicchino, 'Reason and the Rule of Law: Should Bare Assertions of 'Public Morality' Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?' (1998) 87(1) *Georgetown Law Journal* 139, 139, 157, 162, 164.

<sup>22</sup> Finnis, who largely elaborated on Aquinas's theory for modern use, also identifies with the weak natural law thesis. Finnis states that laws that fall short of moral standards are precluded from being a law in the technical sense. Immoral laws are still laws; they are just 'defective laws': See Finnis, above n 12, 363-6.

<sup>23</sup> William F Keesecker, *The Law in John Calvin's Ethics in Calvin and Christian Ethics* (Peter De Klerk ed., Calvin Study Society, 1987) 19, 20.

complete intellectual reversal necessary before [Calvin] could confidently and joyfully understand the knowledge of the relationship between subject and object ... and that the intellect, far from moulding the object, is itself formed to the capacity of the knowledge of the object by the object itself.<sup>24</sup>

Therefore I will argue in this paper that the great divide between Thomist and Calvinist interpretations of natural law stems fundamentally from the order. In a crude manner of speaking, I attempt to turn natural law on its head. To begin by recognising humanity's inherent depravity as the descriptive position, Calvin derives his first principles solely from the divine attributes of God. Thus by comparing Calvin's approach to Aquinas's, I contend that the order of priority, God or human reason, predetermines the force of natural law norms.

## II HUMANITY'S INHERENT DEPRAVITY

Calvin's emphasis on the supremacy of God is fundamental to his understanding of natural law. Like two sides of the same coin, on the flipside of the notion of the supremacy of God is the fact that nature does not possess ontological independence but is always dependent on God's will. This is the critical point at which Calvin departs from the doctrine of his Thomist predecessors. Aquinas adopts the Aristotelian notion of *analogical entis* (the 'analogy of being') which assumes that inherent good remains common to both God and humanity.<sup>25</sup> In contrast, Calvin's emphasis on God's supremacy for his natural law invariably foregrounds the contingent reality of the depravity of human nature.

Although, in the beginning, God created all things to be good, harmonious and orderly, the result of original sin was to render nature at

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<sup>24</sup> T H L Parker, *John Calvin: Biography* (J M Dent & Sons Ltd, 1975) 12.

<sup>25</sup> Thomas Aquinas, *Summa Theologica I-II*, q 25, a 3; Ibid 237.

all times thereafter, in whichever state, irreparably corrupted. Natural law cannot be derived from human standards but is completely measured by and constituted in God's divine character.<sup>26</sup> This is the state of affairs on the kingdom of earth. And this is precisely the reason that human nature and reason in their fallen state *ought not* to be conflated with the perfect will of God.<sup>27</sup> By following closely in Augustine's footsteps, humanity's inherent depravity has become the cornerstone for Calvin's natural law theory.

### A *The Source of Natural Law*

Calvin situated his natural law in the broader context of God's sovereignty. He identified natural law with both God's divine will and the divine attributes of God. Up to this point, Calvinist and Thomist natural law bear substantive semblance. Both appear to have insisted on the inseparability of divine will and the divine attributes. We might call this the *unity principle*.<sup>28</sup>

However, this is as far as the continuity extends. Unlike Aquinas, Calvin's natural law thesis is fundamentally characterised by the doctrine of inherent depravity based on Romans 3:10-12: 'None is righteous, no, not one: no one understands; no one seeks for God. All have turned aside; together they have become worthless, no one does good, not even one.'<sup>29</sup>

<sup>26</sup> Keesecker, above n 23, 19, 20.

<sup>27</sup> See Susan E Schreiner, *The Theatre of His Glory: Nature and Natural Order in the Thought of John Calvin* (Labyrinth Press, 1991) 78.

<sup>28</sup> 'Therefore since God claims to Himself the right of governing the world, a right unknown to us, let it be our law of modesty and soberness to acquiesce in his supreme authority, regarding his will as our only rule of justice, and the most perfect cause of all things, - not that absolute will, indeed, of which sophists prate, when by a profane and impious divorce, they separate his justice from his power, but that universal overruling Providence from which nothing flows that is not right, though the reasons thereof may be concealed': see Calvin, above n 3, I.XVII.2.

<sup>29</sup> The Holy Bible, English Standard Version (ESV).

Calvin makes clear that the depravity of humanity is extensive, even total in the sense that we are entirely incapable of self-redemption. There are severe limitations on the ‘human ability to correctly interpret natural events and human history.’<sup>30</sup> In conceiving human culpability and divine sovereignty as congruent, Calvin openly prefers divine revelation over human reason as the basis for his *lex naturalis*. This means that Calvin, like John Locke,<sup>31</sup> F. A. Hayek,<sup>32</sup> and many other jurists who succeeded him, accepted the severely limited character of human reason as the basic reality shaping legal and political institutions.

In contrast, regardless of humanity’s fall from divine grace, Aquinas retains confidence in the natural abilities of humans to be rational beings with a ‘natural inclination to do good’ (*incinatio ad bonum*) which he claims to be a proper human attribute.<sup>33</sup> According to Aquinas, humanity’s natural tendency to act according to reason as tethered to the ‘common precepts’ which guide them to virtue together encompass the natural law. Aquinas’s idea of eternal laws – laws governing the universe by which each creature participates with this type of divine wisdom in a way that is befitting its nature<sup>34</sup> – is in tension with the idea of the fallen state of nature. The doctrine of imputed righteousness which is foundational to Calvin’s theology is perceptibly absent from Aquinas’s natural law.<sup>35</sup> Inherent to Calvin and Luther’s epistemology was the recognition that humanity could only ever become righteous through

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<sup>30</sup> C Scott Pryor, ‘God’s Bridle: John Calvin’s Application of Natural Law’ (2006/2007) 22(1) *Journal of Law and Religion* 225, 245.

<sup>31</sup> John Locke, *An Essay Concerning Human Understanding* (1690).

<sup>32</sup> F A Hayek, ‘The Use of Knowledge in Society’ (1945) 35 *American Economic Review* 519.

<sup>33</sup> Aquinas, *Summa Theologica I-II*, above n 25, q 93, a 6.

<sup>34</sup> Aquinas, *Summa Theologica I-II*, above n 25, q 91, a 2.

<sup>35</sup> Charles Raith III, ‘Theology and Interpretation: The Case of Aquinas and Calvin on Romans’ [2011] *International Journal of Systematic Theology* 1, 13-7.

imputation because righteousness could only emanate from the ultimate and perfect good – God Himself.

The Thomist notion that all human beings have access to eternal law, naturally, by virtue of their rationality, toys with the risk of conflating the descriptive and normative elements of natural law. This conflation may, in turn, culminate in the danger of confusing human reasonableness with divine revelation.

### B *Human Nature and Natural Law*

Calvin attributes our residual capacities to *know* and *act upon* the truth by exploring our consciences to God's divine character expressed through common grace.<sup>36</sup> By emphasising God's divine character as the source of our consciences, Calvin views the conscience as a means of keeping us universally and ultimately accountable to God. How, then, does Calvin deploy the concept of natural law?

Calvin premises the foundation of natural law on two grounds. Firstly, Calvin asserts that natural law exists naturally. It is derived from human nature as part of God's creation. In deriving natural law from human nature, as afforded to us by God, Calvin does not consider the contingent fact of human sociability as directly relevant to the substance of the natural law. Calvin admits the obvious fact that humans are social beings, but he does not accept the notion that humans can be credited with the creation of natural law simply because they are social. Instead, he declares that God has engraved the natural law upon the hearts of all humans, albeit to an imperfect extent. This aspect of Calvin's theory therefore contrasts with jurists like Samuel Pufendorf and Lon Fuller who

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<sup>36</sup> Calvin, above n 3, II.ii.16; see John Hesselink, *Calvin's Concept of Natural Law* (Pickwick Publications, 1992) 70-1.



view natural law mainly as a response to the challenge of social coordination.<sup>37</sup>

Second, natural law is not merely an order in the human mind, but reflects the overall condition of fallen human nature. Rather than restricting natural law to the faculty of human reason, Calvin makes it ‘part and parcel’ with human nature in its entirety<sup>38</sup>. In other words, Calvinist natural law alludes to a state in which all human beings find themselves. Not only was human reason corrupted when humans fell from grace, but the whole natural order suffered as a result of the fall. ‘Nature suffers the disordering effects of sin and, while reason remains common to all people, it is corrupted... the results of even correct judgments are vitiated by a corrupt will.’<sup>39</sup> Calvin therefore identifies the navigational core of human existence primarily with the exercise of the will rather than with the human mind’s participation in divine reason.

Calvin’s emphasis on humanity’s fall from grace leads him to conclude that even where corrupt will results in correct judgment for a single matter, its concupiscence overflows. Natural law for Calvin ultimately functions as God’s bridle for humankind, to curb our descent into bestiality.<sup>40</sup> According to this postulation, the role of natural law is (loosely) twofold:

1. To restrain humans from descent into bestiality; and,

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<sup>37</sup> Samuel Pufendorf, *De jure Naturae et gentium libri octo* (Clarendon Press, 1934) 205; Lon Fuller, *The Morality of Law* (Yale University Press, 1969).

<sup>38</sup> Calvin appears to identify the heart more closely with the will. Not only does this mean that natural law encompasses the sentimental capacity of human beings but it also upholds it on equal terms with human rationality (Unlike Aquinas’ emphasis only on human reason). See generally C S Lewis, *The Abolition of Man* (Harper Collins, 1971).

<sup>39</sup> Gunther H Haas, *The concept of Equity in Calvin’s Ethics* (Wilfrid Laurier University Press, 1997) 70.

<sup>40</sup> Pryor, above n 30, 251; Calvin, above n 3, II.iii.3.

2. To inspire humans to strive for the transcendent good.

Calvin's primary emphasis therefore falls upon the pursuit of the ultimate transcendent good, whereas all other subsidiary goods are enjoyed incidentally to this process. This contrasts with Aquinas's view, whereby human participation in the several discrete modes of good enables us to progressively develop our understanding of God through the exercise of our natural capacity for reason.

### C      *Descriptive and Normative Functions of Natural Law*

The emphasis on the inherent depravity of humans in Calvin's natural law theory renders humility the only appropriate response<sup>41</sup>. Calvin, quoting Augustine, concludes that '[b]ecause we do not know all the things which God in the best possible order does concerning us, we act solely in good will according to the law'.<sup>42</sup> Even before addressing the full implications of the fall for the order of the human mind, we can see Calvin turn his attention to the need for God's revealed law. Due to God's common grace, by divine design, a minimal level of order has been provided to the world.

Calvin holds that the human will is extensively impaired but not to the extent that it is reduced to less than animals.<sup>43</sup> Though he emphasises the limits of humans' truth-identifying capacity in general, the degree varies significantly with the object of consideration.<sup>44</sup> With respect to heavenly things, the impact of sin on human reason becomes more pronounced than in regards to earthly things.<sup>45</sup> The symptom of degenerate human

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<sup>41</sup> Calvin, above n 3, II.ii.11.

<sup>42</sup> Ibid I.xiii.2.

<sup>43</sup> Ibid II.ii.17.

<sup>44</sup> Ibid II.ii.13.

<sup>45</sup> Ibid II.ii.18.

reason is erroneous judgments, but this propensity to error is not the primary reason for futility. Rather, impiety is the main basis of reason's futility.<sup>46</sup> Depraved consciences when they reason invariably 'divert reason's power of judgment from its divinely appointed end.'<sup>47</sup> The inherent fallibility of human reason is due to the fallibility of humans themselves and not merely to defects in their reasoning processes. Human reason therefore can only achieve an imperfect understanding of the good.

Calvin, although remaining realistic about the limitations of natural law absent the recognition of God's 'divine grace,'<sup>48</sup> does not preclude the role of natural law based on common grace.<sup>49</sup> Though commentators like Hittinger lament the limited force of natural law outside a Christian theological discourse,<sup>50</sup> this is not necessarily true. A closer look at Calvin's jurisprudence should reveal that civil laws are required to bridle humanity's inherent depravity. Civil laws are thus grounded in natural law in a descriptive sense. This is because civil laws ought to only be valid insofar as they are consistent with the moral requirements of natural law.

The idea of common grace further distinguishes Calvin's natural law tradition from the Thomist tradition. 'God by his providence bridles perversity of nature that it may not break forth into action; but he does

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<sup>46</sup> Pryor, above n 30, 245.

<sup>47</sup> Ibid; Calvin, above n 3, II.ii.25.

<sup>48</sup> Calvin, above n 3, II.ii.24.

<sup>49</sup> R S Clark, 'Calvin on the Lex Naturalis' (1998) 6(1-2) *Stulos Theological Journal* 1-22.

<sup>50</sup> 'Premises or conclusions even remotely theological (natural or revealed) are unacceptable for public purposes.' See Russell Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World*, (ISI Books, 2007) xvii-xviii.

not purge it within.’<sup>51</sup> What Calvin means by this is that the redemptive nature of common grace is subject to obvious limits.<sup>52</sup> Without paying homage to God, the human instinct of self-preservation is not sufficient to enable us to reach moral perfection.<sup>53</sup> In other words, God’s common grace governs the worst of human corruption, acts as the minimal check on human arbitrariness, but does no more. Positive laws, unless they appeal to a higher law, cannot expect to remain morally sound. In this context, natural law has a critical role to play.

Calvin thus defines natural law by its purpose. He draws a clear separation between the descriptive and normative components of natural law. ‘The purpose of natural law is to render men inexcusable. This would not be a bad definition: natural law is that apprehension of conscience which distinguishes between the just and unjust, and which deprives men of the excuse of ignorance, while it proves them guilty by their own testimony’.<sup>54</sup> The conscience is not the standard by which right and wrong is adjudged but, rather, the instrument by which we may know and pursue justice and the basis which renders all inexcusable from accountability.

Although Thomist and Calvinist approaches to natural law all assert that humans possess consciences by virtue of our nature – ‘the divine law is etched upon human hearts’<sup>55</sup> – Calvin’s commitment to the depravity doctrine reveals a lack of confidence in the human capacity to know and,

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<sup>51</sup> Calvin, above n 3, II.iii.3.

<sup>52</sup> For more comprehensive discussion of Calvin’s views on ‘common grace’: see Kuiper, above n 16.

<sup>53</sup> Calvin, above n 3, II.ii.24.

<sup>54</sup> Ibid II.ii.22.

<sup>55</sup> Ibid II.iii.6; see J Budziszewski, *Written on the Heart: The Case for Natural Law* (Intervarsity Press, 1997) 184-6.

therefore, to act upon the truth.<sup>56</sup> The discontinuity between Thomist and Calvinist approaches to natural law is therefore a matter of degree regarding humanity's potential to capitalise on our natural awareness and understand the precise content of transcendent moral norms. Nonetheless, this slight difference has far-reaching implications.

### III AQUINAS'S FIRST PRINCIPLES

Aquinas lays down as the absolutely first principle for his theory on practical reason: 'Good is to be done and pursued, and bad avoided.'<sup>57</sup> Indeed each of the basic forms of good characterising Aquinas's natural law possess this 'primariness' which Aquinas refers to as 'basic' (*primum*).<sup>58</sup> The first principles of practical reason identified by Aquinas are marked by both self-evidence (*per se notum*)<sup>59</sup> and undeducibility (*indemonstrabile*).<sup>60</sup> Up to this point, Aquinas's theory aligns with Augustine in the extent to which it emphasises the universality of human goods. However, where Augustine emphasises the divine origin of the goods, Aquinas emphasises their self-evidence from the standpoint of human reason. Aquinas's theory therefore has an inherent disposition to foreground human understanding of the 'good' rather than its transcendent origins.

Aquinas further notes that humans may both differ in their understanding of the good and participate in the good in quite different ways. This does not mean that the good as it is normatively is subjective rather than objective. It is not that some goods are more self-evident than others, but it may allow the latitude to suggest that different people may have

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<sup>56</sup> Calvin, above n 3, II.ii.12.

<sup>57</sup> Thomas Aquinas, *Summa Theologica*, I-II, q 94, a 2.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid I-II, q 94, a 3; Clark, above n 49, 4.

different ways of participating in the goods, notwithstanding their self-evident nature.<sup>61</sup> This point provides a further illustration of how Aquinas emphasises human understanding of the goods as opposed to the ultimate unity of purpose reflected in their transcendent origins.

In this context, we must be mindful of how high the threshold of first principles is. C. S. Lewis<sup>62</sup> suggests that goods must be self-evident by virtue of the ‘Tao’, functionally equivalent to Aquinas’s first principles. This means that any attempt to ‘debunk’ the ‘basic goods’ requires the assumption that the critics are speaking from a position itself immune from the ‘debunking’ process. The inquirers are thus in no better a position to argue than those they are opposing. When applied to the present issue, if the ‘goods’ in question are derivable from human reason, this would mean that they are not immune from the ‘debunking process’, which is the threshold requirement for attaining the status of a basic norm.

Aquinas’s focus on the human understanding of the ‘basic goods’ shifts the emphasis from the ultimate good to the limited and often flawed human understanding of the good. This is not to say that the Thomist approach refutes the idea of God as the ultimate source of the good, but rather that it has the unavoidable implication of elevating the role that human beings play in the determination of what constitutes natural law.

#### IV CALVIN’S FIRST PRINCIPLES

In contrast, Calvin begins *The Institutes of the Christian Religion* with the confident declaration that ‘...all wisdom we possess, that is to say, true and sound wisdom, consists of two parts: the knowledge of God and

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<sup>61</sup> Thomas Aquinas, *Summa Theologica*, I-II, q 91, a 3.

<sup>62</sup> Lewis, *The Abolition of Man*, above n 38, ch 1.

[then] of ourselves.’<sup>63</sup> At first blush, the difference may appear trivial. But like isolated organisms that multiply at an exponential rate in their habitat, the subtle differences between Calvin and Thomist interpretations of natural law leave lasting impressions when applied in context.

First of all, the obvious difference between the two approaches lies in the order. To Aquinas, God is the end of human participation, whereas for Calvin God is the starting point. Where Aquinas sees God as the ‘unity of all goods’, Calvin sees God as the ‘transcendent good’, the normative means and the ideal end for which we strive. Following from this then is Calvin’s ‘first principle’ of natural law: that everything is derived from a single and paramount good which is God Himself.<sup>64</sup> The second component, inextricably related to the first, is that this good is sourced in the unity of God’s nature.<sup>65</sup> Based on this emphasis then is the fundamental natural law idea that all other human laws are necessarily derivatives from a transcendent moral source. According to Calvin, the first component of Christian natural law, that everything is derived from God, asserts God’s omnipotence, while the second component asserts God’s righteousness.

In dealing with the first component, Calvin gives prominence to the will of God. This emphasis is reflected in his theological doctrines of ‘predestination’ and ‘election’. Calvin wrote that ‘[God’s] will is, and rightly ought to be, the cause of all things that are. For if it has any cause,

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<sup>63</sup> Calvin, above n 3, I.i.1.

<sup>64</sup> Keesecker, above n 23, 19, 20.

<sup>65</sup> ‘Therefore since God claims to Himself the right of governing the world, a right unknown to us, let it be our law of modesty and soberness to acquiesce in his supreme authority, regarding his will as our only rule of justice, and the most perfect cause of all things, - not that absolute will, indeed, of which sophists prate, when by a profane and impious divorce, they separate his justice from his power, but that universal overruling Providence from which nothing flows that is not right, though the reasons thereof may be concealed.’ See Calvin, above n 3, I.xvii.2.

something must precede it [and] this is unlawful to imagine.’<sup>66</sup> Here, Calvin is asserting the eternal nature of God. A sovereign God transcends the limits of time and as such, has no beginning and no end. The name Yahweh by which God makes Himself known to Moses<sup>67</sup> translates in Hebrew to mean ‘I am who I am’<sup>68</sup> and represents the transcendence marking the nature of God.<sup>69</sup> What does this mean for natural law? It means that there is an objective, external standard by which all human beings are to be held accountable. This standard is atemporal, self-evidently powerful and good in and of itself.

## V ‘BASIC GOODS’ OR THE ‘ULTIMATE GOOD’?

Aquinas’s conception of realism differs importantly from Calvin’s. The difference in their conceptions is most clearly manifested in Aquinas’ position on the ‘nature of the good’. Aquinas borrowed Aristotle’s ‘nomenclatures of causality’ to argue that the end for which a thing exists is the purpose for which it was built. In other words, everything has been created by God with an in-built *telos* so that, once created, God cannot further redefine ‘what is good for the thing.’<sup>70</sup> The assumption inherent in this idea is that God’s will for something corresponds with the real nature of the thing. By this categorisation, the Thomist tradition was able to assert a rational universe in which everything possesses the means to

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<sup>66</sup> Ibid III.xiv.21.

<sup>67</sup> Ibid IV.xx.15.

<sup>68</sup> Exodus 3:14 (ESV).

<sup>69</sup> See John Calvin, *Commentary on the Gospel According to John 11-21* (1553) where Calvin writes with respect to Augustine’s realistic epistemology: Augustine, who is excessively addicted to the philosophy of Plato, is carried along, according to custom, to the doctrine of ideas; that before God made the world, he had the form of the whole building conceived in his mind; and so the life of those things which did not yet exist was in Christ, because the creation of the world was appointed in Him. But how widely different this is from the intention of the Evangelist we shall immediately see.

<sup>70</sup> Charles Taylor, *A Secular Age* (Stanford University Press, 2001) 773.



realise its own perfection. The ultimate source of moral values is the natural state of the good as opposed to the will of God as existing independently of the good.<sup>71</sup>

The teleological argument that the existence of the human faculty of reason proves humanity's purpose within a divine scheme is relatively uncontroversial; it represents the common ground between the Thomist and Calvinist approaches. However, to suggest that human reason is an exhaustive reflection of the content of divine law would be taking the argument too far. The faculty of reason or the discomfort of conscience may prove the existence of a higher authority but using it to determine what is mandated by that authority would be a misconceived exercise.

What is backgrounded in the process of overstating the centrality of human goods? The transcendent good loses its status and is reduced to a mere by-product of human reason. Aquinas's exaggeration of the role of humans in their participation with the 'basic goods' bears the potential of shifting the focus from the 'ultimate good' to human participants. By arguing that the goods are a product of human participation, we commit a logical fallacy that may have extensive implications. For in doing so we clearly fail to accept the limitations to human reason. We determine self-evident goods by reference to human interests; we ignore the reality that human nature is inherently corruptible. In claiming that the 'good' is discoverable purely by reference to human reason, we commit the error, according to Hume, of conflating the normative with the descriptive and thereby detracting from the usefulness of natural law as a source of moral authority.

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<sup>71</sup> Bemoaning the loss of the 'sacramental perspective' in the modern world, the idea that created objects find their reality and identity in God's word: see Hans Boersma, *Heavenly Participation* (WmB Eerdmans Publishing, 2011) 7.

Once again, the significance is in the order. Aquinas's view upholds God's attributes as the goal which humans may discover by observing the telos of everything else. Augustine and Calvin stand at odds with this position by maintaining that God's will is not discoverable by its conformity to the rational 'ecosystem of natures' but rather exists as an independent and transcendent standard by which the good of everything else may be judged. In essence, Calvin's rejection of Thomist realism is because it contradicts the logos doctrine as revealed in the gospel of John, 'In the beginning, there was the word and the word was with God and the word was God.'<sup>72</sup>

According to this passage, Christ is not only a divine revelation of God's grace but the self-evident embodiment of God's communication to humanity – His logic, reason, clarity, order, definitions and concepts.<sup>73</sup> Reason is therefore God-given and divinely inspired, rather than representing a human path to understanding God and humanity's own nature. In this way, while the Thomistic synthesis places heavy emphasis on the 'proper good', Augustinian scholars promote the transcendence of divine will as sourced in God's righteous nature. Rather than ascribing something to God's will because it is good, Calvin sees God's will and actions as existing independent of an immanent standard of good and flowing from the goodness of His eternal nature.<sup>74</sup>

Calvin's account of natural law stands at odds with at least two main features characterising Aquinas's thought. Firstly, Calvin does not identify natural law with human reason's participation in God's eternal

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<sup>72</sup> John Calvin, *Commentaries on John* 1; John 1:1.

<sup>73</sup> 'Every good gift and every perfect gift is from above, coming down from the Father of lights with whom there is no variation or shadow due to change': see James 1:17; Anton-Herman Chroust, 'The Fundamental Ideas in St. Augustine's Philosophy of Law' (1973) 18 *American Journal of Jurisprudence* 57.

<sup>74</sup> See e.g. Lewis, *The Problem of Pain*, above n 4.

law.<sup>75</sup> Aquinas, in his eagerness to systemise Augustinian thought maintained that the deliverances of reason and divine revelation were consistent<sup>76</sup> and therefore frames the relationship between humans and God as one of metaphysical participation. However, according to Calvin, natural law is not the ‘semi-autonomous mediator’ between God and humanity in general<sup>77</sup> but rather it is the embodiment of God’s merciful nature and an example of common grace provided to all human beings.

## VI THE UNITY OF GOD

A second tension between the Thomist and Calvinist conceptions of natural law flows on from the first. Calvin’s natural law does not see divine revelation as the fruit of the faculty of reason.<sup>78</sup> It is this component of Calvin’s natural law theory – the source of the good in God’s unified transcendence – which explains the difference in emphasis discussed above. It is by God’s merciful nature that we humans may access natural laws as ‘written on our hearts’<sup>79</sup> regardless of our faith in Christ’s salvation. The natural consequence of sin was to impair human reason. Nonetheless, by God’s mercy, shown through common grace, humanity is given the freedom to access natural law to some extent.

By the same token, this freedom of choice holds humankind accountable to the transcendent laws of God. In this way, by starting with and emphasising God as the supreme source, Calvin’s account of natural law reinforces the universal accountability of humans to a transcendent moral standard. This emphasis on the transcendent nature of normativity also informs Calvin’s conception of God’s nature and, in particular, his

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<sup>75</sup> Thomas Aquinas, *Summa Theologica*, I-II, q 91, a 3-5.

<sup>76</sup> Calvin, above n 3, 225.

<sup>77</sup> Backus, above n 16, 12.

<sup>78</sup> Paul Helm, *John Calvin’s Ideas* (Oxford University Press, 2004) 117.

<sup>79</sup> John Calvin, *Commentaries on Romans* II:14-5.

rejection of voluntarism. It is impossible for God to act without rule or reason according to the unity of His nature. This inner unity is what ensures that the natural law is consistent not only with the divine will but also with divine wisdom.<sup>80</sup>

The unity of God finds expression in the natural law inscribed on the hearts of humans. This transcendent source of natural law inspires the workings of conscience and human reason. Reason is not the starting point to grasping the natural law, but represents a mechanism which God's common grace grants individuals in order to access natural law. Calvin's rejection of human participation as a model for human understanding of the good is therefore sourced in the notion that God's 'power is always conjoined to His justice.'<sup>81</sup> Calvin maintains in this regard, 'It is easier to dis sever the light of the sun from its heat, or for that matter its heat from fire, than to separate God's power from His righteousness.'<sup>82</sup> It is the omnipotence of God's will reconciled to His righteousness that become the bedrock for His providence.

This emphasis on the 'ultimate good' presupposes human limitation. Calvin's evaluation of the extent of corruption of human's natural capacities reveals that human minds and abilities to reason are not completely incapacitated, but if left unchecked are inclined to invariably go awry. '[E]ven though something of understanding and judgment remains... we shall not call a mind whole and sound that is both weak and plunged into deep darkness.'<sup>83</sup> Instead of placing emphasis on individual rights, Calvin's analysis acknowledges the eminence of

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<sup>80</sup> Calvin carefully maintained that in God's superiority to natural law his power is always conjoined with his justice: see Schreiner, above n 27, 78.

<sup>81</sup> Ibid.

<sup>82</sup> John Calvin, *Concerning the Eternal Predestination of God* (1552) X.12.

<sup>83</sup> Ibid II.ii.12.

individual responsibility before God. Such an emphasis overcomes an unhealthy fixation on our own rights by means of self-justification.

Aquinas' emphasis on 'practical reason' and 'the nature of the goods' leads him to focus on the good in human nature.<sup>84</sup> This effectively marginalises the role of God in determining the content of natural law. On the other hand, Calvin's natural law theory begins with the transcendent nature of God and asserts His supremacy. This means that regardless of the disfigurement to human nature as a consequence of the fall, by God's providence alone we are able to state that human nature remains sufficiently intact to allow for the flourishing of human society.<sup>85</sup> By virtue of his formulation of God as the 'ultimate good', Calvin is able to maintain the transcendence of an independent moral standard whilst remaining confident about its universal application to all humans at any point in time.

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<sup>84</sup> Thomas Aquinas, *Summa Theologica* I-II, q.91; Calvin, above n 3, 236.

<sup>85</sup> Ibid 245: 'the flourishing of human society' by reference to the potential to give God the glory; see John Piper, *Desiring God* (Multnomah Books, rev ed, 2011) 17-28.



## METHOD IN EARLY INTERNATIONAL LAW

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### ABSTRACT

*One of the most distinctive features of Modern thinkers is their concern with the method of investigation. In order to break with the past and, at the same time, build a solid system of thought, Modern authors turned their attention to the “hard” sciences and introduced their method in the study of Politics and Law. The authority of ancient texts, by itself, no longer has anything to teach. Much has been said about the membership of Hugo Grotius amongst Modernity, but if, on the one hand, the presence of a mathematical method in his thought is one of the main modern features, then this author joins the ranks of Modernity. On the other hand, the use of such a mathematical method in Grotius is so full of nuance that it induces the reader to question the seriousness of his choice. Regarding method, the Dutch jurist is ‘more or less’ modern, or ‘more or less’ medieval, depending on the point of view. Or perhaps the Modern Revolution was not so revolutionary and Hugo Grotius was a transitional author.*

*This present work is a qualitative study and has used the inductive method. Since the object of this study is a writer’s thought, Grotius’ oeuvres are the primary sources, and the secondary sources are the works of his commentators. As this is a text in the history of ideas, the methodology created by the ‘school of Cambridge’ (developed by authors such as Peter Laslett and Quentin Skinner) was deployed. Therefore, I have first outlined the intellectual context of the debate about method at the time of Grotius in order to unveil his influences. Then, I have compared the concept of the “mathematical method” created by Descartes and Galileo with the passages in which Grotius explains his own method. I reach the conclusion that a mathematical method in Grotius would be nothing short of an anachronism.*

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## I INTRODUCTION

The purpose of this paper is to verify the modernity of Hugo Grotius. One aspect of his work was chosen: the method employed by the author to determine natural law. In the early 17th century, amongst juridical and political writings, there was a widespread concern in developing solid knowledge, because everything that had been done by Medieval authors did not seem to stand up to examination by reason. Compared with the hard sciences, the social sciences (and law in particular) did not seem to have progressed at all, and they were still debating the big questions raised by Classical Antiquity. One of the reasons that modern authors attributed to this underdevelopment was the lack of a rigorous method in medieval authors.

At the age of 40, Hobbes accidentally discovered Euclid's Elements of Geometry. He opened the book on the forty-seventh proposition and considered it absurd. But the statement derives logically from the previous statement (that was still absurd), and this one to the one that came before, and so on until he reached a first axiom that is evident *per se* and incontestable. Hobbes was very impressed.

Philosophers like Hobbes, Galileo and Descartes believed that only the sciences that used this procedure from geometry would be able to develop. The perceived underdevelopment in the study of the Social Sciences was attributed to a defect of their method. Modern authors' main target of criticism was Aristotle. There were two reasons for this. The first related to the authority that his work acquired in the Middle Ages, such that his work was read uncritically, while dismissing the need to present any other evidence. Grotius shares this idea. In addition, Aristotle presented an epistemological realism which was considered



somewhat naive, since it does not question the existence of external entities to subjectivity. Skeptics like Pierre Charron asserted that one couldn't build a solid knowledge in physics, because human perception can be illusory and, in ethics, because of the diversity of customs, beliefs and behaviors in various locations. In the late 16th century, this attack that skeptics had launched on Aristotelianism seemed successful, but they only had deconstructed a philosophy and not yet presented any alternative. It was up to Modernity to find a way out.<sup>1</sup>

Jacobus Zabarella, Galileo's older colleague at the University of Padua, under the influence of Aristotle, Euclid and Averroes, began the research that would give rise to the modern method. He perceived it as a *regressus*: in order to obtain an accurate science of a phenomenon known imperfectly, one must return to its causes, and only after a reflection on these causes and their effects *in abstractu* may he then return to the initial phenomenon.<sup>2</sup>

There is however a certain vagueness over the name and the species of methods created by this school. It can be called the geometric method, because Euclid's *Elements* represent the paradigm of scientific demonstration. It could also be called a mathematical method, as geometry is a part of mathematics. Yet there is a subtle difference between the two. The geometric method comes from Euclid and the

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<sup>1</sup> Richard Tuck, 'Grotius, Carneades and Hobbes' (1983) 4(1) *Grotiana* 43, 45.

<sup>2</sup> Ibid 68. Grotius sent a letter to Galileo in which he confessed to be an admirer: Hugo Grotius, 'Letter to D Galilaeo Galilaei' in *Epistolae quotquot reperiri potuerunt; in quibus praeter hactenus Editas, plurimae Theologici, Iuridici, Philologici, Historici & Politici argumenti occurrunt* (Amstelodami: P & I Blaeu, 1687) 266 [654]. Although, some works from Galileo – *Saggiatore* (1623), *Dialogue concerning the two chief world systems* (1632) and *Discorsi su due nuove scienze* (1638) – were written much later than the *De Jure Praedae Commentarius*. Thence, however interested, Grotius could not have seen the entire method revolution in Modernity.

mathematical method (used by Galileo and Newton) is more related to modern physics than mathematics. One is more concerned with explanation of the axioms, the clarity of the concepts and the accuracy of the statement, while the other deals with observation and measurement of data in mathematical language.<sup>3</sup> As will be seen, in the *De Jure Praedae Commentarius*, Grotius compares his procedure with that of a mathematician, which seems to evoke the latter method.

In the history of modernity, this subtle distinction creates two important methods. The geometric method was employed by Descartes and became known as ‘Resolutive-compositive’. It involves the decomposition (or resolution) of a phenomenon to its most simple elements, so that a few relations (such as speed, space and time) can be isolated and, finally, a principle or general law in which the phenomenon fits can be formulated. This method was employed by Hobbes. The mathematical method, in its turn, originated from the Paduan School and focuses more on demonstration rather than invention. Zabarella began to develop it, but it was Galileo that best explains it. Demonstration is twofold: analysis and synthesis. The analysis shows how the phenomenon was assembled and how the effects depend on the cause. Then the synthesis examines the causes by the effects, ponders the validity of the conclusions and proposes definitions, axioms and theorems.<sup>4</sup>

In addition, modernity has also developed other methods. Since the two already described represent direct ancestors of the hypothetical-deductive method of today physics – and physics is paradigm of science – sometimes other methodological formulations, more empirical and less

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<sup>3</sup> Alfred Dufour, L’influence de la méthodologie des sciences physiques et mathématiques sur les Fondateurs de l’École du Droit naturel moderne (Grotius, Hobbes, Pufendorf)’ (1980) 1(1) *Grotiana* 33, 37.

<sup>4</sup> Ibid 38-9.

abstract, are neglected. One must recall, however, the work of the British empiricists like Bacon, Locke and Hume. In the late 16th century and in the following one, method became a widespread concern.

## II METHOD IN THE *DE JURE PRAEDAE COMMENTARIUS*

The first chapter of Grotius' *De Jure Praedae Commentarius*, titled *Exordium, Argumentum, Distributio, Methodus, Ordo Operis*, contains a passage that apparently adheres to Modernity:

It is necessary for our purposes to organize the discussion as follows: first, we will establish what is universal as a general proposition; then we will gradually break down this generalization, adapting it to the specific nature of the case under review. As well as mathematicians especially secure before any demonstration a preliminary statement of certain axioms on which all people agree, in order to be a fixed departure point from which one can draw the following proof, then we will also point out certain rules and laws of a general nature, presenting them as general assumptions that should be reviewed and demonstrated again in order to create a foundation on which other statements can safely derive from.<sup>5</sup>

It sounds like a description that only a modern writer could conceive. In the next paragraph, Grotius apologizes to the reader for any gaffe that he might possibly commit, due to the originality of its intent. In fact, if the author intended to transpose the method of the natural sciences to moral philosophy, he anteceded Descartes by more than three decades.

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<sup>5</sup> Ibid 6. 'Ordo autem instituto hic convenit, ut initio quid universim atque in genere verum sit videamus, idque ipsum contrahamus paulatim ad propositam facti speciem. Sed quemadmodum mathematici, priusquam ipsas demonstrationes aggrediantur, communes quasdam solent notiones, de quibus inter omnes facile constat praescribere, ut fixum aliquid sit, in quo retro desinat sequentium probatio, ita nos quo fundamentum positum habeamus, cui tuto superstruantur caetera, regulas quasdam et leges maxime generales indicabimus, velut anticipationes, quas non tam discere aliquis, quam reminisci debeat'.

Nevertheless, the thesis that Grotius develops a modern method needs to overcome a major obstacle: the allusion to the craft of mathematicians is described in the section that Grotius calls *Ordo*, not in the section that he calls exactly *Methodus*. This is quite relevant. For modern writers, this was a matter of method, not of simple organization. The Dutch jurist sought only an original – and, certainly, more "orderly" – way to explain very old contents; like a good lawyer, he sought a more didactic and convincing way of exposing his arguments. This allusion is but a single comparison, and not the transposition of a method of the hard sciences to jurisprudence. The fact that this comparison is found in the *Ordo* section, not in the *Methodus*, implies that for the author, despite appearances, method does not constitute in itself an independent object of thought. The method, the order, and the apologies in advance to the reader are all at the same level of abstraction; they are all *prolegomena*, an introduction to the rest of the book, and do not address the central issue, which is the law of booty. There is no doubt that, in comparison to earlier works that dealt with the law of war, the general system of *De Jure Praedae* introduces something new. And the novelty is the way it is exhibited, just like a mathematician would. But this is very different from how mathematicians think.<sup>6</sup>

What Grotius called method are two other institutions: the derivation of law from *ractio naturalis* and its confirmation by the *auctoritates*. Grotius here reacted not against Aristotle, but against the traditional method common to Italian Jurists of transposing, without the slightest care, rules and principles of civil and canon law to a sphere (the law of war) in which they lose their validity. This domain, in Grotius, is

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<sup>6</sup> Peter Haggemacher, *Grotius et la doctrine de la guerre juste* (Presses Universitaires de France, 1983) 69 n 15.

characterized not only by its "internationality", but by the lack of judicial courts. Thus, without the possibility of having any legal review, institutions of hierarchical legal systems, such as those from canon Law and civil law are not valid.

Therefore, one cannot proceed as lawyers usually do and apply civil law or canon law institutions to the Law of War. Grotius finds a very interesting solution to this problem:

(...) no positive law is valid between enemies; However, there are customs that are observed by everyone, even between those who display extreme hatred. In the passage quoted, the word 'Customs' is equivalent to the concept of Cicero in the phrase 'unwritten law, law that sprouts of nature' (...).<sup>7</sup>

Between enemies, people who nourish a mutual distrust, one must appeal to an unwritten law, created by its agreement with the mores of the most diverse peoples. This is natural law derived from natural reason. Only this kind of law is valid even between enemies. And, since natural law constitutes one of the sources of the Law of War, it is necessary to devise a way to unveil it. Whereas natural law is rational, it can be discovered *a priori*, by the intellectual mechanisms of reason itself that all men enjoy. The method *a posteriori*, the testimonies of the Sacred Scripture or other human authorities, serves only to confirm what reason has already discovered: when everyone agrees on a particular fact, it is likely that it comes from a common cause.

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<sup>7</sup> Grotius, above n 2, 6 n 19 : '(...) 'Eorum sane quae scripta sunt nihil inter hostes valet; mores autem servantur ab omnibus, etiam cum ad extremum odii processerint.' Ubi mores idem sunt, quod apud Tullium 'non scripta sed nata lex' (...)'.

The appeal to authority is more than enough argument to cause some discomfort in blindly labeling Grotius as modern. So then what would the intellectual affiliation of Grotius be?

First, it should be noted that Grotius was a lawyer, and a good one. The debate about method was beginning to matter not only to philosophers; jurists were also beginning to feel that need. The so called *mos italicus*, the Medieval civil law jurisprudence was displaying signs of exhaustion. It can be characterized by extensive text books on nearly every legal matter, by the use of rhetoric and the conditioning imposed by Roman institutions. But, gradually, there began to arise books on specific topics, such as the Law of embassies and the Law of War. In consequence, it became necessary to ponder a new systematization of law different from that of the Justinian Codex. However, a classification *ratione materiae* did not seem obvious, and systematization on the basis of the Roman *actio* was still tantalizing.<sup>8</sup>

Medieval thinking would still continue to dominate civil law in the region of Italy and in several German States, in addition to canon law. However, in France, humanism would create a new trend: the so called *mos gallicus*, the French way of doing jurisprudence. Its main proponents were jurists such as Ulrich Zasius, Guillaume Budé and Andreas Alciatus. In the Law of War, one must include Connan, Le Douaren and Doneau. This school of thought developed at the University of Bourges, but also obtained good reception in the Netherlands, especially in Louvain and in Leyden. Grotius studied at Leyden, and it is significant that he earned his PhD in Orléans. The *mos gallicus* displayed two major strands: one dominated by history and philology, and the other by a

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<sup>8</sup> Alain Wijffels, 'Early-Modern Literature on International Law and the Usus Modernus' (1995) 16(1) *Grotiana*, 38–9.

dogmatic, systematic and methodological concern. These two trends were sometimes combined, such as in the case of Grotius. The systematization effort did not exclude the intrusion of history and philology in jurisprudence. Moreover, there was no opposition to the *mos italicus*; the *mos gallicus* was more an enlargement and transformation of its predecessor rather than a rejection of it.<sup>9</sup>

When comparing the *magna opus* of Alberico Gentili, a typical pre-modern legal humanist writer, with Hugo Grotius, Professor Peter Haggenmacher points out the close proximity between the two: the same theme, structure and similar topics, among other similarities. Still, there is a fundamental difference. In Gentili, ‘what may at times look like a system is hardly more than a skilful, often quite elegant, discussion of the topical questions as raised and formulated by successive generations of lawyers and theologians in the particular field of the law of war’.<sup>10</sup> His method consists of displaying *topoi*, and is well inserted into the Medieval tradition of *disputatio*. Gentili studied in Perugia and was a spiritual descendant of Bartolists, the Italian Medieval School of Jurisprudence. He identified himself consciously with this tradition. Grotius, in turn, despite his profound knowledge of the Italian masters, was a genuine creature of the *mos gallicus*. ‘What the French systematizers had done for Roman civil law – an orderly reconstruction of the materials afforded by the *Corpus Juris Civilis* according to logical

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<sup>9</sup> Haggenmacher, *Grotius et la doctrine de la guerre*, above n 6, 47–48.

<sup>10</sup> Peter Haggenmacher, ‘Grotius and Gentili: a Reassessment of Thomas E. Holland’s Inaugural Lecture’ in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (Clarendon Press, 2002) 160–161 n 13.

principles – he was to accomplish for the whole field lying beyond the ken of civil law, that is, the *jus belli ac pacis* (...)’.<sup>11</sup>

Grotius appears more orderly, but that does not mean he was affiliated with the mathematical method. This imprecision in the reference to mathematicians reveals that Grotius, although aware of the discussions on the method of his time, did not enjoy a direct contact with the debates at the Paduan School. According to Vermeulen, it seems likely that the source of this method/mathematical comparison of Grotius stems not from Galileo or Zabarella, but from the physicist Simon Stevin, a close friend of the De Groot family.<sup>12</sup>

Hence, Grotius does not break with Medieval legal tradition. He is just a different kind of lawyer.

### III METHOD IN THE *DE IURE BELLI AC PACIS*

In Grotius’s *De Jure Belli ac Pacis*, the treatment method enjoys in his previous work survives only as a residual recollection. There are few sparse references in the *prolegomena*. Grotius begins the whole discussion of his intent by affirming that, in the domain of the Law of the Peoples, ‘few writers have attempted to enter this field and, until now, no one has tried to investigate it completely and orderly’.<sup>13</sup> This statement may seem rather self-praising and even uncalled for since the author himself was aware that his purpose was not original. Yet his emphasis was in the words ‘completely’ and ‘orderly’. In paragraphs 36 and 37 of

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<sup>11</sup> Ibid 161.

<sup>12</sup> Ben Vermeulen, ‘Simon Stevin and the Geometrical Method in *De jure praedae*’ (1983) 4(1) *Grotiana* 63, 64.

<sup>13</sup> ‘(...) attigeunt pauci, universum ac certo ordinem tractavit hactenus nemo (...)’: Hugo Grotius, *De Iure Belli ac Pacis libri tres, In quibus ius naturae et Gentium: item iuris publici praecipua explicantur* (Clarendon Press, first published 1646, 1925 ed) prolegomenum 1.



the *prolegomena*, Grotius recalls that several writers have preceded him in his intent of investigating the laws of war, but ‘these authors had so little to say about such a broad subject and most did so by mixing or confusing *without any order* that which is relative to Natural Law, Divine Law, the Law of the Peoples, Civil Law, or Canon Law’<sup>14</sup>. What Grotius considers his own original contribution is the manner in which he deals with the subject: in comparison to his predecessors, Grotius’ treatise is far more complete and orderly.

Although both the *De Iure Praedae Commentarius* (‘DIPC’) and the *De Iure Belli ac Pacis* (‘DIBP’) addresses the *materia belli*, the difference in purpose between the two works is tantamount. In the latter, the Dutch jurist aspired to completeness. This intention could not have been present twenty years earlier because the DIPC was not the work of a philosopher, but that of a lawyer, someone who stood for a cause. On the other hand, the DIBP is a scientific paper. It is quite suggestive that, in the epilogue of the first book, the author pleads to God to exalt his homeland and thwart the cruel intentions of its enemies, and, in the final paragraph of the other oeuvre, his appeal to God is an intercession for all mankind.<sup>15</sup>

This scientific commitment makes the DIBP a text of pure theory. Only in the light of this information can one understand the next reference to the mathematicians:

It would be outrageous to think that I have not bothered to tackle any of the controversies of our century: those that have already emerged or the ones that may still arise and be predicted. In fact, I

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<sup>14</sup> ‘(...) sed ni omnes de uberrimo argumento paucissima dixerunt, et ita plerique ut sine ordine quae naturalis sunt iuris, quae divini, quae gentium, quae civilis, quae ex canonibus veniunt, permiscerent atque confunderent’: Ibid prolegomenum 37.

<sup>15</sup> DIPC n 19 and DIBP n 28, 25 e 8.

would like to say that, as well as mathematicians consider [geometrical] figures, abstracted from real bodies, similarly, in studying the Law, I have departed from any particular event.<sup>16</sup>

The DIBP is an essentially theoretical text: it has no practical goal and is abstracted from all concrete facts, like mathematicians abstract geometric figures from real bodies. The methodological purposes of this comparison – should they exist – are far simpler than one might think: here, Grotius justifies the absence of any contemporary historical event. This comparison with geometry does not imply the use of the mathematical method, and it does not even introduce a mathematical order, as appeared in the DIPC.

The effort of systematization, which was already present in the monograph of youth, in the DIBP acquires new contours. Axiomatic-deductive structure, which appeared in the second chapter of another work, no longer exists. Instead:

Throughout this work I set out mainly three things: to present my reasons of deciding, and presenting them so evident as possible, to display in good order the themes that had to be dealt, and to distinguish clearly the things that might look alike, compared with each other, but that in reality are quite distinct.<sup>17</sup>

Hence, throughout his work, Grotius observes three methodological maxims: to base, as much as possible, the institutions of the Law of War in evidence; to present the subjects in a quite orderly disposition; and to

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<sup>16</sup> ‘(...) sed ni omnes de uberrimo argumento paucissima dixerunt, et ita plerique ut sine ordine quae naturalis sunt iuris, quae divini, quae gentium, quae civilis, quae ex canonibus veniunt, permiscerent atque confunderent’: Grotius, above n 13, prolegomenum 37.

<sup>17</sup> Ibid, prolegomenum 56. ‘In toto opere tria maxime mihi proposui, ut definiendi rationes redderem quam maxime evidentes, et ut quae erant tractanda ordine certo disponerem, et ut quae cadem inter se videri poterant necerant, perspicue distinguerem.’

distinguish similar yet different institutes. Haggenmacher asserts that this methodological proposal refers, in particular, to the classification of the sources of law (natural and voluntary law, divine law, civil law, the Law of the Peoples and the so-called ‘smaller than the civil law’) that the Dutch jurist exposed in the first chapter of the DIBP.<sup>18</sup>

According to the first maxim, Grotius attempts to lay the sources of law on principles so fundamental that they may become irrefutable. Regarding natural law, this is emblematic. The author establishes it in ‘notions so solid that nobody could deny, unless he lies to himself. Indeed, if given proper care, the principles of that law are almost as clear and evident as the things we perceive by our senses’.<sup>19</sup> Apparently, what the author perceives as evidence in this *ius* is the fact that it is reasonable. This is correct, yet incomplete. For Grotius, ‘evidence’ is not only a rational deduction and merely intellectual, but also what can be perceived by our senses. Therefore, natural law – which is based on reason – is as evident as civil law, because the latter can be read in a legal codex or be heard from the mouth of the sovereign. Both are evident alike.

Likewise, the Law of the Peoples is evident. To prove the existence of this law – which is also an auxiliary proof of natural law – Grotius returns to the testimony of ancient authorities (philosophers, historians, poets and orators). He does not trust them without reservation – since, according to the author himself, some had the habit of twisting the truth in the light of their own interests – but argues the agreement of so many individuals, in different times and places, could only stem from a universal cause. And this can be both a consequence of natural principles and a common

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<sup>18</sup> Haggenmacher, *Grotius et la doctrine de la guerre juste*, above n 6, 452 n 13.

<sup>19</sup> DIBP n 28, prolegomenum 39. ‘(...) notiones quasdam tam certas ut eas nemo negare possit, nisi sibi vim inferat. Principia enim eius iuris per se patent atque evidentialia sunt, multo magis quam quae sensibus externis percibimus (...)’.

consensus. The first alternative unveils natural law and the second the *jus gentium*.<sup>20</sup>

It is important to observe that this notion of evidence also covers the data collected by the senses, which means that either Grotius disagreed with the attacks of Charron on Aristotelian epistemological realism, or he was not aware of it. Both scenarios *evidence* that Grotius was not fond of *a priori* and purely rational conceptions found in the mathematical method.

On the other hand, the theme of the *Ordo*, because of its continued recurrence, seems far more significant to Grotius. In the DIPC, he intended to be as orderly as a mathematician and, in the other book, in *prolegomenum* 37, he berated his predecessors for their lack of completeness and order. The reason for this emphasis lies in the fact that the author sought to draw up a systematic and full text on the Law of War, with an appropriate classification of the *ius belli* sources right at the beginning. It is this classification that allows one to distinguish what in the Law of War is proper to natural law, divine law and the Law of the Peoples. The authors who preceded Grotius ‘had so little to say about such a broad subject and most did so by mixing or confusing *without any order* that which is relative to Natural Law, Divine Law, the Law of the Peoples, Civil Law, or Canon Law’.<sup>21</sup> The reference to the absence of order in the just war writers previous to Grotius appears within the same context in which he claims they mingled the sources of the *ius belli*. That is the importance of the *Ordo* for the Grotian system: because of it, Grotius surpasses the conceptual framework of the Roman notion of *ius*

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<sup>20</sup> Ibid prolegomenum 40.

<sup>21</sup> ‘(...) sed ni omnes de uberrimo argumento paucissima dixerunt, et ita plerique ut sine ordine quae naturalis sunt iuris, quae divini, quae gentium, quae civilis, quae ex canonibus veniunt, permiscerent atque confunderent’: Ibid prolegomenum 37.

*gentium* (a national law that was applied within the Empire between foreigners and was confused with natural law), which persisted in all of Grotius' predecessors.<sup>22</sup>

The third methodological maxim, the distinction between heterogeneous things, refers once again to the classification of sources. In addition to separating *ius gentium* from natural law, Grotius distinguishes natural law from voluntary law. This also corresponds to the first and greatest distinction when the author introduces the sources.<sup>23</sup>

That is worthy of note. In the Protestant cultural universe, voluntarism prevailed and, in the Catholic and Iberian World, Thomistic intellectualism dominated the study of law. In the first, all kinds of law stem from the will of a legislator; regarding natural law, the legislator is God Himself. In the latter, law was depicted as a measure of righteousness, a principle of organization. Thus, intelligence, a rational and orderly design, would constitute the essential element of law. In natural law, the main element was the Divine intellect. Therefore, for the Calvinist environment in which Grotius has emerged, natural law itself

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<sup>22</sup> The Roman Law of the Peoples regulated the relations amongst foreigners (*peregrini*) and foreigners between the Roman *cives* within the Empire. It was taught by a *praetor peregrinus*, an itinerant magistrate, a factor that allowed his edicts to harmonize different legal traditions and cultural proposals. It was therefore a positive law, but quite distinct from the *ius civile* that regulated the relations between the Romans. It turns out that the Romans were not good philosophers and found it hard to justify the *ius gentium* as a positive law in the light of the binary division of law that they inherited from Aristotle. One must observe that even the great jurists compilers Gaius and Ulpian (Emperor Justinian, 'Digest' in Paul Krueger and Theodor Mommsen (eds), *Corpus Iuris Civilis*, (Weidmann Berlin, first published 529, 1908 ed) 1, 1, 1, 4 and 1, 1, 9) and a philosopher such as Cicero (Marco Túlio Cícero, *Dos Deveres* (Martins Fontes, 1999) 136, 157) either find a natural basis for the Law of the Peoples or treat it as synonymous to natural law. This confusion remains throughout the entire Medieval period and persists even in a modern author such as Francisco de Vitoria (Paulo Emilio Borges de Macedo, 'O mito de Francisco de Vitória: defensor dos direitos dos índios ou patriota espanhol?' (2013) 1 *Boletim da Sociedade Brasileira de Direito Internacional* 90-110.

<sup>23</sup> DIBP n 28, I, 1, 9.

was voluntary. Protestant authors could not describe only positive law as voluntary, because every other law was too. Here, the Dutch jurist seems far closer to the Spanish Scholastic tradition. According to Grotius, the main characteristic of positive law lies in its voluntariness, not in being written (because that definition would exclude customs as positive law). The natural law and voluntary law dualism plays a key role in the development of the DIBP. Should one not be distinguished from the other, the task of producing a science of law would fail:

Many have intended so far to craft the Law of War in all its contours. Nobody has succeeded. This cannot be achieved unless – and about this there is still enough concern – the things that come from Positive Law and those which arise from nature are properly distinguished. The precepts of Natural Law, being always the same, may easily be assembled into a systematic ruling, but the provisions that come from Positive Law, everchanging and varying according to different places, are beyond a methodical system, like the other notions of singular things.<sup>24</sup>

Grotius intended to write a theoretical text and, to this end, it is necessary to observe the regular and constant phenomena. However, only natural law is universal and invariant: positive law varies according to each country and is based on opinion, *doxa*. The predecessors of Grotius were not able to write a theoretical work because they would mingle positive with natural elements.

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<sup>24</sup> ‘Artis formam ei imponere multi ante hac destinarunt: perfecit nemo: neque vero fieri potest nisi, quod non fatis curatum est hactenus, ea quae ex constituto veniunt a naturalibus recte separentur. nam naturalia cum semper eadem sint facile possunt in artem colligi: illa autem quae ex constituto veniunt, cum et mutantur saepe et alibi alia sint, extra artem posita sunt, ut aliae rerum singularium perceptiones.’: Ibid prolegomenum 30.

Therefore, Grotius' three methodological rules are not related to the geometric method, but they are an effort towards completeness and systematization in the composition of the DIBP. They are methodological concerns – no doubt – but not such as those of a Descartes or of a Galileo. Rather, they are efforts of systematization on jurisprudence undertaken by the French jurists, adequate to the precepts of *mos gallicus*. The attention that these jurists dispensed to method was part of the spirit of the time, but it never reached the levels or the sophistication of the Paduan School.

Finally, that which Grotius in the DIPC considered method resurged as 'evidence' twenty years later. Natural law is proven *a priori* by its adequacy to rational and social nature, and *a posteriori* by an agreement of all nations (or all of the most civilized) on a certain subject.<sup>25</sup> The opinion of the ancient texts, the Bible and the wise men provide 'historical evidence'. So, also in his mature oeuvre, Grotius prefers the first manner of proof and reserves to the second a merely confirmatory function. However, one should not assume inferiority, since, as mentioned above, it is only in this manner that one can prove the Law of the Peoples.

Hence, the conclusion that Grotius arrives, in *prolegomenum* 38, of his predecessors about the absence of the 'light of History', amounts to their rejection on a methodological level. They lack enough evidence to support their arguments. To address this mistake, they compensated by elevating Aristotle's ideas to the level of absolute truth, which Grotius claimed to be harmful, despite his own style being quite ornamental. The author returns to ancient writers not only as an appeal to authority, but as historical evidence. One should notice that this use of history is not even

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DIBP I, 1, 12.

remotely close to the research effort of a contemporary historian. It is nothing more than a reference to events of Classical Antiquity, the older, the better. Still, it is an indirect reference, always mediated by the Bible or by Classical writers. Nonetheless, for the jurist of Delft, History provides for a methodologically better argument.

The methodological debate that Grotius witnessed, in his time, was a widespread reaction to the Medieval tradition. Some strands were incorporated to Modernity, while others were lost in time. Yet, broadly speaking, method is not so important in Grotius as it is in Descartes. According to Haggemacher, Grotius' epistemology still seems somewhat "naïve", typical of a pre-Modern cultural universe.<sup>26</sup> However, in this respect, it is necessary to produce a semantic agreement about what the Modern method really is. If one regards only those of Descartes and Galileo, then indeed, Grotius is but a legitimate representative of the *mos gallicus* in the Law of War. But this interpretation excludes from Modernity even British empiricists.

#### IV CONCLUDING REMARKS

Finally, Grotius also descends from another tradition apparently quite strange for a Calvinist Dutchman: Scholasticism.

The Scholastic concern for method – even Spanish Scholasticism – has no epistemological basis. The so-called 'Scholastic method' was just a way to display complex issues more didactically. It begins by presenting a theological or philosophical proposition, followed by an objection or a questioning. The argument concludes with the solution of the problem and the answer to the objection. It was not employed in every work, only

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<sup>26</sup> Haggemacher, *Grotius et la doctrine de la guerre*, above n 6, 69 n 15.



those that were aimed at students. Thomas Aquinas himself did not use this method outside the two *Summas*.

However, in comparison with the works of pre modern jurists, Scholastics seemed to develop a more accurate knowledge, but that is due to the assumption of Aristotelian logic instead of rhetoric. Practical sciences, such as ethics and jurisprudence, which aimed at the good life, were not expressed according to the tenets of formal logic, but were made for convincing and persuasion. Rhetoric was the civil art of humanism, the art of the citizen who influences the politics of his city with his oratory. Most Medieval Italian lawyers, such as Bartolo, Baldo or Paulus Castrensis, of which Grotius descends at least indirectly, employed a method based on persuasion and casuistry.

Grotius does not use the Scholastic method, but even Thomas Aquinas did not employ it in all his writings. The Grotian method (the *recta ratio* and the appeal to authority) strongly resembles Scholasticism in another way. Unlike the Protestant tradition of an Alberico Gentili, to the Scholastics, original sin has not corrupted man absolutely. He could still perceive natural law through reason. The first principles of natural law are evident, even prior to any experience, because they are embedded in the human intellect. The problem is how to derive from these first principles practical guidance for everyday human life. For this venture, it is necessary to observe what the wise men of the past had said on the subject. To know what intelligent men of the past have spoken about natural law is a measure of prudence. Aquinas said that tradition is a hill that the researcher needs to climb to see farther. Hence, the use of reason and the authority of the ancient texts have always been an investigative procedure of the Scholastics.

Furthermore, in the works of Grotius, references to Aquinas, Francisco de Vitoria and other Scholastics abound. I wrote a doctoral thesis to prove the influence of Francisco Suárez *ius gentium* on Grotius. Therefore, the Scholastics' conscientious effort towards systematization and didactics is no stranger to the jurist from Delft. Amongst Dutch Calvinists, Grotius is the most 'Latin Catholic'.

# THE ART OF PERSUASION

GABRIËL A MOENS\*

## ABSTRACT

*This paper deals with the Golden Rules of Advocacy which have to be observed when 'persuading' a court or arbitral tribunal of the validity of an advocate's arguments. It also deals with successful advocacy strategies that could be used in court or arbitration hearings.*

## I INTRODUCTION

In this paper, I propose to review briefly some advocacy strategies which, in my experience, could be used successfully to persuade a court or arbitral tribunal of the validity or importance of an advocate's arguments. Advocacy 'is not necessarily a matter of truth, but rather of persuading a court or a tribunal to a point of view, and doing so within the scope of the relevant rules, and without misleading.'<sup>1</sup>

The ability to offer a persuasive argument is a superbly satisfying and gratifying emotion. This is because all advocates want to win their case. This reminds me of a poster that hangs in my study: the poster depicts a tennis player who appears to stretch to get to the ball. It has an inscription which reads: 'Whoever said, it's not whether you win or lose that counts, probably lost.' Over the years, I have observed advocacy performances

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<sup>1</sup> Toni Lucev, *Advocacy – Some Essential Tips for Beginners*, Western Australian Courts, Summer Clerks Course, 11 December 2012.

that were often hampered by common problems, including (but not limited to) an absence of a coherent structure, lack of content, inadequate questions and answers skills, poor time management and a failure to engage with the court or arbitral tribunal. Of course, common sense suggests, and experience confirms, that advocates cannot be equally well qualified: indeed, there are open-ended degrees of excellence and one advocate will necessarily be better or worse than another advocate.

It is important for advocates to understand the forum in which the advocacy happens. Indeed, an advocate will need to adapt their style of speaking to the forum, for example a court or arbitral tribunal. Let us take an arbitral tribunal as an example: an arbitral proceeding cannot be treated as a trial or an appeal to a court. As such, the language used is less formal than the language used in courts. Consequently, it is inappropriate to refer to arbitrators as ‘Your Honour’. Instead, it is customary to refer to ‘Mr (or Madam) President or Mr Chairman (or Madam Chair) and Members of the Tribunal’ or to mention the arbitrators by name.

Also, in an arbitral hearing, as opposed to a court hearing, it may be ineffective ‘to submit’ your argument to the arbitral panel. Indeed, this may be a non-effective way of advocating because, when submitting arguments to the arbitral panel, advocates are, in effect, inviting the arbitral panel to merely consider their arguments and possibly to disagree with them. Instead, in this context, advocacy is about persuading the arbitral panel of the validity of the advocate’s arguments and, therefore, the language used should be more direct than that used in a court. In arbitral hearings, advocates ‘argue’, ‘contend’ or persuasively or directly ‘communicate’ the position of their clients to the arbitral panel.

## II THE GOLDEN RULES OF EFFECTIVE ADVOCACY

There is no mechanical procedure which will necessarily result in successful persuasion. However, my experience of participating in many arbitral hearings and court cases reveals that there are, at least, three rules which should be embraced if an advocate wants to be persuasive. I refer to these rules as the ‘Golden Rules of Effective Advocacy.’

### Rule One: *Successful advocacy requires simplicity*

Without simplicity there will be no persuasion. It might be useful to develop your arguments in a simple way to ensure that an ‘intelligent moron’ would be able to understand them. My ‘intelligent moron’ test is not an oxymoron; it envisages that advocates try out their arguments on a reasonably intelligent person who is not involved with the relevant issues and may not even have been trained in the rigorous discussion of legal or ethical issues. If our ‘intelligent moron’ understands the arguments of the advocate, the arguments have been presented clearly and with precision. Albert Einstein, in a celebrated quote attributed to him, said that, ‘If you can't explain it to a six year old, you don't understand it yourself.’ Indeed, as the relevant laws, rules and ideas which have to be presented to a court or arbitral panel are often very complex, advocates need to develop the skill of explaining complex arguments in a simple way.

### Rule Two: *Sophisticated advocacy requires that all statements be supported by references*

This Rule appears to be incompatible with the previous Golden Rule, but it is not. A long time ago, Leonardo da Vinci reminded us that ‘simplicity is the ultimate sophistication.’ Indeed, simplicity and sophistication are not contradictory or mutually exclusive characteristics of an argument

because sophistication merely requires that all statements made, and arguments developed, by advocates be supported with authorities. These authorities could be facts found in the relevant case file, case law (jurisprudence), doctrinal references or principles of *lex mercatoria*. In this way, the goal of simplicity may even be enhanced if the advocate is able to provide support for all statements made and arguments developed during his/her court appearance or arbitration hearing. Indeed, supporting authorities have the effect of making the arguments developed by advocates clearer, more transparent and, therefore, more simple and possibly more convincing and persuasive.

*Rule Three: Success ultimately requires flexibility and adaptability*

Effective advocacy usually requires a certain amount of rigidity which enables advocates to provide the court or tribunal with standard replies to predictable questions. Automatism has to be mastered before it is possible to aspire to freedom from rigidity. However, success will often depend on the amount of flexibility or adaptability displayed by advocates. Indeed, as Albert Einstein reminded us long ago, ‘The measure of intelligence is the ability to change.’

The importance of flexibility and adaptability may be illustrated with an example which is relevant to an arbitral hearing. In arbitration, the Respondent will often be asked to start with their arguments on jurisdiction. This is because the arbitral panel obviously assumes that the Claimant is not likely to question the authority of the tribunal to hear the substance of the dispute because the Claimant is the party that initiates the arbitration. However, the Respondent may wish to question the authority of the tribunal and, therefore, this party needs to provide reasons for objecting to the jurisdiction of the tribunal. These objections

vary from case to case and could include, among others, a claim that the dispute is not covered by the arbitration agreement or that the dispute has been initiated in the wrong arbitral institution. The distinct possibility that the Respondent might have to start its arguments first, should alert advocates to the need to be flexible and to prepare arguments which will suit all circumstances.

### III ADVOCACY TIPS

What is the secret of successful persuasion? The answer to that question is as mundane as it is true: success requires very hard work, commitment, devotion, perseverance and enthusiasm, especially in circumstances where the advocate is faced with a new problem that he/she has not encountered before.

Although it is certainly the case that luck is an important factor in determining how successful an advocate will be, a statement credited to the Roman philosopher Seneca the Younger reminds us that ‘luck is what happens when preparation meets opportunity.’

Advocates are actors in that they persuasively present the best case for their client, even if the advocate knows that the arguments are weak. A good actor will attempt ‘to sell’ the client’s case to the court or arbitral tribunal. A good way of facilitating this skill is by imagining that the client is looking over the shoulder of the advocate to see what he is doing to advance their case. However, at the same time, it is important to remember that a counsel only presents the best possible case for their client. The advocate is thus not emotionally affected by the outcome of the dispute because, ultimately, it is the client who wins or loses. The advocate is merely a convenient vehicle used for the purpose of arguing the case on behalf of the client.

The following are merely tips, adherence to which might facilitate successful advocacy. Most tips are firmly rooted in common sense, but some may appear to be slightly unorthodox. They are not listed in any particular order.

(1) Advocates must have a strong opening and a roadmap. Advocates also need to develop a plausible case theory. A strong opening may well be practiced, but it has to be delivered without reading. It could sound like this:

Mr President, Members of the Tribunal. My name is x and I appear for y, which I will refer to as z. This case is about d [*note: this should be a compelling point and delivered clearly*]. I will be dealing with the procedural issues (add time) and my colleague will address the substantive issues (add time).

During their presentations, advocates should indicate to the court or arbitral tribunal when they are moving to their next argument. They also need a very strong closing statement, in which they summarise succinctly their main argument (namely, why their client should win). The closing statement should be a ‘big bang’ statement that emphasises the main points that the advocates would like to make and it should resonate in the minds of judges or arbitrators. Obviously, it is important that the closing statement reinforces the opening statement.

(2) During the advocates’ presentation, it is important that their road map is followed impeccably. The roadmap enhances the structure of the arguments that advocates make during their presentations and, therefore, judges and arbitrators should be regularly reminded of the structure of advocates’ arguments. Some indicative words could generally be used to signpost the structure of the argument. For example, an advocate could



indicate that he or she is moving to another argument by signposting it as follows:

‘Your Honour, or Mr President, Members of the Tribunal, moving to my second argument’ or ‘Madam Chair, Members of the Tribunal, my next argument is ...’.

Some advocates, especially when appearing in court and before moving to their next argument, have a discernible tendency to say:

‘if you do not have any other questions’ or ‘if the court has no questions ... we move to our next argument ....’

Such statements do not operate as signposts, but instead may generate further questioning from the court, thereby endangering the time management of the advocates.

(3) In a hearing, advocates should only bring up their strong points, and never discuss their weak points (in any event, a party’s weak points will undoubtedly be raised by the opposing counsel). It is also recommended that advocates should only reply to the strongest arguments of opposing counsel. In this context, I often tell my audience my toddler story: if you walk in a street, anyone of us would be able to knock down a toddler with the flick of our finger. However, it does not prove that that we are strong. We would only be strong (and be perceived as such) if we are able to knock down a strongly-built person. The message of this story is that, to be persuasive, we need to address the strongest arguments of our opposition and to proceed to discredit them. Then, and only then, will we be regarded as strong advocates. Of course, in order to be able to do this, we need to ascertain the strong points of our opposition (not just our strong points). Thus, advocates need to know their own arguments intimately and must also understand most, if not all, of the arguments that

their opponents might develop. In ascertaining the case for the opponents, advocates should seek 'to stand' in the shoes of their opponents.

It is a dreadful mistake for an advocate to endeavour to communicate all his/her arguments to the court or arbitral panel, regardless of their strength. Not only would it be impossible to do this from a timing point of view, resulting in serious and possibly unsurmountable time management issues, but it would also be strategically disastrous because judges or arbitrators may not be able to distinguish between strong and weak arguments. By and large, the court is most interested in a consideration of the 'crucial' facts or issues which are likely to help them decide the case.

(4) Advocates should be able to use questions asked of them by the court or members of the arbitral panel as an opportunity to advance the interests of their client. Challenges presented through questioning, are not problems, but present opportunities to impart the party's case to the court or arbitral tribunal. Indeed, a good advocate is able to convert even a challenging question into an opportunity to show their level of understanding, knowledge and ability. When a judge asks a question, the advocate should immediately cease speaking, make eye contact with the judge, listen carefully to the question in order to understand its thrust and relevance. There is no harm in thinking about a suitable reply for a few seconds.

(5) The Defendant/Respondent should concentrate on, and respond to, the arguments advanced by the Appellant/Claimant and should not make an independent, parallel speech. Not unfrequently, judges remark that the parties were like 'two ships passing each other in the night.' Such a remark is indicative of the fact that the Respondent failed to respond to

the Appellant/Claimant. If there is an important argument that the Respondent needs to make, but is not responsive to arguments made by the Claimant, this argument may be advanced provided the court or tribunal is alerted to its non-responsive nature.

(6) It would appear almost inevitable that an advocate will make a mistake (or two) during a hearing. For example, an advocate may have the facts mixed up (which may be fatal to their chances of success) or may have forgotten an important fact that is either supportive of one's case or critical of the opponent's case. In such situations, it is advisable to desist from overtly advertising these mistakes to the court/tribunal. Instead, advocates might want to use their skill to minimise the impact of their mistakes, even if the judges/arbitrators are aware of them. This could be done, for example, by saying, with a smile, that 'to err is human.' As judges/arbitrators are human too, they too would have made mistakes in their careers and, hence, could presumably relate to the occurrence.

Although a slip of the tongue may be regarded as harmless, it could actually leave a bad impression on the court or tribunal. For example, if an advocate were to acknowledge the members of the court during an afternoon hearing with a supposedly friendly 'good morning' greeting, such *faux pas* could easily be interpreted as lack of confidence or nervousness on the part of the advocate.

(7) It is constantly necessary to remind the court or arbitral panel why the advocate's client should win. If advocates know (as they should) why their clients should win, that point should be signposted throughout the argument. The simplicity of the argument plays a crucial role in this regard. Simplicity indicates that the advocate clearly knows the strong

position of his or her client's case. It also helps the tribunal to filter out, among the complex factual matrix and several legal principles, the most important points which are important in deciding the case.

(8) Advocates would leave a very bad impression if they were to read their arguments (or a prepared speech). Apart from the obvious fact that reading impedes efforts at maintaining eye contact, it also inhibits the meaningful communication of ideas and, clearly, is not amenable to the development of a sensible discussion among professional people. Indeed, ultimately, a court hearing should become an intelligent and meaningful discussion between counsel and the court. However, any quotes that advocates would like to use during their presentations should be read, lest the advocates be accused of parroting behaviour or of having memorised the quotes by rote learning.

(9) It is important to ensure that judges or arbitrators do understand the argument that is being made. However, after answering a question, advocates should not wait until the judge or arbitrator has commented on the 'quality' or 'correctness' of the answer, hoping to receive their blessings. This generally happens when an advocate becomes silent after answering a question from the court or tribunal. This creates an awkward situation where the counsel is waiting for a comment whilst the court or tribunal is waiting for the counsel to move on with their arguments. Some advocates even use sentences like 'does it answer the question of your Honour?' or other sentences to the same effect. Instead, I suggest that advocates continue with their presentation. However, this should be done in such a manner so as to ensure that the advocate is not evading the question asked of him or her. Apart from wasting valuable time, counsel is expected to cover all their essential arguments and, hence, if time is not

utilised profitably, time management may prevent them from fully developing their arguments in a hearing.

(10) Of great importance is the power of rebuttal. In a rebuttal an advocate can undo a lot of problems that were caused during the main presentation. However, an advocate should limit themselves to two or maximum three hard-hitting points, and end with a 'big bang' statement, namely, as to why their client should win. Under no circumstances can the rebuttal be used for the purpose of introducing new arguments. An advocate may find that they have many points to rebut. Nevertheless, it is important to rebut only those points which are wrong in law or in fact. Moreover, a rebuttal should focus on the opposing counsel's strong points which the advocate seeks to discredit in his or her rebuttal.

(11) Advocates should try to be on 'the side of the angels'. This point, which was first indicated to me by Justice Desmond Derrington of the Supreme Court of Queensland, alerts advocates to the necessity of developing arguments in a way which will create sympathy for their case among the judges/arbitrators. Sympathy is often generated by advocates arguing that their client's actions make sense from a business point of view or by indicating that they were 'doing the right thing in the given circumstances' or that they 'tried to minimise losses as much as possible' or 'tried to help the other party in carrying out the obligations under the contract.'

(12) Advocates should desist from putting words in the mouth of the judges/arbitrators and should not use any comments made by arbitrators in order to bolster their own arguments. For example, it is inappropriate to say to a judge or arbitrator: 'as you yourself have stated when commenting on a point made by the opposing counsel ....' Indeed, the

value of such a statement is questionable at best because, in making this statement, the advocate assumes that the judge/arbitrator has made up his mind about a certain issue and will necessarily be on the advocate's side on this issue. Instead, the judge/arbitrator may merely have sought further information from the counsel, without wishing to divulge their own view of a matter.

A good advocate may, however, use answers given by the opposing counsel to the questions of the court or tribunal to their advantage. For example, if opposing counsel gave a patently wrong or no answer to a question asked by the court, then a good advocate may preface their own presentation by answering the question. This could be done by saying: 'Your Honour, in answer to the question addressed to opposing counsel, I will provide you with the correct answer/information.' This strategy will be favourably received by the court, for a number of reasons. First, the court will presumably be happy that the counsel has remembered the question. Second, the counsel proves his or her attentiveness to the proceedings and the arguments developed by the opposing counsel. This style of advocacy promotes interactivity and enhances engagement and dialogue between the counsel and the court/tribunal.

(13) Advocates should speak slowly and loud enough, without being condescending. It is the physical environment which dictates how loud an advocate should speak. When the court room is big and the distance between the counsel table and the judges' table is relatively large, then counsel should speak louder than usual. Also, during their presentation, an advocate may vary the pace and pitch of the sound in order to emphasise certain points. For example, if a counsel relies upon a crucial fact found in the file, they should read it slowly and emphasise crucially important words by slightly raising their voice. Advocates should never

underestimate the power of inserting pauses in their presentation. Using fluctuations in delivery enhances a lively presentation while speaking at the same pitch makes the delivery monotonous.

(14) Advocates should ensure always to answer a question asked of them by a judge or an arbitrator. In this context, it is important to never shirk their responsibility by telling the court that this issue will be discussed later or will be addressed by their co-counsel. Therefore, it is important for a good advocate to know not only his or her own issues, but also the issues which their co-counsel will discuss in their presentations.

(15) Never underestimate the power of humour! I recall an arbitration hearing in the late 1990's when counsel told the arbitral panel that 'you do not have to be an Einstein to understand this point.' The implication of this statement was that the statement/argument made by the opposing counsel was so stupid because they could not understand or concede a point which everyone knew to be true or obvious. At the first available opportunity, counsel on the other side, who in effect had been accused of stupidity, retorted that he agreed that 'you do not have to be an Einstein to understand this point,' but then added brilliantly that 'but it does help to be a good lawyer.'

(16) There are many issues, some of which may seem to be trivial, for example, how advocates should be dressed, how much water they should consume during their presentation, among other things. It is not the purpose of this paper to deal with these minutiae, even though they may be relevant in any court or arbitral hearing. Nevertheless, it is useful to point out that advocates should be dressed conservatively and their materials should be neatly organised on the table or lectern before them.

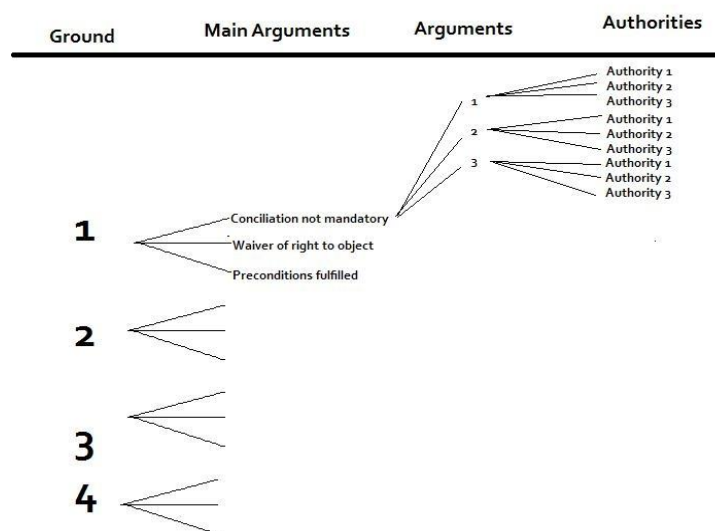
A professional look, attitude and approach are likely to be appreciated and respected by the court or tribunal.

#### IV THE SECRET OF SUCCESSFUL ADVOCACY

This strategy, which is discussed briefly here, consists of three planks: (a) the multi-tiered approach, (b) the questions and answers bank, and (c) time management strategy.

##### A *The Multi-tiered Approach*

The multi-tiered approach (also known as the 1/2/3 strategy) is a strategy aimed at ensuring that every statement made, or argument developed, by advocates is supported, ideally, by three authorities (hence the 1/2/3 strategy). These authorities could be a fact found in the File, a relevant case, or doctrinal authority. The multi-tiered approach consists of four levels, as diagrammatically seen below.



The first level of the above diagram, developed during the 18<sup>th</sup> Willem C Vis International Commercial Arbitration Moot, has four grounds that the



advocate wants to plead, the first one of which is that the arbitral tribunal does have authority to hear the case. The second level of the first ground are the main arguments in favour of the proposition that the tribunal has the authority to hear the substance of the case, namely that (i) conciliation is not mandatory, (ii) the Respondent waived his right to conciliation, and (iii) the preconditions to arbitration were fulfilled. At the third level, each of these three arguments is further supported by three sub-arguments. Finally, at the fourth level, each level three sub-argument is supported by authorities (a fact found in the File, case authorities, doctrinal authorities, including quotes, principles of *lex mercatoria*, etc.).

This multi-tiered strategy is developed for each ground (including all procedural and substantive grounds). Eventually, impressive diagrams are created which enable advocates, depending on the questions asked of them by judges or arbitrators, to move from one part of their diagrams to the any other part and to return to their main argument after having answered the questions of the court/arbitral panel.

### B      *The Questions and Answers Bank*

Advocates should establish a bank of potential questions and model answers. This will undoubtedly help advocates in their attempts to answer questions asked of them by judges or arbitrators. In the unlikely event that a completely novel question is asked, it should be possible to design an answer by combining parts of model answers given to other questions in the bank.

### C      *Effective Time Management*

Successful advocates manage their allocated time effectively. Advocates are expected to deal with all the issues which they have foreshadowed in

the roadmap. Occasionally, if not often, advocates may be diverted from their roadmap by the incessant and relentless questioning of the court/arbitral panel. Nevertheless, success will evade the advocates if they do not deliver what they promised to deliver in the roadmap. With regard to time management, the question arises how time can be managed if judges or arbitrators keep on asking questions. Perhaps, good time management may require advocates to admit that they cannot take this issue any further and that, therefore, they propose to move on. As a general rule, if an advocate cannot communicate an argument in, say three minutes, perhaps it should not be delivered at all? The Golden Advocacy Rule of simplicity obviously plays a very important role in this regard.

## V CONCLUSION

In this paper, I have briefly reflected on successful advocacy strategies which could be used, with benefit, by advocates who appear before courts or arbitral tribunals. Although none of the advice proffered in this paper will necessarily result in a successful outcome, I am of the opinion, that these strategies, which I have used successfully during the last two decades, will facilitate the achievement of success and will substantially increase the persuasive nature of an advocate's arguments. Nevertheless, ultimately success will only come through very hard, diligent and persistent work.

# WHEN SOME PEOPLE ARE MORE EQUAL THAN OTHERS: THE IMPACT OF RADICAL FEMINISM IN OUR ADVERSARIAL SYSTEM OF CRIMINAL JUSTICE

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## ABSTRACT

*There is no doubt that in decades past, gender neutrality was certainly lacking in various aspects of our adversarial system of criminal justice, especially where allegations of rape and other sexual assaults were made. However, the reality is that most of these antiquated and unfair rules have now been legislated or construed out of existence. This article will examine several areas in which the Victorian Parliament has arguably accorded preferential treatment to one gender at the expense of the other. In particular, the discussion will focus on how this preferential treatment has egregiously affected our system of criminal justice, especially such sacrosanct tenets as the presumption of innocence and that all persons are regarded as equal before the law.*

## I INTRODUCTION

If the word ‘feminist’ denotes a person or organization that favors equality between the two genders in terms of equal pay for equal work as well as voting and other matters in which there is no rational basis to discriminate on the basis of gender, this writer has no qualms with characterizing himself as an ardent feminist. However, even the most strident advocates of equal rights for both genders would readily concede that there are obvious anatomical differences between men and women that cannot be gainsaid. Though there are always statistically insignificant segments of the population that may cavil with that or any other notion, it

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is fair to say that the overwhelming majority of rational thinking people would not favor gender-neutral rest rooms in areas open to the general public, nor would they advocate gender-neutrality in certain sporting events such as rugby, football, boxing and the like. It is an incontrovertible fact that the anatomical differences between the two genders are such that in these and similar instances, it would be neither fair nor practical to force or even allow the two sexes to compete against one another. Also emanating from the obvious anatomical differences that inexorably lead to these observations, and depending in large measure upon the extant cultural mores that prevail in various parts of our planet, there are traditional advantages and disadvantages in being a person of either gender.

Though there are those who might quibble with the following examples in modern western societies, many would argue that men have traditionally had an advantage in heterosexual relations in that it is they who are expected to initiate a verbal exchange in which the woman is asked if she is interested in spending time with the male in some sort of social setting in which a friendship, whether platonic or heterosexual, may develop. To some, this is seen as an advantage for men because it places them in a position to be the one who initiates such an exchange with a woman of their choice. Under this view, despite the concomitant risk that the woman may spurn such an expression of interest, it is still better to be in a position to choose rather than passively wait until such time as a suitable male fortuitously initiates an exchange. On the other hand, there are many who see this arrangement as a disadvantage for men who, by taking the initiative, are the only gender that is forced to incur the risk that their offer will be flouted. Regardless of how one perceives the relative advantages or disadvantages of each gender in this process, it

is apparent that there are cultural expectations as to how men and women should behave in the incipient stages of heterosexual relationships.

Similarly, many men regard it as customary to open doors for women, to always allow them to enter cars, homes, flats, restaurants or other establishments first, and typically assume full responsibility for the costs associated with most or all social engagements. Moreover, it is only in recent years and in some western countries that women are permitted to partake in combat while serving in the military. During the very unpopular Viet Nam War, for example, it was quite common for men to resist conscription. Women, on the other hand, were not liable to being conscripted at all, let alone expected to risk their lives in combat. Depending upon one's perspective, of course, this serves as another illustration of an advantage that inures to members of one gender as opposed to the other. Readers are also reminded of the tragedy of the Titanic in which, save for some exceptions involving sophistry, women and children were given preferential access to an inadequate number of lifeboats while adult males were consigned to suffer a horrible death in the icy waters of the Atlantic Ocean.

The point of noting that the two genders have always received disparate treatment, sometimes justified and other times not,<sup>1</sup> is to reinforce the point that some have sought far more than equal pay for equal work and general equality in instances where fairness and common sense dictate that there is no sound justification for disparate and unfair treatment of

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<sup>i</sup> For example, there were common law rules that conclusively assumed that: males under the age of 14 were incapable of committing rape: *R v Waite* [1892] 2 QB 600; a married man cohabitating with his wife was conclusively deemed to be incapable of raping her: Matthew Hale, *1 Historia Placitorum Coronae: The History of the Pleas of the Crown* (1778) 628; and that consent given by a woman to sexual penetration was irrevocable until such time as the man completely withdrew his genitalia from the vaginal cavity: *Kaitamaki v The Queen* [1984] 2 All ER 435.

women.<sup>2</sup> Rather than embracing the reality that there are very real anatomical differences and cultural norms that serve to create what many see as a beautiful dynamic between the two genders, there are some who seek to retain all the real or perceived advantages of one gender and, at the same time, augment them by demanding that they likewise receive the

<sup>2</sup> This article does not challenge the various rules that have been developed to equalise the position of women who are victims of sexual assault. Many of these developments are legitimately directed towards correcting an existing imbalance and are necessary and welcome. Examples of such outdated rules include that in sexual assault prosecutions the accused was permitted to adduce evidence on all matters relating to the complainant's past sexual conduct, including her general reputation in the community for chastity, whether on cross-examination or as part of his case-in-chief: James J Wesolowski, 'Indicia of Consent – A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Victim's Character for Chastity' (1976) 7 *Loyola University of Chicago Law Journal* 118; Melanie Heenan, 'Reconstituting the 'Relevance' of Women's Sexual Histories in Rape Trials' [2003] (13) *Women Against Violence: An Australian Feminist Journal* 4. In addition, and unlike prosecutions for other offences, a rape complainant's testimony was deemed as insufficient to convict unless it was corroborated by independent [external] evidence: Constance Blackhouse, 'The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth-Century Canada and Australia' (2001) 26(2) *Queen's Law Journal* 297. Finally, 'Juries were reluctant to convict "upstanding" young men who were accused of raping "loose" women (often defined as unmarried non-virgins). Moreover, being "dressed for sex" was considered a form of consent by some courts, and prostitutes could not be raped because they were in the "business" of consenting': A Dershowitz, *Taking The Stand* (Crown Publishers, 2013) 322. Over the past three or four decades, however, all of these common law rules have been abrogated by legislation or construed out of existence by the courts as part and parcel of their inherent power to incrementally develop the common law. In Australia, see *Crimes Act 1958* (Vic) ss 62(1), (2); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 48–53; *Crimes Act 1914* (Cth) ss 15YB–15YC; *Criminal Procedure Act 1986* (NSW) s 293; *Evidence Act 2008* (Vic) ss 97, 98, 101; *Criminal Procedure Act 2009* (Vic) ss 339–352; *Evidence Act 2001* (Tas) s 194M. The statutory analogues in the jurisdictions which have thus far rejected the Uniform Evidence legislation are: *Evidence Act 1929* (SA) s 34L; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) ss 36A–36BC; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4. For examples of rape shield provisions outside Australia, see, eg: NY Criminal Procedure Law § 60.42 (2011); Ga Code Ann (LexisNexis 2011) § 24-2-3; Wyo Stat Ann § 6-2-312 (2011); Colo Rev Stat 18-3-407 (2011); Ohio Rev Code Ann 2907.02 (LexisNexis 2011); *Criminal Code*, RSC 1985, c C-46, s 276; *Youth Justice and Criminal Procedure Act 1999* (UK) ss 41–43; *Evidence Act 2006* (NZ) s 3. Perhaps just as importantly, societal attitudes are far more enlightened in regard to the notions of 'dressed for sex' and the protection of prostitutes from rape: Barbara Sullivan, 'Rape, Prostitution and Consent' (2007) 40(2) *Australian and New Zealand Journal of Criminology* 127.

real or perceived advantages of the other. In the writer's view, therefore, this is tantamount to a declaration that what is mine is mine - and what is yours is mine.

In Victoria, the most insidious consequences of the radical feminists' quest for preferential treatment have been those relating to both the substantive and procedural rules that govern our adversarial system of criminal justice. The balance of this article will focus on these rules and why they are inimical to what have been long regarded as the cardinal tenets of the right to a fair trial in *all* criminal prosecutions; namely, that all people are equal before the law irrespective of race, ethnicity or gender, the presumption of innocence, and that the prosecution bears the onus of satisfying the fact-finder of all essential elements of its case beyond reasonable doubt.

## II SUBSTANTIVE REFORMS THAT ACCORD SPECIAL DISPENSATION TO WOMEN

Though many examples could be noted, considerations of convenience dictate that only three of the most flagrant and foreboding rules will be examined: the crime of infanticide;<sup>3</sup> the abolition of provocation as a partial defence to the crime of murder;<sup>4</sup> and allowing rape to be prosecuted as a crime of absolute liability.<sup>5</sup>

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<sup>3</sup> *Crimes Act 1958* (Vic) s 6.

<sup>4</sup> *Crimes Act 1958* (Vic) s 3B.

<sup>5</sup> See *Crimes Act 1958* (Vic) ss 35, 36, 38. See also K J Arenson, 'Rape in Victoria as a Crime of Absolute Liability: A Departure from Both Precedent and Progressivism' (2012) 76(5) *Journal of Criminal Law* 389.

## A      *The Crime of Infanticide*

The *Crimes (Homicide) Act 2005* (Vic) ushered in many important changes to the law of homicide in Victoria, one of the most notable being the creation of the offence of infanticide that is now set out in s 6 of the *Crimes Act 1958* (Vic). That section provides as follows:

### *Infanticide*

(1) If a woman carries out conduct that causes the death of her child in circumstances that would constitute murder and, at the time of carrying out the conduct, the balance of her mind was disturbed because of—

(a) her not having fully recovered from the effect of giving birth to that child within the preceding 2 years; or

(b) a disorder consequent on her giving birth to that child within the preceding 2 years—

she is guilty of infanticide, and not of murder, and liable to level 6 imprisonment (5 years maximum)...

(2) On an indictment for murder, a woman found not guilty of murder may be found guilty of infanticide.

Three important factors are readily apparent from the definition of infanticide. The first is that this form of unlawful homicide applies only to women who commit what would otherwise constitute the murder of their children, provided the conduct causing death occurs within the two-year statutory period. The second is that the conduct resulting in death must also occur at a time when the balance of the woman's mind was disturbed, either because she had not fully recovered from the effect of giving birth or due to a disorder resulting from the same. Thus, while the rather controversial diagnosis known as post partum depression is never



expressly mentioned in the definition of the offence, the expressions ‘effect of giving birth’ and ‘disorder consequent on...giving birth’ would undoubtedly encompass the term. Finally, readers will note that in Victoria, the common law offence of voluntary manslaughter has been abolished in name.<sup>6</sup> The *Crimes (Homicide) Act 2005* (Vic), however, has now substantively reintroduced the excessive force manslaughter doctrine through the creation of the offence of ‘defensive homicide’<sup>7</sup> which, in this context, operates in exactly the same manner as the common law offence of voluntary manslaughter prior to the High Court’s decision in *Zecevic v DPP*.<sup>8</sup> For present purposes, however, it is important to understand that the offence of voluntary manslaughter is actually the same offence as murder, save that the accused’s conviction is reduced to the former due to the fact that the killing occurred under extenuating circumstances that the law regards as sufficient to warrant a reduction.<sup>9</sup> At a time when there were a litany of capital offences, particularly murder, a reduction to the non-capital offence of voluntary manslaughter was literally a matter of life and death.

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<sup>6</sup> See, eg, *Crimes Act 1958* (Vic) s 9AB (expressly abolishing the common law defence of provocation insofar as it applies cases in which a killing that would otherwise constitute murder is reduced to the lesser offence of voluntary manslaughter due to the mitigating circumstance that the accused was induced to kill by provocative conduct on the part of the deceased which does not operate to completely excuse or justify the killing). See also *Zecevic v DPP* (1987) 71 ALR 641 (‘*Zecevic*’) (abolishing the excessive-force-manslaughter doctrine, also known as the ‘excessive’ or ‘imperfect’ self-defence doctrines in which a person could be convicted of voluntary manslaughter rather than murder, provided that the accused was found to have acted with an honest, albeit objectively unreasonable belief, that his or his use of deadly force was necessary in self-defence or the defence of another or others).

<sup>7</sup> *Crimes Act 1958* (Vic) ss 9AC, 9AD.

<sup>8</sup> *Zecevic* (1987) 71 ALR 641. For a brief discussion of the excessive-force-manslaughter doctrine, see above n 6.

<sup>9</sup> *Parker v The Queen* (1963) 111 CLR 610, [46] (‘*Parker 1*’); *Parker v The Queen* (1964) 111 CLR 665, [37] (‘*Parker 2*’). For a thorough discussion of the defence of provocation that operates to reduce what would otherwise constitute murder to the lesser crime of voluntary manslaughter, see P Gillies, *Criminal Law* (LBC Information Services, 1997, 4<sup>th</sup> ed) 363–95.

Though the common law was quite limited in terms of the circumstances that were regarded as sufficiently extenuating to warrant such a reduction,<sup>10</sup> there are currently other unlawful homicides in Victoria (and elsewhere),<sup>11</sup> including infanticide,<sup>12</sup> that are equally deserving of the voluntary manslaughter epithet because they too involve killings that would otherwise constitute murder were it not for mitigating circumstances that parliament regards as sufficient to warrant a reduction to some lesser offence. What is astonishing, however, is that unlike voluntary manslaughter which is a level 3 offence punishable by a maximum term of twenty-five years imprisonment,<sup>13</sup> infanticide is a mere level 6 offence that carries a maximum term of only five years

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<sup>10</sup> See above n 6.

<sup>11</sup> *Crimes Act 1900* (NSW) ss 23(1)–(5); *Crimes Act 1900* (ACT) ss 13(1)–(6); *Criminal Code Act 2013* (NT) ss 158(1)–(8); *Criminal Code Act 1899* (Qld) ss 268(1)–(5); *Homicide Act 1957* (UK) s 3; *Criminal Code*, RSC 1985, c C-46, s 232(1)–(3). Every American state recognizes provocation as an extenuating circumstance that reduces what would otherwise constitute murder to the lesser offence of voluntary manslaughter. See, for example, Mass Gen Laws ch 265 § 1; John R Snowden ‘The Case for a Doctrine of Precedent in Nebraska’ (1982) 61 *Nebraska Law Review* 565; La Stat Rev Ann 14:31 § 31 (1973).

<sup>12</sup> See also *Crimes Act 1958* (Vic) s 6B (survivor of a suicide pact). This too involves a killing that would otherwise constitute murder were it not for the extenuating circumstance that it was carried out as part of a suicide pact among persons thought to be so mentally impaired that a conviction for manslaughter is deemed more appropriate. Readers should note that the crime of infanticide can be traced back to the *Infanticide Act 1938* (UK): G Williams, *The Criminal Law: General Part*, 557, n 20. It was later adopted in Victoria and as a result of the *Crimes (Homicide) Act 2005* (Vic), it was later amended into its current form. The Act departed from English law in many respects, most notably by recognizing both duress and necessity as complete defences to murder in ss 9AG and 9AI respectively. One has to question, therefore, why parliament gave no consideration to fathers suffering from similar ‘disorders’ consequent to the birth of their children. Was this obvious omission permitted by mere coincidence? If not, what, aside from the influence of a special interest group, would explain such an inequitable statutory offence?

<sup>13</sup> *Crimes Act 1958* (Vic) s 5. Although this section uses the generic term ‘manslaughter’ without drawing a distinction between voluntary and involuntary manslaughter, it has always been construed as encompassing both genres of manslaughter: G Nash, *Annotated Criminal Legislation Victoria*, (LexisNexis, 2012) 97–106.

imprisonment.<sup>14</sup> The relatively minor offence of common assault,<sup>15</sup> for example, is also a level 6 offence.<sup>16</sup> Further, it is regarded as the least serious of the numerous non-sexual assault offences that currently exist in Victoria. It would encompass, for example, *any degree* of direct<sup>17</sup> intentional or reckless touching of another person without their consent, including via the use of an instrumentality or an innocent agent such as young child or an attack dog.<sup>18</sup> Slapping another person in the face because of an inability to control one's anger in response to harsh criticism, for example, would constitute an example of a common assault.<sup>19</sup>

Whether it is justifiable to allow a mother to escape a murder conviction under the circumstances set forth in s 6 is certainly open to debate. Even assuming that it is, one has to question why these particular extenuating circumstances are also sufficient to warrant the same level 6 maximum sentence that can be imposed for offences as minor as common assault. If one who killed in response to adequate provocation was subject to level 3

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<sup>14</sup> *Crimes Act 1958* (Vic) s 6.

<sup>15</sup> In this context, the offence of common assault can consist of either the 'psychic' or 'battery' genre: *R v Lynsey* [1995] 3 All ER 654, 654. It is now well settled that both limbs are offences of *mens rea*; that is, 'psychic' type common assault requires, as a constituent element, that the accused must intentionally or recklessly place the victim in apprehension of an immediate and unlawful touching of his or her person without consent: *MacPherson v Brown* (1975) 12 SASR 184, 190 (Bray CJ); *R v Bacash* [1981] VR 923, 935 ('*Bacash*'); *R v Williams* (1990) 50 A Crim R 213, 220; *R v Venna* [1975] 3 WLR 737 ('*Venna*'). 'Battery' type common assault, on the other hand, requires as an essential element that the accused must intentionally or recklessly touch the victim without his or her consent: *Venna* [1975] 3 WLR 737; *R v Williams* (1983) 78 Cr App R 276 at 279. For a thorough discussion of both limbs of the common law offence of common assault, see K J Arenson, M Bagaric and P Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 3<sup>rd</sup> ed, 2011) 261–4.

<sup>16</sup> *Crimes Act 1958* (Vic) s 320.

<sup>17</sup> *R v Salisbury* [1976] VR 452, [2]; *R v Sherriff* [1969] Crim LR 260.

<sup>18</sup> *Bacash* [1981] VR 923, 932 (19 December 1980); *Venna* [1975] 3 All ER 788. See also Gillies, above n 9, 552–8.

<sup>19</sup> Gillies, above n 9, 552–8.

punishment of a maximum of twenty years imprisonment,<sup>20</sup> how does one justify a maximum of five years imprisonment for a mother who, without lawful justification or excuse, deliberately or recklessly causes the death of her child within two years of birth because she suffers from some 'effect' or 'disorder' arising from that birth?

Moreover, s 6 does not require the mother to demonstrate that she was suffering from post partum depression or any recognized psychiatric condition at the time of the conduct causing death. In the view of many, such broad and undefined mitigating circumstances can amount to most anything, including a mere inability to cope with the sudden responsibilities of motherhood or, if you will, buyers' regret. This may be viewed as extending a modified license to kill any baby of two years of age or less, provided the mother is willing to run the risk of a maximum custodial sentence of five years. One might legitimately ask whether fathers who also experience negative effects or some form of mental disorder from the birth of their child should be treated with any less compassion? As the ambit of s 6 extends only to mothers, fathers who kill their children under similar circumstances are left to face murder charges, a level 1 offence punishable by a maximum of life imprisonment. On what rational basis can such blatantly disparate and unfair treatment of men be justified? The writer believes that the answer lies in identifying which voting demographic is not only the largest, but stands to gain the most from the offence of infanticide.

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<sup>20</sup>*Crimes Act 1958* (Vic) s 5.

## B      *The Abolition of Provocation as a Partial Defence to Murder*

It was earlier noted that although the common law offence of voluntary manslaughter has been abolished by name in Victoria,<sup>21</sup> it was reinstated in substance via ss 9AC and 9AD of the *Crimes Act 1958* (Vic) which codified the excessive-force-manslaughter doctrine and substituted the offence of ‘defensive homicide’<sup>22</sup> for what was previously the offence of voluntary manslaughter.<sup>23</sup> Section 3B of the *Crimes (Homicide) Act 2005* (Vic), later inserted as s 3B of the *Crimes Act 1958* (Vic), however, expressly provides that ‘[t]he rule of law that provocation reduces the crime of murder to manslaughter is abolished’.<sup>24</sup> The word ‘manslaughter’ in this quotation denotes a killing that would otherwise constitute murder, except that it is reduced to the lesser offence of voluntary manslaughter due to the mitigating circumstance that the accused was induced to kill by provocative conduct on the part of the deceased.<sup>25</sup> The provocation defence is regarded as a reasonable concession to human frailty in that those who kill under sufficient provocation to succeed in the defence are deemed as less morally culpable than those who kill for hire, thrill, revenge, jealousy or other reasons that the law does not regard as sufficiently mitigating to warrant a reduction to voluntary manslaughter.<sup>26</sup> As this form of voluntary manslaughter exists in all American and Canadian jurisdictions, the UK, and every Australian jurisdiction with the exceptions of Western

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<sup>21</sup> See above n 6. Although the common law offence of voluntary manslaughter that was based on provocative conduct of the deceased as a mitigating circumstance is expressly set forth in s 9AB of the *Crimes Act 1958* (Vic), s 9AB was actually introduced as part of the *Crimes (Homicide) Act 2005* (Vic).

<sup>22</sup> *Crimes Act 1958* (Vic) ss 9AC, 9AD.

<sup>23</sup> *Zecevic* (1987) 71 ALR 641, [13].

<sup>24</sup> *Crimes Act 1958* (Vic) s 3B.

<sup>25</sup> See above n 9.

<sup>26</sup> *Parker I* (1963) 111 CLR 610, [26].

Australia, Tasmania and Victoria,<sup>27</sup> what has provided the impetus for its abolition in these three jurisdictions? The unofficial and de facto answer

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<sup>27</sup> See *Crimes Act 1958* (Vic) s 3B; *Criminal Code Act 1924* (Tas) s 160; *Criminal Code Act Compilation Act 1913* (WA) s 245. The Victorian Parliament has stated its reasons for the abolition of provocation. Rob Hulls, who was then the Attorney-General of Victoria, stated that ‘the partial defence condones male aggression towards women and is often relied upon by men who kill partners or ex-partners out of jealousy or anger’: Victoria, *Second Reading Speech*, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General). ‘The attorney-general further added that ‘[t]his is a reform that is aimed at removing entrenched bias and misogynist assumptions from the law to make sure that women who kill while genuinely believing it is the only way to protect themselves or their children are not condemned as murderers.’ See Victoria, *Second Reading Speech*, Legislative Assembly, 26 October 2005, 1844 (Rob Hulls, Attorney-General).

The Tasmanian Parliament expressed their reasoning behind the removal of the defence: ‘The defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the “battered women syndrome”’. See Tasmania, *Second Reading Speech*, Legislative Council, 20 March 2003, 30–108 (Judy Jackson, Minister for Justice and Industrial Relations).

Western Australia was not as explicit as Tasmania or Victoria; in particular, their glancing reference to the amendment emphasises the need to address issues faced by women in domestic violence situations. The provocation defence was seen as insufficient to address the issue: Western Australia, *Second Reading Speech*, Legislative Council, 17 June 2008, 3845b–3855a (Simon O’Brien, Member for South Metropolitan Region).

The reader should be aware that Queensland has not abrogated the defence in its entirety. For example, see *Criminal Code Act 1899* (Qld) s 304. Changes summarized as: a reversal of the onus of proof onto the accused; provocation cannot be based upon the deceased’s choice to change the status of his or her relationship; the defence cannot be based on words alone; and when the victim and the accused were in a relationship, the provocation defence cannot be based on what the accused mistakenly believed the deceased had done to damage the relationship.

New Zealand abrogated the defence in 2009, removing provocation as a partial defence and amending s 169 in the *Crimes Act 1961* (NZ). In the UK the ‘loss of control defence’ was introduced in 2009 in response to concerns in relation to the defence of provocation: *Coroners and Justice Act 2009* (UK) s 54. The defence of provocation proved problematic and was subject to much consideration by the appellate courts due to inconsistencies in the interpretation and application of s 3 of the *Homicide Act 1957* (UK). The new ‘defence of loss of control’ is broadly similar to the defence of provocation in its requirements. It is, however, far more restrictive in its application.

In Canada, see *Criminal Code*, RSC 1985, c C-46, s 232; *R v Thibert* [1996] 1 SCR 37, [4]; *R v Hill* [1986] 1 SCR 313; *R v Angelis* [2013] ONCA 70, [36]. In the United

in Victoria and probably Tasmania and Western Australia is both shocking and antithetical to the cardinal precept that irrespective of race, ethnicity or gender, all accused persons are regarded as equal in the eyes of the law.

In 2004 the writer became aware that the Victorian Law Reform Commission (VLRC) had recommended that Parliament abolish provocation as a partial defence that reduces murder to the lesser crime of voluntary manslaughter. Alarmed by this development, the writer contacted the VLRC chairperson and inquired as to the reasons for its recommendation which, regrettably, became law as part and parcel of the *Crimes (Homicide) Act 2005* (Vic). The chairperson informed the writer that this defence was no longer viable because it was a defence ‘used by men who murder their wives and girlfriends’. When the writer reminded the chairperson that a Melbourne-based woman who was charged at the time with the murder of her husband was relying on that particular defence, she responded that the scenario to which the writer referred ‘doesn’t happen very often’ – meaning that it is highly uncommon for women to kill their husbands or boyfriends. Though the woman offered no statistics in support of her argument, the writer then asked whether the VLRC’s recommendation would be the same if it could be demonstrated that women who are charged with the murder of their husbands or boyfriends invoke the defence with the same or greater frequency than men who are accused of murdering their wives or girlfriends. When the woman refused to provide an unequivocal yes or no answer and merely

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States, all states have adopted some form of the provocation defence, whether at common law or in statutory form. Some examples include: 2 Alaska Stat § 11.41.115 (1978); 720 Ill Comp Stat 5/9–2 (2010); 15 Tex Code Ann § 9.31 (2007); Cal Penal Code 192 (2006); Mass Gen Laws ch 265 § 1; John R Snowden ‘The Case for a Doctrine of Precedent in Nebraska’ (1982) 61 *Nebraska Law Review* 565; La Stat Rev Ann 14:31 § 31 (1973).

reiterated that the postulated scenario rarely occurs, the writer inferred that her answer was yes; the chairperson was apparently reluctant to make such an outrageously ludicrous and sexist comment.

Nonetheless, the implications of the conversation are clear. If the viability of provocation or any other defence such as self-defence, duress, necessity, insanity or diminished responsibility, for example, is made to depend upon which of the two genders invokes it with greater frequency, then what remains of the sacrosanct tenet that all persons are regarded as equal before the law? It is frightening to even contemplate that we may be moving down a foreboding path in which the retention or abolition of any particular defence<sup>28</sup> will ultimately depend upon whether it is viewed as favouring one gender more than the other. Perhaps even more foreboding is that the chairperson with whom the writer spoke is now a sitting Justice of the Supreme Court of Victoria.

### C      *Charging Rape as a Crime of Absolute Liability*

The *Crimes Amendment (Rape) Act 2007* affected significant changes to the law of rape in Victoria. The most notable for present purposes is that rape can now be prosecuted as a crime of absolute liability.<sup>29</sup> In order to fully comprehend the subtlety and sophistry through which this change was implemented, it is appropriate to provide an explanation of what constitutes offences of strict and absolute liability.

An offence of strict liability is one that, by definition, does not require the prosecution to prove “fault” on the part of the accused. In this context, the term “fault” denotes any one or more of the *mens rea* recognised under

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<sup>28</sup> Gillies, above n 9, 203-4.

<sup>29</sup> *Crimes Amendment (Rape) Act 2007* (Vic) ss 35-38 collectively govern the law of rape in Victoria. The offence itself is encompassed in s 38, although the definitions of sexual penetration and consent are set out in ss 35 and 36 respectively.



Australian common law doctrine or, alternatively, some form of negligence.<sup>30</sup> An example of an offence of strict liability would be the regulatory traffic offences that exist in all jurisdictions that make it an offence to drive a motor vehicle on a public road in excess of the prescribed speed limit. These statutory offences rarely, if ever, require the prosecution to prove as a constituent element of the offence that the accused acted with knowledge that he or she was or might have been exceeding the speed limit at the time in question, nor do they require proof that the accused acted negligently in so doing. Thus, a crime is technically classified as one of strict liability if it requires neither proof of one or more of the *mens reas*, nor that the accused was in any way negligent in bringing about one or more of the *actus reus* elements of the offence.

It is important to note that there are various forms of negligence that, depending on the likelihood and severity of the risk involved and whether the conduct of the accused was engaged in with or without advertence to the risk(s) involved, are termed as ordinary, criminal or gross, and recklessness.<sup>31</sup> Given the nature and availability of what is often termed the *Proudman* defence, the very existence of so-called strict liability offences may be called into question.

In *Proudman*, the general nature of this defence was expressed by Dixon J: 'As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence'.<sup>32</sup> Absent some form of negligent conduct on the part of the accused, it would be difficult

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<sup>30</sup> Gillies, above n 9, 46, 80–2.

<sup>31</sup> Ibid 39–41, 59.

<sup>32</sup> *Proudman v Dayman* (1941) 67 CLR 536, 540.

to envision a situation in which an accused could commit an offence of strict liability while holding a bona fide, yet unreasonable belief, in the existence of such exculpatory facts. Though the authorities have not been totally consonant on the question of which parties bear the evidential and legal burdens of proof on the *Proudman* defence,<sup>33</sup> it is now well settled that the accused bears the evidential burden, meaning that he or she must satisfy the court that a jury could reasonably find that the Crown has failed to prove beyond reasonable doubt that the belief was not honestly held or, if it was, that it was not based on reasonable grounds.<sup>34</sup> Assuming the accused satisfies the evidential burden, the prosecution then bears the legal burden of negating the defence by ultimately persuading the jury beyond reasonable doubt that the subjective or objective element of the defence, or perhaps both, have not been satisfied. Thus, when the *Proudman* defence is interposed as a defence to a strict liability offence,<sup>35</sup>

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<sup>33</sup> *McCrae v Downey* [1947] VLR 194, 203; *Gherashe v Boase* [1959] VR 1; *Mayer v Marchant* (1973) 5 SASR 567, 579.

<sup>34</sup> *Stingel v The Queen* (1990) 171 CLR 312, 336. This formulation of an accused's evidential burden was adopted by all seven justices of the High Court in *Stingel*. Although *Stingel*'s enunciation of the accused's evidential burden related to the partial defence of provocation rather than the *Proudman* defence, in substance it is the formulation that is applied to all defences (with the exceptions of insanity and diminished capacity) that are characterised as 'secondary' or 'affirmative' defences: Arenson, Bagaric and Gillies, above n 15, 30–1. A 'secondary' or 'affirmative' defence is one that does not necessarily deny that the prosecution has proved the elements of the crime(s) and the accused's complicity therein beyond reasonable doubt; rather, it is a defence that absolves the accused of liability irrespective of whether the prosecution has met its legal burden of proving both the elements of the offence(s) and the accused's complicity therein beyond reasonable doubt; at 36–7. The insanity and diminished capacity exceptions repose both the evidential and legal burdens on the accused. This requires the accused first to satisfy the trial judge that a jury could reasonably find, on the balance of probabilities, that the elements of these defences have been proved. Assuming the accused meets this burden, in order to succeed in this defence, the accused must convince the jury, on the balance of probabilities, that the elements of these defences have been proved.

<sup>35</sup> This is not to say that the *Proudman* defence is the only available one in prosecutions for so-called strict liability crimes. In theory, at least, defences such as duress, necessity, and insanity, for example, are also available. Nonetheless, it would

fault in the form of negligence is thereby transformed into a constituent element of the offence; that is, in order to obtain a conviction, the prosecution must prove beyond reasonable doubt that the *Proudman* defence is unsustainable for want of a genuine belief in exculpatory facts, a well-founded belief in such facts, or both. While it may appear, therefore, that a crime is one of strict liability because neither a *mens rea* nor negligence constitutes an element of the crime according to its statutory definition, the *Proudman* defence has the practical effect of instituting negligence as a constituent element of the offence. From a practical standpoint, therefore, the very existence of the defence raises a legitimate question as to whether there is such a thing as an offence of strict liability.

An offence of absolute liability is one that is defined, whether expressly or by necessary implication, as one of strict liability, but the legislature has expressly or by implication excluded the *Proudman* defence.<sup>36</sup> For present purposes, however, it is important to emphasise that unlike offences of strict liability, the legitimacy of the very existence of offences of absolute liability is not open to question. Offences of absolute liability truly permit conviction without proof of “fault” in the relevant sense.

Section 38 of the *Crimes Act 1958* (Vic) provides as follows:

*Rape*

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be rare indeed to see these defences interposed in prosecutions for putative strict liability offences.

<sup>36</sup> *Mayer v Marchant* (1973) 5 SASR 567, 569; *Burnett v LF Jeffries Nominees Pty Ltd* (1983) 33 SASR 124, 134; *Nationwide News Pty Ltd v Bitter* (1985) 16 A Crim R 53, 59; *Lee v Anderson* (1986) 23 A Crim R 68.

(2) A person commits rape if—

(a) he or she intentionally sexually penetrates another person without that person's consent—

(i) while being aware that the person is not consenting or might not be consenting; or

(ii) while not giving any thought to whether the person is not consenting or might not be consenting; or

(b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

(3) A person (the offender) also commits rape if he or she compels a person—

(a) to sexually penetrate the offender or another person, irrespective of whether the person being sexually penetrated consents to the act; or

(b) who has sexually penetrated the offender or another person, not to cease sexually penetrating the offender or that other person, irrespective of whether the person who has been sexually penetrated consents to the act.

(4) For the purposes of subsection (3), a person compels another person (the victim) to engage in a sexual act if the person compels the victim (by force or otherwise) to engage in that act—

(a) without the victim's consent; and

(b) while—

(i) being aware that the victim is not consenting or might not be consenting; or

- (ii) not giving any thought to whether the victim is not consenting or might not be consenting.

As a result of the changes brought about by the *Crimes Amendment (Rape) Act 2007*, sub-ss 38(2)(a)(iii) and 38(4)(b)(ii), readers will note that it is now possible to obtain a conviction under these sub-ss without having to prove what has long been the requisite *mens rea* for rape at common law<sup>37</sup> and under s 38;<sup>38</sup> that is, that the accused was aware at the relevant time that the complainant was not or might not be (recklessness) consenting to the sexual penetration in question.<sup>39</sup> Rather, the aforementioned sub-sections permit the prosecution to wholly circumvent this *mens rea* element by proving instead that the accused sexually penetrated ‘while not giving any thought to whether the victim is not consenting or might not be consenting’. Section 38(4), however, must be read in light of sub-ss 38(3)(a) and (b). Though these sub-ss contain the word ‘compels’ which is defined in s 38(4) as compelling the complainant ‘[by force or otherwise]’ to sexually penetrate the accused or another person, they do not make reference to the recognised *mentes reae* of intention, knowledge (also used synonymously with the word

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<sup>37</sup> *DPP v Morgan* [1976] AC 182, [192] (*Morgan*). At common law, rape is now defined as carnal knowledge of a female without her consent: Arenson, Bagaric and Gillies, above n 15, 299–300. Carnal knowledge is a far more limited term than sexual penetration in that it denotes any degree of penetration of the vaginal cavity irrespective of whether there was emission of seminal fluid: *Holland v The Queen* (1993) 67 ALJR 946.

<sup>38</sup> It should be noted that under the *Crimes Act 1958* (Vic) s 38(2)(b), there is no analogue to ss 38(2)(a)(iii) and 38(4)(iii) under which a conviction may be procured by failing to withdraw from a person who is no longer consenting without giving any thought whatever as to whether the complainant was not or might not be consenting.

<sup>39</sup> Under s 35(1)(a) and (b) of the *Crimes Act 1958*, sexual penetration is defined as ‘(a) the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or (b) the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes.’

‘awareness’), belief or recklessness. It appears to be axiomatic, however, that a person cannot be compelled to sexually penetrate another by force or otherwise without an intention to do so.<sup>40</sup> Though some might take a different view, it is submitted that according to the great weight of authority, not giving any thought as to whether an *actus reus* element existed at the relevant time is *not* a state of mind that would qualify as one of the *mentes reae* recognised by the criminal law.<sup>41</sup>

This raises the question of whether sub-ss 38(2)(a)(iii) and 38(4)(b)(ii) of the *Crimes Amendment (Rape) Act 2007* (Vic) have transformed rape into an offence of either strict or absolute liability. Rape is technically a crime of *mens rea* because irrespective of the particular provision of s 38 under which the offence is alleged to have been committed, a *mens rea* is a constituent element of the offence. As noted above, an offence that consists of one or more *mentes reae* or any form of negligence as a constituent element is regarded as requiring proof of fault and, therefore, does not constitute a crime of strict liability.<sup>42</sup> By definition, therefore, rape is not an offence of strict liability.<sup>43</sup> Rather, the important question is whether the advent of the *Crimes Amendment (Rape) Act 2007* has, in practical terms, transformed rape into an offence of absolute liability when the Crown alleges rape under sub-s 38(2)(a)(ii) or a combination of s 38(3) and sub-s 38(4)(b)(ii)?

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<sup>40</sup> One acts with ‘actual’ intention in regard to a result, fact or circumstance if he or she acts with the subjective intention of bringing about that result, fact or circumstance: *Cuncliffe v Goodman* [1950] 2 KB 237, 253. In addition, a person is regarded in law as intending a result, fact or circumstance if he or she engages in an act with knowledge or an awareness that the result, fact or circumstance is practically certain to result from the act in question: *R v Hurley* [1967] VR 526, 540; *R v Brown* (1975) 10 SASR 139, 154; *Hyam v DPP* [1975] AC 55, 74 (Lord Hailsham LC).

<sup>41</sup> For a thorough discussion of the types of *mens reas* that have garnered such recognition, see Gillies, above n 9, 46–72; Arenson, Bagaric and Gillies, above n 15, 25–6.

<sup>42</sup> Gillies, above n 9 at 46, 80–2

<sup>43</sup> Arenson, Bagaric and Gillies, above n 15, 31, 503–4.

It was noted earlier that technically, each of the foregoing subsections constitutes an offence of *mens rea* by virtue of the requirement that the accused must intentionally sexually penetrate another person. As this requisite intention is regarded as a *mens rea* and, consequently, a type of fault,<sup>44</sup> it is also technically correct to say that as none of these offences are of the strict liability genre, the *Proudman* defence is unavailable. It follows, therefore, that this defence cannot be used as a means of interjecting a negligence fault element into these offences; that is, it is not open to the accused to satisfy the evidential burden on the *Proudman* defence,<sup>45</sup> thereby forcing the prosecution to assume the legal burden of persuading the fact-finder that the accused did not hold a genuine and well-founded belief in the existence of facts which, if true, would have made his or her conduct entirely lawful. Thus, at first glance it appears that the foregoing rape provisions represent a straightforward example of offences of *mens rea* that, by definition, preclude the interposition of the *Proudman* defence. Upon further analysis, however, a cogent argument can be constructed that sub-s 38(2)(a)(ii) or a combination of s 38(3) and sub-s 38(4)(b)(ii), though constituting offences of *mens rea* in the most strict technical sense, are effectively offences of absolute liability.

Although it is beyond doubt that an offence requiring an accused to act with the intention of bringing about one or more of the consequences of a relevant offence is regarded as one of *mens rea*,<sup>46</sup> the practical view is that there has rarely, if ever, been a prosecution for rape in which an accused argued that he or she was entitled to an acquittal on the ground that the Crown failed to meet its evidential or legal burden of proof on the

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<sup>44</sup> Ibid.

<sup>45</sup> *He Kaw Teh v The Queen* (1985) 157 CLR 523, 533–4 (Gibbs CJ), quoting *R v Sault Ste Marie* [1978] 2 SCR 1299, 1325–6.

<sup>46</sup> *Cuncliffe v Goodman* [1950] 2 KB 237, 253; *Hills v Ellis* [1983] 1 All ER 667, 670.

issue of whether the accused's sexual penetration of the alleged victim was accompanied by an intention to do the same.<sup>47</sup> Even under the broad definition of 'sexual penetration' enunciated in ss 35(1)(a) and (b) of the *Crimes Act 1958* (Vic),<sup>48</sup> it would be difficult to envisage a circumstance in which an accused sexually penetrated another person or compelled another person to do so by accident or means that were unintentional. For practical purposes, therefore, the *mens rea* requirement of an intention to sexually penetrate would be all but meaningless were it not for the fact that it technically transforms the various rape offences under s. 38 into crimes of *mens rea*—thereby precluding the accused from raising the *Proudman* defence.<sup>49</sup>

In addition, in instances where the accused is charged under sub-s 38(2)(a)(ii) or a combination of s 38(3) and sub-s 38(4)(b)(ii), all of which relieve the prosecution of the burden of proving that the accused was aware that the victim was not or might not have been consenting—a cogent argument exists that from a practical standpoint, the Crown is able to obtain a conviction without proof of fault. The success or failure of this argument will depend on whether the accused's failure to give any thought to the question of whether the complainant was not or might not have been consenting to the sexual penetration at issue amounts to

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<sup>47</sup> The writer was unable to find any cases, reported or unreported, in which such an argument was raised. Though a conviction for indecent assault can now be obtained without proof that the accused was aware or at least reckless vis-à-vis the victim's lack of consent, this crime is distinguishable from rape in that it requires proof of what can be a very problematic *mens rea* of the type set out above.

<sup>48</sup> Section 35(1)(a) and (b) provides: 'sexual penetration means—(a) the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or (b) the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes'.

<sup>49</sup> *He Kaw Teh v The Queen* (1985) 157 CLR 523, 533–4 (Gibbs CJ), quoting *R v Sault Ste Marie* [1978] 2 SCR 1299, 1325–6.



negligence per se. Subsections (2)(a)(ii) and (4)(b)(ii) of s. 38 are conspicuously devoid of the word 'negligence', and one can envision circumstances in which a person can act without negligence despite sexually penetrating another without turning his or her mind to the question of whether the complainant was not or might not have been consenting to the same. For example, if a newlywed couple had undergone many years of uninterrupted daily sexual encounters in which consent was always forthcoming irrespective of which party initiated the activity, it would be difficult to argue that either party would have acted negligently if he or she proceeded to sexually penetrate the other in the customary manner without giving any thought as to whether the other was not or might not have been consenting. Although situations will arise in which a person's failure to advert to the question of consent would amount to ordinary or criminal negligence, it is sufficient to note for purposes of sub-ss 38(2)(a)(ii) and (4)(b)(ii) that neither criminal nor ordinary negligence is required in order to convict. The practical result is that rape can now be prosecuted as an offence of absolute liability under certain provisions of s 38.

On another view, it will only be in the most unusual of circumstances that the Crown will be relegated to prosecuting its case on the allegation that the accused gave no thought as to whether the victim was not or might not have been consenting to the alleged sexual penetration. One might ask, therefore, why parliament opted to include these subsections that dispense with the need to prove that the accused was aware that the victim was not or might not have been consenting? It is apparent to this observer that these subsections were enacted in order to ensure convictions in cases where the prosecution may encounter insurmountable difficulty in proving that the accused acted with an

awareness that the victim was not or might not have been consenting.<sup>50</sup> In any event, parliament's decision to dispense with the need to prove the requisite *mens rea* vis-à-vis consent has effectively, albeit not technically, transformed the crime of rape under s. 38 into one of absolute liability, save for prosecutions under s 38(2)(b) which require proof of a *mens rea* that, far from a meaningless state of mind that is essentially taken for granted, is often a contentious issue in rape trials.<sup>51</sup>

If one accepts that parliament has substantively transformed all the provisions of s 38 (save for s. 38(2)(b)) into crimes of absolute liability, then several observations are appropriate. The first is that this offends the common law presumption that all common law and statutory offences are rebuttably presumed to be of the *mens rea* genre.<sup>52</sup> Secondly, although the High Court's decision in *He Kaw Teh* noted several factors that a court should take into account in determining whether this presumption has been rebutted, all of the justices agreed that the potential severity of the penalty upon conviction is a consideration that militates in favour of the presumption.<sup>53</sup> Thirdly, crimes of strict or absolute liability are justified to some extent on the notion that they tend to be offences of a regulatory or welfare nature that typically result in minor penalties and

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<sup>50</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 22 August 2007, 2859, (Rob Hulls, Attorney-General).

<sup>51</sup> According to the Victorian Law Reform Commission (Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure*, Appendixes to Interim Report No. 42 (1991) 84–7) in 74 per cent of rape trials the defendant argued that the Crown had failed to prove the case either because the victim was consenting, the defendant believed the victim to be consenting or a combination of the two. Of 45 appeals to the Victorian Court of Appeal between 2010 and 2011, 10 were based on issues of consent including, e.g., *Wilson v The Queen* [2011] VSCA 328; *LA v The Queen* [2011] VSCA 293; *Khan v The Queen* [2011] VSCA 286.

<sup>52</sup> *Hew Kaw Teh v The Queen* (1985) 157 CLR 523, 528–9 (Gibbs CJ); at 552 (Wilson J); at 565–567 (Brennan J); at 590–1 (Dawson J).

<sup>53</sup> *Ibid* 530 (Gibbs CJ); at 546 (Mason J); at 567 (Brennan J); at 595 (Dawson J).

little or no opprobrium in the event of a conviction.<sup>54</sup> In sharp contrast, readers are well aware that few, if any, offences carry more severe penalties or negative social stigmas upon conviction than the crime of rape. Lastly, to permit a conviction for a crime such as rape without requiring any meaningful proof of fault is to trivialise the crime of rape.<sup>55</sup>

These are just three of many examples of how pressure brought to bear on our legislative and judicial branches of government by strident feminists has resulted in deleterious substantive consequences to our adversarial system of justice. Attention will now focus on several procedural and evidentiary consequences of that pressure that have had a similar adverse effect.

### III PROCEDURAL REFORMS THAT ACCORD SPECIAL DISPENSATION TO WOMEN

Our adversarial system of criminal justice has long adhered to the precept that subject to rare exceptions such as offences relating to terrorism, for example,<sup>56</sup> considerations of fairness and the necessity to minimize wrongful convictions require that the accused be afforded various procedural and evidentiary safeguards that include, but are not limited to, the following: the right to a fair and impartial jury in prosecutions for indictable offences;<sup>57</sup> that the prosecution bears both the evidential and

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<sup>54</sup> *Cameron v Holt* (1980) 142 CLR 342 (Mason J), citing, *Sweet v Parsley* [1969] 2 WLR 470, 487.

<sup>55</sup> Arenson, *Absolute Liability*, above n 5, 403–6.

<sup>56</sup> See, eg, the *Terrorism (Commonwealth Powers) Act 2002* (Cth); the *Anti-Terrorism Act 2004* (Cth); *Anti-Terrorism Act (No. 2) 2005* (Cth). Persons held on suspicion of these types of crimes can be held in custody for longer periods of time without trial.

<sup>57</sup> See, eg, the *Australian Constitution* s 80 that mandates that all Australian Commonwealth indictable offences be adjudicated by a. Although s 80 applies only to Commonwealth indictable offences, there are laws which require that state and territorial indictable offences must also be adjudicated via trial by jury in the absence

legal burdens of proof in regard to the constituent elements of the offense(s) charged as well as the identity of the accused as the perpetrator;<sup>58</sup> that all accused persons are cloaked with a presumption of innocence that remains with them until such time, if ever, as it is rebutted by evidence that is sufficient to persuade the fact-finder of the existence of each and every element of the offense(s) charged and the accused's complicity therein beyond a reasonable doubt;<sup>59</sup> the right of an accused to cross-examine all witness against him or her and, if necessary, challenge various other forms of evidence tendered by the prosecution.<sup>60</sup> Moreover, the common law and the various legislative bodies who are responsible for enacting crime legislation have overwhelmingly rejected the notion that these and other safeguards should be either expanded or curtailed, depending upon the seriousness or opprobrium associated with any particular offence.<sup>61</sup> Thus, an accused is generally accorded the same procedural and evidentiary safeguards irrespective of whether he or she is charged with relatively minor offences such as theft or trespassing or more serious offences as murder, kidnapping, armed robbery and treason.

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of legislation permitting the accused to waive his or her right to a jury trial in favor of a bench trial: *Juries Act 1927* (SA) s 6; *Supreme Court Act 1933* (ACT) s 68A; *Criminal Procedure Act 1986* (NSW) s 131; *Criminal Code 1899* (Qld) s 604; *District Court of Queensland Act 1967* (Qld) s 65; *Criminal Code 1924* (Tas) s 361; *Criminal Procedure Act 2004* (WA) s 92; *Criminal Code* (NT) s 348; *Juries Act 2000* (Vic) s 22(2).

<sup>58</sup> K J Arenson and M Bagaric, *Rules of Evidence in Australia: Text and Cases* (LexisNexis, 2<sup>nd</sup> ed, 2007) 14–5, 21, 26 ('*Rules of Evidence in Australia*').

<sup>59</sup> *Momcilovic v The Queen* [2011] 280 ALR 221; *Packett v The Queen* (1937) 58 CLR 190 (the first case where the presumption of innocence was applied in Australia). See also A Ligertwood, *Australian Evidence* (LexisNexis, 4<sup>th</sup> ed, 2004) 86–8, 102; J D Heydon, *Cross on Evidence* (LexisNexis, 8<sup>th</sup> ed, 2010) 293 ('*Cross*').

<sup>60</sup> See generally *Cross*, above n 59, 511–561; see also *R v Chin* (1985) 157 CLR 673, 678 (Gibbs CJ and Wilson J); J L Glissan, *Cross-examination: Practice and Procedure* (LexisNexis, 2<sup>nd</sup> ed, 1991) 75: 'Prima facie any witness may be cross-examined by any party against whom he has testified'.

<sup>61</sup> See, however, *Terrorism (Commonwealth Powers) Act 2002* (Cth); *Anti-Terrorism Act 2004* (Cth); *Anti-Terrorism Act (No. 2) 2005* (Cth). These Acts provide for special rules that the Commonwealth Parliament deemed necessary to deal with crimes of terrorism or threats to national security.

Notwithstanding the aforementioned precepts, in recent years the writer has witnessed an unsettling trend in Victoria (and other jurisdictions)<sup>62</sup> whereby prosecutors and *alleged* victims of rape and other sexual assaults have received special dispensation; in particular, when one or more charges of sexual assault are contained in an indictment, the prosecution is now governed by special rules that are not applicable in prosecutions for other offences that the criminal calendar regards as equally, if not more serious, than any form of sexual assault. To illustrate, murder, kidnapping, armed robbery, arson causing death, and aggravated burglary are all levels 1 and 2 imprisonment offences, yet neither they nor any other Victorian or Commonwealth offences are subject to the disparate and overtly preferential rules that apply in sexual assault prosecutions.<sup>63</sup>

#### A *Indictments and Time Limits for Commencement of Trials*

Although innocuous at first blush, it is only in sexual assault prosecutions that the time for filing indictments<sup>64</sup> and the commencement of trials<sup>65</sup> is substantially truncated. One might query why there is any real or perceived urgency to expedite proceedings in these prosecutions rather than those involving charges such murder, armed robbery, kidnapping, arson causing death and the like? Among the reasons typically proffered in support of such time limits are: the necessity for a speedy trial which becomes paramount when a person who is presumptively innocent is remanded in custody pending trial for want of sufficient assets to post bail; the general consensus among prosecutors, defence attorneys and the general public that a fair and just adversarial system of criminal justice

<sup>62</sup> *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 3A; *Evidence Act 2001* (Tas) s 168.

<sup>63</sup> *Crimes Act 1958* (Vic) s 3; *Crimes Act 1958* (Vic) s 63A; *Crimes Act 1958* (Vic) s 75A; *Crimes Act 1958* (Vic) s 197A; *Crimes Act 1958* (Vic) s 77.

<sup>64</sup> *Criminal Procedure Act 2009* (Vic) ss 159, 163.

<sup>65</sup> *Ibid* ss 211, 212.

demands a swift resolution; that is, if the accused is ultimately acquitted, justice necessitates that the inevitable stress, cost and interference with his or her life be minimized to the fullest extent possible, especially if he or she cannot post bail pending the resolution of the case. If, on the other hand, the accused is convicted, then the general feeling appears to be that the shorter the time interval between the commission of the offence and its resulting sanctions, the more effective the punishment will be as a deterrent. Finally, and perhaps most importantly, witnesses' memories normally fade with the passage of time. Thus, although it may be disappointing to many that a criminal trial is not a truth seeking mission, it is difficult to argue with the notion that the interests of justice are best served by having witnesses testify at a time when their recollection of the relevant events is at its best.

If these are the obvious underpinnings of the time constraints for filing indictments and the commencement of trials, there appears to be no reason in logic or principle for imposing stricter time limitations in prosecutions where one or more charges of sexual assault are included in the indictment, but not in prosecutions for offences that are considered to be of equal or greater seriousness than those involving a charge of sexual assault. This argument is further buttressed by the fact that some sexual assaults are relatively minor in comparison to the level 1 and 2 offence examples noted above. Indecent assault, for example, is a sexual assault that is a level 5 offence that carries a maximum term of ten-years imprisonment. Merely touching another person in an indecent manner that would amount to a common assault, as by grabbing a male's buttocks or touching a female's breast, would constitute the statutory offence of

indecent assault in Victoria.<sup>66</sup> Aside from the desire to be seen as treating sexual assaults as a special genre of offences committed only by men against women that are therefore worthy of being dealt with as a matter of greater urgency than other offences, what possible rationale can justify these divergent time limitations?

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<sup>66</sup> See *Crimes Act 1958* (Vic) s 39. Section 39(2) provides that '[a] person commits indecent assault if he or she assaults another person in indecent circumstances— (a) while being aware that the person is not consenting or might not be consenting; or (b) while not giving any thought to whether the person is not consenting or might not be consenting. Thus, in addition to the commission of a common assault in indecent circumstances, the accused must have acted with the *mens rea* described in s 39(2)(a) or at least acted without having given any thought as to whether the victim was not or might not have been consenting as set forth in s 39(2)(b). Indecent circumstances have been defined in various ways, all of which are quite similar. In *R v Court* [1986] 3 WLR 1029, the court opined that indecent assault 'is concerned with the contravention of standards of decent behaviour in regard to sexual modesty or privacy': at 1034. It is noteworthy that for purposes of s 39 and various other statutory sexual assault offences under the *Act*, the presence or lack thereof of consent is governed by s 36 of the *Act* which provides: '*For the purposes of Subdivisions (8A) to (8D) "consent" means free agreement. Circumstances in which a person does not freely agree to an act include the following—(a) the person submits because of force or the fear of force to that person or someone else; (b) the person submits because of the fear of harm of any type to that person or someone else; (c) the person submits because she or he is unlawfully detained; (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing; (e) the person is incapable of understanding the sexual nature of the act; (f) the person is mistaken about the sexual nature of the act or the identity of the person; (g) the person mistakenly believes that the act is for medical or hygienic purposes (emphasis added).* Thus the deeming provisions set forth in ss 36(a)–(g) must be read in conjunction with the first sentence of s 36; that is to say that although ss 36(a)–(g) appear to be exhaustive of the situations in which consent will be deemed as lacking, these provisions are not exhaustive of all the circumstances in which there is no free agreement and, hence, no consent. For example, if a woman is pulled into a dark alley and forcibly raped by a total stranger despite making every effort to physically resist, no one would have the slightest doubt that a rape occurred. Yet none of the ss 36(a)–(g) deeming provisions would be applicable to negate consent because one who resists does not, by definition, 'submit' for any of the reasons set out in ss 36(a)–(c). Yet one who resists does not freely agree to the sexual penetration. As 'free agreement' is not defined in s 36, we look to the common law to determine what constitutes consent in order to resolve this apparent ambiguity. In *R v Wilkes and Briant* [1965] VR 475, consent was defined as free and conscious permission. In this scenario, consent is patently lacking, but one must rely upon the first sentence of s 36 in order to negate consent for purposes of indecent assault under s 39 of the *Act*.

## B      *Committal Hearings*

As any criminal law practitioner is acutely aware, a committal hearing<sup>67</sup> is a critical phase of any criminal prosecution. In fact, the High Court has held that its importance is such that in the absence of compelling circumstances, it would amount to an abuse of process warranting a stay of the proceedings if the prosecution were to directly indict<sup>68</sup> an accused to stand trial.<sup>69</sup> A committal hearing is of vital importance for several reasons, one of the most paramount being that a neutral and detached magistrate is duty bound to decide whether the Crown's evidence, looked upon in the light most favorable to the Crown,<sup>70</sup> is such that a jury could reasonably find that each and every element of the indictable offence(s) charged, as well as the accused's complicity therein, has been proved beyond reasonable doubt. Thus, a committal hearing serves as a neutral buffer between the Crown and the accused for the purpose of extirpating indictable offence prosecutions that are not supported by sufficient evidence to meet this standard.

Another important objective of a committal hearing is to allow the accused to assess the strength of the Crown's case in order to decide whether it is prudent to proceed to a trial by jury in the County or

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<sup>67</sup> See *Criminal Procedure Act 2009* (Vic) s 96, authorizing the conduct of a committal hearing in regard to indictable offences.

<sup>68</sup> See *Criminal Procedure Act 2009* (Vic) s 161, providing that an accused can be directly indicted to stand trial.

<sup>69</sup> See *Barton v The Queen* (1980) 147 CLR 75, [3] ('*Barton*').

<sup>70</sup> The committal proceeding 'constitutes the only independent public scrutiny of prosecutorial discretion. It is intended to be an administrative screen or filter against unjustifiable prosecutions to ensure that no one stands trial for an indictable crime without good reasons': Richard Fox, *Victorian Criminal Procedure* (National Library of Australia, 2005) 198. 'The committal proceeding gives the person accused an opportunity to obtain more precise details of the charges laid and the supporting evidence': at 199. The powers of the magistrate are extended to allow them to order the prosecution to provide further information about the charges brought against the accused': *Summers v Cosgriff* [1979] VR 564, 568.



Supreme Court or, alternatively, obtain a sentencing discount<sup>71</sup> by indicating his or her intention to enter a plea of guilty after being committed to stand trial in one of these courts. If the accused is confronted with overwhelming evidence of guilt, it is likely that he or she will indicate an intention to plead guilty and take advantage of the sentencing discount. This is a boon to all concerned, particularly the courts and taxpayers who would otherwise be inundated with costly, wasteful and time-consuming jury trials.

In addition, if the accused intends to enter a plea of not guilty in the event that the magistrate commits him or her to stand trial in the County or Supreme Court, the importance of the committal hearing cannot be overstated.<sup>72</sup> While it is true that the vast majority of committal hearings are determined on the contents of a hand-up-brief that must be submitted to both the magistrate and the accused in advance of the committal proceeding,<sup>73</sup> this is a reflection of the fact that most prosecutions, including those involving indictable offences, result in guilty pleas as opposed to summary hearings or jury trials following pleas of not guilty;<sup>74</sup> that is to say that if the prosecution's case is strong as evidenced

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<sup>71</sup> *Sentencing Act 1991* (Vic) s 6AAA.

<sup>72</sup> *Barton* (1980) 147 CLR 75, [5]. In *Barton*, the High Court emphasized the critical importance of the committal hearing as a discovery tool from the standpoint of the accused. In fact, the Court held that in the absence of a very limited number of compelling circumstances such as the availability of other equally effective means of discovery, a direct indictment or any other procedure that would deny or substantially eviscerate the scope of discovery that typically occurs in a committal hearing would amount to an abuse of process giving rise to a temporary or permanent stay of the proceedings.

<sup>73</sup> *Criminal Procedure Act 2009* (Vic) ss 107–115. These are the provisions that govern the hand-up-brief procedure. Section 110 sets forth the documents, exhibits and information that must be included in the prosecution's hand-up-brief. It is quite extensive and includes practically every piece of evidence that the Crown intends to rely upon at trial.

<sup>74</sup> As published by the Australian Bureau of Statistics, 'the majority (92% or 13,193) of defendants whose cases were adjudicated in the Higher Courts in 2009-10 were proven guilty. Of those defendants proven guilty, 89% pleaded guilty and 10%

by the contents of the hand-up-brief, it is nearly always in the accused's best interest to indicate his or her intention to enter a plea of guilty at the earliest possible time in order to obtain the maximum sentencing discount.<sup>75</sup>

Finally, and most importantly from the standpoint of an accused who intends to plead not guilty and have the matter determined before a jury in the County or Supreme Court, the committal affords the accused with an invaluable opportunity to seek leave of court to have prosecution witnesses brought to the hearing and tendered for cross-examination.<sup>76</sup> Though the presiding magistrate must have regard to the factors set forth in s 124 of the *Criminal Procedure Act 2009* (Vic) in deciding whether leave should be granted, leave is typically granted if the witness' testimony is both relevant to an issue or issues in dispute and allowing cross-examination is necessary to allow the accused to adequately prepare his or her defence at trial. These factors are nearly always satisfied because the Crown would not be permitted to call witnesses unless their testimony is relevant to one or more contested issues at trial, and it is difficult to envisage any scenario in which allowing the accused to cross-examine the witness would not be critical in ensuring that he or she has a full and fair opportunity to prepare for trial.

It is one thing for a potential Crown witness' testimony at trial to be summarized in affidavit form and included, as it must, in the prosecution's hand-up-brief. It is quite another to allow the accused, particularly through the guiding hand of counsel, to cross-examine the

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were found guilty following a trial': Australian Bureau of Statistics, *Criminal Courts Australia Snapshot* (1 February 2014) Australian Bureau Of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/4513.0~200910~Chapter~Introduction?OpenDocument>>.

<sup>75</sup> *Sentencing Act 1991* (Vic) s 6AAA.

<sup>76</sup> *Criminal Procedure Act 2009* (Vic) ss 123, 124.

witness in a courtroom setting in which defence counsel, rather than the witness or prosecutor, is permitted to formulate the questions and probe for information that counsel believes to be essential to the eventual outcome. Subject to some notable exceptions,<sup>77</sup> the accused is under no obligation to disclose whether it will present a defence or the nature thereof until such time as the Crown rests its case at trial.<sup>78</sup> Aside from the obvious discovery benefits of cross-examining the prosecution's witnesses, defence counsel also benefits through his or her visual assessment of the witness' demeanor in answering questions. It is often the case that a decision as to whether it is advisable to ultimately take a case to a trial by jury will depend on counsel's assessment of whether a witness' demeanor is such that his or her testimony is likely to be accepted or rejected by the jury.

These considerations notwithstanding, the popular notion held by strident feminists that sexual assaults are a special genre of offences and should be treated as such has again manifested itself in the rules governing committal hearings. When any indictment alleges one or more counts of sexual assault,<sup>79</sup> a magistrate must not grant leave to cross-examine a complainant<sup>80</sup> who, at the time when the criminal proceeding was commenced, was 'a child or a person with a cognitive impairment...'<sup>81</sup> and made a statement a copy of which was served in the hand-up-brief or whose evidence-in-chief or examination at a compulsory examination hearing was recorded and a transcript of the recording was served in the

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<sup>77</sup> Ibid ss 189, 190 (relating to the obligation of the accused to provide notice of his or her intention to call expert or alibi witnesses respectively).

<sup>78</sup> Fox, above n 50, 212.

<sup>79</sup> *Criminal Procedure Act 2009* (Vic) s 123(a).

<sup>80</sup> Ibid s 123.

<sup>81</sup> Ibid s 123(b).

hand-up-brief".<sup>82</sup> The obvious intent of s 123 is to protect mentally impaired and child complainants from being subjected to the type of cross-examination at committal hearings that is commonplace when leave is sought at hearings that do not relate in whole or part to the prosecution of one or more sexual assault offences.<sup>83</sup> To many, this legislation is intended to serve what many believe is the laudable objective of minimizing, insofar as possible, the emotional trauma that naturally attends giving sworn testimony in a court proceeding. As laudable as this may appear, there are overriding considerations that not only outweigh this objective, but which demand that all complainants alleging one or more sexual assaults be subjected to the same cross-examination as any other complainant would be under s 124 of the *Act*.

First, as noted earlier, not all sexual assaults are level 2 offences such as rape. In fact, readers are reminded that there are numerous types of sexual assaults, including indecent assault (see above) that is only a level 5 imprisonment offence. Secondly, even if all sexual assaults were level 2 imprisonment offences, it does not inexorably follow that complainants who have made *allegations* of sexual assault should be treated with any greater deference than a complainant who alleges aggravated burglary, arson causing death, kidnapping, armed robbery or any other type of offence. Lest we forget, anyone can make a mere *allegation* against any person and it is the purpose of a trial to determine whether or not that allegation has been proven to the satisfaction of the jury beyond reasonable doubt. That is because a cardinal tenet of our adversarial system of criminal justice is that all accused persons enter the courtroom cloaked with a presumption of innocence that remains with them until

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<sup>82</sup> Ibid s 123(c).

<sup>83</sup> Victoria, *Introduction and First Reading*, Legislative Council, 5 February 2009, 194 (Justin Madden, Minister for Planning).

such time, if ever, as the jury finds that it has been rebutted by evidence that persuades them of the accused's guilt beyond all reasonable doubt.<sup>84</sup> Stating that child or mentally impaired complainants are deserving of special protection in any type of prosecution, much less one particular genre of prosecution, is tantamount to reversing this sacrosanct presumption. Unless it can be assumed before trial that the complainant's allegations are truthful, what is the rationale for protecting them against the rigors of cross-examination which is thought by many to be among the best means ever devised for exposing perjured testimony? As harsh as this may sound, the only alternatives are to eradicate the presumption of innocence altogether - or respect this cardinal tenet of the criminal law.

Secondly, if protecting children or the mentally impaired from being cross-examined at committal hearings is such a laudable objective, then one might ask why there is no comparable protection for complainants who allege offences such as kidnapping or armed robbery at committal hearings? Though rape is a form of sexual assault that is particularly appalling for obvious reasons, it is arguably no more traumatic to complainants than kidnapping, armed robbery and various other offences that are also level 2 imprisonment, but are viewed with less opprobrium than rape. Might the answer be that kidnapping, armed robbery and other equally traumatic crimes are not generally regarded as offences committed by men against women?

Lastly, the testimony given at trial by a child or mentally impaired complainant can and often is just as damaging as that of an adult, non-mentally impaired complainant. Thus, whatever interests are arguably served by protecting those who have made what are mere unproven

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<sup>84</sup> *Momcilovic v The Queen* [2011] 280 ALR 221; *Packett v The Queen* (1937) 58 CLR. See also Ligertwood, above n 59, 86–8, 102; Cross, above n 59, 293.

allegations unless and until a jury convicts, they are outweighed by the need to afford an accused with full discovery of both the identity of his or her accuser(s) and the particulars of the allegations being made against him or her. In fact, for all the same reasons that many believe that child or mentally impaired complainants are deserving of this extraordinary protection, there is a heightened risk that their testimony may be tainted by the suggestions of others or the risk that their mental impairment may adversely affect the veracity of their testimony.

### C *Rape Shield Provisions*

The common law has long recognized the right of an accused to adduce all legally admissible and exculpatory evidence on his or her behalf.<sup>85</sup> An accused that is charged with some form of non-sexual assault and interposes a claim of self-defence, for example, is free to adduce what is commonly referred to as character evidence<sup>86</sup> relating to the complainant or, in some instances, a third party such as a co-accused.<sup>87</sup> Character evidence could consist of evidence of the complainant's general reputation within the community for whatever character trait is most relevant to the offence charged which, in this scenario, is one's propensity towards violence.<sup>88</sup> Similarly, the character evidence could consist of what is known as similar fact evidence, a species of character evidence.<sup>89</sup> In this fact pattern, an example of such similar fact evidence

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<sup>85</sup> *Lowery v R* [1974] AC 85, 101-3 ('*Lowery*'); *Re Knowles* [1984] VR 751, 768 ('*Knowles*'); see also Ligertwood, above n 59, 86-8, 102.

<sup>86</sup> Character evidence is often used synonymously with the terms 'propensity' or 'disposition' evidence. These terms denote evidence which shows that a person (or thing such as a corporation or partnership, for example) has a continuing proclivity to behave in a particular manner or act with a particular state of mind: *Rules of Evidence in Australia*, above n 58, 193.

<sup>87</sup> *Lowery*, [1974] AC 85, 101-3; Ligertwood, above n 39, 102-4.

<sup>88</sup> *Knowles* [1984] VR 751, 768.

<sup>89</sup> This type of evidence is 'generally defined as evidence of specific conduct,

would be eyewitness testimony (or conviction documents) showing that on one or more occasions unrelated to the incident in question, the complainant committed assaults on persons other than the accused.<sup>90</sup> Regardless of whether the accused's character evidence consists of the complainant's general reputation in the community for violence or evidence of the complainant's assaults, either would be admissible under the general common law rule that an accused may present all legally admissible and exculpatory evidence on his or her behalf;<sup>91</sup> that is, either form of character evidence would satisfy the above criteria because the evidence, if accepted as truthful, would tend to support the accused's claim that it was actually the complainant who initiated the unlawful use of force.

In stark contrast, the prosecution is generally prohibited from adducing character evidence of the accused's general reputation in the community

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usually criminal or otherwise discreditable in nature, which is of the same general character as or shares some common feature with the conduct which is the subject of the proceeding, and which is tendered as circumstantial evidence of one or more of the constituent elements of that conduct': J D Heydon, *Cross on Evidence*, (LexisNexis, 7<sup>th</sup> ed, 2004) 596. Though Heydon does not define similar fact evidence in these exact words, the writer believes that the above-quoted definition is both accurate and reflective of the great weight of judicial and academic opinion. In *Knowles* [1984] VR 751, 765–6 the petitioner was convicted of the murder of his de facto wife by stabbing her to death. He claimed that the killing had occurred accidentally as he attempted to dispossess her of the knife in order to protect both her and their two children from harm after she had consumed alcohol and became belligerent. In reversing the conviction on appeal, the Full Court of the Supreme Court of Victoria held that a miscarriage of justice had occurred due to a gross neglect of duty on the part of defence counsel in failing to adduce evidence from two of the deceased's former lovers that they had ended their relationships with her because she had become aggressive and violent on several occasions after consuming moderate amounts of alcohol. In so holding, the court reaffirmed the common law rule that an accused is generally permitted to adduce all relevant and exculpatory evidence on his or her behalf, including, as in this case, similar fact evidence relating to specific instances of past conduct on the part of the alleged.

<sup>90</sup> *Knowles* [1984] VR 751, 765–6.

<sup>91</sup> *Lowery* [1974] AC 85, 101–3; *Knowles* [1984] VR 751, 765–6.

for the relevant character trait as part of its case-in-chief.<sup>92</sup> With the exception of the similar fact species of character evidence (discussed below), the prosecution may only adduce this or any other form of character evidence if the accused has placed his or her character in issue.<sup>93</sup> This occurs, for example, when the accused calls witnesses to attest to his or her good reputation in the community for the relevant character trait, testifies that he or she has lived a crime free existence, refers to specific incidents which form the basis for his or her good reputation in the community, cross-examines prosecution witnesses with a view toward establishing his or her good character, tenders documents or by any other means reveals information to the fact-finder in an attempt to show that he or she is a person of good character.<sup>94</sup> This is true even if the information revealed is not technically admissible in evidence, as by merely asking a question of a witness that reveals information that tends to cast the accused's character in a favourable light.<sup>95</sup>

There are instances, however, despite difficult obstacles to surmount, in which the prosecution may adduce similar fact evidence as part of its case-in-chief irrespective of whether the accused has placed his or her

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<sup>92</sup> Lowery [1974] AC 85, 101–3; Knowles [1984] VR 751, 765–6; *Rules of Evidence in Australia*, above n 58, 195.

<sup>93</sup> *Rules of Evidence in Australia*, above n 58, 195.

<sup>94</sup> See, for example, *R v Perrier (No 1)* (1991) VR 697 ('Perrier'). In *Perrier*, it was held that by merely tendering a letter written by a prosecution witness that made reference to the accused's distaste for prohibited substances, the accused had placed his character in issue, thereby opening the door for the prosecution to rebut such evidence of good character, in this instance by adducing evidence of the accused's prior convictions, some of which involved illegal drugs.

<sup>95</sup> *Rules of Evidence in Australia*, above n 58, 193. The questions of counsel are not considered as evidence. The answers given by the witnesses are regarded as evidence, provided they are not excluded by an evidentiary rule of exclusion or a common law or statutory discretion to exclude: *ibid*.



character in issue.<sup>96</sup> This is an extremely complex topic and one that is far beyond the scope of this article.<sup>97</sup> Suffice it to say for present purposes that the common law has long accorded far greater latitude to an accused in adducing all forms of character evidence relating to the complainant or a co-accused.<sup>98</sup> As one might have expected, however, this is yet another area of the law in which a very different set of rules apply when the accused is charged with one or more counts of any form of sexual assault, and this is true regardless of whether other types of offences are joined in the charge sheet or indictment.<sup>99</sup> As the discussion to follow will demonstrate, there are now statutes in all Australian jurisdictions and other democratic societies that have significantly truncated the accused's right to adduce all legally admissible and exculpatory evidence on his or

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<sup>96</sup> For an incisive and comprehensive discussion of the Australian common law approach to the admissibility of similar fact evidence, see *Rules of Evidence in Australia*, above n 58, 223–315.

<sup>97</sup> For a comprehensive discussion of the rules and rationale governing the admissibility of a accused's past conduct in each of the Australian jurisdictions, see K J Arenson, 'The Propensity Evidence Conundrum: A Search for Doctrinal Consistency' (2006) 8 *University of Notre Dame Australia Law Review* 31–63.

<sup>98</sup> The reason for extending greater latitude to the accused is that given the heavy legal burden of proof reposed on the Crown in criminal prosecutions, the law has opted to accord the accused every opportunity to adduce legally admissible and exculpatory evidence that is capable of creating reasonable doubt: Ligertwood, above n 59, 413–5.

<sup>99</sup> In Australia, see *Crimes Act 1958* (Vic) ss 62(1) and 62(2); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 48–53; *Crimes Act 1914* (Cth) ss 15YB–15YC; *Criminal Procedure Act 1986* (NSW) s 293; *Evidence Act 2008* (Vic) ss 97, 98, 101; *Criminal Procedure Act 2009* (Vic) ss 339–352; *Evidence Act 2001* (Tas) s. 194M. The statutory analogues in the jurisdictions which have thus far rejected the Uniform Evidence legislation are: *Evidence Act 1929* (SA) s 34L; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) ss 36A–36BC; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4. For examples of rape shield provisions outside Australia, see: NY Criminal Procedure Law § 60.42 (2011); Ga Code Ann (LexisNexis 2011) § 24-2-3; Wyo Stat Ann § 6-2-312 (2011); Colo Rev Stat 18-3-407 (2011); Ohio Rev Code Ann 2907.02 (LexisNexis 2011); *Criminal Code*, RSC 1985, c C-46, s 276; *Youth Justice and Criminal Procedure Act 1999* (UK) ss 41–43; *Evidence Act 2006* (NZ) s 3.

her behalf. Statutes of this type are often referred to as ‘rape shield’ laws.<sup>100</sup>

The ‘rape shield provisions’ now in effect in Victoria are contained in ss 339–352 of the Criminal Procedure Act 2009 (Vic), which are essentially a re-enactment of its predecessor, s. 37A of the Evidence Act 1958 (Vic). Consonant with the provisions of s. 37A, s. 341 of the Criminal Procedure Act 2009 (Vic) prohibits an accused from adducing evidence of the complainant’s general reputation in the community for chastity, and this is true irrespective of whether such evidence is adduced by way of cross-examination or as part of an accused’s case-in-chief. Although ss 339–352 must be read in their entirety to fully understand their effect, the overall impact effect of these and similar provisions in other jurisdictions is to require the accused to first obtain leave of court as a precondition to adducing evidence relating to the complainant’s past sexual conduct (meaning sexual conduct other than that which is the subject of the current prosecution), whether by way of cross-examination of the complainant or otherwise.<sup>101</sup> Section 349 then provides:

[t]he court must not grant leave under section 342 unless it is satisfied that the evidence has substantial relevance to a fact in issue and that it is in the interests of justice to allow the cross-examination or to admit the evidence, having regard to—

(a) whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the

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<sup>100</sup> The term ‘rape shield’ is generally accepted as a reference to any procedural or evidential provision which provides extended protection to victims of sexual assault crimes, but the author was unable to locate the originating source of the term as used in this context. For an example of a treatise that employs the term in the present context, see I Freckelton and D Andrewartha, *Indictable Offences in Victoria* (Thomson Reuters, 5<sup>th</sup> ed, 2010) 116.

<sup>101</sup> *Criminal Procedure Act 2009* (Vic) s 342.

admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked; and

(b) the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility; and

(c) the need to respect the complainant's personal dignity and privacy; and

(d) the right of the accused to fully answer and defend the charge.'

Section 349 is limited by ss 343 and 352(a) which respectively provide that '[s]exual history evidence is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates' and that '[s]exual history evidence is not to be regarded . . . as having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition'. The impact of these sections is to preclude a court from finding that the disputed evidence has substantial relevance to a fact at issue solely by virtue of the fact that the evidence, if accepted by the fact-finder, can found an inference that the complainant has a propensity to behave in a manner that is consistent with the evidence of past sexual history, from which a further inference can be drawn that the complainant is likely to have consented to the activity which is the subject of the prosecution.<sup>102</sup>

This is what is commonly referred to as a propensity or dispositional chain of reasoning which, for reasons that will be discussed (below), has

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<sup>102</sup> K J Arenson, 'Propensity Evidence in Victoria: A Triumph for Justice or an Affront to Civil Liberties?' (1999) 23(2) *Melbourne University Law Review* 263, 268.

caused the courts to view it with such great suspicion that the prosecution is generally prohibited from utilizing it as a basis for reasoning towards guilt. Stated differently, the accused is on trial for the offence(s) with which he or she is currently charged—and not for any crimes or conduct for which he or she has been previously convicted or suspected of committing. Moreover, it is an extremely presumptuous and dangerous leap for a fact-finder to infer, assuming it accepts the evidence of past sexual conduct as truthful, that because the accused has acted in a certain manner or with a particular state of mind in the past, he or she has a propensity to behave in a similar manner or with that particular state of mind, from which a further inference can be drawn that he or she is likely to have acted in a similar manner or with a similar state of mind on the occasion which is the subject of the current prosecution.<sup>103</sup>

Where s. 349 is concerned, the determining factor in the admissibility of such evidence will depend, subject to the limitations imposed by ss 343 and 352(a), on whether it is in the interest of justice to admit it having regard to the factors enumerated in s. 349(a)–(d). Section 349 is further limited by s. 352(b) which provides that ‘[s]exual history evidence is not to be regarded...as being proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant’.

It follows that throughout Australia, rape and other sexual assault offences may be seen as a special genre of offences in which disparate rules apply which, it can be argued, afford enhanced protection to the accuser and attenuated protection to the accused. This is achieved in two ways: (1) unlike an accused who is charged with only non-sexual assault offences, an accused who is charged with one or more sexual assault

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<sup>103</sup>

Ibid 26.

offences must first seek and obtain leave of court in order to cross-examine the complainant on or otherwise adduce evidence of the complainant's past sexual conduct; and (2) in order to obtain leave, an accused must demonstrate not merely that the complainant's past sexual conduct is relevant to an issue in the case or to impeaching the complainant's credit, but 'substantially' so.

This raises a question as to why rape and other sexual assaults are treated as a special class of offences in which special dispensation is bestowed upon both the prosecution and accuser and, concomitantly, the common law right of an accused to adduce all legally admissible and exculpatory evidence is attenuated through restrictions that have no application in prosecutions that do not include one or more charges of sexual assault? Though it may be true that restricting an accused's right to adduce evidence of a complainant's past sexual conduct will encourage more allegations of sexual assault to be made, that interest must be balanced against the longstanding common law rule that permits an accused to adduce all legally admissible and exculpatory evidence. Are persons accused of committing sexual assaults any less entitled to the presumption of innocence than those who are charged with other offences? Unless one is prepared to answer in the affirmative, one must query whether it is more important to encourage alleged victims of sexual assault to come forward than those who claim to be victims of other offences? If that question is answered in the affirmative, then the question is why? Readers will recall that several non-sexual assault offences are regarded as equally serious, if not more so, than rape and other forms of sexual assault. Yet it is only with regard to prosecutions for sexual assaults that the law has eviscerated the common law right of an accused to adduce all legally and exculpatory evidence on his or her behalf.

Although it is one thing to seek to protect those who have been traumatized by criminal conduct, it is quite another to presume guilt and dispense with the presumption of innocence before there has been an adjudication of guilt. It is insidious enough to flout the presumption of innocence in any prosecution, but to do so exclusively in sexual assault prosecutions is blatantly sexist and indefensible. Whether strident feminists wish to accept it or not, it is a fact that the law does not consider one who merely makes an accusation to be a victim. Perhaps radical feminists should be reminded that the goal of our criminal justice system is not limited to ensuring that persons accused of sexual assaults receive their just deserts; rather, the overriding objective of our criminal justice system is to protect all persons from the evils of wrongful conviction.<sup>104</sup>

#### IV SHE IS RAPED A SECOND TIME DURING CROSS- EXAMINATION WHEN DEFENCE COUNSEL FORCES HER TO RELIVE THE RAPE AGAIN

This hackneyed cliché, perhaps more than any other, exemplifies the myopic view that has been visited upon our adversarial system of criminal justice. The question to be posed to those who subscribe to this adage is whether they would be comfortable with like-minded people sitting on their jury if they were falsely accused of committing a sexual assault or, for that matter, any crime? The answer is abundantly clear. No rational person would countenance the presence of such a person on his or her jury in such circumstances because it would be obvious that one who subscribes to this expression has rejected the presumption of

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<sup>104</sup> See Andrew Sanders and Richard Young, *Criminal Justice*, (Butterworths, 1994) 2 which states that the aims of the criminal justice system are ‘to ensure that those suspected, accused, and convicted of crimes are dealt with fairly, justly, and with a minimum of delay’ and ‘to convict the guilty and acquit the innocent’.

innocence and substituted a strong presumption of guilt in lieu thereof. If one enters the jury box in the belief that the complainant is about to be raped a second time by virtue of being subjected to the most basic right of any accused to confront and cross-examine his or her accuser, the juror has already determined that the complainant was sexually assaulted, and probably by the accused. The sheer frequency with which this cliché is used is indicative of the successes enjoyed by those who seek to emasculate or even abrogate some of the most hallowed tenets of our system of criminal justice.

## V CONCLUSION

This article has demonstrated the many ways in which the powerful and strident feminist lobby has adversely affected some of the most sacrosanct rights that the common law has long recognized as essential to the notion of a fair trial. The influence of this voting demographic has provided the impetus for the abolition of the partial defence of provocation in murder prosecutions, an effective reversal of the presumption of innocence by according protections to sexual assault complainants that are not accorded to alleged victims of other crimes, and a flagrant assault on the cardinal tenet that all persons are regarded as equal before the law. This article has also noted the pernicious effects that this formidable demographic has foisted upon other important substantive and procedural rules within our system of criminal justice.

It is important to stress, however, that the very nature of lobbying is such that it involves alliances, bargaining and even political blackmail that occur under a cloud of secrecy. It would be extraordinary, for example, to expect any parliamentarian to provide direct evidence of its existence by confessing that he or she supported legislation solely because of pressure

brought to bear by a well-organized and very committed group such as the feminist lobby.

There are no doubt many instances in which a special interest group's views and political influence are so obvious as to obviate the need for it to make an express or implied threat that failure to support or oppose certain legislation could well cost a parliamentarian his or her seat in a marginal district. Yet the existence and influence of special interest groups is so widely known and accepted that a court would probably be remiss in failing to take judicial notice of these facts. That observation aside, there are instances in which circumstantial evidence can be equally, if not more, cogent than direct evidence. In the writer's view, a rather compelling circumstantial case has been made that the specific substantive and procedural rules discussed in this piece are evidence of a disturbing trend that is explicable only on the basis that preferential treatment has been accorded to one gender at the expense of the other. A key link in this circumstantial chain is to infer why this is so and who stands to benefit by this preferential treatment.

To those who hold dear the right to freedom of speech and subscribe to its underlying rationale that in the free marketplace of ideas, the better reasoned ones are likely to gain favor with the masses, there appears to be but one method of curtailing, halting, and eventually reversing the trend toward capitulating to the wishes of those who seek not mere equality between the genders, but what any fair and neutral observer would regard as preferential treatment for one gender; namely, to better inform the public of the arguments put forth in this article. It is only through educating the masses about the issues at hand that public opinion can be transformed to the extent required to halt this trend and reverse the invidious effects of this powerful voting demographic.





# SHORT ESSAYS

# CRITIQUING POSTMODERN PHILOSOPHIES IN CONTEMPORARY FEMINIST JURISPRUDENCE

MICHELLE TRAINER<sup>\*</sup>

## I INTRODUCTION

Contemporary feminist jurisprudence consists of many differing feminist legal theories.<sup>1</sup> Despite their differences, most feminist legal theories are united by two common features: a belief that the law perpetuates patriarchy,<sup>2</sup> and a goal to improve the position of women in relation to, and through, the law.<sup>3</sup> However, each feminist legal theory has a different belief about how this goal can be best achieved. Postmodern legal feminism uses postmodern philosophies to try to achieve this common goal. Like feminist legal theories, there are many different postmodern philosophies.<sup>4</sup> This essay examines the impact of two postmodern philosophies on contemporary jurisprudence: the disbelief that meta-narratives offer a satisfactory way to understand reality,<sup>5</sup> and the rejection of the concept of the self as an essential and rational subject.<sup>6</sup>

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<sup>1</sup> Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish, 1998) 5.

<sup>2</sup> MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Thompson Reuters, 8<sup>th</sup> ed, 2008) 1287.

<sup>3</sup> Barnett, above n 1, 8, 13.

<sup>4</sup> Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 255.

<sup>5</sup> Tim Woods, *Beginning Postmodernism* (Manchester University Press, 1999) 8.

<sup>6</sup> Barnett, above n 1, 179-80; Freeman above n 2, 1298.

## II POSTMODERNISM AND FEMINIST JURISPRUDENCE

Postmodernism is most easily explained in contrast to modernism.<sup>7</sup> Both terms refer to a connected group of philosophical theories and cultural practices that are historically locatable. Historically, modernity can be roughly located from the Enlightenment in the 18<sup>th</sup> century until the 1960s. Modern philosophies, espoused by Enlightenment thinkers, reflect a belief in a ‘coherent, stable, rational and unified’<sup>8</sup> subject capable of using reason to contribute to the progress of society.<sup>9</sup> Modern thinkers believe that through science, empiricism and reason the subject can objectively know the world.<sup>10</sup>

Broadly speaking, postmodernity commenced just after World War II,<sup>11</sup> and extends to the present day. Postmodern philosophies are sceptical that modern philosophies offer a sufficient method for thinking about the world.<sup>12</sup> Tim Woods provides a reason for postmodernism’s mistrust:

Whereas [modern philosophers] at the beginning of the Enlightenment placed a great deal of faith in a human’s ability to reason as a means of ensuring and preserving humanity’s freedom, many twentieth-century philosophers – especially those living through and after the Holocaust – have come to feel that such faith in reason is misplaced, since the exercise of human reason and logic can just as probably lead to an Auschwitz or Belsen as it can to liberty, equality and fraternity.<sup>13</sup>

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<sup>7</sup> Woods, above n 5, 6.

<sup>8</sup> Ibid 9.

<sup>9</sup> Zimmermann, above n 4, 254; Woods, above n 5, 9-10.

<sup>10</sup> Zimmermann, above n 4, 254; Douglas E Litowitz, *Postmodern Philosophy and Law* (University Press of Kansas, 1997) 9.

<sup>11</sup> Zimmermann, above n 4, 254; Litowitz, above n 10, 8.

<sup>12</sup> Litowitz, above n 10, 10.

<sup>13</sup> Woods, above n 5, 9.

Several theorists suggest the Enlightenment was ‘something of a failure’<sup>14</sup> for postmodernists because the Nazi’s used modern values such as rationality and reason to justify the Holocaust.<sup>15</sup> As a result, postmodern philosophers mistrust and critique the modern theories that they believe have failed them.

### A      *Meta-narratives*

One key postmodern philosophy, pioneered by the philosopher Jean-François Lyotard,<sup>16</sup> is that ‘meta-narratives’ are an unsatisfactory way to understand reality. A meta-narrative is ‘any unifying story which tries to make sense of the world through a comprehensive world view.’<sup>17</sup> While meta-narratives were central to modernism,<sup>18</sup> Lyotard claims that postmodernism is defined by its ‘incredibility towards meta-narrative.’<sup>19</sup> For example, Enlightenment philosophers believed in the meta-narrative that humanity was ‘progressing’ toward a utopian ideal.<sup>20</sup> In postmodernity, where war, suffering and injustice can be seen every night on the news, the meta-narrative of ‘progress’ becomes hard to believe, and thus, incredible. Accordingly, postmodernists are sceptical that totalising meta-narratives are a useful way to understand the world.

Lyotard suggests that postmodern subjects use micro-narratives to explain reality.<sup>21</sup> Micro-narratives are ‘little stories’ instead of ‘big

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<sup>14</sup> Litowitz, above n 10, 10 (citations removed).

<sup>15</sup> See Litowitz, above n 10, 10; Barnett, above n 1, 178.

<sup>16</sup> See Woods, above n 5, 19–24.

<sup>17</sup> Zimmermann, above n 4, 255.

<sup>18</sup> Woods, above n 5, 20.

<sup>19</sup> Zimmermann, above n 4, 255, citing Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press, 1984) xxiv.

<sup>20</sup> Woods, above n 5, 20–1.

<sup>21</sup> See *ibid* 20.

stories’;<sup>22</sup> multiple narratives that provide the subject with a personal and local way of seeing the world.<sup>23</sup> Woods explains that in postmodernity:

[T]here is a disillusionment with ambitious ‘total explanations’ of reality, such as those offered by science, or religion, or political programmes like Communism; instead there is a growing preference for smaller-scale, single-issue preoccupations, so that people devote their time to saving the whale, or opposing a local by-pass road. These might exemplify Lyotard’s [‘micro-narratives’]; the ‘meta-narratives’ would be appeals to the emancipation of the working classes or saving the global environment.<sup>24</sup>

For postmodernists, reality should not be explained through one universal ‘Truth’, but instead through multiple and personal ‘truths.’<sup>25</sup> They propose that knowledge ‘can only be partial, fragmented and incomplete.’<sup>26</sup> Meta-narratives simplify reality because they hide other competing discourses that may be present. Micro-narratives offer a more satisfying way of understanding the world because they allow multiple discourses to coexist.

Postmodern legal feminists problematise liberal feminism’s reliance on meta-narratives. Liberal feminism, which emerged in the 19<sup>th</sup> century,<sup>27</sup> claims that women are as rational as men,<sup>28</sup> and as a result should have the same legal rights and opportunities.<sup>29</sup> To construct their argument, liberal feminists use the meta-narrative of women’s sameness with men. For postmodern legal feminists, this meta-narrative is ‘incredible’,

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<sup>22</sup> Barnett, above n 1, 179.

<sup>23</sup> See Woods, above n 5, 21.

<sup>24</sup> Ibid 20.

<sup>25</sup> Zimmermann, above n 4, 255.

<sup>26</sup> Woods, above n 5, 20; see also Barnett, above n 1, 179.

<sup>27</sup> Zimmermann, above n 4, 232.

<sup>28</sup> Litowitz, above n 10, 10-1.

<sup>29</sup> Zimmermann, above n 4, 232-3.

because women's lives are often *not* the same as men's, for example in relation to reproduction and sexuality.<sup>30</sup> Legal feminist Clare Dalton points out the limitations of a legal feminism based on women's sameness to men:

The well-founded fear that where the law saw difference it would justify disadvantage, prevented women from insisting that the law take account of their reality. The price women paid was a theoretical legal equality which the actual, material constraints of their lives frequently left them unable to take advantage of.<sup>31</sup>

If legal feminists argue that women deserve legal equality because of their sameness to men, it becomes difficult to argue for women's rights where they are obviously different. This difficulty was demonstrated in the United States case of *Geduldig v Aiello* ('*Geduldig*').<sup>32</sup> In *Geduldig* the plaintiff used the sameness meta-narrative to argue that a disability insurance scheme discriminated against women.<sup>33</sup> She argued that pregnancy disabled women in the same way that other conditions disabled men, so pregnant women should receive benefits.<sup>34</sup> The Supreme Court held that the scheme did not discriminate against women because 'all people who were not pregnant were treated the same; only pregnant women were treated differently.'<sup>35</sup> For postmodern legal feminists,

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<sup>30</sup> Clare Dalton, 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (1987) 3 *Berkeley Women's Law Journal* 1, 5.

<sup>31</sup> *Ibid*; see also Judith G Greenberg, 'Introduction to Postmodern Legal Feminism' in Mary Joe Frug, *Postmodern Legal Feminism* (Routledge, 1992) ix, xii.

<sup>32</sup> 417 US 484 (1974) cited in Greenberg, above n 31, xii.

<sup>33</sup> See Greenberg, above n 31, xii.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*.

theories that use meta-narratives to argue for women's legal rights, like in *Geduldig*, often turn out 'not to work.'<sup>36</sup>

Postmodern legal feminists dismantle meta-narratives about the law by identifying that they are partial and constructed.<sup>37</sup> In modernity, the law's claims to 'objectivity', 'neutrality' and 'equality' were justified 'by reference to ahistorical and acontextual truisms about human nature, God, reason, and natural law.'<sup>38</sup> Postmodern legal feminists deconstruct these claims by arguing that legal discourse and the legal system is not 'natural' but has been created and enforced by the socially powerful,<sup>39</sup> who have historically been white, western men.<sup>40</sup> Accordingly, the law reflects a male-perspective on the world, and 'what has been presented as "the world" and "the truth" has obscured women's reality, and ignored women's perspective.'<sup>41</sup> Postmodern legal feminists believe that they must critique the legal system itself, rather than specific laws, to achieve any significant improvements for women.<sup>42</sup>

Postmodern legal feminists are cautious about creating feminist meta-narratives in place of male meta-narratives.<sup>43</sup> However, this may mean they lack a strong foundation from which to construct their arguments.<sup>44</sup>

Woods explains the position of feminist Somer Brodribb:

Postmodern arguments which stress the importance of micro-narratives and the collapse of the grand narratives of history have

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<sup>36</sup> Mary Joe Frug, *Postmodern Legal Feminism* (Routledge, 1992), 4, 18. See also Dalton, above n 30, 4-5; Greenberg, above n 31, xii – xiii.

<sup>37</sup> Barnett, above n 1, 19; see also Zimmermann, above n 4, 243.

<sup>38</sup> See generally Litowitz, above n 10, 7.

<sup>39</sup> Dalton, above n 30, 11.

<sup>40</sup> Zimmermann, above n 4, 243.

<sup>41</sup> Dalton, above n 30, 6.

<sup>42</sup> Ibid 12.

<sup>43</sup> Ibid 7.

<sup>44</sup> Litowitz, above n 10, 10.



posed significant threats to an ideological critique of patriarchy based upon a ‘grand narrative’ of male domination. Such postmodern theories effectively subvert the potential for female agency and the radical political effectiveness of a feminist project based upon the analysis of a hegemonic male power.<sup>45</sup>

This essay’s introduction states that legal feminist theories are united by their belief that the law perpetuates patriarchy.<sup>46</sup> However, postmodern legal feminists may reject this claim because it relies on a meta-narrative. If postmodern legal feminists avoid all meta-narratives, they may lack a unified position from which to argue for women’s rights before the law.

## B      *Essentialism*

Postmodernists reject the Enlightenment concept that a rational and essential self exists separately from society.<sup>47</sup> Instead, postmodernists see the self as a created by multiple discourses, such as those offered by culture, politics and history.<sup>48</sup> Similarly, postmodern feminists believe that the idea of ‘woman’ continually changes in relation to discourse.<sup>49</sup>

Postmodern legal feminism:

[C]hallenges the notion that women can be encapsulated within some single theory of society and law, [and] denies that the interests of women are the same, as if there is some “essential woman” involved with the characteristics and needs of every woman, irrespective of age, race or class.<sup>50</sup>

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<sup>45</sup> Somer Brodribb, *Nothing Mat(t)ers: A Feminist Critique of Postmodernism* (Spinifex Press, 1993) cited in Woods, above n 5, 41.

<sup>46</sup> See Freeman above n 2, 1287.

<sup>47</sup> Ibid 1297.

<sup>48</sup> Barnett, above n 1, 179; Litowitz, above n 10, 11-2.

<sup>49</sup> Greenberg, above n 31, xix.

<sup>50</sup> Barnett, above n 1, 8.

Accordingly, postmodern legal feminism critiques the use of all-encompassing theories to explain 'woman' or women's position in relation to the law.

Postmodern legal feminists believe that theories which attempt to speak for *all* women will always exclude women who do not fit the mould.<sup>51</sup> For example, they criticise the theory of radical legal feminist Catharine MacKinnon,<sup>52</sup> who believes that the social context in which laws are created positions women as sexual subordinates to men.<sup>53</sup> By theorising about all women, MacKinnon excludes those who may not be sexual subordinates, such as lesbians.<sup>54</sup> Similarly, theories that 'generalize from the experiences of upper middle-class white women'<sup>55</sup> exclude the experiences of women of colour.<sup>56</sup> Postmodern legal feminism aims to use pluralisms instead of 'essentialist assumptions',<sup>57</sup> because such assumptions ignore many women's actual experiences.<sup>58</sup>

While postmodern legal feminists recognise that essential assumptions about gender can marginalise both men and women, they also acknowledge the importance of gender as an organising concept.<sup>59</sup> For Hilaire Barnett, 'gender ... remains the basis on which women can challenge the dominant male discourse.'<sup>60</sup> She suggests that without the concept of gender, legal feminism may lose sight of its political and legal

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<sup>51</sup> Dalton, above n 30, 8; Ibid 8.

<sup>52</sup> Greenberg, above n 31, xix.

<sup>53</sup> Dalton, above n 30, 7-8; Barnett, above n 1, 5-6.

<sup>54</sup> Barnett, above n 1, 193.

<sup>55</sup> Greenberg, above n 31, x.

<sup>56</sup> Ibid; Barnett, above n 1, 193.

<sup>57</sup> Barnett, above n 1, 197.

<sup>58</sup> Dalton, above n 30, 8.

<sup>59</sup> Barnett, above n 1, 19.

<sup>60</sup> Ibid 197.

goals and become mere ‘philosophical speculation.’<sup>61</sup> Patricia Cain explains that:

[P]ostmodern thought poses a certain dilemma. Any theory requires some degree of abstraction and generalization. Thus, if feminists embrace the particular situated realities of all individual women, plural, we will find it difficult to build a theory, singular, to combat oppression.<sup>62</sup>

Arguably, legal feminists require an essential definition of ‘woman’ in order to best improve the position of women in relation to the law.<sup>63</sup>

### III CONCLUSION

Postmodernism’s disillusionment with meta-narratives has recognisably impacted on feminist jurisprudence. Postmodern legal feminists question whether liberal feminism’s reliance on meta-narratives hides the fact that the law is constructed and not ‘natural’. By deconstructing legal meta-narratives, legal feminists have shifted their focus from specific laws, to now ‘challenge even the structure of legal thought as contingent and in some culturally specific sense ‘male,’ implying the need for more radical changes than the ameliorative amendments we have offered in the past.’<sup>64</sup>

Postmodern legal feminists also embrace postmodernism’s rejection of essentialism. They aim to avoid theories that try to speak for *all* women and seek instead theories which recognise that women experience the world differently. They try to ensure that the multiple discourses that shape women are not hidden or silenced.

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<sup>61</sup> Ibid 199.

<sup>62</sup> Patricia A Cain, ‘Feminism and the Limits of Equality’ (1990) 24 *Georgia Law Review* 803 cited in Freeman above n 2, 1317.

<sup>63</sup> Barnett, above n 1, 199-200.

<sup>64</sup> Dalton, above n 30, 12.

However, postmodernism also offers a challenge for feminist jurisprudence. Postmodern philosophers tend to critique and deconstruct other theories, rather than find a solid foundation from which to articulate their own. Accordingly, postmodern legal feminists must ensure that they do not get caught up in theorising about theories. They must make sure to keep their practical goal – to improve the position of women in relation to the law – well in their sights.

# **RADICAL RE-ADMISSION: MORAL AND METAPHYSICAL IMPLICATIONS OF THE ‘IS’/‘OUGHT’ DISTINCTION THROUGH THE LENS OF DRUZIN’S EXPANDED SIGNALLING MODEL OF NORMS**

ROBERT T THORLEY\*

*“[T]he actual theory of law developed by positivist philosophers like Bentham, Hart, and Raz, ... is, and was, understood by its proponents, to be a radical theory of law, one unfriendly to the status quo and anyone, judge or citizen, who thinks obedience to the law is paramount”.*

– Brian Leiter<sup>1</sup>

## **I INTRODUCTION**

The core concept of legal positivism has been expressed by Brian Leiter as a normative command that has come into effect by way of a particular form of human action.<sup>2</sup> This definition assists in distinguishing legal positivism from the schools of thought invoking universal or religious truths but does little to reveal the role ethics and metaphysics does or does not play in a positivistic legal system. By examining positivism

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<sup>1</sup> Brian Leiter, ‘The Radicalism of Legal Positivism’ (2009) 66 *National Lawyers Guild Review* 165, 165 (emphasis in original).

<sup>2</sup> Ibid.

through the lens of a Law and Economics perspective, in particular the use of an Expanded Signalling Model of Norms (ESM)<sup>3</sup>, it is possible to evidence that, by separating ‘is’ from ‘ought’, positivism actually encourages engagement with ethical and metaphysical dialogues.

The finer details of positivism vary depending on the source – ranging from the Sophist view of law as of accidents of convention<sup>4</sup> or Thrasymachus’ ‘advantage of the stronger’<sup>5</sup> dating back to ancient Greece, through to the *Leviathan* of Thomas Hobbes and beyond. For the purposes of this discussion, H. L. A. Hart’s variant will be considered. Hart considered that previous positivist explanations for the source of law were too narrow, at times equating it to little more than ‘orders backed by threats’<sup>6</sup>. He believed that laws represented social norms that had been elevated by way of social recognition of the power of the enacting body to create such laws. So called ‘weak acceptance’ or recognition is sufficient – the basis for recognition need not be universal, only the recognition itself.<sup>7</sup> (It is worth noting that Hart recognized that whilst a group may present acceptance of a conduct there is no reason to conclude their moral values or reasoning are the same).<sup>8</sup> The effect of this rule of recognition is that there is no fundamental content of law, only that which

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<sup>3</sup> See Bryan Druzin, ‘Law, Selfishness, and Signals: An Expansion of Posner’s Signalling Theory of Social Norms’ (2011) 24(1) *Canadian Journal of Law and Jurisprudence* 5.

<sup>4</sup> J M Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 2007) 14.

<sup>5</sup> Plato, *The Republic* (B Jowett trans, KayeDreams Novel Art, 2009) 54 [first published 360 BC].

<sup>6</sup> H L A Hart, *The Concept of Law* (Clarendon Press, Oxford, 1994) 20.

<sup>7</sup> Ibid 160.

<sup>8</sup> Ibid 198-9.

is ‘posited’. To use the words of Austin – ‘The existence of law is one thing; its merit or demerit is another...’<sup>9</sup>

If law is governed by social norms, an understanding of the mechanics of social norms will assist in the understanding of the mechanics of law under a positivist approach. Bryan Druzin presents a comprehensive, multidisciplinary theory of social norms,<sup>10</sup> expanding on Posner’s signalling theory of norms.<sup>11</sup> Posner’s theory posits that social norms are effectively tools to signal ‘discount rates’ of individuals, discount rates being indicative of whether an individual is a worthwhile long-term co-operative partner.<sup>12</sup> Normative behaviour, having an inherent transaction cost, is but a tool to show the willingness to make a sacrifice in the present for future benefit, thus representing a person who is a ‘good investment’.<sup>13</sup> Posner acknowledges that this model relies entirely on the assumption of rational choice.<sup>14</sup>

## II DRUZIN’S EXPANDED SIGNALING MODEL OF NORMS

The main difficulty is that a rational choice model does not accurately describe human behaviour,<sup>15</sup> as is evidenced from numerous behavioural experiments.<sup>16</sup> This has led some commentators to speculate that norms

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<sup>9</sup> John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, first published 1832, 1995 ed) 157.

<sup>10</sup> Druzin, above n 3.

<sup>11</sup> Eric A Posner, *Law and Social Norms* (Harvard University Press, 2000).

<sup>12</sup> Ibid 24-5.

<sup>13</sup> Posner, above n 11, 6.

<sup>14</sup> Ibid 46.

<sup>15</sup> John Scott, ‘Rational Choice Theory’ in G Browning, A Halcli and F Webster (eds), *Understanding Contemporary Society: Theories of the Present* (Sage Publications, London, 2000) 133.

<sup>16</sup> See, eg, Bryan Druzin, ‘Law Without the State: The Theory of High Engagement and the Emergence of Spontaneous Legal Order within Commercial Systems’ (2010) 41 *Georgetown Journal of International Law* 1; Robert Axelrod & William D Hamilton, ‘The Evolution of Cooperation’ (1981) 211 *Science* 1390, 1392; Ernst Fehr, Urs Fischbacher & Simon Gächter, ‘Strong Reciprocity, Human

are no more than arbitrary preferences that happen to be shared.<sup>17</sup> The key difference with Druzin's model is that it does not rely on the traditional rational choice model, instead suggesting that internalisation of norms is an adapted evolutionary behaviour such that

evolution has generated an instinctual proficiency in working with norms as signals in whatever form they take – a proficiency that invariably manifests in an emotional context.<sup>18</sup>

By internalising the process of identifying normative signals a person is more likely to have an advantage in identifying suitable economic partners, which in turn increases the likelihood of success and survival.<sup>19</sup> A comparison to this internalisation process can be drawn to the human body internalising 'hunger' in order to ensure sufficient caloric intake rather than relying on the individual's reasoning to ensure that said needs are met.<sup>20</sup> Once internalised, the emotive response is instinctual and thus not reliant on whether, in a given circumstance, the signal in question is beneficial to send or receive.<sup>21</sup> It is not a novel idea that emotions are evolutionary traits;<sup>22</sup> however it is important to note that emotions are, of themselves, not normative beliefs. Druzin's theory does present a novel idea though; the idea that normative beliefs are simply internalisations of discount rate signals. If this concept is transported to Hart's theory of legal positivism we are given the position that both law and morals are governed by (internalised) discount rate signals which are the result of

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Cooperation, and the Enforcement of Social Norms, (2002) 13 *Human Nature* 1; W Guth et al., 'An Experimental Analysis of Ultimatum Bargaining' (1982) 3 *Journal of Economic Behavior and Organization* 367.

<sup>17</sup> Scott, above n 15.

<sup>18</sup> Druzin, above n 3, 15 (emphasis in original).

<sup>19</sup> Ibid.

<sup>20</sup> Druzin, above n 3, 16.

<sup>21</sup> Ibid.

<sup>22</sup> See, eg, François Nielsen, 'Sociobiology and Sociology' (1994) 20 *Annual Review of Sociology* 267, 277.



evolutionary adaption. Equally, it stands that the rule of recognition is itself a discount rate signal. Consequently – the law is effectively a means of demonstrating one’s suitability as a long term economic partner.

### III SIMILARITIES AND DIFFERENCES

It is prudent to raise a distinction at this point between this conceptuality and legal utilitarianism, such as that those proposed by Epicurus<sup>23</sup> or Bentham.<sup>24</sup> Utilitarianism is the theory that the law should be made to create maximum social benefit, whereas this theory purports that the law is a result of people seeking to demonstrate their willingness to engage in behaviour that will result in maximum benefit for both themselves and the group. (If you will, the distinction is one of what the law ‘is’ versus what the law ‘ought to be’.)

Similarly, it should be noted at this point that, despite sharing an apparently ‘natural’ basis with natural law concepts, Druzin’s theory embraces the variation in normative values between various segments of societies, given that signals are somewhat idiosyncratic in their creation and the effectiveness of individual signals relies on their value within a given grouping of people.<sup>25</sup> It is similarly stated that norms may still arise due to their ‘inherent survival value, or as solutions to coordinated dilemmas’, thus implying that if a particular group is facing a pressing disadvantage a norm may develop, which will subsequently be internalised, in effect resulting in a moral stance.<sup>26</sup> This can be evidenced by analysing the following position put forward by Robert Nozick: If, in a jurisdiction such as the modern United States, slavery is considered a

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<sup>23</sup> See generally Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexus Butterworths, 2013), 56.

<sup>24</sup> Ibid 65.

<sup>25</sup> Druzin, above n 3, 20.

<sup>26</sup> Druzin, above n 3, 8.

violation of fundamental human rights and cannot be made into law, is taxation not, by requiring a person to surrender a portion of the gains of their labour, equivalent to forcing a person to work without recompense for a portion of their working week equivalent to the rate of taxation experienced and therefore in violation of the aforementioned fundamental right?<sup>27</sup> However, even should one agree with such a premise, it is unlikely one would argue that various tax assessment acts are not, in fact, valid law, more likely viewing the concept an artefact of sophistry.<sup>28</sup> There is a co-existence of a normative value against all slavery (which is a direct contrast to the historical acceptance of slavery) with normative value of the acceptance of taxation, which logically stems from its perceived public utility, both of which have been internalised, both of which existing under a normative value of law. The Expanded Signalling Model of Norms can explain this seeming contradiction by simple reference to the discount rate inherent in these internalised signals. Slavery, much like committing murder or cannibalism, signals a rather high discount rate as it is an indicator that economic partnerships with the sender carry elevated risks. ‘After all, what is a greater indication of disinterest in long-term cooperation than killing and eating the other person?’<sup>29</sup> Taxation, on the other hand, indicates an interest in future cooperation and thus is a signal of a low discount rate.

#### IV EFFECT OF ESM ON POSITIVISM

This capacity for changing and conflicting norms can be paralleled to Leiter’s description of the positivism of Hart and the like as ‘a *radical*

<sup>27</sup> Robert Nozick, *Anarchy, State and Utopia* (Oxford, 1974) 169-72.

<sup>28</sup> D N MacCormick, ‘Law, Morality and Positivism’ (1981) 1 *Legal Studies* 131, 131.

<sup>29</sup> Druzin, above n 3, 30; Cf Leo Strauss, *Natural Right and History* (Chicago University Press, 1965) 3.

theory of law, one unfriendly to the *status quo* and anyone, judge or citizen, who thinks obedience to the law is paramount.’<sup>30</sup> If norms can contradict, then it follows that simply because a person believes in the rule of recognition and the norm that is ‘law’, that person does not need to normatively adopt the content of any given law within the system. If an individual disagrees with a given law they can 1) choose to obey the law and continue to recognize the source of law, 2) choose to *disobey* the law but still continue to recognize the source of law, or 3) choose to no longer personally recognize the source of law. There is no element of positivism that prevents any of these options. If sufficient people chose option 3, the rule of recognition fails and the entire system of law ceases to exist. Essentially, positivism is concerned with what the law ‘is’ (including whether or not there is in fact a valid system of law), not whether it ‘ought’ to be followed.

It is this ‘is’ versus ‘ought’ distinction that challenges the allegation that positivism promotes the expulsion of ethics and metaphysics from the law. Positivism is a technique for describing what law is, compared to what it ought to be, but it does not attempt to fix the law as invariable or ‘right’. E.S.M seeks to explain the mechanics behind social norms, including morals, but in the same way that positivism does not seek to assign value to law, E.S.M. does not attempt to engage with metaphysical considerations such as what norms would exist in an ideal society.

## V CONCLUSION

MacCormick has said ‘The problem is not that viciously oppressive laws do not exist, but that they do.’<sup>31</sup> By acknowledging such a possibility, the

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<sup>30</sup> Leiter, above n 1, 165 (emphasis in original).

<sup>31</sup> MacCormick, above n 28, 131.

very nature of positivism, as examined through the perspective of the Expanded Signalling Model of Norms, invites the participants of a system to engage with and evaluate laws, on both a morally and metaphysical basis. After all – you can't plot a course to a destination without knowing where you are starting from.

# CHINA'S GREATEST CHALLENGE: DOES A MARKET ECONOMY MEAN PROFITS AT ANY COST?

IAN SAMPSON<sup>\*</sup>

## ABSTRACT

*China gained the tag "Economic Miracle" as it transitions from Mao's closed-door ideologies, via a centrally planned economic system to today's market economy. Although amazing, this transformation has come at a cost and the People's Republic of China ('PRC') face many new challenges. Furthermore, this economic success now means the PRC is now perfectly positioned to recognise and own past errors and set new World standards in sustainability.*

*This short essay addresses several key issues by asking; does a market economy mean profits at any cost? To explore this question, John Elkington's Triple Bottom Line model is utilised to assess some of China's new challenges and examine their balanced scorecard. As a model, Triple Bottom Line is worthy of consideration by all emerging nations. Particularly, a nation like China, who are in the process of re-establishing the rule of law, education, public utilities, the judiciary and food security.*

## I INTRODUCTION

China and Chinese culture predates Christ. Early recordings such as the Bamboo Annals date the Xia Dynasty (China's first Dynasty) prior to 2000 BC. Since then, China has survived different leaderships, varied leadership styles and policies, and enjoyed unprecedented successes. Many of these successes in the arts, technical design, exploration and

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foreign trade are attributed to the effective leadership and sustainable governance of the Ming Dynasty (1368 - 1644). Today, China has advanced through the isolation and turbulence of Mao's closed-door ideologies via a well-executed and centrally planned economic system to a more market oriented economy. China's outstanding success in economic development has gained it the label of the 'economic miracle'. The other side of the economic success is the cost to the environment and increasing gap between the wealthy and poor.

This essay will examine China's massive economic successes, social reforms, and environmental protection policies by considering the headline question:

***Does a market economy mean profits at any cost?***

To evaluate this proposition and draw conclusions this paper will overlay China's economic performance on the Triple Bottom Line ('TBL') model. The TBL is a refinement of the United Nations 1983 Brundtland Commission recommendations and later refinement by Elkington.<sup>1</sup> Simply, the TBL measures non-economic performance factors, the people (social responsibility/social outcomes), the plant (the environment in which we operate), the economic measure profit and establishes a 'costs – benefit' ratio that is not measured solely in Dollars, Euros, Kroners, Yen, Francs or Renminbi. The TBL removes the paramount focus of maximising returns to shareholders (a western doctrine) at all costs and places a value for all stakeholders including suppliers, clients, owners, employees, governments and the communities in which they operate. It is

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<sup>1</sup> Brian Murphy and Rongmei Wang, 'An evaluation of stakeholder relationship marketing in China' (2006) 18 *Asia Pacific Journal of Marketing and Logistics* 1: citing John Elkington, *Cannibals with Forks: the Triple Bottom Line of 21<sup>st</sup> Century Business* (Capstone, 1998). John Elkington is considered by many to be the father of sustainable development and corporate responsibility.

not a socialist ownership by the state model, or a model 'to rob the organisation of its profits' but promotes the desired outcome of sustainable profits, improved lifestyles and better environments (within and outside the organisation). These desirable outcomes should fit naturally with Chinese 'can do' culture, the 'Confucian teaching ...to achieve social order and harmony'<sup>2</sup> and the internal motivation of the people to achieve.

The TBL model has gained popular acceptance among many of the Fortune 500 companies in the USA and widespread acceptance in India. The following will examine each element (the three 'Ps') of the TBL (II) Profits, (III) People, and (IV) Planet with available information on China.

## II PART ONE: PROFITS

The TBL assumes that profits can be in many forms and not all profits need necessarily be economic profits. Michael Baye describes economic profits as the 'difference between total revenue and total opportunity cost' and further notes, 'it is common for most firms to maximize profits as a primary goal.'<sup>3</sup> Some argue that profits are based on self-interest and greed. Others understand that profits are required for a business to exist. Regardless of your perspective, without profits businesses are unable to expand, unable to meet their financial commitments and ultimately unable to exist. So, is this good or bad for the communities in which they operate? The TBL model suggests that profits are good. When profits are high, organisations can reinvest in improving plant and equipment (their operating environment) and assisting the people (the staff and broader

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<sup>2</sup> Hong Xiao, 'Values Priority and Human Rights Policy: A Comparison between China and Western Nations' (2005) *Journal of Human Values* 11, 89.

<sup>3</sup> Michael Baye, *Managerial Economics and Business Strategy* (McGraw-Hill Irwin, 2006) 5-8.

community, the external environment) while providing a fair return on investment to the shareholders. A win/win/win situation. As the TBL and Michael Baye are from free trade backgrounds, can these theories and practices add value to China's evolution?

China has moved from communism, to the planned economy, to a market economy<sup>4</sup>. This transition has not been as easy to manage and will face many fresh challenges in the future. As the Chinese Government divests many State Owned Enterprises ('SOE') to provincial or private ownership, many aspects of the businesses functions will require re-evaluation. Many of the older communist SOE have old plant and equipment, are set up for mass production with little variety, questionable quality, and in most situations only one customer (the State). These businesses have been sustainable to date: due in part, to the low cost and abundance of labour. As China's economy evolves and the middle class emerges, these labour rates will rise while the plant and equipment will continue to age. This is evidenced by large SOEs like Anshan Iron and Steel Complex<sup>5</sup> who are having difficulties adapting from high volume government backed orders and low cost mass production, to a focused differentiation strategy<sup>6</sup> more suited to a market economy. Likewise, the Government themselves have experienced problems in exercising managerial economics<sup>7</sup> as

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<sup>4</sup> Wenlie Yu, 'China's Socialist Market Economy' (2009) 12 *Nature, Society, and Thought*, 447.

<sup>5</sup> Chung Kui Jin Pao, 'Steel giant departs from the planned economy' (1990) *China Daily North American ed*, 3.

<sup>6</sup> Arthur A Thompson Jr., A J Strickland III and John E Gamble, *Crafting & Executing Strategy The Quest for Competitive Advantage* (McGraw-Hill Irwin, 5<sup>th</sup> ed, 2005) 153.

<sup>7</sup> Baye, above n 3, 5.



demonstrated by the cabbage crisis where they simply got the numbers wrong.<sup>8</sup>

Plainly, businesses must make a profit. Likewise, Governments ought to stay in surplus (a Governments equivalent to profit) if the economy is to continue to grow. The balancing act is in the reinvesting of the profits. Having large amounts of money in Government or a few people's hands is clearly not helpful if the workers are dying from respiratory decease, drinking polluted water and generally have a low quality of life. Likewise, the business/governments future is bleak if profits are unsustainable or if demand for goods suddenly drops.

The TBL offers concepts worthy of consideration.

### III PART TWO: PEOPLE

In economic terms people are a resource. People can provide knowhow (intellectual capital), or labour (human capital).<sup>9</sup> The CIA World Fact Book estimates China's population at 1,336,718,015 at the July 2011 with 73.6% of this population being between 15 - 64 years of age (i.e. working age) and 47% of the population living urbanely.<sup>10</sup> This means that China is rich with human capital that provides a significant competitive advantage in labour intensive industries. However, the new challenge for the PRC is to keep this human capital working and working on

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<sup>8</sup> Adi Lgnatius, 'Wanted: an Enterprising Person With a Whole Lot of Corned Beef' (1989) *The Wall Street Journal* 1.

<sup>9</sup> Baye, above n 3, 210; Phillippe Lasserre and Hellmut Schutte, *Strategies for Asia Pacific Meeting New Challenges* (Palgrave Macmillan, 3<sup>rd</sup> ed, 2006) 258-63.

<sup>10</sup> Central Intelligence Agency, 'The World Factbook', <<https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>>.

meaningful tasks in fair and proper conditions with fair and proper reward.<sup>11</sup>

As China returns to its proper position as a global citizen, they will have to move past the 'Post-Mao' period where the new leaders tended to blame the 'gang of four' for all the violations of human rights and said that they were on the path of reform.<sup>12</sup> Likewise, Chinese officials may have to soften their claim that in China economic prosperity is the major concern of the people and an emphasis on social order versus individual freedom is good for economic growth.<sup>13</sup> Mao's China will haunt China's leaders for some time yet. The one child policy for example means that China now has an aging population. Likewise, as the emerging middle class gain more and more information, exposure and understanding of foreign lifestyles, working conditions and practices through television and the internet their attitude to collectivism and subservience to government may change.

Until recently, foreign leaders have avoided public reference to China's human rights practices. It was widely accepted within the bureaucracy that the People's Republic of China ('PRC') was not an appropriate target of human rights initiatives<sup>14</sup> and politically viewed as unwarranted intervention in China's internal affairs.<sup>15</sup> This proposition is also changing. Kurt Lewin the popular German-American psychologist is widely considered the father of social psychology and organisational

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<sup>11</sup> R Schuler, *Human Resource Management* (John Wiley and Sons, 1995) 4.

<sup>12</sup> Yeshi Choedon, 'The Human Rights Factor in US-China Relations: The Carter Period' (2000) *China Report* 36, 215.

<sup>13</sup> Xiao, above n 2, 88.

<sup>14</sup> US Congressional Research Service report published in 1979 as cited in Choedon, above n 12, 201.

<sup>15</sup> Choedon, above n 12, 216.

development defined his change model named the Force Field Analysis.<sup>16</sup> This model suggests that change begins when the driving force of the desired change exceed the restraining forces acting against the change. Since China's open-door policy commenced, China has sought to recommence its position as a global citizen and thereby the driving forces for social reform and adoption of human rights has increased and will continue to increase at an expedient rate. Tiananmen Square, the 1997 handing back of Hong Kong and the Beijing Olympic games has focused the World press and media more critically than ever before. Likewise, China has joined the World Trade Organisation (WTO), the International Labour Organisation (ILO) and the United Nations (UN). On the other side, the main restraining forces are lack of technical knowhow and the operant conditioning toward communist party conformity. When these external driving forces merge with China's emerging middle class and the general broader population are exposed to outside sources will ultimately overpower the restraining forces and change will follow out of necessity, sustainability and external pressure. Lewin's change model may well indicate that for China to survive major reforms it may well have to change to a more TBL aligned practices, whether intentionally or inevitably.

#### IV PART THREE: PLANET

In 2004, 16 out of 20 of Worlds most polluted cities were in China and of the 412 sites tested on China's seven main rivers over 58 per cent were too dirty for human consumption.<sup>17</sup> Birkin et al further claims; one third of China suffers sever soil erosion, an estimated 75 per cent of waste

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<sup>16</sup> Steven McShane and Tony Travaglione, *Organisational Behaviour on the Pacific Rim* (McGraw-Hill Irwin, 2005) 566-74.

<sup>17</sup> F Birkin et al, 'New Sustainable Business Models in China' (2009) 18 *Business Strategy and the Environment* 64.

water is discharged untreated, 60 per cent of the drinking water does not meet World Health Organisation's minimum acceptable standard and that one in four people die of respiratory diseases.<sup>18</sup> The CIA World Factbook states: Soil erosion and the steady fall of the water table, especially in the north, loss of arable land because of soil erosion and economic development. Likewise, China's air pollution problem in Beijing was broadcast worldwide in the lead up and during the 2008 Olympic Games. These problems are the most serious challenges for China. Like Fukushima Japan, and the omission of carbon in other countries, the problems are not contained. Our planet is everyone's and everyone's responsibility.

Worldwide, private companies are held to account for their environmental disasters,<sup>19</sup> in my view it is only time until governments are held accountable and responsible for their emissions. Whether this responsibility is ever levied upon governments or not, China is now in the perfect position to set new world standards in environment protection. China's massive economic growth and building of new infrastructure is the ideal opportunity to build new super environmentally friendly cities, factories, public places, private and public transport and for the introduction of new low emission technology in delivering services such as power and water. China has an added advantage of autonomous authority and influence<sup>20</sup> that could implement new standards quickly and easily by behaviour modification.<sup>21</sup> Chinese collectivism is more likely to

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<sup>18</sup> Ibid, 67.

<sup>19</sup> Stathis Palassis, 'Reconciling the international and United States approaches to civil liability for oil pollution damage' (2007) 24 *Environmental and Planning Law Journal*, 2.

<sup>20</sup> Birkin et al, above n 17, 67.

<sup>21</sup> McShane and Travaglione, above n 16, 45.

emphasize the power and responsibility of the state<sup>22</sup> and the state has the available money to make this environmental revolution reality. If the PRC follow through with their proposed *Jeuqi* reforms<sup>23</sup> and make a genuine and serious approach to pollution control and sustainability, China will leave their old image behind and become the new World leader in environmental protection and sustainability. This type of development should meld the Taoism, Daoism and Confusion values that reside within the broader community.

China can learn with the benefit of hindsight from the Ethiopian experience of soil degradation, the New Zealand experience in decimating their Orange Ruffy fish stocks to the point of extinction and the Australian experience of soil salinity from clearing too much broad-acre farmland. Similarly, positives ought to be extracted from processes such as Western Australia's well-managed fisheries.

Businesses, governments and communities cannot exist in a vacuum. The inputs of business and societies come from our environment; life and our environment are interdependent.

## V CONCLUSION

China is home to 1.3 billion people and the population is aging. The CCP as the governing body of China has embarked upon a course to global citizenship by embracing new ideas and technologies and making considerable progress on social and economic reforms. However, there is still a long way to go if the country's economy is going to continue to grow and prosper.

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<sup>22</sup> Xiao, above n 2, 87.

<sup>23</sup> Birkin et al, above n 17, 67.

For China to continue to grow and prosper they must embrace a holistic approach to business, governance and the people. The world's focus is currently on China, and China is now in the perfect position to recognise and own past errors and set new World standards in sustainability. The renewing of infrastructure is providing the opportunity to build new environmentally sustainable businesses, cities and utilities. The renewing, and in many cases creation of new legislation allows freer adoption of contemporary World standards such as the WTO, ILO and UN's charters, conventions and treaties. Further, China's enormous economic success means their government has the cash reserves necessary to make the preceding ideas possible. The Triple Bottom Line as a model is worthy of consideration by all emerging nations, particularly, a nation like China, who has so many people to care for.

The three 'Ps'

### PROFITS

Profits drive growth; provide livelihoods and communal infrastructure. They are necessary for sustainability and not evil greed and self-interest but a necessary element of sustainability.

### PEOPLE

Our people require clean food and water. They require sunshine, clean air, relaxation, safe working conditions with fair reward and have a right to enjoyment of life.

## PLANET

Our planet is a finite resource and requires our nurturing.

Profits must serve the People and the Planet.

# LEGAL NOTES



**BEYOND JURISTIC CLASSIFICATION:  
THE HIGH COURT'S DECISION IN  
*COMMONWEALTH V AUSTRALIAN CAPITAL  
TERRITORY (SAME-SEX MARRIAGE CASE)*<sup>1</sup>**

CHRISTOPHER JAMES DOWSON\*

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I INTRODUCTION

The High Court of Australia delivered its decision on the legality of the Australian Capital Territory's *Marriage Equality (Same Sex) Act 2013* (the ACT Law) on 12 December 2013. In a unanimous and brief judgment, the full bench stated that the ACT Law was inconsistent with the *Marriage Act 1961* (Cth) (the Federal Law). The High Court stated that due to the comprehensive nature of the Federal Law, there was no way in which the ACT Law could be consistent with the Federal Law and so was of no effect. Importantly, the High Court explicitly discussed the meaning of marriage as one of 'juristic classification' and that the meaning of marriage at the time of Federation was not relevant to the case before it. In doing so, the High Court has opened the way for the Federal government to potentially widen its powers under s 51(xxi) of the Australian Constitution and use it to legislate for the marriage of same-sex couples as well as heterosexual couples.

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<sup>1</sup> [2013] HCA 55.

## II FACTUAL BACKGROUND AND HISTORY OF PROCEEDINGS

The ACT parliament passed the ACT law on 22 October 2013 becoming effective on 7 November 2013, by a vote of 9-8 in the Legislative Assembly. The Prime Minister, Tony Abbott, had sought legal advice on 11 September 2013 concerning the legislation and its operation with respect to the Federal Law. On 22 October 2013 the Commonwealth sought a hearing before the High Court and after a directions hearing on 4 November 2013, French CJ scheduled hearings on 3 and 4 December 2013 before the Full Bench. The key point in the Commonwealth's submissions was that the ACT law recently enacted was inconsistent with the Federal Law and the *Family Law Act 1975* (Cth). The Commonwealth argued that it was not open for any other legislature to purport to clothe with the legal status of marriage (or a form of marriage) a union of persons, 'whether mimicking or modifying any of those essential requirements of marriage, or to purport to deal with causes arising from any such union'.<sup>2</sup> The ACT's submissions countered by arguing that the Commonwealth 'had not exhausted its legislative power with respect to either recognising or prohibiting same-sex marriage'.<sup>3</sup> Both parties, as well as Australian Marriage Equality (as amicus curiae) all submitted that the federal Parliament had legislative power to provide for marriage between persons of the same sex.

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<sup>2</sup> Commonwealth of Australia, 'Annotated Submissions of the Plaintiff', Submission in *Commonwealth v Australian Capital Territory*, C13 of 2013, 13 November 2013, 5.4.3.

<sup>3</sup> Australian Capital Territory, 'Annotated Submissions of the Australian Capital Territory', Submission in *Commonwealth v Australian Capital Territory*, C13 of 2013, 13 November 2013, 6(d).

## A      *The Statutory Framework*

The ACT law specified under s. 7 that two people of the same sex could marry subject to certain provisos, such as each person being required to be an adult and not already married. Under the dictionary of the ACT law appended to the end of the act, the definition of ‘marriage’ was worded identically to s 5(1) of the Federal Law with the obvious change, i.e. that it was the union of two people of the same sex to the exclusion of all others, voluntarily entered into for life; but did not include a marriage within the meaning of the Federal Law. The Federal Law (s 5(1)) was amended in 2004 to limit the definition of ‘marriage’ under the act to read: “Marriage” means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.<sup>4</sup> The ACT argued in its submissions that the Federal Law was enacted to create uniform Australian laws with respect to marriage as defined under the amended s 5(1), however that did not exclude the ACT from enacting laws for the recognition of same-sex marriage.<sup>5</sup> The Commonwealth argued that the clear objective intention of the Federal Law was that under the Federal Law there should be ‘one form of union that shall be recognised as a marriage under law’, namely the amendment as it now stands under s 5(1).

## B      *The High Court’s Decision*

The High Court decided that the Federal Law, read as a whole, ‘at least in the form in which it now stands’ (an important aside from the court),<sup>6</sup>

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<sup>4</sup>      *Marriage Act* 1961 (Cth) s 5.

<sup>5</sup>      Australian Capital Territory, ‘Annotated Submissions of the Australian Capital Territory’, Submission in *Commonwealth v Australian Capital Territory*, C13 of 2013, 13 November 2013, 6(g).

<sup>6</sup>      As will be discussed below, the High Court uses this case to shift the onus back on the legislature to deal with the statutory definition of same-sex marriage.

‘makes the provisions which it does about marriage as a comprehensive and exhaustive statement of the law with respect to the creation and recognition of the legal status of marriage’.<sup>7</sup> The court said that this was so, otherwise why was the Federal Law amended in 2004 by the introduction of a definition of marriage, ‘except for the purpose of demonstrating that the federal law on marriage was to be complete and exhaustive?’<sup>8</sup> The court concluded that the particular provisions of the Federal Law, read in the context of the whole Act, necessarily contained the implicit negative proposition that the kind of marriage provided for by the Act was the *only* kind of marriage that may be formed or recognised in Australia. It followed that the provisions of the ACT Law which provide for marriage under that Act could not operate concurrently with the Federal Law and accordingly were inoperative.<sup>9</sup>

### C      *The High Court and the Definition of Marriage*

The difficult area of the High Court’s judgment was its reluctance to indulge in any analysis of the tradition behind the definition of marriage. This reluctance led the court to follow what it called a ‘juristic classification’ of marriage<sup>10</sup> as espoused by Windeyer J in *Attorney-General (Vic) v The Commonwealth*.<sup>11</sup> This interpretation of the definition of marriage ignored the intent of the original framers of the Australian Constitution, as the court stated:

...‘What, then, is the nature of this institution as understood in Christendom?’ The answer to that question cannot be the answer to

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<sup>7</sup>      *Commonwealth v Australian Capital Territory* [2013] HCA 55, [57].

<sup>8</sup>      Ibid.

<sup>9</sup>      Ibid [59].

<sup>10</sup>     Ibid [14].

<sup>11</sup>     (1962)107 CLR 529, 578.

the question ‘What is the nature of the subject matter of the marriage power in the Australian Constitution’.<sup>12</sup>

In this statement, the High Court removes the Western Christian tradition from the Australian Constitution, in keeping with the philosophies of figures such as Thomas Jefferson and John Locke. However, the Constitution under s 116 only explicitly mentions the prohibition on the Commonwealth making any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion. The Constitution derives its values largely from Western civilisation, particularly from British, American and Swiss models, and affirms Australia’s Christian heritage in the Preamble itself, which begins:

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland...

The question now becomes one of originalism versus progressivism, an ongoing debate amongst Constitutional lawyers. The current High Court clearly sees marriage as a purely legal concept without any connection to Christian or Western tradition. They single-out a quote from Windeyer J to prove their point:

The statute law of marriage may seem to be in a small compass. But it embodies the *results of a long process of social history*, it codifies

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<sup>12</sup> *Commonwealth v Australian Capital Territory* [2013] HCA 55, [19].

much complicated learning, it sets at rest some famous controversies.<sup>13</sup>

Yet no doubt their Honours would have seen Windeyer J's statement in the preceding paragraph: 'We share in the inheritance of European Christian civilisation. We derive from it a concept of marriage that is universal in all systems of law that participate in that inheritance'.<sup>14</sup> Indeed their Honours quote from this very paragraph when they ask what is the relevant 'topic of juristic classification' for marriage, concluding it is laws of a kind: 'generally considered, for comparative law and private international law, as being the subjects of a country's marriage laws'.<sup>15</sup>

The court stated that the description given by Windeyer J identified the content of the relevant topic of juristic classification 'in a way which does not fix...the concept of marriage...to the state of the law at federation'.<sup>16</sup> This signaled a clear intent by the Court not to follow an originalist interpretation of 'marriage' under s 51(xxi) and instead follow a progressive interpretation of the Constitution as something able to adapt to changing social pressures and attitudes. Craven has argued for the central importance of progressivism as a potential constitutional methodology:

By wielding the Constitution as a 'living force', the Court can mould its provisions so as to permit the judicial disposition of an entire range of important social and policy questions...<sup>17</sup>

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<sup>13</sup> *Commonwealth v Australian Capital Territory* [2013] HCA 55, [18], citing *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 579 (Windeyer J).

<sup>14</sup> Ibid 578.

<sup>15</sup> Ibid.

<sup>16</sup> *Commonwealth v Australian Capital Territory* [2013] HCA 55, [23].

<sup>17</sup> Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' (2003) 31 *Federal Law Review* 87, 88.

This inevitably invites debate as to whether or not it is the judiciary's role in the first place to be shaping the Constitution according to changes in social and policy questions instead of putting such important changes to the people via referenda.<sup>18</sup> The apparent traditions and values upon which the Australian Constitution was framed are thus now called into question. Marriage, being a cornerstone of the Christian faith and tradition, is now rendered a topic for 'juristic classification'. The High Court noted that in other Federal laws such as the *Family Law Act 1975 (Cth)* under s 6, polygamous marriages from outside Australia are deemed to be 'marriages' for the purpose of the Act.<sup>19</sup> Their Honours concluded that from such an example, it becomes evident that the juristic concept of 'marriage' cannot be confined 'to a union having the characteristics described in...nineteenth century cases'.<sup>20</sup> Instead their Honours attempted to define marriage:

...[T]o be understood in s 51(xxi)...as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.<sup>21</sup>

The High Court also noted the importance of global trends in the law with respect to same-sex marriage, observing that other legal systems now

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<sup>18</sup> See, eg, Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677; Sir Anthony Mason, 'Constitutional Interpretation: Some Thoughts' (1998) 20 *Adelaide Law Review* 49; Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *University of Melbourne Law Review* 1.

<sup>19</sup> *Commonwealth v Australian Capital Territory* [2013] HCA 55, [32]

<sup>20</sup> *Ibid* [33].

<sup>21</sup> *Ibid*.

provide for marriage between persons of the same sex.<sup>22</sup> Their Honours make it clear that:

It is not useful or relevant for this Court to examine how or why this has happened. What matters is that the juristic concept of marriage (the concept to which s 51(xxi) refers) embraces such unions.<sup>23</sup>

The connection between the High Court's own 'juristic classification' of marriage under s 51(xxi) and the recognition of same-sex marriage in other jurisdictions overseas is unclear. Jurisdictions such as the United States of America were based on very different legal frameworks (their Bill of Rights is but one example),<sup>24</sup> or in the United Kingdom which lacks a formalised Constitution altogether. How relevant, then, is the explicit reference to God in the Australian Constitution's Preamble? The question of whether such a reference makes Christianity and its values relevant to the reading of the Constitution (and subsequently s 51(xxi)) as a historical document, but also a 'living force' in the evolution of society is a debate outside the scope of this case note. The High Court has clearly signaled that the powers of the Commonwealth under the Constitution are not in any way related to the values or traditions upon which the document was framed. Instead, the powers are so wide that the Federal government can legislate for 'marriage' in a new and expanded sense of a 'consensual union formed between natural persons'. It is through the choice of the Federal government of the day as to whether it restricts this power or expands it beyond the traditional definition of marriage into yet unexplored and undefined territory.

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<sup>22</sup> *Commonwealth v Australian Capital Territory* [2013] HCA 55, [37]

<sup>23</sup> *Ibid.*

<sup>24</sup> There is also a conspicuous absence of any appeal to a God or any Christian references in the United States Constitution's Preamble.



### III CONCLUSION

The High Court's recent decision in *The Commonwealth v Australian Capital Territory*<sup>25</sup> resulted in the invalidation of the ACT's same-sex marriage legislation which had been passed in October 2013. This has rendered the marital status of many same-sex couples that had legally married in the ACT void and has cemented the expansive powers of the Commonwealth to legislate for marriage. The High Court has now effectively resolved to leave the matter to the federal legislature. The High Court also removed the originalist conception of the definition of marriage under s 51(xxi) and has redefined it as a topic of 'juristic classification' which includes same-sex marriage. Whether this is at odds with the Western values and Christian traditions upon which the Australian Constitution was clearly framed is a broader and perhaps more compelling debate beyond the scope of the 'juristic classification' and even the legal system itself.

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<sup>25</sup> [2013] HCA 55.

# BOOK REVIEWS

## BOOK REVIEW: MICHELLE EVANS AND AUGUSTO ZIMMERMANN (EDS) –GLOBAL PERSPECTIVES ON SUBSIDIARITY

DR KEITH THOMPSON<sup>\*</sup>

In the first volume of his celebrated work, *Democracy in America*, Alexis de Tocqueville wrote in 1835 that

[c]entralization...perpetuates a drowsy regularity in the conduct of affairs which the heads of the administration are wont to call good order and public tranquillity...but...[i]ts force deserts it when society is to be profoundly moved, or accelerated in its course; and if ...the cooperation of private citizens is necessary to the furtherance of its measures, the secret of its impotence is disclosed.<sup>1</sup>

Though De Tocqueville's celebration of America's early 19<sup>th</sup> century success with decentralized power<sup>2</sup> would doubtless draw groans of nostalgia from many contemporary Americans, a number of his related insights are timeless. For example, he noted that centralized power 'accustom[ed] men to set their own will habitually and completely aside',<sup>3</sup> and that the removal of any sense of individual responsibility for the welfare of the village enabled the individual to 'fold his arms and wait

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<sup>1</sup> Alexis de Tocqueville, *Democracy in America* (David Campbell Publishers, 1994) vol 1, 90.

<sup>2</sup> Ibid 92, 94. De Tocqueville tributes America's success with decentralization to the supremacy of each state legislature: ibid 87.

<sup>3</sup> Ibid 86.

till the whole nation comes to his aid.’<sup>4</sup> He also said that when a nation has reached the point where individuals

oscillate...between servitude and licence, <sup>5</sup> [fear of central bureaucrats and expectation of benefit from their largesse] that nation must either change its customs and its laws, or perish; for the source of public virtues is dried up; and though it may contain subjects, it has not citizens.<sup>6</sup>

For De Tocqueville, ‘patriotism and religion are the only two motives’<sup>7</sup> which enable unity and these cannot be maintained in the long term by fear.<sup>8</sup> No government can motivate or harness individual initiative in a manner approaching the efficiency of free enterprise.<sup>9</sup>

Michelle Evans and Augusto Zimmermann have done Australia and the world a service by taking the time to compile and edit the essays that make up their recent book entitled *Global Perspectives on Subsidiarity*.<sup>10</sup> For neither De Tocqueville’s 19<sup>th</sup> century insights, nor at least three subsequent Papal encyclicals have changed the way we do business and government as they should have done.

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<sup>4</sup> Ibid 92.

<sup>5</sup> Ibid 93.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 94. Note that the Mormon Prophet Joseph Smith appears to have espoused subsidiarity principles in De Tocqueville’s time though without the modern Catholic label. An 1851 report records that before he died in Nauvoo, Illinois in June 1844, he was asked ‘how it was that he was enabled to govern so many people, and to preserve such perfect order.’ He is said to have responded, ‘I teach them correct principles, and they govern themselves’: (‘The Organization of the Church’, *Millennial Star*, 15 November 1851, 339).

<sup>10</sup> Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014).

The contributions are diverse ranging from where the idea of subsidiarity came from, to how the concept plays out, or should play out in modern Brazil, Australia, Germany, the European Union and the global village.

But what is subsidiarity? Its latin root *subsidio*, literally means ‘to help’ or ‘aid’, but it is Catholic social teaching since 1891 that has provided the word ‘subsidiarity’ with its contemporary meaning. Nicholas Aroney explains early in the book that Popes in 1891, 1931 and 1991 have drawn threads of meaning together from distant roots in Aristotle and Aquinas.<sup>11</sup> In 1891, in his encyclical *Rerum Novarum*, Pope Leo XIII implied that while the state was obliged to act against the secret combinations of men established for evil purposes, the state had a greater obligation to encourage private associations focused on free enterprise and the common good.<sup>12</sup> Pope Pius XI fleshed out these ideas in his 1931 encyclical *Quadragesimo Anno* which was subtitled ‘On the Restoration of the Social Order and Perfecting it Conformably to the Precepts of the Gospel.’<sup>13</sup> This second encyclical treating subsidiarity subject matter, included this statement:

[I]t is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice... and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought... to furnish help to the members of the body social, and never destroy and absorb them.

The supreme authority of the State ought... to let subordinate groups handle matters of lesser importance, which would otherwise

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<sup>11</sup> Ibid 12.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid 32.

dissipate its efforts... the State will... do all things that belong to it alone... directing, watching, urging restraining.... [T]hose in power should be sure that the more perfectly graduated order is kept among the various associations, in observance of the principle of “subsidiarity function” [to enable]... the happier and more prosperous condition of the State.<sup>14</sup>

For Patrick K. Brennan,<sup>15</sup> the Catholic position is that higher organizations, including the state, should never absorb those hierarchically below them, and when higher organizations assist those below them, they should only do so in a manner designed to strengthen in the long term so that they remain contributors to the flourishing of the society as a whole.<sup>16</sup>

But the Evans/Zimmermann project is not about Catholic evangelism. Rather, their primary goal is to identify the virtues in the principle of subsidiarity and expose more of its salutary applications.

Weinberger<sup>17</sup> and Chaplin<sup>18</sup> compare subsidiarity to related social and political concepts – respectively ‘sphere sovereignty’ from the Dutch Calvinist tradition and ‘social pluralism’, which is a political theory that aspires to divide authority in the interests of the greater good.

Weinberger suggests that ‘sphere sovereignty’ may be seen as the 19<sup>th</sup> century Dutch equivalent of Madison’s ‘separation of powers’ doctrine in the United States.<sup>19</sup> If the doctrine is observed, it protects church and state from corrupting each other<sup>20</sup> but sphere sovereignty is complementary to

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<sup>14</sup> Ibid 35 quoting *Quadragesimo Anno*, 79 and 80.

<sup>15</sup> Ibid ch 3.

<sup>16</sup> Ibid 35.

<sup>17</sup> Ibid ch 4.

<sup>18</sup> Ibid ch 5.

<sup>19</sup> Ibid 54.

<sup>20</sup> Ibid 59-61.

subsidiarity since it holds that social needs are best met at the lowest level.<sup>21</sup>

Chaplin says similarly that social pluralism and subsidiarity are complimentary because they enable the different communities within society that are necessary to human flourishing.<sup>22</sup> Both promote a sense of community and counter the evil of individualism.<sup>23</sup>

Reverend Sirico<sup>24</sup> develops De Tocqueville's insights about the evils of the dole and applies them to 21<sup>st</sup> century societies.<sup>25</sup> The state is better placed to provide defence than income security. The welfare state has 'drain[ed] private capital that could have gone towards helping others invest in future prosperity.'<sup>26</sup> Much better to let private local charity assess income support needs.<sup>27</sup> Private charity will not do anything for paupers that they can do for themselves because it understands that a dole ultimately diminishes human self-worth.<sup>28</sup>

Zimmermann's own contribution to the collection<sup>29</sup> includes the suggestion that modern Brazil would benefit if it could implement subsidiarity into its constitutional and civic structures. Brazil-style statism supported by anti-change inertia and "compassionate individuals" who think the state is the only entity with the power to eradicate poverty and promote "social justice",<sup>30</sup> have resulted in a society that is completely

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid 64 (abstract).

<sup>23</sup> Ibid 68.

<sup>24</sup> Ibid ch 7.

<sup>25</sup> Ibid 123-4.

<sup>26</sup> Ibid 119.

<sup>27</sup> Ibid 120.

<sup>28</sup> Ibid 122.

<sup>29</sup> Ibid ch 6.

<sup>30</sup> Ibid 95.

“colonized” by the bureaucratization of all social relations.’<sup>31</sup> If Brazil could draw upon the principle of subsidiarity to decentralize,<sup>32</sup> the redistribution of power would democratize society<sup>33</sup> and introduce a culture of individual responsibility in citizens.<sup>34</sup>

Jürgen Bröhmer discusses subsidiarity in his native Germany.<sup>35</sup> Though subsidiarity is embedded in the Basic Law (Constitution)<sup>36</sup> and though decentralization is the buzz throughout Europe at present,<sup>37</sup> there is still a strong bias towards central administration and recalibration of power to the Lander (states) has not been convincing.<sup>38</sup> In practice subsidiarity in modern German jurisprudence means little more than that no one can apply for European Union remedies until they have exhausted all the remedies available in local and national law.<sup>39</sup> For Brohmer that is still a pretty thin version of subsidiarity. But ongoing efforts to empower local municipalities with financial independence are a beacon of decentralization hope<sup>40</sup> – though that beacon remains on the horizon.

Professors Moens and Trone<sup>41</sup> summarize that under the founding treaties of the European Union, subsidiarity is legally enforceable but ineffective.<sup>42</sup> In practice, subsidiarity has only ever worked as a principle that has afforded political guidance. Even though some European Union countries feature constitutional provisions that allow direct legal action

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<sup>31</sup> Ibid 99.

<sup>32</sup> Ibid 101.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid 103-4.

<sup>35</sup> Ibid ch 8.

<sup>36</sup> Ibid 132: citing various constitutional provisions and noting that ‘all power lies with the states rather than the federal level’.

<sup>37</sup> Ibid 130.

<sup>38</sup> Ibid 129, 134, 137.

<sup>39</sup> Ibid 140-1.

<sup>40</sup> Ibid 146-7.

<sup>41</sup> Ibid ch 9.

<sup>42</sup> Ibid 157.



for breach of the subsidiarity principle,<sup>43</sup> commentators have concluded ‘that subsidiarity “was largely inoperable at the stage of adjudication”...[and is regarded] “essentially as a political and subjective principle”’.<sup>44</sup> They conclude that though there is hope that this essentially ‘moribund principle’<sup>45</sup> may be judicially resuscitated; it seems destined to be a would-be constitutional guard dog that does not bark!<sup>46</sup>

Because Michelle Evans<sup>47</sup> addresses the relevance of the subsidiarity principle to Australian constitutional interpretation, some readers may find hers the most interesting contribution. Her discussion is captivating because she challenges contemporary orthodoxy. Though subsidiarity should be a natural fit in federal systems since power is already divided,<sup>48</sup> it does not work that way in Australia.<sup>49</sup> Subsidiarity themes dominated the pre-federation debates<sup>50</sup> and are unavoidable in any objective reading of the resulting Constitution,<sup>51</sup> but Australia is no longer an authentic federation.<sup>52</sup> The Senate has not protected state interests as the framers anticipated<sup>53</sup> and the High Court has disregarded its role as guardian of both state and federal constitutions.<sup>54</sup> It simply defers to the Commonwealth government.<sup>55</sup> Though Evans makes constructive

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<sup>43</sup> Ibid 161-2: discussing France, Austria and Ireland.

<sup>44</sup> Ibid 163, citing Professor Dashwood’s report to the English House of Commons in 2008 and The Council of the European Union’s own annual subsidiarity report in 2011.

<sup>45</sup> Ibid 169.

<sup>46</sup> Ibid 169-70, referring to Justice Kirby’s memorable summary of the principle in *Kable v DPP (NSW)* (1996) 189 CLR 51 expressed in *Baker v R* (2004) 223 CLR 513, [54].

<sup>47</sup> Ibid ch 10.

<sup>48</sup> Ibid 185.

<sup>49</sup> Ibid 185-6, 188-98.

<sup>50</sup> Ibid 188-90.

<sup>51</sup> Ibid 190-4.

<sup>52</sup> Ibid 185, 189, 195, 203.

<sup>53</sup> Ibid 193-4, 203.

<sup>54</sup> Ibid 194 citing Quick and Garran, and Craven.

<sup>55</sup> Ibid 195-8.

suggestions as to how authentic federalism could be restored in Australia using subsidiarity principles,<sup>56</sup> one senses that the prospects of a correction in line with the original subsidiarity infused vision, are dim indeed. That is because neither one of the major political parties is ever likely to adopt a policy which would dilute their own power at the federal level.

Andreas Follesdal<sup>57</sup> stands back further than any of the other contributors and considers how subsidiarity principles could enhance global governance in the future. He asks whether subsidiarity principles might be the answer to those who protest against globalization since technology is turning the world into a village?<sup>58</sup> But he notes that subsidiarity like love, is a many-splendoured thing;<sup>59</sup> its Althusian variation has been used to justify separate homelands under the apartheid regime in South Africa<sup>60</sup> and its non-coercion principle which is generally respected in international law, says that improvement will be slow since improvement relies on the building of consensus.<sup>61</sup>

The editors acknowledge that their collection has only scratched the surface of subsidiarity's potential as a decentralizing and empowerment principle.<sup>62</sup> The collection has focused on the principle's philosophical underpinnings and its expression in the field of political governance.<sup>63</sup> But subsidiarity's potential reach is much greater. The editors note that

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<sup>56</sup> Ibid 200-3.

<sup>57</sup> Ibid ch 11.

<sup>58</sup> Ibid 207-8.

<sup>59</sup> Ibid 209-13 where he canvasses various theories of subsidiarity.

<sup>60</sup> Ibid 215-6.

<sup>61</sup> Ibid 216: where Follesdal notes that state sovereignty practically dictates 'that international governance institutions must be based on the "consent of all nations"'.<sup>62</sup>

<sup>62</sup> Ibid 221.

<sup>63</sup> Ibid 2.

universities and corporations would benefit by exploring new ways to manage their human resources and employment relationships in its light.<sup>64</sup> That suggestion resonates with De Tocqueville's suggestion in 1835 that decentralization is the key to mobilizing individual enterprise and personal accountability.<sup>65</sup>

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<sup>64</sup> Ibid 220.

<sup>65</sup> De Tocqueville, above n 1, 90-4.