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THE DEMISE OF EQUALITY BEFORE THE LAW: THE PERNICIOUS EFFECTS OF POLITICAL CORRECTNESS IN THE CRIMINAL LAW OF VICTORIA

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ABSTRACT

The Crimes Amendment (Sexual Offences and Other Matters) Act 2014 (Vic) ushered in profound changes to the statutory offence of rape in Victoria. In particular, it replaced it with a new version that added a hybrid subjective/objective mens rea of the offence. The discussion to follow will examine the extent to which this legislation is consonant with the most rudimentary notions of fairness, common sense and the cardinal tenet that all persons are equal before the law. Further, this discussion will be undertaken against the backdrop of the High Court's decision in Zecevic v The Queen, s 3B of the Crimes (Homicide) Act 2005 (Vic) and ss 3(2) and 3(3) the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) which, collectively, abolished the provocation and excessive force limbs of the offence of voluntary manslaughter in Victoria. Finally, the article will focus on the stated objectives of the forgoing changes and, perhaps more importantly, the extent to which gender based considerations provided the impetus for the same.

I INTRODUCTION

In *Zecevic v Director of Public Prosecutions*,[1] the High Court of Australia confronted the issue of whether the excessive force manslaughter rule[2] should be retained or abolished as part and parcel of the Australian common law doctrine.[3] In addressing this question, the Court began by formulating a general common law rule of self-defence in which Wilson, Dawson and Toohey JJ, with whom Mason CJ and Brennan J concurred, [4] posited the rule to be 'whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did'. [5] The Court then focused on the common law excessive force manslaughter rule under which an accused can be acquitted of murder and convicted instead of the lesser offence of voluntary manslaughter, provided the jury is not only persuaded that reasonable doubt exists as to whether the accused genuinely believed that it was necessary to resort to deadly force in order to protect himself or herself against the deceased's unlawful use of the same, but also convinced

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1 *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645 *('Zecevic')*.

2 Also referred to as the rule of imperfect or excessive self-defence: *People v Gott*, 117 Cal.App.3d 125, 173 Cal.Rptr. 469, 472 (1981); Rollin Morris Perkins and Ronald N Boyce, *Criminal Law* (Foundation Press, 3rd ed, 1982) 1142; N C O'Brien, 'Excessive Self-Defence: A Need for Legislation' (1982-83) 25 *Criminal Law Quarterly* 441, 449–55; Stanley Yeo, 'The Demise of Excessive Self-Defence in Australia' (1988) 37 *International and Comparative Law Quarterly* 348; P Fairall, 'The Demise of Excessive Self-Defence Manslaughter in Australia: A Final Obituary' (1988) 12 *Criminal Law Journal* 24.

3 *Zecevic* (1987) 162 CLR 645, 651–3.

4 Ibid 656 (Mason CJ); at 670 (Brennan J).

5 Ibid 661 (Wilson, Dawson and Toohey JJ); at 666 (Brennan J); at 683 (Gaudron J).

beyond reasonable doubt that such belief was not based upon reasonable grounds.[6]

It is important to emphasise that the underpinning of the excessive force manslaughter rule, as with the offence of *voluntary manslaughter* generally,[7] is that the accused has committed what would otherwise

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6 *R v Howe* (1958) 100 CLR 448, 460–1 (Dixon CJ); at 464 (McTiernan J); at 464 (Fullagar J) ('*Howe*'); *Viro v R* (1978) 141 CLR 88, 146–7 (Mason CJ) ('*Viro*'). Although in *Palmer v R* [1971] AC 814 the Privy Council declined to follow *Howe*, it was unanimously held in *Viro* that the High Court was no longer bound by decisions of the Council: *Viro* (1978) 141 CLR 88, 93 (Barwick CJ); at 121–2 (Gibbs J); at 129–30 (Stephen J); at 135 (Mason J); at 150–2 (Jacobs J); at 166 (Murphy J). Although the Court's decision in *Viro* followed the principles enunciated in *Howe,* Wilson, Dawson and Toohey JJ were of the opinion that in *Viro*, Gibbs, Jacobs and Murphy JJ concurred with the views of Mason J 'only for the purpose of achieving a measure of certainty in a situation of diversity of opinion': *Zecevic* (1987) 162 CLR 645, 661.

7 The common law offence of voluntary manslaughter is a killing that would otherwise constitute murder, except for the fact that it is reduced to the former offence due to extenuating circumstances that the law regards as sufficient to warrant the reduction. Further, voluntary manslaughter at common law is divided into two categories. In the first, the accused causes the death of another person with a requisite *mens rea* and temporal coincidence required for the offence of murder, but is induced into killing because of provocative conduct on the part of the deceased which the law regards as a sufficient mitigating circumstance to negate the requisite malice or forethought for murder and reduce the conviction to voluntary manslaughter: *Parker v the Queen* (1963) 111 CLR 610, 624–5; *Parker v the Queen* (1964) 111 CLR 665, 676–7; *Moffa v the Queen* (1977) 13 ALR 225, 230–1 (Barwick CJ); at 233 (Gibbs J); *Stingel v the Queen (*1990) 97 ALR 1, 12; *Masciantonio v the Queen* (1995) 129 ALR 575, 580; *Green v the Queen* (1997) 148 ALR 659, 660–1. The second category of voluntary manslaughter also involves a killing that would otherwise constitute murder, but it too is reduced to the offence of voluntary manslaughter due to the fact that the accused genuinely believed that he or she was acting in self-defence or the defence of another, albeit a belief that is later determined to have been objectively unreasonable under the circumstances: *Zecevic* (1987) 162 CLR 645, 650–3 (Barwick CJ); at 683–5 (Gaudron J). This belief can relate to the necessity to resort to the use of force in self-defence or the defence of another, the extent of force required to defend oneself or another, or both: ibid. In each category, the mitigating circumstances under which the killing occurred are regarded in law as sufficient to negate the requisite malice of aforethought to convict for the offence of murder at common law: *Parker v the Queen* (1963) 111 CLR 610, 624, 626–7; *Zecevic* (1987) 162 CLR 645, 683–5; *United States v Paul* 37 F 3d 496, 499 (9th Cir 1994) 'Manslaughter is distinguished from murder by the absence of malice, one of murder's essential elements'; Eric J

constitute murder, save for the fact that the killing occurred under circumstances which the law regards as sufficiently mitigating to negate the malice aforethought requirement of murder.[8] This underpinning is further buttressed by the fact that convictions for voluntary manslaughter which emanate from the successful interposition of the provocation defence are commonly regarded as concessions to human frailty; specifically, the law's longstanding recognition that when confronted by extremely provocative conduct on the part of the deceased, ordinary persons might be provoked into acting in the same manner as the accused and resort to the use of deadly force.[9] Thus, the continued vitality of provocation as a partial defence to murder (and certain statutory variations of murder such as, for example, attempted murder and

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Edwards, 'Excessive Force in Self-Defence: A Comment' (1964) 6(4) *University of Western Australia Law Review* 457, 458. For a discussion of the elusive concept of 'malice of aforethought', see below footnote 8.

8 For a succinct discussion of the term 'malice aforethought', see L Waller and C R Williams, *Criminal Law, Text and Cases* (LexisNexis, 10th ed, 2005) 160–2; KJ Arenson, M Bagaric and P Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 4th ed, 2015) 30:

> '[T]he presence or absence of malice aforethought does not depend on whether the accused acted with actual malice or prior design … suffice it to say for present purposes that malice aforethought is nothing more than a term of art that is used to depict the overall conduct of one who kills under any of the circumstances amounting to murder at common law. Conversely, if the accused's conduct does not amount to any form of murder at common law, s/he has not acted with malice aforethought.'

The term was discussed in *Parker v R* (1963) 111 CLR 610, 626–8 (Dixon CJ) (in so far as the partial defence of provocation was deemed to negate the malice aforethought component of murder and thereby reduce the conviction to that of voluntary manslaughter rather than murder). Similarly, see *Zecevic* (1987) 162 CLR 645, 675–6, 679–81 (Deane J); at 684–7, (Gaudron J) (an accused's genuine belief that it was necessary to resort to the use of deadly force in self-defence was deemed to negate the malice aforethought element of murder under the excessive force manslaughter doctrine).

9 *Curtis* (1756) Fost 137; 168 ER 67, 68. For a thorough exposition of provocation as a partial defence to the crime of murder, both statutorily and as a matter of common law doctrine, see P Fairall and S Yeo, *Criminal Defences in Australia* (LexisNexis 4th ed, 2005) 188–218.

wounding with intent to kill)[10] is not only steeped in longstanding common law and statutory precedent throughout the modern world,[11] but supported by considerations of logic, fairness and compassion. Is it logical, fair or compassionate to treat persons who kill for reasons of revenge, hire or thrill, for example, in the same manner as those who kill in response to severe provocation or under a genuine, albeit objectively unreasonable belief, that deadly force is required in self-defence or the defence of others? In the view of many, the answer is self-evident. For centuries, therefore, the law in many jurisdictions has opted to draw an important distinction between these two categories by classifying the former as murder and the latter as voluntary manslaughter.[12] This raises

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10 *Thompson* (1825) 168 ER 1193; *Bourne* (1831) 172 ER 903; *Thomas* (1837) 173 ER 356*; Hagan* (1837) 173 ER 445.

11 See, for example, *Crimes Act 1900* (NSW) s 23; *Crimes Act 1900* (ACT) s 13; *Criminal Code 1899* (Qld) s 304; *Criminal Code* (NT) sch 2, s 158. In the UK, the term provocation is no longer used, but the defence remains under the *Coroners and Justice Act 2009* (UK) s 54 (referred to as 'Loss of Control'). In South Australia, the defence remains viable as a matter of common law doctrine: *R v Lindsay* [2014] SASCFC 56.

12 Hemming puts the development of the doctrine in the 17th century while Edwards traces its development back to the removal of the benefit of the clergy from cases of 'murder of malice prepensed' in the early-16th century; see Andrew Hemming, 'Provocation: A Totally Flawed Defence that has no Place in Australian Criminal Law Irrespective of Sentencing Regime' (2010) 14 *University of Western Sydney Law Review* 1, 2; Edwards, above n 7. In Victoria, Tasmania, Western Australia and New Zealand, the defence of provocation has been abolished: *Crimes Act 1958* (Vic) s 3B; *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas); *Criminal Law Amendment (Homicide) Bill 2008* (WA); *Crimes (Provocation Repeal) Amendment Act 2009* (NZ). In the Second Reading Speech in New Zealand, three factors were cited for the abolition of this defence: (1) the fact that a conviction for murder no longer carried a mandatory life imprisonment or death sentence; (2) the fact that provocation didn't reduce culpability in less serious crimes than murder; and (3) that the defence was most often being used in cases of 'gay panic', meaning heterosexual men killing homosexual men who made advances on them.

the question of why the High Court in *Zecevic* chose to abolish the excessive force manslaughter category of voluntary manslaughter.[13]

II ZECEVIC REVISITED

As the *Crimes Amendment (Sexual Offences and Other Matters) Act* 2014 (Vic) will be examined against the backdrop and analysis of the High court's decision in *Zecevic v Director of Public Prosecutions*,[14] s 3B of the *Crimes (Homicide) Act 2005* (Vic) and ss 3(2) and 3(3) of the *Crimes Amendment (Abolition of Defensive Homicide) Act* 2014 (Vic), it is appropriate to examine the justifications enunciated by the High Court in *Zecevic* for dispensing with the excessive force manslaughter rule. One such justification proffered by the majority in *Zecevic* was its unsubstantiated belief that abolishing the rule would rarely affect the outcome of cases because a jury's finding that the accused lacked reasonable grounds for his or her belief that deadly force was necessary in self-defence or the defence of others would inexorably lead to the conclusion that the accused acted without a genuine belief in the necessity to resort to deadly force, thus resulting in a conviction for

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13 By virtue of statutes in South Australia and New South Wales, the excessive force manslaughter doctrine has now been reinstated: *Criminal Law Consolidation Act 1935* (SA) s 15; and *Crimes Act 1900* (NSW) s 421. Victoria had also reinstated the doctrine by virtue of the *Crimes (Homicide) Amendment Act 2005* (Vic) ss 9AC and 9AD that must be read together. Section 9AD referred to the lesser crime as 'defensive homicide' rather than voluntary manslaughter, although there is no substantive difference between the two offences insofar as the way they apply to the excessive force manslaughter rule. See also P Fairall and S Yeo, *Criminal Defences in Australia*, (LexisNexis, 4th ed, 2005) 178–9; S Yeo, 'The Demise of Excessive Self-Defence in Australia' (1988) 37 *International and Comparative Law Quarterly* 348; S Yeo, 'Revisiting Excessive Self-Defence (2000) 12 *Current Issues in Criminal Justice* 39; S Yeo, 'Excessive Self-Defence, Macauley's Penal Code and Universal Law' (1991) 7 *Australian Bar Review* 223. The rule was again abolished by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (No. 63 of 2014)* (Vic) s 3.

14 *Zecevic* (1987) 162 CLR 645.

murder.[15] This comes perilously close to asserting that the excessive force manslaughter rule is nearly always superfluous because with or without its application, juries are all but certain to arrive at the same verdict; that is, if the accused can satisfy both the subjective and objective tests of self-defence or the defence of others, the verdict will be an acquittal on the charge of murder. If, on the other hand, the accused cannot satisfy the objective test, then the accused is all but certain to be convicted of murder on the basis that the jury would almost always find that the accused had also failed to satisfy the subjective test.

In analyzing the court's reasoning on this point, the first and most poignant question that arises is why the court would undertake to abrogate the excessive force manslaughter rule if it was sincere in its stated credo that doing so would have little or no impact on the verdicts that would be reached if the excessive force manslaughter rule were to remain in effect? Indeed, the court's putative belief on this question is belied by numerous instances in which juries have found the accused not guilty of murder, but guilty of voluntary manslaughter on the basis of the excessive force manslaughter rule.[16]

The High Court further opined that other considerations militating in favour of eradicating the common law excessive force manslaughter rule were respect for the tenet of doctrinal consistency as well as the doctrine

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15 Ibid 669.

16 Edwards, above n 7; Hemming, above n 8; *R v Scully* 171 ER 1213; *R v Patience* (1837) 173 ER 383; *R v Whalley* (1935) 173 ER 108; *Viro* (1978) 141 CLR 483; *Howe* (1958) 100 CLR 448; *State v Jones* 8 P 3d 1282 (1287) (Kan Ct App 2000); *People v Deason* 148 Mich App 27 31 384 NW 2d 72 (1985); *State v Falkner* 483 A 2d 759 (Md 1984). The statutory revival of the defence in jurisdictions such as South Australia and New South Wales further emphasizes the continuing importance of the doctrine; see above n 13.

of stare decisis.[17] In particular, the Court emphasized that with the exception of the excessive force manslaughter rule that applies only in cases in which self-defence is asserted in response to a charge of *murder*, the doctrine of self-defence applies to *all other alleged assaults and unlawful homicides* in exactly the same manner; namely, that aside from the contingency of a hung jury, the only two available verdicts in respect of the offence or offences to which self-defence is raised are 'guilty' and 'not guilty'.[18] Thus, the court stressed that the interest of doctrinal consistency is best served by abolishing a rule that permits a jury to render a third verdict that allows it to find an accused not guilty of murder, but guilty of the lesser offence of voluntary manslaughter.[19]

Without calling into question the salutary nature of doctrinal consistency in the law or the importance of the doctrine of stare decisis, careful analysis leads to the conclusion that neither represents a persuasive justification for eradicating the excessive force manslaughter rule. As the excessive force manslaughter rule had been applied for centuries,[20] is it not fair to characterize the rule as one that prior to the decision of the Privy Council in *Palmer v R,*[21] had been consistently affirmed and reaffirmed by the High Court of Australia and appellate courts in other jurisdictions?[22] If so as the case law suggests, it is ironic indeed that the High Court would seize upon the doctrine of stare decisis as a

17 *Zecevic* (1987) 162 CLR 645, 653–4 (Mason CJ); at 664–5 (Wilson, Dawson and Toohey JJ).

18 Ibid 677–80.

19 Ibid 653–4 (Mason CJ); at 664–5 (Wilson, Dawson and Toohey JJ).

20 See above n 12.

21 *Palmer v R* [1971] AC 814 ('*Palmer*').

22 See, for example, *R v Howe* (1958) 100 CLR 448; *Viro v R* (1978) 141 CLR 88. It was not until the High Court's decision in *Zecevic* (1987) 162 CLR 645 that its earlier decisions in Howe and *Viro* were overruled as a result of the impetus of *Palmer* [1971] AC 814.

justification for its decision in *Zecevic*, a case in which the court departed from the very doctrine that it purported to treat with such reverence.

The Court's reliance on the need for doctrinal consistency in the law as a justification for abolishing the excessive manslaughter rule is similarly misplaced. While there is much to be said for simplicity in the law, simplicity for its own sake is not necessarily a salutary objective. In fact, the evolution of the common law as well as the constant proliferation of legislative enactments are replete with important, albeit esoteric rules and concepts, some of which have long endured even though they are sometimes laden with intractable problems.[23] More importantly, the mere pursuit of simplicity in the law fails to take into account the special relationship that has long existed between the crimes of murder and voluntary manslaughter. As noted earlier, murder is a unique offence in that it requires the presence of malice aforethought.[24] As murder was a capital offence in the UK for centuries, not to mention other jurisdictions such as Australia until it was finally abolished,[25] the availability and successful interposition of the excessive force manslaughter rule was often the difference between life and death. In countries such as the

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23 See, for example, the various attempts to formulate a line of demarcation between mere preparation as opposed to satisfying the so-called proximity rule in the law of attempt: see KJ Arenson, 'The Pitfalls in the Law of Attempt: A New Perspective' (2005) 66 *Journal of Criminal Law (UK)* 146, 156–61; see also the chaotic state of the criminal law relating to causation: *Royall v The Queen* (1991) 172 CLR 378, 381–97 (Mason CJ); 197–405 (Brennan J); 405–17 (Deane and Dawson JJ); 417–33 (Toohey and Gaudron JJ); 433–59 (McHugh J).

24 See above n 8.

25 *The Murder (Abolition of Death Penalty) Act 1965* (UK). The final Australia jurisdiction to abolish the death penalty completely was NSW in the *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW) which removed capital punishment for the crimes of treason and piracy. The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) prevents any Australian state or territory passing future legislation allowing the death penalty.

United States in which the ultimate penalty is still invoked with alarming regularity,[26] the vital and longstanding relationship between the two offences remains intact. For those who subscribe to the notion that the extenuating circumstances that attend the excessive force manslaughter rule and the provocation defence are a sufficient justification to retain the distinction between the two offences (even in jurisdictions such as the UK and Australia where murder is not a capital offence),[27] the practical abolition of the rule cannot be predicated on the vacuous rationale that considerations of simplicity require that the doctrine of self-defence must be applied in exactly the same manner irrespective of the offence(s) with which the accused stands charged.

Finally, the Court intimated that a final justification for abolishing the excessive force manslaughter rule is that juries may be incapable of understanding the courts' directions in relation thereto.[28] There appears to be little or no validity in this argument as evidenced by the fact that for centuries, jurors have demonstrated that they are possessed of the requisite common sense and intellect to understand and correctly apply such directions to the facts at hand.[29]

As none of the justifications put forth in *Zecevic* can withstand careful analysis, a question arises as to whether the High Court's decision was based on a hidden agenda. If so, what provided the impetus for the abolition of the excessive force manslaughter rule in both *Zecevic* and

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26 Tex Code Ann §19.03; Ga Code Ann §16-5-1, §16-5-40 (2007); Fla Stat §775.082; Okla Stat §21-701-9; La Rev Stat Ann §14.30, §14.113; NC Gen Stat §14-17, §15A-2000; SC Code Ann §16-3-20; Ark Code Ann §5-10-101.

27 This assumes that those who support the distinction believe that one who is convicted of manslaughter rather than murder should receive a lesser and commensurate sentence.

28 *Zecevic* (1987) 162 CLR 645, 653 (Mason CJ); at 659–60 (Wilson, Dawson and Toohey JJ).

29 See above n 16.

Victoria?[30] In exploring this thorny question, it serves well to remind readers that jurists, like parliamentarians, are often susceptible to considerations of political correctness that are brought to bear by special interest groups that are organized, well-financed, inordinately influential and most importantly within the context of this article, inimical to fundamental rights and core societal values. As the writer has pointed out:

> 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.[31]

The task, therefore, becomes one of demonstrating that a rather compelling case can be made that a particular special interest group has provided the impetus for what appears to be the High Court's indefensible decision in *Zecevic* and, more recently, the statutory abolition of the excessive force manslaughter rule in Victoria just nine years after it was reinstated by the *Crimes (Homicide) Act 2005* (Vic).[32]

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30 *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic).

31 KJ Arenson, 'When Some People are More Equal Than Others: The Impact of Radical Feminism in Our Adversarial System of Criminal Justice' (2014) 5 *Western Australian Jurist* 213, 257–8 ('*When Some People*').

32 See above n 13. Although the rule was reinstated in 2005, the lesser offence was termed as 'defensive homicide' rather than voluntary manslaughter: ss 9AC and 9AD of the Crimes Act 1958 (Vic). Substantively, the excessive force

III THE ABOLITION OF THE OFFENCE OF VOLUNTARY MANSLAUGHTER

A *The Abolition of Provocation as a Partial Defence of Murder*

During the period in which the *Crimes (Homicide) Act 2005* (Vic) was being considered by the Victorian Law Reform Commission ('VLRC'), the writer had a most informative, yet profoundly unsettling telephone conversation with a woman who was then the Chairperson of the VLRC and then became a Justice of the Supreme Court of Victoria before resigning from the court in order to chair a Royal Commission that was tasked by its Terms of Reference with finding the most effective methods of preventing family violence, improving early intervention to identify and protect those at risk, supporting victims and making perpetrators accountable.[33] As we were both law professors at the time, the conversation was undertaken in the spirit of a collegial and candid interchange of contrasting views concerning a major law reform proposal that the Honourable Rob Hulls, then the Attorney-General of Victoria, had similarly tasked the VLRC[34] with studying in 2004 and making appropriate recommendations concerning the defence of provocation.

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manslaughter rule operated in exactly the same manner despite this change in vernacular.

33 Premier Daniel Andrews announced the creation of this Royal Commission and its Terms of Reference on 19 January 2015; Premier of Victoria, *Nothing off Limits in Family Violence Royal Commission* (19 January 2015) <http://www.premier.vic.gov.au/nothing-off-limits-in-family-violence-royal-commission>.

34 See 'Review of Family Violence Laws: Terms of Reference Victorian' available at Law Reform Commission, *Family Violence* (23 March 2015) <http://www.lawreform.vic.gov.au/all-projects/family-violence>.

It became immediately apparent that the VLRC had already resolved to recommend that the partial defence of provocation be abolished. When the writer asked the Chairperson for the underlying rationale for this recommendation, she stated that the defence was being misused in the sense that generally speaking, it was commonly invoked by men who murder their wives and girlfriends.[35] The obvious rejoinder was to remind the Chairperson that the provocation defence is predicated on the rationale noted above and that it, as with nearly all recognized common law or statutory defences known to the criminal law (with the exception of infanticide),[36] is facially devoid of gender bias. It was additionally pointed out to the Chairperson that as of the time of our conversation, a Melbourne based woman who was accused of murdering her husband was relying on the defence. When it was further noted that the provocation defence would have been unavailable to the woman if the VLRC's recommendation had become law prior to the alleged incident, the Chairperson's only response was that in comparative terms, women rarely murder their husbands or boyfriends. When the writer then asked whether she was implying that the VLRC would have supported the retention of the defence if the available data had shown that women invoked the defence with greater frequency than men, she refused to give a direct response to the question and merely reiterated that women rarely kill their husbands and boyfriends.

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35 See above n 7.

36 Infanticide is a defence that originated in the UK: *Infanticide Act 1938* (UK). It has also been recognized in other jurisdictions such as Victoria and New South Wales: *Crimes Act 1958* (Vic) s 6; *Crimes Act 1900* (NSW) s 22A. This defence is unique in that it is only available to women who kill their children under circumstances that would constitute murder, save for the fact that the killing occurred under mitigating circumstances that consist of some type of mental disorder emanating from the adverse psychological effects of having given birth within a prescribed period of time following the birth of the deceased child.

Under the circumstances, the only logical inference to be drawn is that had an answer been forthcoming, it would have been a resounding 'yes'. Was it a mere coincidence that no other factors were mentioned in support of the VLRC's recommendation? For those who remain skeptical that gender bias was a predominant factor in the Victorian Parliament's decision to eradicate the provocation defence by enacting s 3B of the *Crimes (Homicide) Act 2005* (Vic),[37] it is noteworthy that Rob Hulls, the Attorney-General of Victoria at the time, commented 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 (emphasis added)'.[38] Similar gender bias was expressed in the Second Reading Speeches of the Parliaments of Tasmania, Western Australia and New Zealand where the provocation defence has also been abolished.[39] In expressing its reasons for abolishing the defence, the Tasmanian Parliament commented that

> [t]he defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behavior. 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".[40]

Although Western Australia was less explicit than Victoria or Tasmania, their cursory reference to the proposed abolition of the defence emphasized the need to address issues confronted by women in domestic violence situations. In short, the provocation defence was seen as

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37 Which is now s 3B of the *Crimes Act 1958* (Vic).

38 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General).

39 *Criminal Code* (Tas) s 160*; Criminal Code* (WA) s 245*; Crimes (Provocation Repeal) Amendment Act 2009* (NZ) s 5–4.

40 Tasmania, *Parliamentary Debates*, Legislative Council, 20 March 2003, 30–108 (Judy Jackson, Minister for Justice and Industrial Relations).

inadequate to effectively address this problem.[41]

In New Zealand, the Second Reading Speech cited three factors in support of abolishing the defence: (1) the fact that a conviction for murder no longer carried a mandatory sentence of life imprisonment or death; (2) the fact that provocation did not reduce culpability in crimes less serious than murder; and (3) that the defence was most often interposed in cases of 'gay panic', meaning heterosexual men killing homosexual men who made advances on them.[42]

In examining these three factors, it appears that only the third rings true. In many jurisdictions, for example, the death penalty and mandatory life sentences for the crime of murder have been abolished.[43] Moreover, murder is still considered a more serious crime than voluntary manslaughter - and for all of the reasons noted earlier. It is simply illogical and unfair to equate a person who commits murder with someone who commits what would otherwise have been murder, save for the fact that the killing occurred under circumstances that the law has long regarded as sufficiently mitigating to negate the malice aforethought aspect of murder and permit the fact-finder to convict on the alternative and less serious offence of voluntary manslaughter.[44] As for the second justification, the defence of provocation has only been applied as a partial defence to the crime of murder, despite some occasional aberrations.[45]

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41 Western Australia, *Parliamentary Debates*, Legislative Council, 17 June 2008, 3845b–3855a (Simon O'Brien).

42 (17 November 2009) 659 NZPD 77555.

43 See e.g. *Crimes (Life Sentences) Amendment Act 1989* (NSW); *Crimes (Amendment) Act 1986* (Vic) pt 3; *Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994* (Tas) s 4.

44 See above n 12.

45 See, for example, *Criminal Code* (Qld); ss 268–269; *Criminal Code* (WA) ss 245–246. These provisions allow provocation to operate as a complete defence to certain non-fatal assaults. Traditionally, however, the defence has been

Can one assume that it is merely fortuitous that the third justification happens to be gender based in much the same manner as that advanced by the VLRC Chairperson and the Second Reading Speeches in Tasmania and Western Australia? If the provocation defence, though previously available to both genders, was abolished solely because 'the defence was most often being used in cases of "gay panic", meaning heterosexual men killing homosexual men who made advances on them', one can only conclude that its abolition in these four jurisdictions was predicated mostly, if not solely, upon the fact that one gender appears to have invoked the defence with greater frequency than the other.

The implications of this are as ominous as they are far-reaching. Is it not a cardinal precept of our criminal justice system that we are all regarded as equal before the law?[46] If so, how can this precept be reconciled with the notion that even though a defence is supported by logic, fairness and a long line of precedent, it should be discarded if it can be demonstrated that statistically, one gender has invoked it more often than the other? If that is a defensible rationale upon which the defence of provocation can be discarded, then perhaps others such as self-defence, duress, necessity, insanity and diminished capacity should be subjected to a similar statistical breakdown and discarded accordingly if one or more have been invoked with greater frequency by men than women. What is particularly alarming about the Chairperson's remarks is that they did not dispute that women have and would continue to benefit from the availability of the

confined to being interposed as a partial defence to the crime of murder: see above n 11; see also P Gillies, *Criminal Law* (Law Book Co, 4th ed, 1997) 384. For excellent commentaries on the defence of provocation generally, see Ashworth, 'The Doctrine of Provocation' (1976) 35 *Criminal Law Journal* 292; Victorian Law Reform Commissioner, *Provocation as a Defence to Murder*, Working Paper No 6 (1979); Fairall and Yeo, above n 9, 188–218.

46 See e.g. Judicial Commission of NSW, *Equality Before the Law Bench Book* (8 June 2014) <http://www.judcom.nsw.gov.au/publications/benchbks/equality>.

provocation defence. In light of the aforementioned incident involving a Melbourne based woman who was relying on the defence at the time, it would have been impossible for the Chairperson or the VLRC to have made a credible denial to that effect. If the viability of provocation or any other defence can be made to depend on which of the two genders invokes it with greater frequency, there can be no pretense of equality before the law and, consequently, neither can there be any pretense of fairness or the appearance thereof in the law. The implications of such a state of affairs are unthinkable to decent and fair-minded persons and wholly insufferable in any society that regards itself as a representative democracy.

B The Abolition of the Excessive Force Manslaughter Rule

Paragraphs 3-5 of the Second Reading Speech for the *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*(Vic) state as follows:

> At the same time as recommending the abolition of provocation, it recommended in balance the introduction of a partial defence to murder to provide a "halfway house" for women who kill in response to family violence who were unable to successfully argue self-defence (and thereby obtain an acquittal).
>
> However, since its introduction, defensive homicide has predominantly been relied upon by men who have killed other men in violent confrontations, often with the use of a weapon and often involving the infliction of horrific injuries. This has caused justifiable community concern that the law, like provocation once did, is allowing these offenders to "get away with murder".
>
> Abolishing defensive homicide follows recommendations made by the Department of Justice in its 2013 consultation paper on *Defensive Homicide* -

Proposals for Legislative Reform.[47]

Without belabouring the explanation and rationale that have served as the underpinnings of this rule for centuries,[48] suffice it to say that once again, parliamentarians have openly identified gender bias as the predominant motive for dispensing with yet another version of voluntary manslaughter.[49] For all of the same reasons that gender bias could not withstand careful analysis or serve as adequate justification for flouting the cardinal precept of equality before the law in the context of eradicating the alternative offence of voluntary manslaughter in cases involving the defence of provocation, neither can it withstand similar scrutiny or provide the necessary justification for infringing the principle of equality in abrogating the alternative offence of voluntary manslaughter in the context of the excessive force manslaughter rule.

If gender bias is a justification for the abolition of both forms of voluntary manslaughter as an alternative offence to murder in Victoria and other jurisdictions, the question to be asked is who has provided the impetus for these changes, and why? Even if one accepts that men have invoked the provocation and excessive force manslaughter limbs of voluntary manslaughter with greater frequency than women, it has not, nor could it be argued, that women have derived little or no benefit from the alternative offence of voluntary manslaughter. As noted earlier, such inane reasoning has the clear potential to result in the abolition of such defences as duress,[50] necessity,[51] diminished capacity,[52] insanity,[53] self-

47 Victoria, *Parliamentary Debates,* Council, 25 June 2014, 2128 (E J O'Donohue).

48 See above n 12.

49 See above n 47.

50 See, for example, *R v Hurley and Murray* [1967] VR 526, 529; *R v Dawson* [1978] VR 536; *Crimes Act 1958* (Vic) s 9AG.

defence and related defences such as the defence of others,[54] defence of property[55] and the right to use lawful force in order to effectuate a lawful arrest or prevent the commission of a crime.[56] There is no reason in logic or principle to believe that the trend toward stripping both genders of a defence on the basis that it is invoked more often by one than the other would not lead inexorably to the abolition of most, if not all of the other defences that the law has long recognized as beneficial. Even more disturbing and foreboding is the tacit implication in all of the second reading speeches that both limbs of voluntary manslaughter would have been retained had the statistical analysis shown that this partial defence to murder was being invoked with greater frequency by the female as opposed to the male gender. One might ask what interest is so paramount that it should be permitted to trump the sacrosanct tenet that all persons stand on equal footing before the law? Apparently there are many who no longer subscribe to the notion that justice is blind, irrespective of gender or other factors such as race, ethnicity and political persuasion. What special interest group would favour such a perverse transformation of the law?

IV THE EVOLUTION OF THE LAW OF RAPE IN VICTORIA

In order to place the purpose and effect of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) in proper perspective, it is

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51 *R v Loughnan* [1981] VR 443; *R v Rogers* (1996) 86 A Crim R 542; *Crimes Act 1958* (Vic) s 9AI.

52 See, for example, *Crimes Act 1900* (NSW) s 23A; *Crimes Act 1900* (ACT) s 14; *Criminal Code* (Qld) s 304A.

53 *R v Porter* (1933) 55 CLR 182.

54 *Zecevic* (1987) 162 CLR 645.

55 *Crimes Act 1958* (Vic) s 322K; *Criminal Code 1995* (Cth) s 10.4(2)(c)–(e); *Crimes Act 1900* (NSW) s 418(2)(c); *Criminal Law Consolidation Act 1935* (SA) s 15A.

56 See, for example, *Crimes Act 1958* (Vic) s 462A; *Crimes Act 1914* (Cth) ss 3W, 3Z, 3ZC.

necessary to examine the evolution of the law of rape in Victoria, commencing with its common law formulation and rules and concluding with the Victorian Parliament's decision in 1980[57] to codify rape into a statutory regime that has undergone many changes over the past thirty-five years.[58] At common law, rape was defined as carnal knowledge[59] of a woman against her will.[60] As that definition eventually morphed into 'carnal knowledge of a woman without her consent',[61] there remained

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57 *Crimes (Sexual Offences) Act 1980* (Vic).

58 *Crimes (Sexual Offences) Act 2006* (Vic); *Crimes (Sexual Offences) (Further Amendment) Act 2006* (Vic); *Crimes Amendment (Rape) Act 2007* (Vic).

59 At common law, carnal knowledge denotes any amount of penile penetration of the vaginal cavity, however slight, and regardless of whether there is emission of seminal fluid: *Holland v The Queen* (1993) 67 ALJR 946. It is important to note that at common law, acts of forcible sodomy do not fall within the classification of rape for the reason that they involve penetration of orifices other than the vaginal cavity. Therefore, by definition, they do not constitute carnal knowledge of a woman, the very essence of the offence of rape at common law. Instead, acts of forcible sodomy were encompassed by the less serious offence of buggery that was punishable by a lower maximum period of imprisonment and/or fine: see the *Sexual Offences Act 1956* (UK) s 1(1) which specified a maximum penalty of life imprisonment for rape while forced buggery (s 12(1)) attracted as little as ten years as a maximum penalty where the victim was an adult male. Because acts of forcible sodomy and rape are regarded as equally invidious, all Australian jurisdictions have now repealed the crime of buggery and enacted legislation extending the ambit of rape to all forms of non-consensual penetration: see, for example, *Criminal Code* (Qld) s 349; *Criminal Code* (WA) s 319 (which defines sexual penetration) and s 325 (which makes sexual penetration without consent a crime); *Crimes Act 1900* (NSW) ss 61H–61I.

60 *Hales's Pleas of the Crown*, vol 1, 626. With the passage of time, however, it became more appropriate to replace the words, 'against her will' with the words, 'without her consent': L Waller and CR Williams, *Criminal Law: Text and Cases* (LexisNexis, 9th ed, 2001) 89–90. As Waller and Williams explain, 'Were it otherwise any woman who was unconscious, for example from excessive drinking, would be at the mercy of any man who chose to take advantage of her condition, for it would be impossible to say that the penetration occurred against her will in such a case … In the ordinary case, however, where the woman is fully conscious and her mental capacity is not in doubt, it is important that the jury should be made aware that she must be an unwilling victim of the accused': ibid. Moreover, the words 'against her will' falsely implied in order to satisfy this criterion, a woman is required to partake in some overt act of resistance when, in fact, none is required.

61 At common law, consent denotes free and conscious permission*: R v Wilkes and Briant* [1965] VR 475 at 480 ('*Wilkes and Briant*'). Thus, if one accedes to

some troubling common law aspects of the offence that were ultimately eradicated in Victoria and elsewhere as they justifiably came to be viewed as anachronistic and sexist relics of the common law. These antiquated relics include: the common law rule that unless a husband and wife are living apart pursuant to a court order, a husband cannot be convicted (at least as a principal in the first degree) of raping his lawfully wedded spouse;[62] a conclusive presumption that boys under the age of fourteen are incapable of committing the crime of rape;[63] and that once given, a woman's consent to penile penetration of the vaginal orifice cannot thereafter be revoked until such time as the accused has voluntarily terminated the same.[64]

Insofar as the *mens rea* for rape at common law is concerned, it was held by the House of Lords in *DPP v Morgan*[65] that an accused must act with an intention to have carnal knowledge of the complainant without her consent.[66] This was construed by the court as denoting that the accused intended to have carnal knowledge of the woman without her consent while aware that she was not or might not be consenting to the penetration at issue.[67] The holding of *DPP v Morgan*, however,

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sexual intercourse out of force or fear of force or other harm of any type, there is no consent.

62 Repealed in Victoria by the *Crimes Act 1958* (Vic) s 62(2). This did not, however, preclude a husband from being convicted as an accomplice to the rape of his lawfully wedded spouse, whether as an accessory before the fact or as a principal in the second degree: Arenson, Bagaric and Gillies, above n 8, 32–5, 299.

63 Repealed in Victoria by the *Crimes Act 1958* (Vic) s 62(1).

64 Repealed in the relevant jurisdictions by *Kaitamaki v The Queen* [1984] 2 All ER 435; *Crimes Act 1961* (NZ) s 128(5)(c); *Crimes Act 1900* (NSW) s 61H(1)(d); *Criminal Law Consolidation Act 1935* (SA) s 5; *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) ss 34C, 38, subs 37D(1)(d).

65 *DPP v Morgan* [1976] AC 182 ('*Morgan*').

66 Consent having the meaning of free and conscious permission: *Wilkes & Briant* [1965] VR 475, 480.

67 *Morgan* [1976] AC 182, 208–9.

encompassed far more than an exposition of the requisite *mens rea* for the common law offence of rape.

In writing for the majority, Lord Hailsham further opined that an accused's genuine belief that the complainant is consenting is, by definition, dissonant with the above *mens rea*, and this is so irrespective of whether the belief was predicated upon reasonable grounds or would have been held by a reasonable person in the same position as the accused.[68] This is not to say that the reasonableness of the putative belief or the lack thereof is devoid of relevance in rape prosecutions. To the contrary, his Lordship stressed that this is an important evidentiary factor to be considered by the fact-finder in determining whether such a belief was truly held by the accused.[69]

Though the *Morgan* principle was generally accepted as a matter of common law doctrine in both the UK and Australia for twenty-seven and[70] thirty-six years respectively,[71] it was not received uncritically.[72] On

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68 Ibid.

69 Ibid 214.

70 It should be noted that England and Wales have now resiled from the *Morgan* principle by virtue of s 1 the *Sexual Offences Act 2003* (UK). In order to prove rape under s 1, the prosecution must prove, as a constituent element, that the accused did not reasonably believe the complainant was consenting.

71 See for example, *Crimes Act 1900* (NSW) s 61H(1); *Criminal Law Consolidation Act 1935* (SA) s 5(3). The *Morgan* principle was adopted by the Victorian Court of Appeal in *R v Saragozza* [1984] VR 187 and reaffirmed by the court in a more recent series of decisions: *R v Zilm* [2006] VSCA 72 (5 April 2006) ('*Zilm*'); *Worsnop v The Queen* [2010] VSCA 188 (28 July 2010) ('*Worsnop*'); *Getachew v The Queen* [2011] VSCA 164 (2 June 2011) ('*Getachew*'); *Roberts v The Queen* [2011] VSCA 162 (2 June 2011) ('*Roberts'*); *Neal v The Queen* [2011] VSCA 172 (15 June 2011) *('Neal'*); and *Wilson v The Queen* [2011] VSCA 328 (27 October 2011) ('*Wilson'*). The *Morgan* principle was reaffirmed by the High Court's decision in *R v Getachew* [2012] HCA 10 (28 March 2012) [21]–[25] ('*Getachew 2'*). These Victorian Court of Appeal decisions, unlike *Morgan*, dealt with the statutory crime of rape under s 38 of the *Crimes Act 1958* (Vic) which supplanted the common law crime of rape that existed in Victoria prior to 1981. While the basic principle of *Morgan* was reaffirmed in each of these decisions, it should be noted that unlike

one view, for example, carnal knowledge of a woman without her consent, if proven, should warrant a conviction for rape regardless of whether an accused is aware that the alleged victim is not or might not be consenting. This view is predicated on the notion that the complainant has been irrevocably violated and, therefore, it is of no significance to the question of criminal liability that the accused acted with an honestly held, albeit not necessarily reasonable belief, that the complainant was consenting to the relevant sexual act.

A *Rethinking the Morgan Honest Belief Defence*

As a result of the *Crimes (Sexual Offences) Act 1980* (Vic), *Crimes (Sexual Offences) Act 2006* (Vic) and *Crimes (Sexual Offences) (Further Amendment) Act 2006* (Vic), the law of rape in Victoria, prior to the enactment of the *Crimes Amendment (Sexual Offences and Other Matters) Act* 2014 (Vic), was comprised of ss 35(1)(a) and (b), 36, 37, 37A, 37AA, 37AAA, 37B and 38. For present purposes, however, it is only necessary to extract ss 35(1)(a) and (b), 36, 37, 37AA and 38. These provisions state as follows:

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the general common law definition of consent or the lack thereof as set out in above n 61, s 36 of the *Crimes Act 1958* (Vic) appears to provide a finite list of circumstances in which consent is deemed to be lacking: Victoria, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 1998 (Jim Kennan, Attorney-General); Victoria, *Law Reform Commission*, *Rape: Reform of Law and Procedure, Report No. 43* (1991) 6 [12]. As will be discussed below, however, the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) has effectively supplanted what had been Victoria's statutory offence of rape that was collectively set out under ss 35–38 of the *Crimes Act 1958* (Vic).

72 See H Power, 'Towards a Redefinition of the Mens Rea of Rape' (2003) 23 *Oxford Journal of Legal Studies* 379 (arguing that those who make unreasonable mistakes in the context of sexual crimes are morally culpable); S Leahy, 'When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law' (2013) 23 *Irish Criminal Law Journal* 2.

Section 35

(1) In Subdivisions (8A) to (8G)—

…

"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 …

Section 36

Meaning of consent

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 purpose …

Section 37

Jury directions

(1) If relevant to the facts in issue in a proceeding the judge must direct the jury on the matters set out in sections 37AAA and 37AA.

(2) A judge must not give to a jury a direction of a kind referred to in section 37AAA or 37AA if the direction is not relevant to the facts in issue in the proceeding …

Section 37AA

Jury directions on the accused's awareness

For the purposes of section 37, if evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act, the judge must direct the jury that in considering whether the prosecution has proved beyond reasonable doubt that the accused was

aware that the complainant was not consenting or might not have been consenting, the jury must consider—

(a) any evidence of that belief; and

(b) whether that belief was reasonable in all the relevant circumstances having regard to—

(i) in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant; and

(ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and

(iii) any other relevant matters

…

Section 38

Rape

(1) A person must not commit rape …

(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.

Readers will note that ss 38(3) and (4) expanded the definition of rape to include, for example, situations in which the accused compels another person to sexually penetrate the offender or another person in accordance with the definition of sexual penetration as set forth in ss 35(1)(a) and (b). Prior to the addition of these sections, for instance, a woman who forced a man to sexually penetrate her at gunpoint would not have committed rape because the constituent element of sexual penetration as defined by ss 35(1)(a) and (b) would have been lacking; specifically, 35(1)(a) would not have been applicable because it requires penile penetration of the vaginal, anal or oral cavity by the perpetrator which, in this scenario, is impossible because a woman is incapable of penile penetration of any orifices. Section 35(1)(b) would similarly be inapplicable because in the situation postulated, the woman has not inserted an object or a part of her body into the V's anal (or vaginal, because V has no vagina) cavity. Although the postulated fact pattern is most improbable, there are countless homosexual encounters in the prison milieu that, but for the addition of ss 38(3) and (4), would not constitute rape. Also noteworthy is that under subss 38(2)(a)(ii) and 38(4)(b)(ii), a person can be convicted of rape despite the absence of proof that he or she acted with an awareness that the complainant was not or might not be consenting. Rather, these subss allow the fact-finder to convict if it is satisfied beyond reasonable doubt that the accused gave no thought as to whether the complainant was not consenting or might not have been consenting. It appears, therefore, that subss 38(2)(a)(ii) and 38(4)(b)(ii) fall short of any *mens rea* known to the criminal law[73] and provide an attractive alternative for the prosecution

[73] For a well-articulated and thorough discussion of the topic of *mens rea*, see Gillies, above n 45, 46–75. According to Gillies, there are four types of *mentes reae* known to the criminal law in Australia and presumably the UK: intention, knowledge (or awareness), belief and recklessness. Gillies stresses the importance of the distinction between a voluntary act or omission to act where

where there is insufficient proof that the accused was aware that the complainant was not or might not have been be consenting.

Although it was noted earlier that the Victorian Court of Appeal had consistently affirmed the *Morgan* principle that an honestly held belief that the complainant was consenting, whether based on reasonable grounds or not, is mutually exclusive with the *mens rea* for rape under any of the provisions of s 38,[74] this principle has now fallen into disrepute as a matter of Australian common law doctrine.[75] As noted in *The Queen v Getachew*, [76] s 37AA of the *Crimes Act 1958* (Vic) (above) was enacted into law in Victoria by virtue of the *Crimes Amendment (Rape) Act 2007* (Vic). As the accused in *Getachew* did not assert or lead evidence that he acted with a belief that the complainant was consenting,[77] the High Court's observations concerning s 37AA(b)(i) were merely *obiter dicta*. Nonetheless, the High Court's comments on the effect of an accused's honest belief in consent are most illuminating. In addressing this point,

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the law imposes a duty to act and the concept of *mens rea:* at 28–32 Though Gillies explains that the former is generally a component of the *actus reus* which must be proved beyond reasonable doubt in all but the most exceptional cases, he points out that as with the concept of *mens rea*, it too has a minimal mental component, but one that falls short of a *mens rea*: at 29. As Gillies explains:

> Because this basic mental state, that associated with voluntariness of conduct, is ascribed to the *actus reus*, it follows that the *mens rea* will need to be defined as consisting of that mental element required by the definition of the crime, over and above that which is needed to engage in the physical conduct prescribed by the definition of the crime.

74 See above n 71.

75 *The Queen v Getachew* [2012] 286 ALR 196 ('*Getachew 2*'); *NT v The Queen* [2012] VSCA 213 (6 September 2012) *('NT')*.

76 *Getachew 2* [2012] 286 ALR 196.

77 In this regard, s 37(2), which was also introduced by the *Crimes Amendment (Rape) Act 2007* (Vic), specifically provides that a 'judge must not give to a jury a direction of a kind referred to in section 37AAA or 37AA if the direction is not relevant to the facts in issue in the proceeding'. Section 37AA is consonant with s 37(2) in that it requires that a 37AA instruction must be given if 'evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act …'.

French CJ, with whom Hayne, Crennan, Kiefel and Bell JJ joined, opined:

> Reference to an accused holding the belief that the complainant was consenting invites close attention to what was the accused's state of mind. It was said in the Explanatory Memorandum accompanying the Bill for the 2007 Act that "belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive". So much may be accepted if "belief in consent" is treated as encompassing a state of mind where the accused accepts that it is possible that the complainant might not be consenting.
>
> For present purposes, it is enough to notice that, if an accused asserted, or gave evidence at trial, that he or she thought or "believed" the complainant was consenting, the prosecution may yet demonstrate to the requisite standard either that the accused was aware that the complainant might not be consenting or that the asserted belief was not held. It is to be recalled that, since the 2007 Act, the fault element of rape has been identified as the accused being aware that the complainant was not or might not be consenting or the accused not giving any thought to whether the complainant was not or might not be consenting. The reference to an accused's awareness that the complainant might not be consenting is, of course, important. An accused's belief that the complainant may have been consenting, even probably was consenting, is no answer to a charge of rape. It is no answer because each of those forms of belief demonstrates that the accused was aware that the complainant might not be consenting or, at least, did not turn his or her mind to whether the complainant might not be consenting (citations omitted).[78]

As the *mes rea* relating to the lack of consent element of rape at both common law and s 38 requires an awareness (or knowledge)[79] as opposed

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78 *Getachew 2* [2012] 286 ALR 196, [26]–[27].

79 The *mentes reae of* 'knowledge' and 'awareness' are used synonymously at common law with each denoting that the accused acted or omitted to act while holding certain facts or circumstances that make his or her act criminal to be true: Gillies, above note 45, 67–70.

to a mere belief[80] that the complainant is not or might not be consenting, it follows that the forgoing *obiter dicta* cannot be reconciled with the *Morgan* defence of honest belief. Thus, a clear understanding of the distinction between the *mentes reae* of knowledge and belief is essential to an understanding of the above-quoted passages from *Getachew*. This vital distinction is explained by Professor Peter Gillies:

> There is a clear conceptual distinction between knowledge and belief. "Belief" as opposed to "knowledge" may be used to refer to that state of mind in which D holds a fact to be true, but is not entirely free from doubt, while knowledge strictly . . . denotes the situation where D does not, having regard to the facts known to D, have any doubts as to the existence of the fact in issue. In many instances it will be difficult to have knowledge in its strictest sense, as opposed to belief—D cannot even be absolutely confident, for example, that D was born on the day shown on D's birth certificate. Nevertheless, D will regard herself or himself as 'knowing' this date . . . In practice, therefore, there will frequently be little difference between situations of "knowledge" and "belief". [81]

This writer expounded further on this distinction and its impact on the *Morgan* defence of honest belief:

> Thus, by definition the *mens rea* of belief denotes a state of mind in which the accused entertains some measure of doubt as to the existence of whatever fact or circumstance that he or she is required to believe by the common law or statutory definition of the offence. If a person acts or omits to act (where there is a legal duty to act) with an honest belief as contrasted with actual knowledge or awareness concerning the existence of a fact or circumstance that makes the

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80 The *mens rea* of 'belief', on the other hand, while akin to 'knowledge' or 'awareness', denotes that the accused acted or omitted to act while believing that certain facts or circumstances that make his or her act criminal existed, albeit with some degree of doubt as to their existence: Gillies, above note 45, 72–3. This stands in contrast to 'knowledge' or 'awareness' where the accused acts or omits to act while holding such facts or circumstances to be true without any room for doubt other than a mere theoretical possibility: at 72.

81 Ibid 72.

relevant conduct criminal, he or she is acting with an acceptance that there is a degree of doubt with regard to the existence of that fact or circumstance. In legal parlance, that acceptance constitutes a *mens rea* that is commonly referred to as recklessness. It is therefore apparent that an accused's mere belief that the complainant was consenting will not necessarily preclude the prosecution from proving that *mens rea.*

Several months subsequent to the High Court's *obiter dicta* comments in *Getachew*, the Victorian Court of Appeal elevated that *obiter dicta* to binding precedent by rejecting the applicant's claim, based upon the *Morgan* precept, that if the jury accepted his claim that he had acted in the belie that the complainant was consenting to the sexual penetration, this would have precluded it from finding that the *mens rea* for rape had been proven. Citing the High Court's *obiter dicta* in *Getachew*, the Court of Appeal reaffirmed the High Court's view that an honestly held belief in consent and an awareness that the complainant was not or might not be consenting, or gave no thought whatever to the same, are not mutually exclusive of one another. In *NT*, Nettle, Redlich and Osborn JJA opined:

> Directions along those lines may well have been desirable to provide the jury with further assistance. We note that, since the Victorian Criminal Charge Book was revised following the High Court's decision in Getachew, it has included the following suggested directions concerning an accused's belief in consent:
>
> > There is a difference between a belief in consent which [the accused] relies upon and an awareness that [the complainant] was not or might not be consenting, which is what this element is about. That is because there are different strengths of belief.
> >
> > • At one end of the scale, I might have a belief as to something and the strength of that belief leaves no possibility for error.
> >
> > • At the other end of the scale, I can have a belief as to something while being aware that I might be mistaken. For example, I might believe that I parked my car on the fourth level of a car park, but I'm aware that it might be on the third level. I then go to the fourth level to find my car, even though I'm aware it might not be there.

> In order to prove this element of awareness, the prosecution must prove to you that [the accused] did not have such a strong belief that [the complainant] was consenting that he did not think of the possibility that she might not be consenting. In determining the strength of [the accused's] belief in consent, you should consider the matters I just mentioned that are relevant to whether the belief was held. This includes any evidence of the belief, whether the accused was aware that [describe relevant s. 36 or s. 37AAA(d) or (e) circumstances], whether the accused took steps to find out whether the complainant was consenting and any other relevant factors (citations omitted) ...[82]

Though the Court of Appeal made reference to what it termed as 'belief' at opposite ends of a scale that is based on the degree of conviction with which it is held, a belief held so strongly as to exclude any possibility of doubt is tantamount to a convoluted description of a *mens rea* that is commonly referred to as knowledge or awareness.[83] Regardless of whether one chooses to characterize such a state of mind as knowledge/awareness or the genre of belief depicted above by the Court of Appeal, it is apparent that either state of mind, if found by the fact-finder to have been held by the accused at the time of the sexual act in question, would preclude a finding that the accused acted with the requisite *mens rea* for rape at common law or under the now repealed version of s 38 of the *Crimes Act 1958* (Vic).

On the other hand, if the accused's state of mind contemplates a real as opposed to a mere a theoretically possibility of error, however slight, this is descriptive of the *mens rea* that is typically termed as 'belief'. A mere 'belief', therefore, falls short of knowledge/awareness that the

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82 KJ Arenson, The Chaotic State of the Law of Rape in Victoria: A Mandate for Reform' (2014) 78 *The Journal of Criminal Law* 326, 331–33 (quoting *Getachew 2* [2012] 286 ALR 196, [26]–[27] and *NT v The Queen* [2012] VSCA 213 (6 September 2012) at [15]) ('*NT*')).

83 See above notes 79 and 80.

complainant is not or might not be consenting. Is it not correct to state that a belief in consent which, by definition, contemplates the possibility or perhaps an even greater likelihood that the complainant might not be consenting, is actually descriptive of the *mens rea* required for rape at both common law and under the now repealed s 38? If so, it follows that the clear wording of the above-quoted passages from *NT*, when read in conjunction with *Getachew*, have overruled the *Morgan* honest belief precept that had served as an important staple in the law of rape under the Australian common law doctrine for the previous thirty-six years. While an honest belief in consent, if accepted by the fact-finder, was once a complete defence to rape at both common law and under the now repealed version of s 38, in the post-*Getachew/NT* era an assertion of or evidence led that the accused acted with such a belief is now the equivalent of direct or circumstantial evidence of the *mens rea* that was required at common law and under the repealed version of s 38.

It was earlier stated that the sweeping changes to the law of rape instituted by the *Crimes Amendment (Sexual Offences and Other Matters) Act* 2014 (Vic) are a result of pressure brought to bear by special interest groups. This fact and the unnecessary, ill-advised nature of this new legislation will be dealt with below. One would have thought, however, that those who believed that conviction rates for rape were inordinately low, thereby necessitating a drastically different definition of rape and major substantive and procedural reform in the rules governing the investigation and prosecution of rape and other sexual assaults,[84] would have rejoiced in the degree of progress that was reflected in the litany of progressive changes in the repealed version of s 38.

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84 For examples of such changes for which these people have presumably provided the impetus, see When Some People, above n 31, 214–58.

Indeed, readers are now aware that rape was no longer restricted to mere carnal knowledge of a woman, but was rightfully extended in the repealed s 38 to include non-consensual sexual penetration of all body orifices. Although there are numerous provisions in the repealed Victorian rape regime (which consisted of ss 35-38) that even the most ardent feminists would have viewed as progressive and giant steps toward achieving fairness to rape complainants and prosecutors, it is worth noting some of the most momentous: boys under the age of fourteen were no longer conclusively presumed to be incapable of committing the crime of rape;[85] husbands no longer enjoyed any form of spousal immunity for the rape or other forms of sexual assault of their wives;[86] a woman's consent to sexual penetration of any orifice, once given, was no longer regarded as incapable of being revoked;[87] either gender was capable of committing rape against the other as opposed to rape being limited to acts of rape committed solely by men against women;[88] the purview of rape was extended to persons who compel the complainant to sexually penetrate the offender or another person without the complainant's consent or by compelling the complainant to acquiesce in sexually penetrating the offender or another person without the complainant's consent; [89] and in the case of subss 38(2)(a)(ii) and 38(4)(b)(ii), by allowing for conviction upon mere proof that the accused gave no thought to whether the person was not or might not have been consenting.[90] It is important to stress that the final subsections have effectively dispensed with the only meaningful *mens rea* in the repealed s 38 by reason of the fact that the second *mens rea* requirement of s 38, an intention to sexually penetrate, is rarely (if

85 *Crimes Act 1958* (Vic) s 62(1).
86 *Crimes Act 1958* (Vic) s 62(2).
87 *Crimes Act 1958* (Vic) s 38(2)(b).
88 See ss 35(1)(a)–(b), 38(2)(a)–(b), 38(3)–(4).
89 *Crimes Act 1958* (Vic) ss 38(3)–(4).
90 *Crimes Act 1958* (Vic) sub-ss 38(2)(a)(ii), 38(3), (4)(b)(ii).

ever) committed accidentally. Thus, while it is never a live issue at trial, its mere presence had the effect of technically rendering s 38 as a crime of *mens rea*, thus precluding the accused from interposing the *Proudman* defence and effectively converting prosecutions in which subss 38(2)(a)(ii) and 38(4)(b)(ii) are alleged into offences of absolute liability.[91]

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91 The House of Lords construed the *mens rea* for rape at common law to also include an *intention* to have carnal knowledge with a woman without her consent: *Morgan* [1976] AC 182, 191, Thus, in addition to the requirement that the accused must act with an awareness that the complainant is not or might not be consenting, there must also be an intention to effect penile penetration of the vaginal cavity. Though this entails that the accused must possess both *mentes reae*, the reality is that penile penetration of the vaginal cavity (as well as the anal and oral cavities) rarely, if ever, occurs accidentally; at 191–2. Thus, the requisite *mens rea* of an intention to effect penile penetration of the vaginal orifice is really not a live issue in rape prosecutions, although the requirement that the accused must have acted with such an intention effectively precludes the common law offence of rape from being classified as one of strict liability even if the offence were to be redefined to dispense with the additional *mens rea* of knowledge that the complainant is not or might not be consenting. This also has the effect of preventing an accused from interposing the *Proudman* defence: The defence which came to be known as the *Proudman* Defence following *Proudman v Dayman* (1941) 67 CLR 536 was recognized as a defence to strict liability offences in cases such as *Maher v Musson* (1934) 52 CLR 100, 104–5 (Dixon J); at 109 (Evatt and McTiernan JJ); *Thomas v R* (1937) 59 CLR 279. To succeed in this defence, the accused must meet the evidential burden of showing that he or she acted with an *honest and well founded* belief in the existence of facts which, had they been true, would have rendered his or her conduct entirely lawful: *Proudman v Dayman* (1941) 67 CLR 536, 540. An offence is classified as one of strict liability if it is defined in such a manner that the prosecution need not prove any type of 'fault' on the part of the accused: Arenson, Bagaric and Gillies, above n 8, 31–2; Gillies, above n 45, 81–5, 97–106. In this context, 'fault' denotes one or more *mentes reae* or any degree of negligence: at 43, 46, 80–2. A crime of absolute liability is one in which Parliament has expressly, or by necessary implication, barred the accused from raising the *Proudman* defence despite the fact that the offence does not require proof of 'fault' on the part of the accused: at 107–8. For a thorough discussion of strict and absolute liability offences and the significance of including the *mens rea* of an intention to sexually penetrate under the now repealed s 38 of the *Crimes Act 1958* (Vic) and, by implication, the common law as well as s 38 of the recently enacted *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), see KJ Arenson, 'Rape in Victoria as a Crime of Absolute Liability: A Departure from Both Precedent and

Despite the progressive reforms instituted under the repealed s 38 that were brought about by the *Crimes (Sexual Offences) Act 1980* (Vic), *Crimes (Sexual Offences) Act 2006* (Vic) and *Crimes (Sexual Offences) (Further Amendment) Act 2006* (Vic), these changes fell short of what those aspiring to reform the law of rape had envisaged. That brings us to the question of whether the new definition of rape, introduced through the *Crimes Amendment (Sexual Offences and Other Matters) Act* 2014 (Vic), represents an improvement over the repealed version of s 38.

V THE CRIMES AMENDMENT (SEXUAL OFFENCES AND OTHER MATTERS) ACT 2014 (VIC)

The *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) introduced an entirely different regime of rape and other forms of sexual assault in Victoria. Most pertinent for present purposes is s 38 of the *Act* that now defines rape as follows:

> (1) A person (A) commits an offence if—
>
> (a) A intentionally sexually penetrates another person (B); and
>
> (b) B does not consent to the penetration; and
>
> (c) A does not reasonably believe that B consents to the penetration.
>
> (2) A person who commits an offence against subsection (1) is liable to level 2 imprisonment (25 years maximum).
>
> (3) A person does not commit an offence against subsection (1) if the sexual penetration is done in the course of a procedure carried out in good faith for medical or hygienic purposes.

Progressivism' (2012) 76 *The Journal of Criminal Law* 389, 395–400. For an explanation of the concept of absolute liability, see Gillies, above n 45, 97–108.

This version of s 38, as with its repealed predecessor, must be read in conjunction with other sections that define its constituent elements such as, for example, ss 34C (consent), 37D (sexual penetration) and 37G (reasonable belief). Although changes have been made to the definitions of consent and sexual penetration under ss 34C and 37D respectively, a completely new section defining reasonable belief (as to whether another is consenting to sexual penetration) has been added in order to accommodate the newly defined elements of rape and sexual assault which now include a *mens rea* that consists of both an objective and a subjective component. For present purposes, however, it is sufficient to focus exclusively on the new definition of rape.

In Part 4, the distinction between the *mentes reae* of knowledge/awareness and belief was explicated in the above passages from *Getachew* and *NT*. Readers will recall that belief, unlike knowledge or awareness, denotes a *mens rea* in which the accused's voluntary act or omission to act (where there is a legal duty to act) is accompanied by the accused's belief in certain facts or circumstances that render his or her conduct criminal, albeit with some degree of doubt as to their existence that transcends a mere theoretical doubt emanating from the maxim that 'anything is possible'. This was contrasted with the *mens rea* of knowledge/awareness in which the accused acts or omits to act while holding certain facts or circumstances to be true without allowing for any doubt as to their existence, save for a mere theoretical possibility of the same. As the *mens rea* for rape at common law as well as the repealed version of s 38 required the accused to act with knowledge/awareness that the complainant is not or might not be consenting to the relevant sexual penetration, *Getachew* and *NT* clearly enunciated that an accused's belief

that the complainant is consenting and such a *mens rea* are not mutually exclusive.

To the contrary, the *mens rea* of belief is tantamount to the *mens rea* of recklessness in which the accused, though not intending to cause damage to persons or property through his or her conduct, adverts to an unreasonable risk of harm[92] associated with that conduct and nonetheless elects to proceed despite that awareness.[93] Depending upon whether the accused adverts to a real possibility or even a probability that the risk will come to fruition, his or her conduct is properly characterised as possibility or probability type recklessness respectively, both of which are forms of negligence as well as *mentes reae*.[94] With regard to the *mens rea* for rape at common law and under the repealed version of s 38, one who acts with a *belief* that the complainant is consenting is also acting with knowledge/awareness that there is a real possibility that the complainant is not consenting, otherwise known as recklessness of the possibility genre.[95] Though the strength of the accused's belief may vary as indicated in *NT*, this does not alter the fact that this is the same *mens rea* that would be sufficient to convict for rape at common law and under the previous version of s 38. Indeed, it was for this reason that the High

92 Arenson, Bagaric and Gillies, above n 8, 238.

93 Gillies, above n 45, 58–67.

94 Ibid. See also *Pemble v the Queen* (1971) 124 CLR 107, [18], [22]. *R v Crabbe* (1985) 58 ALR 417, [7]–[10]. In *Boughey v The Queen* (1986) 65 ALR 609 the High Court held that probability type recklessness entails advertence to a real and substantial as opposed to merely a remote risk that one or more of the facts or consequences rendering the accused's conduct criminal would exist or ensue: at 616–7. If the accused adverts to a real as opposed to a mere theoretical possibility of the same, this is referred to as probability type recklessness: *Pemble v the Queen* (1971)124 (CLR) 107 [23]. *Boughey* further held that one can act with probability type recklessness without contemplating that the chance the risk occurring is fifty percent or higher: ibid 615. The Court did not specify how much lower than fifty percent the accused can contemplate and still be regarded as acting with this type of recklessness.

95 Gillies, above n 45, 58–67, 596–97.

Court's *obiter dicta* in *Getachew* and the Court of Appeal's decision in *NT* were of the view that the *Morgan* defence was no longer viable. Succinctly stated, what had been a longstanding and accepted defence has been transformed into an admission of sorts that the accused possessed the *mens rea* for rape as a matter of common law doctrine as well as under the previous version of s 38.

With the *Morgan* defence of honest belief having been overruled in 2012, one would have thought that those advocating sweeping reforms in the law of rape in Victoria and jurisdictions with similar statutes[96] would have been overjoyed. It appeared as though this development, combined with the others previously noted, would be viewed as a major victory in the quest to achieve a proper balance in ensuring fairness for rape complainants and, at the same time, respect for an accused's right to a fair trial. The remaining problem, however, was the jury direction mandated by s 37AA of the *Crimes Act 1958* (Vic) (above) that was introduced into law as part of the *Crimes Amendment (Rape) Act 2007* (Vic), particularly subs 37AA(b)(i). The nonsensical and circular wording of this subsection effectively states that whenever an accused asserts or otherwise leads evidence that he or she believed that the complainant was consenting, the trial judge must direct the jury that in determining whether the accused possessed the *mens rea* for rape (under the repealed version of s 38), they

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96 For other jurisdictions with rape statutes similar to the recently enacted s 38 of the *Crimes Amendment (Sexual Offences and Other Matters) Act* 2014 (Vic), see *Sexual Offences Act 2003* (UK) c 42, s 1 ('rape'); *Crimes Act 1961* (NZ) s 128 ('sexual violation defined'). In the Australian code jurisdictions an almost identical effect is created by the rape statutes of those jurisdictions together with a general defence of mistake of fact; see *Criminal Code Act Compilation Act 1913* (WA) sch ('*The Criminal Code*') ss 325 ('sexual penetration without consent') 326 ('aggravated sexual penetration without consent') 24 ('mistake of fact'); *Criminal Code Act 1924* (Tas) ss 185 ('rape') 14 ('mistake of fact') 14A ('mistake as to consent in certain sexual offences'); *Criminal Code Act 1899* (Qld) ss 349 ('rape') 24 ('mistake of fact').

'must consider… in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant …'.[97]

Readers will recall s 36 (above) which enumerates several factors that, if found to be operating at the time of sexual penetration, are deemed to negate the complainant's consent. When the effect of s 36 is considered in conjunction with the *mens rea* required for rape under the common law and the repealed s 38, it is clear that anytime an accused is aware that a s 36 circumstance is operating, it not only follows that the complainant's consent is lacking, but that the accused is acting with the *mens rea* required by s 38; namely, an awareness that the complainant is not or might not be consenting. Thus, the wording of subs 37AA(b)(i) cannot be reconciled with that of s 38 and is circular in declaring, in effect, that a factor the jury must consider in determining whether the prosecution has proven the requisite *mens rea* for s 38 is whether the accused was in fact possessed of that *mens rea* at the time of the relevant penetration. Notwithstanding the unfortunate language of subs 37AA(b)(i), there were a series of Court of Appeal decisions subsequent to its enactment in 2007 [98] that rejected informative comments contained in the Second Reading Speeches[99] and Explanatory Memorandum relating to s 37AA of

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97 *Crimes Act 1958* (Vic) subs 37AA(b)(i).

98 See *Worsnop v The Queen* [2010] VSCA 188 (28 July 2010) ('*Worsnop*'); *Getachew v The Queen* [2011] VSCA 164 (2 June 2011) ('*Getachew*'); *Roberts v The Queen* [2011] VSCA 162 (2 June 2011) ('*Roberts'*); *Neal v The Queen* [2011] VSCA 172 (15 June 2011) *('Neal'*); and *Wilson v The Queen* [2011] VSCA 328 (27 October 2011) ('*Wilson'*).

99 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 August 2007, 2858 (Rob Hulls); Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 2007, 3034 (Judith Maddigan):

the *Crimes Amendment (Rape) Bill 2007* (Vic). In confirming that the *mens rea* element for rape under the now defunct s 38 was an awareness of the possibility of the complainant's non-consent rather than the absence of an accused's genuine belief in consent, the Explanatory Memorandum stated:

> The directions make it clear that evidence or an assertion of a belief in consent is to be taken into account when determining whether the prosecution has proven beyond a reasonable doubt that the accused was aware that the complainant might not be consenting. Evidence of, or an asserted belief in, consent, even if accepted by the jury, is not necessarily determinative of whether the prosecution has met this burden. That is to say, belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive. In circumstances where the prosecution has satisfied the jury beyond a reasonable doubt that an accused person was aware that the complainant might not be consenting, if the jury are equally satisfied in relation to the other elements, then they should convict irrespective of whether they accept the evidence or assertion that the accused believed the complainant was consenting.[100]

Despite the import of the Second Reading Speeches, Explanatory Memorandum and even the Charge Book, all of which were subsequently vindicated by the decisions in *Getachew* and *NT*, the Court of Appeal continued to apply the *Morgan* precept in the period between the enactment of the *Crimes Amendment (Rape) Act 2007* (Vic) and the above-mentioned 2012 decisions of the High Court and Court of Appeal.

> The bill seeks to address the confusion caused by the terms "belief in consent" and "awareness of lack of consent". Trying to define the difference between those terms is quite difficult and obviously has been for the people drawing up the bill. Whilst there are many ways to describe "belief" and "awareness", "belief" is essentially a state of mind which can exist both when supported by evidence and without any evidence to support it. On the other hand, "awareness" is more akin to perception, observation or consciousness' at 3034.

100 Explanatory Memorandum, Crimes Amendment (Rape) Bill 2007 (Vic) 4.

In *Worsnop v The Queen*,[101] the Court of Appeal even went so far as to state that the Explanatory Memorandum and Charge Book were incorrect insofar as they strayed from the *Morgan* belief defence.[102] In fairness to the Court of Appeal, however, it found itself in the untenable position of being duty bound to give effect to the egregious language of subs 37AA(b)(i) which, even prior to the repudiation of the *Morgan* belief defence in 2012, could not be reconciled with ss 36 and 38 of the *Crimes Act 1958* (Vic) as they existed prior to their repeal via Part 2, Section 4 of the *Crimes Amendment (Rape) Act 2007* (Vic).[103]

Although the frustrations of those seeking massive reform of the substantive and procedural rules governing the prosecution of rape and other sexual assaults were quite understandable, the most simple, effective and obvious remedy would have been for Parliament to either amend or repeal subs 37AA(b)(i) or, alternatively, enact the provisions relating to jury directions that are now set out in the *Jury Directions Act 2013* (Vic*).*[104] Although the *Crimes Amendment (Rape) Act 2007* (Vic) should be commended for its retention and expansion of the progressive measures contained in ss 35(1)(a) and (b), 36, 37 and 37AAA of the *Crimes Act 1958* (Vic) under the previous statutory regime of rape and other sexual assaults, there is an intractable problem with the hybrid fault element of the newly constituted statutory offence of rape; specifically, the element which requires the prosecution to prove that 'A does not

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101 *Worsnop* [2010] VSCA 188 (28 July 2010).

102 Ibid 192–5.

103 For an example of a decision in which the Court of Appeal went to extreme lengths to give effect to subs 37AA(b)(i), see *GC v The Queen* (2013) 39 VR 363 ('*GC*'). In *GC*, the Court held, albeit unpersuasively, that ss 36(a), (b) and (c) were somehow distinguishable from ss 36(d)-(g) of the *Crimes Act 1958* (Vic) because only the former employed the words, 'submits because' or 'submits because of': at [20].

104 *Jury Directions Act 2013* (Vic*)* ss 60, 61.

reasonably believe that B consents to the penetration (emphasis added)'.[105]

A *Why s 38(1)(c) is an Oxymoron*

The critical distinction between the *mentes reae* of belief and awareness/knowledge was explained in the aforementioned passages from *Getachew* and *NT*. As those decisions made clear, the former denotes one who acts or omits to act with an acceptance that there is genuine doubt as to whether a relevant fact or circumstance exists. While a belief that the complainant was consenting, if accepted by the fact-finder, was once regarded as a complete defence to an accusation of rape on the basis that it could not be reconciled with the *mens rea* for rape at common law or the repealed s 38,[106] *Getachew* and *NT* correctly concluded that such a belief denotes exactly the opposite. That is to say that a belief in the existence of a fact or circumstance that is held with an acceptance that there is a real, as opposed to a mere theoretical doubt as to its existence, is but another means of stating that the accused acted with an awareness that there was a real possibility (or perhaps greater) that the complainant was not consenting. In legal parlance, this state of mind is referred to as possibility type recklessness of the type required for rape at both common law and under the repealed s 38.[107]

Though s 38 did not expressly employ the word recklessness, it is now well settled that an awareness that the complainant might not be consenting is synonymous with the possibility type recklessness that will satisfy the *mens rea* for rape at common law and under the repealed s

105 *Crimes Amendment (Rape) Act 2007* (Vic) s 38(1)(c).
106 *Morgan* [1976] AC 182, 208–9.
107 Gillies, above n 45, 62–67, 596–7; see above n 95.

38.[108] Moreover, as recklessness is regarded as an aggravated form of *negligence* in which the accused *adverts* to the fact that his or her conduct involves an unreasonable risk of harm to another or others and nonetheless elects to proceed despite that awareness,[109] it is apparent that the newly constituted s 38 is inherently contradictory and, therefore, irretrievably flawed insofar as it requires the prosecution to prove beyond reasonable doubt that the accused did 'not reasonably believe' that the complainant was consenting to the sexual penetration at issue.

Parliament's attempt to create a hybrid *mens rea* element of rape that includes a subjective as well as an objective element constitutes an oxymoron that is all but certain to lead to unnecessary and costly litigation that will eventually expose it for what it is. The paradoxical nature of this hybrid *mens rea* is predicated on the fact negligence denotes conduct that falls below an objective standard required by law to which all persons must conform their conduct: the standard of the hypothetical reasonable person.[110] As recklessness is an undeniable form of negligence, the hybrid *mens rea* under the newly constituted s 38 is functionally equivalent to stating that the prosecution must prove that the accused did not act with reasonable recklessness regarding the complainant's lack of consent. If one accepts the reasoning of the High Court and Court of Appeal in *Getachew* and *NT* respectively, then by definition it is impossible for an accused to act with reasonable recklessness in relation to the complainant's lack of consent. It therefore follows that it is impossible for the prosecution to prove beyond

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108 Ibid.

109 Ibid. See also JG Fleming, *The Law of Torts* (Thomson Reuters, 8th ed, 1992) 103.

110 Ibid. For a discussion of this standard, what determines whether a risk is an unreasonable one and the attributes that are imputed by law to the hypothetical reasonable person, see Arenson, Bagaric and Gillies, above n 8, 26, 238–9.

reasonable doubt that the accused did not *reasonably believe* that the complainant was consenting to the relevant penetration. By enacting the hybrid version of s 38 and abolishing the purely subjective *mens rea* for rape required at common law and the previous s 38, the Victorian Parliament has revived the confusion spawned by the House of Lords' folly in *Morgan* by failing to draw the distinction between the *mentes reae* of belief and knowledge/awareness. There is much to be said for the aphorism that those who do not study history are doomed to repeat it. Why did Parliament fail to draw this distinction just two years after the decisions in *Getachew* and *NT* eliminated the confusion emanating from the House of Lords' folly in failing to do so in *Morgan*?

VI THE IMPETUS FOR THE CRIMES AMENDMENT (SEXUAL OFFENCES AND OTHER MATTERS) BILL 2014 (VIC)

In order to answer the question posed at the conclusion of Part 5, readers should be reminded of the Second Reading Speeches in Victoria, Western Australia, Tasmania and New Zealand which all contained comments to the effect that gender bias provided the predominant or perhaps sole justification for abolishing one or both limbs of the alternative offence of voluntary manslaughter in murder prosecutions. Readers should also remind themselves of a conversation that the writer had with a woman who was then the Chairperson of the VLRC, subsequently a Justice of the Supreme Court of Victoria and, following her recent resignation from the Court, the person who was appointed to chair a Royal Commission tasked with examining a broad range of issues and proposals for reform concerning domestic violence. The conversation occurred just prior to the enactment of the *Crimes (Homicide) Act 2005* (Vic) which adopted the VLRC's recommendation to abrogate the provocation limb of voluntary

manslaughter.[111] During that conversation, the VLRC Chairperson stated that the impetus for this recommendation was a statistical analysis which demonstrated that the male gender had derived more benefit from the offence than the female gender. The Chairperson readily agreed, however, that women have in fact benefited from the availability of voluntary manslaughter as an alternative to murder in instances where the provocation offered by the deceased was legally sufficient to warrant a verdict of not guilty of murder, but guilty of the lesser offence of voluntary manslaughter. Was gender bias an equally important factor in Parliament's decision to affect the massive reform of Victoria's statutory regime of sexual assault, most notably its decision to discard the traditional subjective *mens rea* element of rape and replace it with the hybrid subjective/objective *mens rea* mandated by s 38(1)(c) of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic)?

In a case note authored by Associate Professor Wendy Larcombe in 2011, [112] the year before *Getachew* and *NT* overruled *DPP v Morgan* on the basis that it failed to draw the distinction between belief as opposed to knowledge/awareness, she correctly concluded that the import of the Second Reading Speeches[113] and Explanatory Memorandum[114] relating to the *Crimes Amendment (Rape) Bill 2007* (Vic)[115] was consonant with the *obiter dicta* and decision that would later ensue in *Getachew* and *NT* respectively; in particular, the manner in which these cases related to the

111 *Crimes (Homicide) Act 2005* (Vic) s 3B. Though this case note was revised on 24 May 2012, the revision preceded the High Court and Court of Appeal decisions in *Getachew* and *NT* that were handed down in March and September of 2012 respectively.

112 W Larcombe, 'Worsnop v The Queen: Subjective Belief in Consent Prevails (Again) in Victoria's Rape Law' (2011) 35(2) *University of Melbourne Law Review* 697 ('*Larcombe case note*').

113 See above n 99.

114 See above n 100.

115 Ibid.

distinction between belief and knowledge/awareness and its impact on the *Morgan* honest belief defence.[116] Professor Larcombe should be highly commended for her intuitive construction given the fact that neither the Second Reading Speeches nor the Explanatory Memorandum explicitly articulated why an accused's belief in consent is not mutually exclusive with the *mens rea* for rape at both common law and the repealed s 38. Professor Larcombe also correctly noted the nonsensical and circular wording of (now repealed) subs 37AA(b)(i) insofar as it declared that an accused's awareness that one or more of the consent negating factors enumerated in s 36 is operating was merely a factor for the jury to consider in its determination of whether the accused was aware that the complainant was not or might not be consenting.[117] Had Professor Larcombe's case note been limited to these particular points, there would be no reason to take issue with various other points raised in her case note and other writings, nor to question whether they were intended to serve as a foundation for a broader agenda that is laden with gender bias and repugnant to the inviolable precept that in our adversarial system of justice, all persons are regarded as equal before the law.

In her case note, for example, Professor Larcombe states that in *Worsnop v The Queen*,[118] the Court of Appeal held that unless the Crown is able to prove beyond reasonable doubt that there is *no possibility* that the accused acted in the belief that the complainant was consenting, the 'fault'[119] or *mens rea* element required under s 38 as it was constituted prior to the enactment of the *Crimes Amendment (Sexual Offences and*

116 Larcombe case note, above n 112, 706–9.
117 Larcombe case note, above n 112, 707.
118 *Worsnop* [2010] VSCA 188.
119 Larcombe case note, above n 112, 714.

Other Matters) Act 2014 (Vic) cannot be established.[120] Aside from the fact that the judgment in *Worsnop* is devoid of such an assertion, anyone of average intellect is aware that save for the axiomatic principles of disciplines such as mathematics or physics, for example, there are relatively few facts that are capable of satisfying a standard of proof of this magnitude. Could it ever be proved beyond any possibility that the sun will rise on the following day, or that an ostensibly healthy young man or woman will not die of a vascular incident before he or she awakens the following day? Irrespective of whether this rather obvious misstatement of the judgment in *Worsnop* was the result of a purposeful embellishment or a misunderstanding of the principle that proof beyond reasonable doubt does not require proof beyond all doubt, such a palpable misstatement does little to inspire confidence in Professor Larcombe's credibility, much less her familiarity with the black letter law principles of the Criminal Law.

Professor Larcombe then adds another observation concerning *Worsnop*. She states in pertinent part:

> Although the Court of Appeal considered that '[b]elief', in the event, was a sideshow to the only issue which was raised ... consent in fact', there was no suggestion in this case that the direction was improperly given because it was not relevant to the facts in issue or because there had been no evidence led or assertion made about honest belief.
>
> On the basis of *Worsnop*, we can conclude that an assertion of belief in consent can be inferred from an assertion of consent, such that it is not improper to give the s 37AA direction even when the only real issue at trial is

120 Ibid.

> "consent in fact". In these circumstances, any distinction between "honest belief" cases and "straight consent" cases remains highly dubious…[121]

Although it is difficult to argue with her conclusion that 'an assertion of belief in consent can be inferred from an assertion of consent' and that 'any distinction between 'honest belief' cases and 'straight consent' cases remains highly dubious', her analysis fails to take into account that s 37AA refers generically to the word 'evidence' and its failure to refer only to direct evidence militates against Professor Larcombe's apparent hostility to the notion that the word 'evidence', as used in s 37AA, is not limited to direct as opposed to direct as well as circumstantial evidence of consent.[122] Perhaps even more destructive to the professor's overt hostility to the notion that an accused who adduces evidence of a complainant's actual consent has, by way of inference, also led to evidence of his or her honest belief in the same, is s 37AA's reference to both an accused's assertion of his or her belief in the complainant's consent as well as leading evidence of that belief. An assertion of belief in consent would, if accepted as truthful, constitute direct evidence that the belief was in fact held. In contrast, an assertion of or leading evidence of the complainant's actual consent would, if accepted as truthful, qualify as direct or circumstantial evidence of the accused's belief in such consent respectively; that is, it would constitute a circumstance from which the fact-finder could find or reasonably infer that the accused

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121 Ibid 709–10.

122 A Ligertwood and G Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis, 5th ed, 2005) 114–27; KJ Arenson and M Bagaric, *Rules of Evidence in Australia: Text and Cases* (LexisNexis, 2nd ed, 2007) xiii, xiiii. Succinctly stated, direct evidence is evidence, which if accepted as truthful, automatically resolves a disputed fact or facts. A good example would be a full confession of guilt to the offence(s) charged. Circumstantial evidence, on the other hand, is evidence which, if accepted as truthful, will not automatically resolve a disputed fact or facts at issue, but gives rise to one or more inferences that point to the conclusion that the disputed fact or facts did or did not exist.

entertained a bona fide belief that the complainant was consenting.[123] Thus, the professor's apparent displeasure with the manner in which the jury was directed in *Worsnop* is unwarranted and amounts to much ado about nothing of any real substance.

In addition, the following passages from Professor Larcombe's case note afford readers with valuable insights into her general attitude toward the male gender as well as her intention to lay a foundation for the hybrid subjective/objective *mens rea* that would eventually become the focal point of the law of rape in Victoria:

> Immunity should no longer be provided for an *accused whose belief in consent is the result only of distorted views of female sexuality*; or false *assumptions about sexual entitlement*…The serious consequences of sexual assault require a higher standard. Serious harm can easily be avoided by legally requiring that a person who seeks to sexually penetrate another takes reasonable steps to ascertain that the other person freely agrees. As the communicative model of consent has attempted to explain, it is not appropriate to engage in sexual penetration *assuming* consent *and only desist once lack of consent has been forcefully communicated.* Under the communicative model of sexual conduct, if affirmative consent has not been communicated, the initiator of sexual penetration is expected before proceeding to take reasonable steps to ascertain whether the other person is consenting.
>
> That expectation, and the communicative model of consent more generally, can be given effect in a range of legislative forms. For example, a number of domestic and international jurisdictions, including Western Australia, Tasmania, Queensland, the United Kingdom and New Zealand, have now reformed their rape laws to institute an "objective" fault element. In these jurisdictions, the accused can only rely on an honest belief in consent if that belief was also "reasonable". This is variously framed as a defence of "honest and reasonable belief", or as an element of the offence so that the prosecution must prove that

123 Arenson and Bagaric, above n 122.

> the accused did not believe on reasonable grounds that the complainant was consenting. In the United Kingdom, for example, the mental element for rape is established if the prosecution proves beyond reasonable doubt that A did not "reasonably believe" that B was consenting. The legislation provides further that "[w]hether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents (emphasis added) (citations omitted)".[124]

It is ironic that Professor Larcombe shows no reluctance to make an assumption (or draw a conclusion) when she feels it is beneficial to one or more of her arguments. In her case note, however, she excoriates men (but not women) 'whose belief in consent is the result only of distorted views of female sexuality' or make 'assumptions about sexual entitlement' in the context of rape.[125] In the context of sexual relations, both men and women routinely make assumptions or draw conclusions, most of which are quite well founded and particularly so depending upon the tenor of the relationship. In relationships where it is customary for either party to initiate a sexual encounter without incident, it is ludicrous to suggest, as Professor Larcombe does, that the initiator (who she insinuates will be the male) should be required to take affirmative steps of an unspecified nature to ensure that the woman is consenting.[126] To recommend such a practice in cases of this sort is ill-advised and as potentially destructive to the relationship as it is impracticable. To recommend that the government foist such a requirement on persons in these and similar situations in which consent is obvious and a lack thereof could be just as easily communicated by the non-initiator, is outlandish. In scenarios in which consent is always forthcoming in the absence of some extraordinary or exigent circumstance, what is the justification for

124 Larcombe case note, above n 112, 712–3.
125 Ibid 711.
126 Ibid 712.

reposing the entire onus solely upon one gender to take affirmative steps to ensure that consent is present? Is it any more onerous to place the burden of communicating a lack of consent on the non-initiating party? Should the parties take a mandatory time out and have a discussion that has the clear capacity to destroy one or both parties' desire to proceed with what would otherwise have been a normal and pleasurable sexual encounter? Because people sometimes prevaricate, should the initiating party be legally bound to tape record such discussion or, better yet, have printed consent forms readily available for both parties to sign in the presence of a justice of the peace? One cannot envisage a more effective means of birth control, save for the obvious exceptions of abstinence, vasectomies, hysterectomies and birth control pills.

For present purposes, however, it is the second of the above-quoted passages from Professor Larcombe's case note that is most significant. It is therein that she strenuously advances the most insidious of the numerous reforms in the law of sexual assault, particularly rape, that were enacted into law as a result of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic); namely, the hybrid subjective/objective *mens rea* as expressed in s 38(1)(c) of the *Act*. Lest there be any doubt that her case note was intended to serve as the foundation for the eventual adoption of this *mens rea*, readers should be aware that Professor Larcombe made an identical recommendation in her submission to the Victorian Department of Justice's (DOJ) Review of Sexual Offences Consultation Paper.[127] Is it purely coincidental that the hybrid subjective/objective *mens rea* advanced in both her case note and submission to the DOJ is now expressed verbatim in subs 38(1)(c) of the

[127] Federation of Community Legal Centres, Victorian Centres Against Sexual Assault and Wendy Larcombe, Submission to the Department of Justice, *Review of Sexual Offences*: *Consultation Paper*, 8.

Crimes Amendment (Sexual Offences and Other Matters) Act 2014 (Vic)? This raises a question as to which persons or organizations are so influential that Parliament opted to adopt their recommendation without changing a single word? That this occurred despite the lessons of *Getachew*, *NT* and the reservations expressed by the Law Institute of Victoria (LIV)[128] is indicative of the degree of influence and power that these persons and organisations wield. In its overall response to Professor Larcombe's submission, the LIV stated:

> [T]he LIV submits that the rights of an accused to trial fairness must also be significantly considered by this review. The focus of this submission will be to draw the Department's attention to the effect of its proposals upon existing rights. The LIV submits that proper balance must be accorded to the defendant's rights as well as those of the complainant. The LIV remains committed to its position in that the presumption of innocence remains paramount in all cases, especially those where consent or fault is an issue, or there may be a risk of seeing an increase in appeals for wrongful convictions in the future.[129]

Also significant is that despite the DOJ's original recommendation that the elements of belief and reasonableness (which now comprise the hybrid *mens rea* of subs 38(1)(c)) should constitute separate and distinct elements of the recently enacted s 38, Professor Larcombe opposed this recommendation on the grounds that doing so would create an unacceptable risk that a jury's finding that the accused acted with a belief in consent would lead to a further finding that there were reasonable grounds for entertaining the same.[130] Again, despite the concerns expressed by the LIV, Professor Larcombe's recommendation has now been codified into law in Victoria.

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128 Law Institute of Victoria, Submission to the Department of Justice, *Review of Sexual Offences: Consultation Paper*, 6.

129 Ibid 4.

130 Ibid 7.

Any neutral and fair-minded observer might well form the view that Professor Larcombe's case note, submission to the DOJ and other writings were also intended to provide the impetus for a substantial increase in the conviction rate where allegations of rape are made. Although the professor asserts that 'while the current legal impunity for rape cannot be condoned, increasing conviction rates is not itself a valid objective of law reform',[131] her assertion is belied by other statements she made in the same article. In particular, Professor Larcombe states:

> (T)he relative difficulty of securing convictions in sexual assault cases, and the impact of low conviction rates on all stages of rape case attrition, has long been recognised in feminist scholarship as an issue requiring redress. However, recent empirical data has renewed concern about conviction rates. Paradoxically, but consistently across a number of jurisdictions, rape conviction rates have further declined in recent years—that is, following extended periods of law reform that might have been expected to increase the number of rape convictions. As Kelly et al. observe:
>
> > Attrition research identifies a paradox internationally: despite widespread reform of statute law and, in many jurisdictions, procedural rules, the 1990s witnessed declining or static conviction rates. The UK has one of the most pronounced patterns. Remarkably little research or legal commentary has, as yet, attempted to explain these common—and unexpected—international similarities… The same pattern of static or falling conviction rates, post-reform, is observable in Australia, as discussed below. And, partly through feminist activism, the low conviction rates have become a pressing political issue—one requiring redress (citations omitted).[132]

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131 W Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27, 29.

132 Ibid 28.

Perhaps the most revealing insight into Professor Larcombe's sexist mindset and its concomitant agenda are a set of recommendations she made in her submission to the DOJ's Consultation Paper, most of which were wisely rejected by Parliament. The recommendations espoused by Professor Larcombe include, *inter alia*, the following:

> While the process of amending the *Crimes Act 1958* (Vic) would go some way to clarifying the law of sexual offences in Victoria, these potential improvements will only be realised if these legislative reforms are implemented in tandem with:
>
> …
>
> • *ongoing education of judges, defence counsel, prosecutors and police about the social context of sexual assault; and associated specialisation*;
>
> • development of clear definitions and examples or explanations, to be included in the *Crimes Act 1958* (Vic) and also used in *training materials for judges, legal officers, police and victim/survivor advocates*…
>
> • greater use of expert witnesses and *specialist decision-makers in sexual offence cases*;
>
> • strong encouragement and support for developing and *providing other forms of assistance to juries in sexual assault trials such as pre-trial education about the social realities of sexual offences, outlines of charges and jury guides, decision flow-charts*;
>
> • empowering judges to disallow questioning of the complainant that is unduly *intrusive, humiliating, intimidating or overbearing;*
>
> • establishing more rigorous processes for auditing and reviewing the handling of sexual offence cases, the decisions regarding charging and the training of personnel;

> • requiring that the views of the complainant are elicited and taken into consideration in decisions to investigate, prosecute, amend or drop charges, change venue or use alternative modes of giving evidence in court;
>
> • requiring that an impact statement is sought from the complainant before the court authorises the admission of sexual history evidence, or medical, counselling or other personal records;
>
> • enabling sexual offence cases to be decided by judge alone if both the accused and the complainant agree;
>
> • ensuring that the complainant's evidence at trial is recorded and, where possible, used in any retrial in preference to requiring the complainant to repeat their evidence and re- submit to cross-examination…
>
> We urge the Victorian Government to undertake further consultation and work to implement the above changes, including funding education and practice change and undertaking further legislative reform where required (emphasis added). [133]

In perusing these recommendations, it is apparent that Parliament was adamant in resisting an obvious attempt to establish a completely different set of substantive and procedural rules that would have applied only in prosecutions for sexual offences to the exclusion, for example, of prosecutions for equally serious crimes such as armed robbery, kidnapping, aggravated burglary and arson. Professor Larcombe apparently subscribes to the credo that judges and legal practitioners, even those who are highly experienced in trying, prosecuting and defending rape and other forms of sexual assault, should undergo some

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133 Federation of Community Legal Centres, Victorian Centres Against Sexual Assault and Wendy Larcombe, Submission to the Department of Justice, *Review of Sexual Offences*: *Consultation Paper*, 5–6.

unspecified type of special training in order to fully comprehend the nature of sexual assault and its full impact on those claiming to be victims of the same. Although this recommendation is devoid of any specificity as to what this training might entail, one can only assume that it will be something along the lines of mandatory courses in women's studies and other forms of curricula that one would normally associate with those professing to be strident feminists.[134] Perhaps the most blatant and audacious attempt to institute a disparate set of rules governing sexual assault prosecutions is the recommendation that sexual assault complainants who give evidence at an earlier trial be exempted from having to do so again in the event of a retrial. This would involve a major amendment to s 66 of the *Evidence Act 2008* (Vic).[135] No rational explanation is provided, nor could it, as to why a whole new hearsay exception should be created solely to accommodate sexual assault complainants, but not complainants of equally traumatic and serious crimes such as those noted above.

In order to place Professor Larcombe's writings in proper perspective, particularly her submission to the DOJ, readers should be aware of the obvious; namely, that there are many avowed feminists and women's rights organisations who zealously endorsed all of the recommendations and assertions advanced in Professor Larcombe's submission to the DOJ

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134 Readers should be aware that in Victoria, there is actually a portfolio over which a Minister for Women presides. If the readers are wondering whether there is a parallel portfolio and a Minister for Men, the answer is a resounding no. The obvious question, therefore, is how did such a glaring and sexist inequality come into existence and why is the majority gender in Victoria and worldwide any more worthy of special protection than the minority gender? See Parliament of Victoria, *Ministers and Members: Current* <http://www.parliament.vic.gov.au/members/ministers>.

135 *Evidence Act 2008* (Vic) s 66, though allowing prior hearsay testimony to be given at a subsequent retrial in some circumstances, places serious restrictions on this practice: at sub-ss 66(2A)(a), (b) and (c).

Consultation Paper. These include the Victorian Centres Against Sexual Assault Forum, Domestic Violence Victoria, Domestic Violence Resource Centre Victoria, In Touch Multicultural Centre Against Family Violence, and the No to Violence Male Family Violence Prevention Association.[136] Also significant in this context is that many avowed feminists have overtly lauded Professsor Larcombe's writings.[137]

A fair reading of Professor Larcombe's case note, writings and the works of others extolling their virtues is cause for much concern. It exposes an unfettered hostility toward the notion that all persons are equal before the law, a willingness to embellish the language of key appellate decisions or an unwitting propensity to misstate well-established legal principles, an attitude towards the male gender that is predicated on overly broad,

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136 Although some of these organisations would not appear to have a strident feminist bent when judged solely by the name of the organisation, the writer is more than content to allow readers to form their own independent judgments as to whether the forgoing groups have been properly characterised as having an agenda that is laden with gender bias.

137 Larcombe's writings have been widely cited by a number of feminist authors; see e.g. Y Russell, 'Thinking Sexual Difference Through the Law of Rape' (2013) 24(3) *Law and Critique* 255; A Powell et al, 'Meanings of 'Sex' and 'Consent': The Persistence of Rape Myths in Victorian Rape Law' (2013) 22(2) *Griffith Law Review* 456 in which the authors note that at 457:

> [o]ver the past four decades, feminist scholars have been instrumental in exposing persistent gendered discourses surrounding so-called "normal sex" "real rape" and "consent" which continue to influence perceptions of rape, victim-complainants and perpetrators, as well as members of the judiciary and jurors in their determinations in rape trials.

A Flynn and N Henry, 'Disputing Consent: The Role of Jury Directions in Victoria' (2012) 24(2) *Current Issues in Criminal Justice* 167: 'we argue that some of the decisions of the appeals courts…send a message that men who rape women can continue to enjoy immunity from conviction in Victoria': at 168; A Powell, 'Seeking Rape Justice: Formal and Informal Response to Sexual Violence through Technosocial Counter-Publics' (2015) *Forthcoming*; K Duncason and E Henderson, 'Narrative, Theatre and the Disruptive Potential of Jury Directions in Rape Trials' (2014) 22(2) *Feminist Legal Studies* 155. For an article that canvases a litany of substantive and procedural rules that are not only limited to prosecutions for sexual assault, but effectively reverse the presumption of innocence, see Arenson, When Some People, above n 31, 213–58.

erroneous and pernicious assumptions, and recommendations that are parochial, unrealistic, ill-advised and, insofar as her support of the current hybrid *mens rea* as set forth in s 38(1)(c) is concerned, contrary to the reasoning advanced in her 2011 case note that was later adopted in *Getachew* and *NT*.

VII CONCLUSION

This article has demonstrated the extent to which a very well organised, vocal and highly influential special interest group has succeeded in abrogating the alternative offence of voluntary manslaughter – and based primarily, if not solely, upon considerations of gender bias. Regrettably, and in order to achieve the related objective of enhancing conviction rates in sexual assault prosecutions, these groups have flouted the very arguments that they themselves advanced in support of the rejection of the *Morgan* principle. As strenuously argued in this piece, the hybrid subjective/objective *mens rea* that has now become law in Victoria is an ill-advised oxymoron that is all but certain to spawn a new generation of unnecessary and costly litigation that is laden with the same flaw that prompted the High Court and Victorian Court of Appeal to overrule *Morgan* in *Getachew* and *NT* respectively. These pernicious reforms are merely the latest volley in a series of reforms that are similarly based upon gender bias as evidenced by the fact that they are applicable only in prosecutions for rape and other forms of sexual assault. Although too complex and lengthy to be examined in great depth in this particular piece, such reforms include, for example: truncated periods in which to commence trials [138] and file indictments [139] in prosecutions involving sexual assaults; the creation of the Victorian offence of infanticide which

138 *Criminal Procedure Act 2009* (Vic) ss 211–212.
139 Ibid ss 159, 163.

allows women, but not men, to commit what otherwise would be murder, save for the fact that the victim is a child of the accused and the killing occurred within twenty-four months of birth and at a time when the 'balance of her mind was disturbed because of…her not having fully recovered from the effect of giving birth...or a disorder consequent on her giving birth…';[140] and the enactment of so-called 'rape shield' laws[141] in Victoria and elsewhere[142] that apply only in prosecutions in which one or more counts of sexual assault are alleged and seriously impinge on the entrenched common law right of an accused to adduce all legally admissible and exculpatory evidence on his or her behalf.[143]

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140 *Crimes Act 1958* (Vic) sub-ss 6(1)(a), 61(1)(b). Incredulously, members of the female gender who are permitted to avail themselves of this offence can receive a maximum sentence of not more than 5 years imprisonment: at sub-s 6(1)(b). Men who experience the same sort of unspecified ill effects or disorders consequent to the birth of their children and kill their children within the same two-year statutory period cannot avail themselves of the infanticide offence and face a charge of murder.

141 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, 5th ed, 2010) 116.

142 In Australia, see *Crimes Act 1958* (Vic) ss 62(1), 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.

143 *Lowery v R* (1974) AC 85, 101–3 ('*Lowery*'); *Re Knowles* (1984) VR 751, 768 ('*Knowles*'); see also Ligertwood and Edmond, above n 122, 86, 88, 102.

The question to be asked, therefore, is what can and should be done about the alarming trend as delineated in this article. In addressing this issue, it is important to point out that both the common law of rape as well as the recently repealed s 38 withstood political pressure to stray from the purely subjective *mens rea* that existed in Victoria for decades prior to the enactment of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic). Moreover, it is also important to note that this *Act* as well as the *Crimes Amendment (Abolition of Defensive Homicide) Act* 2014 (Vic) were ushered into Victoria law in the waning months of the Coalition Government's relatively short tenure that ended in late 2014. Hopefully, the repealed version of s 38 and all its attending progressive features will be revisited and re-enacted by the current Labor Government with the exception, of course, of ss 37, 37AAA, and 37AA which must be amended or replaced with new legislation which is consonant with the *obiter dicta* of *Getachew* and its subsequent adoption by the Victorian Court of Appeal in *NT*.

One would be naïve to believe that the same special interest groups which provided the impetus for most or all of the ill-advised reforms chronicled in this article will somehow abandon their agenda and forebear from attempting to apply the utmost pressure on the current Victorian Government in order to permit the follies of the previous Government to stand. It would likewise constitute the pinnacle of naivety to expect our current Labor Government to eschew the seductive and proverbial path of least resistance and withstand the immense pressure that is certain to ensue.

There is much to be said for the notion that politicians must sometimes compromise and yield to political pressure on matters that they consider to be relatively minor, lest they be voted out of office and thereby

precluded from affecting far reaching and positive changes that they regard as paramount. That consideration aside, there are few who would quibble with the notion that an accused's right to a fair trial, and particularly the cardinal precept of any free society that all persons stand on equal footing before the law, are so fundamental to our adversarial system of criminal justice that they can never be considered as fodder for any type of compromise. Thus, our elected representatives can and must do what is expected of any elective office holder in a society that prides itself on being a representative form of government: reinstate s 38 as well as the provocation and excessive force limbs of the offence of voluntary manslaughter.

There is an old aphorism that 'pacifism in the face of tyranny is no virtue, and extremism in defence of liberty is no vice'.[144] While it would be an overstatement to characterise the reinstatement of both limbs of the offence of voluntary manslaughter and the purely subjective *mens rea* of rape as extremism, it is imperative that the current Labor Government implement the proposals advanced in this article and, in so doing, demonstrate that it is a worthy steward of an accused's right to a fair trial and the hallowed tenet that all people stand on equal footing before the law.

144 Senator Barry M Goldwater, Acceptance Speech, Republican National Convention (1964).

IT'S A SMALL WORLD (AFTER ALL): THE ROLE OF INTERNATIONAL BODIES IN LEGISLATIVE SCRUTINY

Mrs Lorraine Finlay*

ABSTRACT

There is an increasing potential for legislation proposed or passed by State or Federal governments in Australia to be subjected to scrutiny by international quasi-judicial bodies. This paper will consider this trend, particularly in relation to the role played by the various United Nations treaty bodies that monitor Australia's compliance with its international human rights obligations. It will highlight some recent examples of international scrutiny being applied, and consider the possible impact on the development and implementation of legislation in Australia. In particular, the paper will consider the broader implications of this international scrutiny of domestic legislation in relation to national sovereignty, parliamentary sovereignty and Australian federalism.

I INTRODUCTION

The 'growing internationalisation of law' [1] means there is increased potential for international quasi-judicial bodies to scrutinise proposed, or passed, State and Federal legislation in Australia, particularly in relation to Australia's compliance with its international human rights obligations. This paper will examine this trend, considering the various quasi-judicial international bodies and mechanisms that potentially play a role in monitoring Australia's compliance with its international human rights

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1 As described by Henry Burmester, 'National Sovereignty, Independence and the Impact of Treaties and International Standards' (1995) 17(2) *Sydney Law Review* 127, 130.

obligations. It will then consider the broader implications of this international scrutiny in relation to national sovereignty, parliamentary sovereignty and, lastly, Australian federalism.

The first question, in terms of national sovereignty, is whether there is any credence to the 'fear that international law undermines Australian sovereignty or the capacity to govern ourselves as we choose'.[2] In relation to parliamentary sovereignty the question concerns the extent to which an international body should be able to scrutinise democratically-elected legislation (promulgated in either a State or Federal Parliament), and whether this additional international layer of scrutiny will enhance the quality of legislation or undermine parliamentary sovereignty. Finally, international scrutiny gives rise to additional sovereignty issues in federated states (such as Australia) due to sub-national governments being subject to international scrutiny on the basis of international agreements, which national governments enter. The implications of this increased international scrutiny on the Australian federal balance will also be considered.

This paper concludes that the implications for the Australian legislative process of enhanced international scrutiny ultimately depends on the weight given to that scrutiny. If Australian governments deem the conclusions of international scrutiny as definitive, there may be potentially significant effects for parliamentary sovereignty and Australian federalism, and these effects may also undermine our national sovereignty. If, however, international scrutiny is seen as but one factor to be considered by Australian governments and is placed in the

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2 Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *The Sydney Law Review* 423, 424.

appropriate context, then such scrutiny can play a positive role in the Australian legislative process.

II AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

At the time of federation, when drafting the Australian Constitution, the founding fathers gave relatively little thought to the legal mechanisms that would govern Australia's engagement in foreign affairs and international diplomacy. According to Brian R. Opeskin and Donald R. Rothwell, this relative silence should not be surprising given Australia's colonial history:

> Prior to federation in 1901, the U.K. had the power to conduct foreign relations and conclude treaties on behalf of the various Australian colonies, as part of the British Empire. After federation it was thought that the Imperial government should continue to conduct the foreign policy of the Empire. Only gradually did Australia develop an independent international personality.[3]

Today, however, Australia's level of international engagement is entirely different. Australia is a party to a significant – and ever growing – number of international agreements, of which treaties are just one key example.[4] In terms of treaties, a search of the Australian Treaties

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3 Brian R. Opeskin and Donald R. Rothwell, 'The Impact of Treaties on Australian Federalism' (1995) 27(1) *Case Western Reserve Journal of International Law* 1, 4.

4 A useful discussion of Australia's engagement with international instruments other than treaties can be found in Andrew Byrnes, 'Time to put on the 3-D glasses: is there a need to expand JSCOT's mandate to cover "instruments of less than treaty status"?', paper presented at Joint Standing Committee on Treaties, *Twentieth Anniversary Seminar* (Parliament House, Canberra, 18 March 2016). Accessed at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/20th_Anniversary>.

Database ('**ATD**') reveals 2,041 currently in force and binding treaties.[5] In the first half of 2016 alone, the ATD lists 23 new treaties that Australia has signed.

A further feature of the growing number of treaties binding Australia is the expanding range of covered subject areas. Whereas treaties once dealt primarily with matters concerning peace and security between nations, they now cover a whole range of policy areas that were previously seen as the exclusive domain of a domestic government. A simple example is the 'subject matter' options provided under the search function of the ATD, which includes subjects previously not seen as subjects of international character such as 'Criminal Matters' and 'Health and Social Services'. However, in modern times, '[t]he range of topics that might, on one view, be described as being of international concern, is wide and constantly increasing'.[6] It is now difficult to envisage *any* topic that could not potentially be the subject of a future international agreement.

In terms of international human rights, the ATD lists 27 treaties that are currently in force and binding on Australia that can be characterised as primarily concerned with human rights. Of the nine core international human rights instruments listed by the United Nations Office of the High Commission for Human Rights, Australia is signatory to seven of these, namely:

- *International Covenant on Civil and Political Rights ("***ICCPR***");*[7]
- *International Covenant on Economic, Social and Cultural Rights;*[8]

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5 Which can be accessed at: <http://dfat.gov.au/international-relations/treaties/pages/treaties.aspx>.

6 *XYZ v Commonwealth* [2006] HCA 25, [18] (Gleeson CJ).

7 [1980] ATS 23.

- *International Convention on the Elimination of all forms of Racial Discrimination;*[9]
- *Convention on the Elimination of all forms of Discrimination against Women;*[10]
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*[11]
- *Convention on the Rights of the Child;*[12] and
- *Convention on the Rights of Persons with Disabilities.*[13]

Importantly, Australia is also a signatory to a number of Optional Protocols relating to these particular human rights treaties. This paper will focus on these core human rights treaties, although it is obviously acknowledged that there are a range of other international treaties and instruments that are also significant with respect to human rights, which have potential implications in terms of legislative scrutiny.

These core international human rights treaties have also given rise to a growing range of international mechanisms under which a country's compliance with international human rights standards is monitored and measured. Each of the treaties outlined above has a treaty body attached to it,[14] which is a committee of independent experts designed to oversee

8 [1976] ATS 14.
9 [1975] ATS 40
10 [1983] ATS 9.
11 [1989] ATS 21.
12 [1991] ATS 4.
13 [2008] ATS 12.
14 The treaty bodies that relate to the seven human rights treaties listed above are (in order) the Human Rights Committee; Committee on Economic, Social and Cultural Rights; Committee on the Elimination of Racial Discrimination; Committee on the Elimination of Discrimination Against Women; Committee Against Torture; Committee on the Rights of the Child; and Committee on the Rights of Persons with Disabilities.

the implementation of the particular treaty.[15] Treaty bodies have a range of different functions, including monitoring State implementation (primarily through reporting mechanisms, but also including inquiry procedures in some cases), promoting compliance, developing human rights standards (through issuing General Comments regarding treaty interpretation) and, in most cases, considering individual communications alleging breaches of treaty obligations. In the case of Australia, the end result is that the country is obliged to submit regular reports to seven separate United Nations human rights treaty bodies, and has additionally specifically accepted both individual complaints procedures and inquiry procedures in relation to a number of these human rights treaties.[16]

There are also other significant United Nations mechanisms in addition to the above treaty bodies. Most importantly, the United Nations General Assembly has established the United Nations Human Rights Council, which is an inter-governmental body within the United Nations system that is made up of 47 elected Member States. The Human Rights Council has a broad mandate to strengthen the promotion and protection of universal human rights and to address situations of human rights violations. It does this in a variety of ways, including the Universal Periodic Review mechanism and the Complaint Procedure. The

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15 The Committee Against Torture is the smallest of the above treaty bodies, with 10 members. The Committee on the Elimination of Discrimination Against Women is the largest with 23 members. Each of the other five treaty bodies have 18 members.

16 Australia has accepted five individual complaints procedures, specifically those that relate to the *Convention against Torture*, *International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Elimination of All Forms of Racial Discrimination,* and *Convention on the Rights of Persons with Disabilities.* Australia has also accepted inquiry procedures in relation to three treaties, namely the *Convention against Torture, Convention on the Elimination of All Forms of Discrimination against Women* and *Convention on the Rights of Persons with Disabilities.*

Universal Periodic Review mechanism requires all 193 United Nation Member States to engage in what is effectively a 'peer review' of their human rights situation and performance over what was initially a four-year reporting cycle.[17] Australia completed its first cycle of review in 2011 and a second cycle of review in 2015, with this second cycle culminating in the *Report of the Working Group on the Universal Periodic Review: Australia* being released in January 2016.

The complaint procedure adopted by the UN Human Rights Council allows complaints to be submitted by individuals, groups of persons or non-governmental organisations who claim to be the victims of human rights violations, or who have direct and reliable knowledge of the alleged violations. The complaint procedure was established 'to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances'.[18] There are a range of criteria that must be met before a complaint will be considered, including that domestic remedies have been exhausted 'unless it appears that such remedies would be ineffective or unreasonably prolonged'.[19] The complaint procedure is not a judicial one, for a binding determination cannot be imposed on Member States, and the body considering the complaints is not technically a court. Rather, the process is designed to focus on creating dialogue and co-operation with the State concerned in order to

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17 The first Universal Periodic Review cycle was completed between 2008 and 2011, with 48 States being reviewed each year. The second and current cycle (which officially commenced in May 2012) has been extended to four and a half years, with 42 States now being reviewed each year.

18 United Nations Human Rights Council, *Resolution 5/1: Institution-building of the United Nations Human Rights Council* (18 June 2007), [85].

19 United Nations Office of the High Commissioner for Human Rights, *Human Rights Council Complaint Procedure.* Accessed at: <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx>.

address and remedy the alleged violations and, as a result, the procedure is a confidential one.

A final aspect of the Human Rights Council that has particular significance in terms of legislative scrutiny is the system of Special Procedures. This is a system of special rapporteurs, independent experts and working groups who are appointed with particular mandates to report and advise on human rights from either a thematic or country perspective. Their specific tasks are outlined in the individual resolutions creating their mandates; however, they can include activities such as undertaking country visits, communicating with States with regards to individual situations, and producing reports on human rights compliance. There are currently 41 thematic mandates and 14 country mandates.[20] The broad reach of the special procedures mechanisms is apparent from the figures highlighted in the annual report covering activities in 2015. This report indicates that in 2015 alone, 76 country visits were undertaken, 134 reports were submitted to the Human Rights Council, 38 reports were submitted to the General Assembly and 532 communications were sent to 123 State and 13 non-State actors (covering 846 individual cases).[21] Interestingly, it was pointed out in relation to this final statistic that 64% of United Nations Member States received one or more communications from special procedures.[22]

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20 See United Nations Human Rights Council, *Report of the twenty-second annual meeting of special rapporteurs/representatives, independent experts and working groups of the special procedures of the Human Rights Council (Geneva, 8 to 12 June 2015), including updated information on the special procedures* (A/HRC/31/39) (17 February 2016). Accessed at: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

21 Ibid 17.

22 Ibid.

While Australia is not the subject of a specific country mandate, it has been subject to scrutiny in relation to various thematic mandates in recent years. Indeed, Australia is one of 115 United Nations Member States that have extended a standing invitation to always accept requests to visit from all special procedures. The Australian standing invitation was issued on 7 August 2008, with the then-Minister for Foreign Affairs and Trade and Attorney-General issuing a joint media release stating that this standing invitation was designed to demonstrate Australia's 'willingness to engage positively with the international community to implement human rights obligations'.[23] Since the standing invitation was issued Australia has received four special procedures country visits from different special rapporteurs or independent experts, with two other visits currently pending or under active consideration.[24]

The above outline focuses only on human rights scrutiny mechanisms relevant to Australia within the context of the United Nations. It is important to note that there are a whole range of international and regional scrutiny mechanisms beyond this that also impact Australia and create international and regional obligations. Even a limited examination of the United Nations human rights mechanisms outlined above highlights the extensive scrutiny that can potentially be applied to Australian legislation and government policy from the international community.

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23 The Hon Stephen Smith MP (Minister for Foreign Affairs and Trade) and The Hon Robert McClelland MP (Attorney-General), *Invitation to United Nations Human Rights Experts*, 8 August 2008. Accessed at: <http://foreignminister.gov.au/releases/2008/fa-s080808.html>.

24 See <http://www.ohchr.org/EN/HRBodies/SP/Pages/countryvisitsa-e.aspx>.

For example, if we consider the past twelve months (that is, from the July 2015 until June 2016) it is clear that there are considerable activities and obligations undertaken by and in relation to Australia through the above mechanisms. During this most recent twelve month period Australia has submitted periodic State Party reports to both the United Nations Human Rights Committee ('**UNHRC**') and the Committee on Economic, Social and Cultural Rights, and Australia is overdue in submitting reports to the Committee on the Elimination of Discrimination Against Women and the Committee on the Elimination of Racial Discrimination.[25] Under the second cycle of the Universal Periodic Review process Australia submitted its National Report in August 2015, engaged in the interactive dialogue process on 9 November 2015, received the Working Group Report in January 2016 and lodged its response to the 290 recommendations that emerged from this process on 26 February 2016. In terms of Special Procedures, one invited visit by a Special Rapporteur was scheduled to take place in late 2015 but was postponed,[26] a country

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[25] This is not unexpected or unusual. The United Nations High Commissioner for Human Rights noted that,

> [i]f a State ratifies all nine core treaties and two optional protocols with a reporting procedure, it is bound to submit in the time frame of 10 years approximately 20 reports to treaty bodies, i.e. two annually. The reporting includes a national process followed by a meeting between the State party with the respective treaty body in Geneva (or New York) during a constructive dialogue. A State which is party to all the treaties and submits all of its reports on time will participate in an average of two dialogues annually.

See Navanethem Pillay (United Nations High Commissioner for Human Rights), *Strengthening the United Nations human rights treaty body system* (June 2012), 21.

[26] Namely the Special Rapporteur on the human rights of migrant's agreed country visit, dated from 27 September 2015 to 10 October 2015. The Special Rapporteur released a statement on 25 September 2015 indicating that the visit had been postponed 'due to the lack of full cooperation from the Government regarding protection concerns and access to detention centres'. Specifically, this appeared to relate to the failure of the Australian Government to provide requested assurances that the *Border Force Act 2015* would not be applied to

visit request by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment was accepted (although has not yet occurred) and a country visit request was made by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. In relation to individual complaints mechanisms, the Committee on the Rights of Persons with Disabilities has made two adverse findings against Australia,[27] and the UNHRC has made one adverse finding.[28]

III THE EROSION OF NATIONAL SOVEREIGNTY

A common criticism of this increased international scrutiny through the United Nations and related bodies is that it represents a loss of national sovereignty or independence and an attack on Australian democracy.[29]

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sanction detention centre service-providers who disclosed protected information to the Special Rapporteur. There were also concerns about being unable to gain access to off-shore processing centres. See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E>.

27 *Beasley v Australia* (Views adopted by the Committee on the Rights of Persons with Disabilities, CRPD/C/15/11/2013, 1 April 2016); *Lockrey v Australia* (Views adopted by the Committee on the Rights of Persons with Disabilities, CRPD/C/15/D/13/2013, 1 April 2016). Both of these communications related to the right of people with disabilities to serve as jurors, with the individual complainants in each case being summonsed for jury service in New South Wales and denied the ability to serve on a jury due to their hearing disabilities. Australia has six months to provide a written response outlining to the Committee the measures that it has taken to implement the recommendations contained in the communication.

28 *Z v Australia* (Views adopted by the Human Rights Committee, CCPR/C/115/D/2279/2013, 5 November 2015). This communication concerned the removal to Australia of a dual national child by his mother from his father in Poland, with the Committee finding that this removal constituted an arbitrary interference with family life, together with other related violations of the ICCPR.

29 See, for example, Sir Harry Gibbs, 'The Erosion of National Sovereignty' (2001) 49 *National Observer;* Senator Rod Kemp, 'International Tribunals and the Attack on Australian Democracy', (1994) 4 *Upholding the Australian Constitution (Proceedings of the Twenty-Second Conference of the Samuel*

The crux of the sovereignty argument is that, in subscribing to international treaties that prescribe international standards, Australia has lost its political independence due to the imposition of international obligations that bind Australia to decisions of international tribunals. This part of the paper will consider whether international bodies scrutinising national legislation does in fact result in the erosion of Australia's national sovereignty, and whether this should be a matter of concern.

An interesting analogy has previously been drawn here between increased international scrutiny and the past debate in Australia concerning appeals to the Privy Council. In 1973 then-Prime Minister Gough Whitlam made a statement to the Australian Parliament in which he indicated his intention to introduce legislation that would abolish residual appeals from Australian courts to the Privy Council,

> [t]he purpose of the Australian Government is to make the High Court of Australia the final court of appeal for Australia in all matters. That is an entirely proper objective. It is anomalous and archaic for Australian citizens to litigate their differences in another country before Judges appointed by the Government of that other country.[30]

The same argument can be raised in terms of national sovereignty and the implications of allowing individual complaints to be made to United Nations bodies. Of course, there are limits to this analogy, with the decisions of United Nations bodies being quasi-judicial and not being

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Griffith Society), Chapter 5; Alun A Preece, 'The Rise and Fall of National Sovereignty' (2003) 8 *International Trade and Business Law Review* 229.

30 Gough Whitlam, *Parliamentary Statement by Whitlam: The Queen and the Privy Council* (Canberra, 1 May 1973). Contained within Department of Foreign Affairs and Trade, *Documents on Australian Foreign Policy: Australia and the United Kingdom, 1960-1975* (vol. 27, doc. 461). Accessed at: <http://dfat.gov.au/about-us/publications/historical-documents/volume-27/Pages/461-parliamentary-statement-by-whitlam.aspx>.

binding in the way that Privy Council decisions once were. In this sense, international scrutiny of Australian legislation and government decisions is less problematic in terms of retaining national sovereignty, as it is the Australian government that still retains ultimate authority over the legislative process. Accordingly, international human rights committees do not directly affect Australian sovereignty when they exercise their monitoring and oversight roles since, ultimately, '[t]he choice whether to accept the standards or the views of international committees remains essentially one for Australia alone'.[31]

But these international treaties and mechanisms must clearly be intended to have *some* impact on Australian decision-making, otherwise what would be the point of signing up to them in the first place? If they are merely symbolic, and the Australian government doesn't actually intend for them to be binding in practice, then surely Australia is in breach of the core *pacta sunt servanda* obligation under international law.[32] Alternatively, assuming that they *are* entered into in good faith, then they are inevitably intended to have some effect within Australia. The question then becomes whether an appropriate balance between international engagement and national sovereignty has been struck and maintained.

To consider this question, attention must turn to the quality of the international scrutiny applied to Australia. To this end, there are appropriate criticisms that can be made regarding the process of human rights scrutiny at the international level. This is not to say that the

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31 Henry Burmester, 'National Sovereignty, Independence and the Impact of Treaties and International Standards' (1995) 17 *Sydney Law Review* 127, 130.

32 Article 26 of the *Vienna Convention on the Law of Treaties* sets out the obligation of *Pacta Sunt Servanda*, namely: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

strengths of the system should not also be acknowledged. But, if we accept that international scrutiny is now a reality of the Australian policy process, then those international mechanisms themselves should not be above criticism. In many respects the existing mechanisms fall well short of the standards that should be expected, given the automatic weight that many expect Australia to automatically accord to any process that has a United Nations label attached to it.

For example, both the membership of those treaty bodies and the realities of the periodic reporting review process necessarily impact the quality of the reviews that those treaty bodies conduct. In terms of membership, each treaty body consists of a group of independent experts who are generally elected by the relevant State Parties. The reality of the election process means that 'sometimes it is questionable whether in the end you get people of the highest calibre, as there is a fair amount of politicking in ensuring that particular candidates are elected'.[33] Torkel Opsahl, writing specifically about the UNHRC, made a similar observation:[34]

> Inevitably, however, independence is relative and varies with the backgrounds of the members and the practices of their governments. It is not unique to this body that some experts seem to have been in closer contact with the authorities of their own countries than other members, if they have not acted directly under instructions; others have at the same time as their Committee membership been serving their governments in an official capacity. Some have even combined posts by being cabinet ministers, UN ambassadors, advisers to the Foreign Ministry, and so on in a way which could easily prejudice the independence of their contribution to the work of the Committee.

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33 See Hilary Charlesworth, 'The UN treaty-based human rights system: an overview' contained in Sarah Pritchard (ed.), *Indigenous peoples, the United Nations and human rights* (Federation Press, 1998).

34 Torkey Opsahl, 'The Human Rights Committee', contained in Philip Alston (ed) *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, 1992), 376.

While these independent experts are elected in their independent capacities, must themselves be of high moral character, and are not formally representatives of their national government, public confidence in the treaty body system is undermined when members so often come from countries whose human rights records are themselves far from exemplary. This is of particular concern in light of the varying realities of independence outlined by Opsahl above, and is especially troublesome when the rights record is poor in the very area that the treaty body exercises responsibility over. For example, of the 22 current members of the Committee for the Elimination of Discrimination Against Women, six come from countries that were ranked amongst the 25 least 'gender equal' countries in the world according to the 2015 Global Gender Gap Index produced by the World Economic Forum.[35] Similarly, the current membership of the UNHRC includes members from three countries who are ranked as 'Not Free' by the 2015 Freedom in the World Report produced by Freedom House.[36] While an argument can certainly be made that this type of positive engagement may ultimately help to improve human rights outcomes in countries with otherwise poor track records, there is also the risk that it delegitimizes the weight given to scrutiny by these human rights bodies, making it easier for national governments to dismiss or deflect that criticism.

In relation to the periodic reporting process, each treaty body meets for only a short period each year (often just several sessions of a number of weeks duration each time). It is difficult to see how in that short space of time they would be able to even begin to adequately consider the periodic

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35 World Economic Forum, *Global General Gap Index* (2015). Accessed at: <http://reports.weforum.org/global-gender-gap-report-2015/>.

36 Freedom House, Freedom in the World Report (2015). Accessed at: <https://freedomhouse.org/report/freedom-world-2015/table-country-ratings>.

reports that are received – even noting that most State Parties are consistently late in submitting their reports with, for example, only 16% of reports due in 2010 and 2011 being submitted in accordance with their original due dates.[37] This problem was highlighted in the 2012 United Nations High Commissioner for Human Rights report, which noted that in 2012 there were 281 State Parties reports that were pending examination under the UN human rights treaty body system.[38] The average waiting time for the examination of State Parties reports was between two to four years.[39] One consequence of this is that it potentially leads to differential treatment among States, with the United Nations High Commissioner for Human Rights acknowledging that 'a State the complies with its reporting obligations faithfully will be reviewed more frequently by the concerned treaty body compared to a State that adheres to its obligations less faithfully'.[40] Given these problems, some have suggested abandoning the periodic reporting process altogether,[41] while others have concluded that the system is 'riddled with major deficiencies'.[42]

The individual complaints process is also experiencing problems related to this growing backlog. The same report by the United Nations High Commissioner for Human Rights noted that as at 21 March 2012 there were 333 pending cases before the UNHRC, with an average time of

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37 Navanethem Pillay (United Nations High Commissioner for Human Rights), *Strengthening the United Nations human rights treaty body system* (June 2012), 21.

38 Ibid 18.

39 Ibid 19.

40 Ibid 22.

41 See Hilary Charlesworth, 'The UN treaty-based human rights system: an overview' contained in Sarah Pritchard (ed.), *Indigenous peoples, the United Nations and human rights* (Federation Press, 1998), 72.

42 Anne Bayefsky, 'The UN Human Rights Treaties: Facing the Implementation Crisis' (1996) 15 *Windsor Yearbook of Access to Justice* 189, 197.

three and a half years between the registration of a communication and the final decision.[43] This is obviously problematic in terms of an individual complainant who is required to wait for an extended period before their complaint is resolved and – while the analogy is somewhat tangential and clearly not without flaws – it is interesting to note that the UNHRC has previously found that Australia violated the right of an individual complainant to be tried without undue delay and thereby breached Article 14(3) of the ICCPR when there was a delay of two years in handing down an appellate decision.[44] From the perspective of a State Party these lengthy delays also have undesirable consequences, as States are often faced with implementing requested interim measures over extended periods and, more importantly, with uncertainty regarding the consistency of their public policy choices with their international obligations.

These are not isolated or small problems, but are instead systemic and reflect a system that urgently needs significant reform. In the report *Universality at the Crossroads* Professor Anne Bayefsky concludes that

> the gap between universal right and remedy has become inescapable and inexcusable, threatening the integrity of the international human rights legal regime. There are overwhelming numbers of overdue reports, untenable backlogs, minimal individual complaints from vast numbers of potential victims, and widespread refusal of states to provide remedies when violations of individual rights are found.[45]

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43 Ibid 23.

44 See *Rogerson v Australia*, Communication No. 802/1998 (U.N. Doc. CCPR/C/74/D/802/1998) (3 April 2002). To further highlight this point, in that particular case the Human Rights Committee took just under six years from the date of the initial communication to the date of the adoption of the Views of the Committee.

45 Anne Bayefsky, '*The UN Human Rights Treaty System: Universality at the Crossroads'* (Kluwer Law International, 2001).

These systemic problems undermine the credibility of these bodies when it comes to monitoring or scrutinizing the actions of Member States and makes arguing that states such as Australia should be willing to cede any degree of national sovereignty considerably more difficult.

A key criticism regularly raised about this enhanced international scrutiny concerns the democratic deficit, since these international bodies are unaccountable to the Australian people for the views and decisions that they adopt in relation to Australia. The fact that treaty bodies approach problems from the single-minded perspective – which comes from their mandate to protect and promote human rights, focusing particularly in many cases on certain specific human rights – amplifies this lack of accountability. The complexities that face governments who are required to balance competing human rights, conflicting public policy priorities, implementation difficulties and financial realities do not need to concern treaty bodies, whose mandate is more narrowly targeted. Treaty bodies do not need to engage in the types of balancing exercises that governments regularly engage in where competing (and sometimes conflicting) interests must be weighed and considered, and need not answer for their decisions at the ballot box in the same way as Australia political leaders. To the Australian public, these treaty bodies can often be seen as out-of-touch, scrutinizing Australian laws without needing to consider fully the practical consequences.

One illustration of this is the recent communication of the UNHRC in *Blessington and Elliot v Australia*.[46] The two complainants were convicted of the rape and murder of Janine Balding in New South Wales

[46] *Blessington and Elliot v Australia* (UN Human Rights Committee, Communication No. 1968/2010) (CCPR/C/112/D/1968/2010), 17 November 2014.

in 1988 when they were 14 and 16 years old respectively. They were sentenced to life imprisonment, with the sentencing judge recommending that they should never be released. The NSW Court of Criminal Appeal rejected appeals against both conviction and sentence in 1992, and a further appeal to the High Court of Australia was dismissed in 2007.[47] The UNHRC received an individual communication from the two prisoners in 2010.

In 2014 the UNHRC found that the imposition of a life sentence without possibility of parole on a juvenile offender was inherently incompatible with Australia's obligations under the ICCPR, specifically Articles 7, 10(3) and 24. It was held that a life sentence would only be compatible with these rights 'if there is a possibility of review and a prospect of release, notwithstanding the gravity of the crime they committed and circumstances around it'.[48] The UNHRC emphasised that this did not mean that release should necessarily be granted in any individual case, but rather that there needed to be a thorough review procedure in place that assessed release as more than a theoretical possibility.

It is highly unlikely that this decision would have surprised any international human rights lawyer. It appears to be consistent with previous interpretations given to those particular human rights obligations and, when considered in isolation, it does not seem unreasonable from a human rights perspective to conclude that a juvenile offender should not be sentenced to life imprisonment with no prospect of release. However, these types of issues can never be considered in isolation. The context is important, and this particular decision aroused considerable controversy

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47 *Elliot v The Queen; Blessington v The Queen* (2007) 234 CLR 58; [2007] HCA 51.

48 Ibid [7.7].

in Australia. In particular, the family of Janine Balding and victim support groups were vocal in criticising the UNHRC for failing to give appropriate weight to the horrific nature of the crime committed and for failing to acknowledge the human rights of the individual who was killed in a manner that the Sentencing Judge described as 'barbaric'.[49] Indeed, the NSW Attorney-General was quoted as saying that he had no plans to release the two men despite the communication stating that the UNHRC 'has failed to acknowledge the human rights of Janine Balding and those of the community who are entitled to protection' and that 'I don't see any sign that the Human Rights Committee weight up the barbaric end to her life at the hands of these individuals'.[50] The formal response of the Australian Government to the UNHRC was much more diplomatic and circumspect, but ultimately committed only to giving the UNHRC the assurances of its highest consideration'.[51]

Again, while it is important not to overplay the impact of this international scrutiny on Australian national sovereignty, it is also important to recognise that it is not without consequence. It is true – as highlighted in the *Blessington* example – that the views of a treaty body are not binding, but are only recommendations. Indeed, there are a significant number of examples in which the Australian Government has simply rejected the findings of United Nations treaty bodies, asserting

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49 See, for example, Stephen Gibbs, 'Could two of Australia's most notorious murderers go free? Victims' groups horror after UN claimed life sentences for Janine Balding's killers were "cruel, inhuman and degrading"', *The Daily Mail* (22 November 2014).

50 Janet Fife-Yeomans, 'NSW will defy United Nations on killers of Janine Balding', *The Daily Telegraph*, 25 November 2014.

51 See *Response of Australia to the Views of the Human Rights Committee in Communication No. 1968/2010 (Blessington and Elliot v Australia).* Accessed at: < https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/BlessingtonAndElliotVAustralia-AustralianGovernmentResponse.pdf>.

that the views of these bodies are not binding and 'it is up to the countries to decide whether they agree with those views and how to respond to them'.[52] In this way, national sovereignty is technically maintained, as it is ultimately up to the Australian Government to determine if and how it will respond to any adverse finding.

However, these findings do carry weight by virtue of the fact that they come from the United Nations, and there are significant political factors that make it difficult for governments to simply ignore such findings. Sir Harry Gibbs noted this point, observing that while the findings of United Nations Committees were non-binding and that the Committees had no power to actually enforce their decisions within Australia:

> it is equally true that individuals living in Australia have a right to apply to these international tribunals to seek redress against Australian laws and governmental actions. The decisions of these tribunals are seen to have so strong a moral force that governments face obloquy at home and abroad if they fail to give effect to them. Realistically these Conventions have diminished Australian sovereignty.[53]

It is important not to overstate this point. Clearly, Australia is still a sovereign state and retains the ultimate authority to decide whether to act on decisions or recommendations made at the international level by United Nations bodies. However, it is equally clear that those international decisions or recommendations are designed to have some impact, and there will be some form of consequence (even if only symbolic or reputational) if they are dismissed or ignored. The growing

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52 J MacDonald, 'Australia Rejects Ruling on Asylum Seekers', *The Age* (Melbourne) 18 December 1997 at A10, quoted in Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *The Sydney Law Review* 423, 431.

53 Sir Harry Gibbs, "The Erosion of National Sovereignty" (2001) 49 *National Observer*.

role of international bodies in legislative scrutiny necessarily must place *some* level of constraint on Australian decision-makers.

A clear example of this can be seen in the *Toonen* case. In this example, Nicholas Toonen lodged a complaint with the UNHRC claiming that sections 122(a) and (c) and 123 of the *Tasmanian Criminal Code* breached his human rights under the ICCPR, in particular the right to privacy under Article 17 and the right to freedom from discrimination on the ground of sex under Article 26. The relevant laws made sexual contact between consenting adult men in private a criminal offence in Tasmania. The UNHRC ultimately found that there had been a violation of Toonen's human rights, with the appropriate remedy being the repeal of the offending laws. The Tasmanian Parliament refused to repeal the relevant provisions. As a result, the Federal Government intervened and passed the *Human Rights (Sexual Conduct) Act 1994* (Cth), which provided that

> [s]exual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.[54]

This Commonwealth law had the obvious effect of overriding the Tasmanian criminal law that had been the subject of Toonen's original complaint to the Human Rights Committee. The *Toonen* case will be referred to again below when the impact of international scrutiny on the Australian federal balance is considered. For the moment, however, it stands as a good example of the impact that the non-binding decisions of the UNHRC can have. Nicholas Poynder observed that, while the views of the UNHRC are not enforceable, 'they are widely published and carry

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54 *Human Rights (Sexual Conduct) Act 1994* (Cth), s 4(1).

significant moral and persuasive authority', and there is 'no doubt' that the UNHRC finding in the *Toonen* case 'led directly to the enactment by the Australian Parliament of legislation rendering those laws ineffective'.[55]

Indeed, Christian Porter, the former Western Australian Attorney-General, has observed that 'particularly in relation to international human rights bodies, to assume that, because their decisions are non-binding, that they are therefore of no consequence, is a superficial and incomplete analysis'.[56] Instead, he considered that these decisions – although non-binding – 'are likely to have a significant and practical effect on the capacity of domestic Australian legislatures and executives to effect outcomes that they consider represent those desired by the citizens they represent'.[57] Where Australia ultimately retains the power to adopt or reject the views of these international bodies it cannot be said that national sovereignty has been entirely abrogated. However, for reasons discussed above, it can certainly be seen that this enhanced international scrutiny does constrain Australian decision-making to some degree. Given this, the shortcomings of such scrutiny and particularly its inherent democratic deficit are factors that should not be overlooked or beyond comment.

IV AN INTERNATIONAL DIMINUTION OF PARLIAMENTARY SOVEREIGNTY?

55 Nicholas Poynder, *When All Else Fails: The Practicalities of Seeking Protection of Human Rights under International Treaties* (Speech given at the Castan Centre for Human Rights Law, Melbourne, 28 April 2003).

56 Christian Porter, 'Parliamentary Democracy, Criminal Law and Human Rights Bodies' (2010) 22 *Upholding the Australian Constitution (Proceedings of the Twenty-Second Conference of the Samuel Griffith Society)* 321, 352-353.

57 Ibid 353.

While the overarching question of national sovereignty is an important one, it is also important to consider the internal processes by which Australia engages in treaty-making. As discussed above, the international treaty system is based primarily on the concept of consent. That is, nation states consent to treaty obligations and, as such, it can be argued that they retain sovereignty despite subjecting themselves to enhanced international scrutiny as they ultimately retain the ability to withdraw that consent if they so desire. The international scrutiny also carries additional weight, for it is a scrutiny that the nation state itself invited and agreed. If, however, there is a disconnect between our own internal decision-making processes (or constitutional framework) and our external treaty-making processes, this may run the risk of de-legitimizing that international scrutiny as those being scrutinized can claim they had no role in consenting to such scrutiny in the first place. It is in this context that a discussion about international scrutiny and its impact on both Australian parliamentary sovereignty and the federal balance is significant, and it is to these two issues that the paper now turns.

The process of treaty signing and ratification in Australia is one which is entirely dominated by the Commonwealth Government, and specifically the Executive. The power to enter into treaties falls exclusively to the Executive under s 61 of the *Australian Constitution*, with Justice Stephen acknowledging that 'the federal executive, through the Crown's representative, possesses exclusive and unfettered treaty-making power'.[58] The treaty-making power of the Executive 'has political ramifications, but it is subject to no legislative or constitutional limits'.[59]

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58 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 215 (Stephen J).

59 Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, 'Deep Anxieties: Australia and the International Legal Order'(2003) 25 *The Sydney Law Review* 423, 431.

Parliamentary approval is neither a constitutional or legal pre-requisite to the creation of an international obligation however, given Australia's dualist approach to international law,[60] parliamentary approval is required for the passage of domestic legislation to implement the provisions of an international treaty within Australia.

The fundamental doctrine of parliamentary sovereignty is, put simply, the concept that Parliament is the supreme lawmaker, with the power to create, amend or repeal any law. This is a principle that has been endorsed without reservation by the greatest authorities on our constitutional, legal and cultural history.[61] Dicey described the doctrine as follows:

> [The] Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[62]

In the Australian context, it has been suggested that the concept should be strictly described as one of parliamentary supremacy, given that the powers of Australian Parliaments are constitutionally limited.[63] Justice Dawson recognised parliamentary supremacy as 'a doctrine as deeply rooted as any in the common law. It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should

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60 See, for example, Joanna Harrington, 'Redressing the democratic deficit in treaty law making: (re-) establishing a role for Parliament' (2005) *McGill Law Journal* 465.

61 Lord Bingham, 'The Rule of Law and the Sovereignty of Parliament?' (2008) *King's Law Journal* 223, 228.

62 AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed, 1959), 39-40l.

63 Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32(1) *Federal Law Review* 57.

give unquestioned effect to it accordingly'.[64] For the purposes of this article, the term parliamentary sovereignty will be used to describe the general concept of parliamentary legislative supremacy relative to the zexecutive and judicial branches of government.

The importance of the concept of parliamentary sovereignty is rooted in democratic theory and fundamental to the principle of representative government, on which Australia's political system is based. The concept ensures that Australia's elected representatives are ultimately accountable to the Australian people. Professor Jeffrey Goldsworthy eloquently explained the consequences of repudiating or diminishing parliamentary sovereignty:

> What is at stake is the location of ultimate decision-making authority – the right to the 'final word' – in a legal system. If the judges were to repudiate the doctrine of parliamentary sovereignty, by refusing to allow Parliament to infringe unwritten rights, they would be claiming that ultimate authority for themselves. In settling disagreements about what fundamental rights people have, and whether legislation is consistent with them, the judges' word rather than Parliament's would be final. Since virtually all significant moral and political controversies in contemporary Western societies involve disagreements about rights, this would amount to a massive transfer of political power from parliaments to judges. Moreover, it would be a transfer of power initiated by the judges, to protect rights chosen by them, rather than one brought about democratically by parliamentary enactment or popular referendum. It is no wonder that the elected branches of government regard that prospect with apprehension.[65]

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64 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, [1996] HCA 24, [17] (Dawson J).

65 Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Oxford University Press, 1999), 3.

The words 'international human rights bodies' could easily be substituted for 'judges' in the above quotation to demonstrate the potential problem that this paper is examining. There is a real risk here of 'a diminution of the sovereignty of Australia's domestic democratic institutions through the procedures enlivened by the continuing signature of international documents'.[66] This diminution of parliamentary sovereignty, resulting from the Executive's dominance in the treaty process and the growing scrutiny exercised by international bodies, should be of significant concern if it leads to reduced democratic accountability and responsiveness by Australian governments and a transfer of responsibility away from local parliaments. For this diminution, ultimately, has potentially detrimental consequences for the practical operation of representative government in Australia.

There have been various attempts in Australia over the years to provide for greater parliamentary involvement in the treaty process. For example, in 1961 the Menzies Government instituted a practice of tabling all treaties for a period of time in both Houses of the Commonwealth Parliament prior to ratification. This reflected the *Ponsonby Rule* in Britain, which required the tabling of a treaty in both Houses of Parliament at least 21 days prior to ratification.[67] The advantage of this practice was that it helped to avoid the potential international embarrassment that would arise if Australia consented to international treaty obligations, signing and ratifying a particular treaty, only for the Australian Parliament then to refuse to pass enacting legislation to

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66 Christian Porter, 'Parliamentary Democracy, Criminal Law and Human Rights Bodies' (2010) 22 *Upholding the Australian Constitution (Proceedings of the Twenty-Second Conference of the Samuel Griffith Society)* 321, 373.

67 Rt. Hon. Sir Ninian Stephen, *The Expansion of International Law – Sovereignty and External Affairs* (Sir Earle Page Memorial Trust Lecture, 15 September 1994).

implement those treaty obligations at the domestic level. Allowing a period of parliamentary scrutiny prior to ratification was designed to ensure that there was an opportunity for any concerns surrounding Australia's entry into the treaty to be raised. In fact, the dualist approach to international law was initially developed partly as a way to limit prerogative power and 'mitigate the absence of parliamentary consultation'.[68] However, as Sir Ninian Stephen observed:

> its mitigating effect is reduced by the fact that, once the executive ratifies a treaty, so that the state becomes a party to it, the legislature will have little option but to enact any necessary enabling legislation; not to do so would be tantamount to repudiation, to a failure to honour the country's obligations.[69]

By the time of the Hawke/Keating Government this practice had fallen into disuse, and it had instead become commonplace for groups of treaties to be tabled in Parliament every six months, which left little room for parliamentary scrutiny as the treaties were generally tabled after they had been signed.[70]

The Howard Government revived this practice as part of a series of reforms in 1996, following the landmark Senate Legal and Constitutional References Committee review of the treaty-making power,[71] and which were designed to enhance meaningful parliamentary scrutiny of treaties (as well as the involvement of State Governments in the treaty process, which will be discussed further below). The following were included in the adopted reforms: the re-institution of the practice that all proposed

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68 For a discussion on the origins of the doctrine of dualism see Ibid.

69 Ibid.

70 Joanna Harrington, "Redressing the democratic deficit in treaty law making: (re-) establishing a role for Parliament (2005) *McGill Law Journal* 465.

71 Commonwealth of Australia, Senate Legal and constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (November 1995).

treaty actions be tabled in Parliament at least 15 joint sitting days before any binding action is taken; the creation of the Joint Standing Committee on Treaties ('**JSCOT**') (appointed to review and report on all proposed treaty actions before any binding obligations are entered into); the development of a National Interest Analysis to accompany each proposed treaty that is tabled; and the creation of an Australian Treaties Database ('**ATD**') to make the treaty process more publicly accessible.[72] It has been noted, however, that while the Senate inquiry recommended that these reform measures be implemented legislatively they weren't entrenched in this way but implemented through policy and administrative means.[73]

These reforms have certainly enhanced to some degree the role of the Commonwealth Parliament by providing it with a greater ability to scrutinize international treaties prior to ratification. However, the involvement of Parliament is ultimately consultative only, and the reforms do not impose any legal constraints on the executive in its exercise of its treaty-making powers. Further, the Commonwealth Parliament is only involved after the treaty has been signed, with the failure to provide for any parliamentary involvement or input during the negotiation phase limiting the ability of Parliament to contribute to the treaty making process in a meaningful and substantive way. For example, while JSCOT has been described as 'the most influential of all

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72 For an outline of these reforms see, for example, Tasmanian Government, Department of Premier and Cabinet, *Treaties: Policy & Procedures Manual* (June 2014), 9; Joanna Harrington, 'Redressing the democratic deficit in treaty law making: (re-) establishing a role for Parliament' (2005) *McGill Law Journal* 465.

73 Tasmanian Government, Department of Premier and Cabinet, *Treaties: Policy & Procedures Manual* (June 2014), 9.

of the 1996 reforms'[74] it is doubtful that it has had a substantial independent impact on Australia's engagement in the treaty-making process. Indeed, Ann Capling and Kim Richard Nossal described the main role of JSCOT as being 'a tool of political management, a means by which the executive can channel protest, deflect opposition, and in essence legitimize its own policy preferences'.[75]

This 'side-lining' of Parliament can also be seen not only in the treaty-making process, but also in the way that Australia responds to legislative scrutiny under existing treaty mechanisms. The recent Universal Periodic Review process provides a good example of this, with the timeline of Australia's second cycle review noted above. The Working Group Report that Australia received in January 2016 contained 290 individual recommendations that emerged from the interactive dialogue that took place in Geneva in November 2015. There were a number of parliamentarians amongst the Australian delegation that participated in the interactive dialogue session in 2015, which is a welcome development in terms of strengthening the role of the parliamentary arm of government in this sphere. However, there were conservatively over 50 recommendations that expressly called for legislative action, which is ultimately the domain of the Parliament. Yet, aside from noting that 'there was limited time for full consideration across all levels of government',[76] there is no indication in the Australian response that there

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74 Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *The Sydney Law Review* 423, 441.

75 Ann Capling & Kim Richard Nossal, 'Square Pegs and Round Holes: Australia's Multilateral Economic Diplomacy and the Joint Standing Committee on Treaties', paper presented at the annual meeting of the International Studies Association (Chicago, 20-24 February 2001).

76 UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia, Addendum: Views on conclusions and/or*

had been any formal engagement with either state or federal parliaments as part of the process of preparing the Australian response. Indeed, the only reference to the Universal Periodic Review in the Commonwealth Parliament during the period when the Australian Government would have been finalising its formal response was on two occasions in early February when two parliamentary committees asked some basic questions about the review process during Estimates Hearings. Both State and Federal Parliaments lack a meaningful role in this process, despite their cooperation and assistance being essential if Australia is to act on many of the recommendations.

In many respects this is unsurprising. It reflects the reality of both Australia's international relations being traditionally considered the domain of the Executive, and an Executive that increasingly dominates Parliament. However, given that the international scrutiny of Australian legislation continues to expand, the failure of the Executive to engage in a meaningful way with Parliament is a problem that is likely to become acutely apparent in the future.

The lack of a legal or constitutional role for Parliament in the treaty-making process, and the corresponding lack of any legal or constitutional restraints on the Executive role, undermines parliamentary sovereignty and gives rise to a possible democratic deficit.[77] This possible democratic deficit is particularly concerning when the ratification of a treaty has the result of transferring power from the national government

recommendations, voluntary commitments and replied present by the State under review, [2].

77 See here Rt. Hon. Sir Ninian Stephen, *The Expansion of International Law – Sovereignty and External Affairs* (Sir Earle Page Memorial Trust Lecture, 15 September 1994).

to an international body.[78] This is problematic not only from the perspective of undermining parliamentary sovereignty, but also in terms of its longer-term impact on Australia's international engagement. If the Australian people feel that the treaty-making process lacks democratic legitimacy, then they are also less likely to accept the international scrutiny that results from those treaties as legitimate.

V INTERNATIONAL SCRUTINY AND THE FEDERAL BALANCE

A specific issue that arises in a federal system of government, such as Australia, is international bodies scrutinising the legislation of regional parliaments, who themselves did not consent to the international treaty under which the relevant international obligations were created. In the Australian context, the Commonwealth Executive enters into international treaties, yet legislation from State Parliaments is often subject to human rights scrutiny at an international level. Accordingly, this section of the paper will consider the impact of international scrutiny on the Australian federal balance.

At the international level, the national Australian government enters into treaties and is responsible under international law for meeting those treaty obligations. However, the effect of international human rights treaties 'extend to all parts of federal States without any limitations or exceptions'.[79] Indeed, Article 27 of the *Vienna Convention on the law of treaties* expressly provides that a State 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. That is, a national government cannot avoid international responsibility by

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78 Ibid.

79 See, for example, Article 50 of the *International Covenant on Civil and Political Rights* and Article 28 of the *International Covenant on Economic, Social and Cultural Rights.*

claiming that a treaty breach is actually due to the actions of a sub-national government. To this end, the previous policy of the Australian Government of seeking the inclusion of federal clauses in international treaties was of doubtful use.[80]

This creates an interesting dynamic wherein the Australian Government is responsible at the international level for treaty obligations that may, in practice, deal with areas of activity that are the exclusive responsibility of State Governments. Indeed, as Katharine Gelber observed, in Australia 'the onus of responsibility for implementing treaty obligations on many issues including human rights rests with the States'.[81] This is a common difficulty in a federated State, as Justice Stephen noted: '[d]ivided legislative competence is a feature of federal government that has, from the inception of modern federal [S]tates, been a well recognized difficulty affecting the conduct of their external affairs'.[82]

Notably, for State Governments, this opens up the possibility of the Commonwealth Government creating binding obligations at the international level without necessarily requiring any State Government's input or consent. This has important constitutional consequences in Australia, for under the external affairs power, [83] when the Commonwealth Government ratifies an international treaty, the Commonwealth Government is granted the constitutional power to

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80 For a discussion of federal clauses see Henry Burmester, 'Federal Clauses: An Australian Perspective' (1985) 34 *International and Comparative Law Quarterly* 522;

81 Katharine Gelber, 'Treaties and Intergovernmental Relations in Australia: Political Implications of the Toonen Case' (1999) 45(3) *Australian Journal of Politics and History* 330, 336.

82 *New South Wales v Commonwealth ('Seas and Submerged Lands Case')* (1975) 135 CLR 337, 445 (Stephen J).

83 Section 51(xxix) of the *Australian Constitution* provides that '[t]he Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to … external affairs'.

introduce domestic legislation to implement the treaty, which may encroach on the State's legislative purview. Further, under s 109 the Commonwealth legislation will prevail over any inconsistent State law, which will be invalid to the extent of the inconsistency. In this way, the external affairs power under the Australian Constitution and the modern proliferation of international treaties combine to expand greatly the legislative power and purview of the Commonwealth Government.

But the founding fathers never intended the external affairs power to be such an expansive power. Sir Ninian Stephen surmised the intended scope of the power as being 'no wider than to permit the implementation within Australia of imperial treaties affecting it'.[84] As early as 1936 Justices Evatt and McTiernan noted that this could potentially lead to a considerable expansion of Commonwealth jurisdiction when they observed that

> [t]he Commonwealth has power both to enter into international agreements and to pass legislation to secure the carrying out of such agreements according to their tenor, even though the subject matter of the agreement is not otherwise within Commonwealth legislative jurisdiction.[85]

Indeed, the Victorian Federal-State Relations Committee concluded exactly the same, acknowledging that under Australia's constitutional arrangements '[s]imply by entering into a treaty, the Commonwealth Government can give the Commonwealth Parliament what is in effect a new head of legislative power'.[86] The effect of this expansive interpretation of the external affairs power has been described as

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84 Rt. Hon. Sir Ninian Stephen, *The Expansion of International Law – Sovereignty and External Affairs* (Sir Earle Page Memorial Trust Lecture, 15 September 1994).

85 *R v Burgess* (1936) 55 CLR 608; [1936] HCA 52, per Evatt and McTiernan JJ.

86 Victorian Parliament, Federal-State Relations Committee, *Report on International Treaty Making and the Role of States* (1997), 13.

'revolutionary'.[87] The concern is that this will be at the expense of the State Government's current legislative powers, which will further tilt the Australian federal balance in favour of the Commonwealth Government.

This potentially also opens the door for Commonwealth intervention whenever there is adverse scrutiny by any of the United Nations human rights mechanisms in relation to State Government legislation. A finding that State Government legislation is contrary to an existing Australian treaty obligation would seemingly provide the Commonwealth with the constitutional power to introduce legislation to address that breach to ensure that Australia complies with its international obligations in the future. While there may well be political limits to the extent that the Commonwealth Government would wish to intervene in this way, the constitutional power must now be surely beyond doubt.

A current example from Western Australia highlights the potential reach of this mechanism. At the time of writing, the WA Parliament is considering the *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015*. This Bill is primarily intended to deal with the common tactic of protestors locking themselves onto objects, creating new criminal offences of 'Physical prevention of lawful activity' and 'Preparation for physical prevention or trespass'.[88] These are criminal offences, with a maximum penalty of imprisonment for one year and a $12,000 fine.[89] While the proposed legislation has been controversial, the most interesting intervention, perhaps, has been the statement issued by three United Nations Special Rapporteurs who urged the WA Parliament

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87 Rt. Hon. Sir Ninian Stephen, *The Expansion of International Law – Sovereignty and External Affairs* (Sir Earle Page Memorial Trust Lecture, 15 September 1994).

88 Which will be enacted as s 68AA and 68AB of the *Criminal Code (WA)*.

89 Imprisonment and the fine increases to two years and $24,000 if the offence is committed in circumstances of aggravation.

not to adopt the proposed laws.[90] This statement, publicly released the day before the legislation was due to be debated in the WA Legislative Council, followed a similar statement that had been released the year before that addressed anti-protest legislation being considered in the Tasmanian Parliament.[91]

The statement was jointly issued from Geneva on 15 February 2016 by the Special Rapporteur on freedom of opinion and expression, Special Rapporteur on the rights to freedom of peaceful assembly and of association, and Special Rapporteur on the situation of human rights defenders. While the Special Rapporteurs ultimately urged the WA Parliament not to adopt the legislation and highlighted a number of perceived problems with the proposed laws, the key statement that was made was that '[i]f the Bill passes, it would go against Australia's international obligations under international human rights law'. Whether these views ultimately influenced the parliamentary debate in Western Australia regarding this Bill is yet to be determined. However, if indeed the Special Rapporteurs are correct in their assessment that the laws go against Australia's international obligations, this would seemingly open up the potential for the Commonwealth Government to legislate to override the laws in an effort to ensure compliance with our treaty obligations. One of the significantly detrimental consequences of enhanced international scrutiny based on treaty obligations is its impact

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90 United Nations Office of the High Commissioner for Human Rights, *UN human rights experts urge Western Australia's Parliament not to pass proposed anti-protest law*, 15 February 2016. Accessed at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17047&LangID=E>

91 United Nations Office of the High Commissioner for Human Rights, *UN experts urge Tasmania to drop its anti-protest bill*, 9 September 2014. Accessed at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E>.

on federalism; in that, it greatly expands the potential constitutional reach of the Commonwealth Government, undermining the sovereignty of State Governments.

The *Toonen* case (outlined above) illustrates this point, both in terms of the ultimate outcome of that case and the process by which that outcome was reached. Brian R. Opeskin and Donald R. Rothwell observed that the Commonwealth Government had not, at that point in time, developed adequate procedures to deal with communications lodged with the UNHRC, particularly given the necessary interplay between the federal and state levels of government.[92] In this case it was the Commonwealth Government that was the State Party to the complaint, despite it being the Tasmanian legislation that was being complained about. There was significant disagreement between the two levels of government in terms of how the complaint should be addressed. While the Tasmanian Government requested that the admissibility of the claim be contested, the Commonwealth Government formally conceded this point. Similarly, the Commonwealth Government conceded that Toonen 'ha[d] been a victim of arbitrary interference with his privacy, and that the legislative provisions challenged by him cannot be justified on public health or moral grounds'.[93] It did however 'incorporate into its submissions the observations of the government of Tasmania, which denies that the author has been the victim of a violation of the Covenant'.[94]

This highlights the potential tension in a federal system between a national government that is ultimately responsible at the international

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92 See Brian R. Opeskin and Donald R. Rothwell, 'The Impact of Treaties on Australian Federalism' (1995) 27(1) *Case Western Reserve Journal of International Law* 1, 51.

93 *Toonen v Australia,* Communication No. 488/1991 (Human Rights Committee, U.N. Doc CCPR/C/50/D/488/1992) (1994), [6.1].

94 Ibid [6.1].

level for compliance with international human rights obligations, and a sub-national government whose laws are the subject of a complaint but who does not have any recognised international personality before the United Nations treaty bodies.[95] It is simply an international reality that State Governments from Australia are not entitled to speak directly to United Nations treaty bodies in response to complaints alleging human rights violations as a result of State legislation. Instead, they must rely on the Commonwealth Government to speak on their behalf, inevitably 'providing scope for Commonwealth flavouring of the tone of Australian government response'.[96]

Further, the ultimate legislative outcome in the *Toonen* example highlights a further movement of the federal balance towards the Commonwealth Government and away from the States. When Tasmania refused to repeal the relevant provisions of the *Tasmanian Criminal Code* the Commonwealth Government intervened and passed Commonwealth laws to override the Tasmanian provisions. Putting to one side any views regarding the substantive merits of the particular laws, this is a clear example of the hypothetical situation described above in relation to the proposed WA anti-protest laws. That is, the fact that the UNHRC found that the Tasmanian laws breached Australia's international obligations

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95 Justice Murphy reinforced this point in the *Seas and Submerged Lands Case* when he stated that

> [t]he States have not international personality, no capacity to negotiate or enter into treaties, no power to exchange or send representatives to other international persons and no right to deal with other countries, through agents or otherwise. Their claims to international personality or to sovereignty are groundless.

See *New South Wales v Commonwealth ('Seas and Submerged Lands Case')* (1975) 135 CLR 337, 506 (Murphy J).

96 Katharine Gelber, 'Treaties and Intergovernmental Relations in Australia: Political Implications of the Toonen Case' (1999) 45(3) *Australian Journal of Politics and History* 330, 337.

under the *ICCPR* gave the Commonwealth Government the constitutional power to legislate to override the laws to ensure compliance with our treaty obligations. This is despite criminal law traditionally being an area of State Government responsibility. In this way, enhanced international scrutiny can be seen as a potentially powerful tool in enhancing the legislative powers of the Commonwealth Government and weakening the Australian federal balance.

There have been attempts to reform the treaty process to provide for greater State input and involvement before treaties are entered. For example, the Treaties Council, established under the Council of Australian Governments in 1996, comprises the Prime Minister, State Premiers and Territory Chief Ministers. The Council was intended to meet at least once a year, empowered with an advisory role in relation to treaties and other international instruments of particular sensitivity or importance to the States and Territories. The Commonwealth-State-Territories Standing Committee on Treaties provides another advisory mechanism for intergovernmental consultation, being initially established in 1991 and consisting of senior Commonwealth, State and Territory officers who meet twice a year. The adoption of a strengthened *Principles and Procedures for Commonwealth-State Consultation on Treaties* in 1996 was another positive attempt to increase cooperation and to provide the States with a greater role in the treaty process. However, while these efforts to enhance cooperation and consultation are positive, they do not go nearly far enough in terms of entrenching meaningful consultation. For example, the Treaty Council can only be convened with the consent of the Commonwealth and has only been convened once

since its creation.[97] Similarly, the *Principles and Procedures for Commonwealth-State Consultation on Treaties* has been criticised as establishing a consultative mechanism that is merely discretionary and symbolic.[98]

Ultimately, speaking with one voice at the international level is desirable, and it is necessary for the Commonwealth Government to retain the ultimate responsibility for entering into treaties on behalf of Australia. However, it is also desirable for the States to be given a more substantive role in this process, both to strengthen the federal balance but also, at a practical level, to ensure compliance with the international obligations that Australia does ultimately sign up to given that much of this responsibility does rest with the States. There have been various suggestions for reform, including the establishment of an Inter-Parliamentary Working Group on Treaties consisting of parliamentary representatives from all jurisdictions, which would have the benefit of enhancing both parliamentary and State Government involvement in the treaty process,[99] introducing a practice of tabling treaties and relevant information in State Parliaments,[100] and establishing State Parliamentary Committees to advise State Parliaments on matters concerning treaties.[101]

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97 Brian Galligan, 'The Centralizing and Decentralizing Effects of Globalization in Australian Federalism: Toward a New Balance', in Harvey Lazard, Hamish Telford and Ronald L Watts (eds), *The Impact of Global and Regional Integration on Federal Systems: A Comparative Analysis* (McGill-Queen's University Press, 2003), 113.

98 See Augusto Zimmermann and Lorraine Finlay, 'Reforming Federalism: A Proposal for Strengthening the Australian Federation' (2011) 37 *Monash University Law Review* 190, 219.

99 See Joint Standing Committee on Treaties, *A Seminar on the Role of Parliaments in Treaty Making* (JSCOT Report 24) (August 1999), [3.31] – [3.32]; Victorian Parliament, Federal-State Relations Committee, *International Treaty Making and the Role of the States* (October 1997), [0.35].

100 Victorian Parliament, Federal-State Relations Committee, *International Treaty Making and the Role of the States* (October 1997), [Recommendations 2 & 4].

101 Ibid, [Recommendation 3].

It is well overdue for serious thought to be given to reform in this area as presently it remains the case 'that a continuing difficulty in the conduct of Australia's foreign affairs is the need to balance the national interest in pursuing a robust foreign policy with the political exigencies of a federal system of government'.[102]

VI CONCLUSION

This paper is not trying to suggest that there is no role for international bodies or international scrutiny. Indeed, as Henry Burmester recognised some twenty years ago, 'an acknowledgment that Australia is increasingly subject to international constraints in terms of its internal governance seems necessary'.[103] It is, however, arguing that ultimately Australia's engagement with the international community must be premised on a strong recognition of the paramountcy of the national interest and national sovereignty. To ensure that this remains the case, it is important to understand what international scrutiny is being applied, and what its consequences are. As this paper has sought to highlight, there is an increasing potential for Australian legislation to be subjected to international scrutiny, particularly in relation to compliance with international human rights obligations. This heightened scrutiny has potentially important implications in terms of national sovereignty, parliamentary sovereignty and Australian federalism.

The ultimate question here is one of balance. While international engagement is simply a reality for the modern-day Australian nation, it is important to balance this with maintaining a strong sense of national

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102 Brian R. Opeskin and Donald R. Rothwell, 'The Impact of Treaties on Australian Federalism' (1995) 27(1) *Case Western Reserve Journal of International Law* 1, 59.

103 Henry Burmester, 'National Sovereignty, Independence and the Impact of Treaties and International Standards' (1995) 17 *Sydney Law Review* 127, 149.

sovereignty. If enhanced international scrutiny simply results in an additional international voice playing some role in the broader public debate over policy issues in Australia, and this international voice is placed in its appropriate context, then this ultimately has limited foundational impact on the Australian system of governance. If, however, the international scrutiny is viewed as being itself beyond scrutiny and as placing a significant restraint on the legislative capacity of Australian governments, then this represents a considerable shift away from the democratic foundations that have served this country so well throughout its history.

PREVENTION INITIATIVES WITHIN THE CRIMINAL JUSTICE SYSTEM OF WESTERN AUSTRALIA AND THE IMPORTANCE OF THE RECIPROCAL RELATIONSHIP BETWEEN THE INDIVIDUAL AND THEIR COMMUNITY

Maire Ni Mahuna*

ABSTRACT

This paper explores justice reinvestment as a possible solution to the issues identified in the Western Australia criminal justice system. It draws upon the connection between the philosophical writing of the relationship between the individual and the community by highlighting the reciprocal nature of this relationship, emphasising the fact that an adequate philosophical account of the human person must recognise and describe this reciprocity. The research investigates other jurisdictions and how these jurisdictions have addressed the overcrowding of prisons and recidivism. The research also includes local projects that are addressing the causal relationship between the general levels of disadvantage of particular communities and their contact with the justice system.

I INTRODUCTION

The Honourable Wayne Martin, Chief Justice of Western Australia has frequently recognised the ongoing issues regarding Indigenous contact with the justice system:

> I have often described the gross over-representation of Aboriginal people within the criminal justice system of Western Australia as one of the

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> biggest issues confronting that system. I will continue to do so until there is some indication that we are making progress in reducing the extent of the over-representation.[1]

In identifying the causal relationship between the general levels of disadvantage of particular communities and contact with the justice system, finding a solution to the problem is both complex and essential.

> I do not think you need scientific qualifications or social surveys to conclude that there is a causal relationship between the general levels of disadvantage that are suffered by Aboriginal people in Australia in areas such as employment, housing, education, health and their over-representation in the criminal justice system.[2]

This paper aims to explore Justice Reinvestment as a possible solution to the issues identified by the Chief Justice of Western Australia.

Justice Reinvestment is about focusing on prevention initiatives within the communities affected by disadvantage rather than on the individual offender when addressing crime. It is a new way of looking at tackling crime '… International research highlights the fact that the criminal justice system works best where there are cohesive communities.'[3] Thus,

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1 The Honourable Wayne Martin, 'Corrective Services for Indigenous Offenders - Stopping the Revolving Door' (Speech delivered at the The Joint Development Day - Department of Corrective Services, Perth Convention Centre, 17 September 2009) <http://www.supremecourt.wa.gov.au/_files/Joint_Development_Day_DCS.pdf >.

2 The Honourable Wayne Martin, 'Address to the Lung Institute of Western Australia Inc' (Speech delivered at the Lung Insitute of Western Australia, Perth Duxton Hotel, 23 October 2009) <http://www.supremecourt.wa.gov.au/_files/Lung_Institute_of_WA_Nov_09.pdf>.

3 Community Development and Justice Standing Committee, 'Making Our Prisons Work: An Inquiry into the Efficiency and Effectiveness of Prisoner Education, Training and Employment Strategies' (WA Parliament, 2010) 103.

Justice Reinvestment looks at the cause rather than treating the symptoms.

The first section of this paper contains a general discussion of the various theories that have led to the development of the concept of Justice Reinvestment beginning with Aristotle's, and later Thomas Aquinas' commutative justice and distributive justice, the social theory of subsidiarity, social justice and restorative justice.

The second section of the paper discusses the Western Australia jurisdiction and the contemporary issues regarding high incarceration rates, the 'tough on crime' stance by leading policymakers and recidivism rates. This section aims to put into context the reasons for exploring alternative corrective services policies that are more cost effective and efficient.

The third and fourth sections of the paper, explores the jurisdictions of Texas and New Zealand where alternative corrective services policies like Justice Reinvestment have been established. This section will examine the reasons why the jurisdictions chose a different pathway for their criminal justice system and the impact these pathways have had in the selected communities.

The concluding section of the paper examines programmes of Justice Reinvestment that are currently being piloted in Australia. It will then apply this discussion to the Western Australian context.

II THEORETICAL DEFINITIONS

'The term Justice Reinvestment was first coined only 10 years ago, in an article for George Soros's Open Society Foundation in 2003.'[4] Justice reinvestment seeks to divert some of the money spent on building prisons into rebuilding the communities from which most of the prison population come. It also aims to empower and enable these local communities to solve their own problems and it asserts that certain problems can best be solved at a local level. It would also maintain that the state has a duty to provide a certain degree of assistance to help those communities.[5]

The theory behind the concept has its origins and roots in ancient Greek philosophy. Over the centuries, many different theories have been developed to engage investment in local communities for the benefit of the greater good. Aroney in 'Subsidiarity in the writings of Aristotle and Aquinas' states that for Aristotle man was a social being, a political animal whose nature developed in the family and villages and in the polis-the self-sufficient city-state. This latter was the 'supremely authoritative community'[6] which determined what the 'good life' was: the 'chief end of humankind.'[7]

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[4] David Brown, 'Justice Reinvestment: the circuit breaker?', *Insight Magazine Victorian Council of Social Service* (Online) 036<http://insight.vcoss.org.au/wp-content/uploads/2013/06/JusticeReinvestment.Final_.pdf>.

[5] 'Susan B. Tucker and Eric Cadora, 'Ideas for an Open Society: Justice Reinvestment' (Occasional Papers from OSI-U. S. Prgrams, Vol 3 No 3, Open Society Institute, November 2003) 1-4 <https://www.opensocietyfoundations.org/sites/default/files/ideas_reinvestment.pdf>.

[6] Nicholas Aroney, 'Subsidiarity in the writings of Aristotle and Aquinas' in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Solidarity* (Springer, 2014) 13.

[7] Ibid.

Aristotle did not think that the polis or city-state should wield total power to the exclusion of the households and villages.[8] This distinguishes him from his teacher, Plato, who in the Republic, made the state all-powerful, abolishing marriage, parenthood, and family and making each person, a citizen, totally subservient to the state.[9] Aristotle opposed an 'extreme unification'[10] of the polis and rejects the idea that 'the highest unity of a state is its highest good.'[11]

Aroney goes on to argue that Thomas Aquinas, the medieval philosopher and theologian, attempted a synthesis between Aristotle's thought and the insights of Christianity. Taking certain Aristotelian propositions and giving them added emphasis. He pointed out that while states are composed of households and villages, it did not mean that 'the state is an absolute unity in which such "subordinate" units have no independent powers of operation.'[12] Aroney states that Aquinas went further than Aristotle in emphasising the greater degree to which households and neighbourhoods could claim self-sufficiency, and that he anticipated the modern concept of subsidiarity by asserting that each group or association should be allowed to make their proper contribution without being hindered by the state.[13]

Brennan, in 'Subsidiarity in the Tradition of Catholic School Doctrine' shows that the principle of Subsidiarity was fully articulated and defined in the 1931 papal encyclical *Quadragesimo Anno* both in its dual aspects. 'Negatively (negative subsidiarity), it is a principle of non-absorption of

8 Ibid 15.
9 Allan Bloom, *The Closing of the American Mind* (Simon and Schuster Inc, 1988) 102 – 3.
10 Aroney, above n 6, 14.
11 Ibid.
12 Ibid 20.
13 Ibid 19-21.

lower societies by higher societies, above all by the state … Positively, subsidiarity is also a principle that when aid is given to a particular society, including by the state, it be for the purpose of encouraging and strengthening that society.'[14] It is also part of the notion of subsidiarity that the state has a duty to intervene to help a community when that community does not have the resources to adequately address its problems, but it must do so in a manner that 'encourages and strengthens'[15] that community.

The idea of distributive justice is pertinent here as it has to do with the distribution of the goods of a community to its members. Burke argues that this distribution of goods will always be mediated through governing bodies as they possess the requisite power to effect the distribution.[16] Justice reinvestment therefore seeks to influence the distribution of goods in relation to the problem of crime and incarceration. It seeks to divert some of the goods of the community (money) from building prisons into building up the impoverished communities that they may deal more effectively with their problems and in this way make a substantial contribution to the overall common good of the wider community.[17] Burke notes in his article that, 'When properly exercised, distributive justice conforms to the principle of subsidiarity and unites the community more closely in solidarity.'[18]

Howard Zehr in his book, 'The Little Book of Restorative Justice', begins to describe what Restorative Justice' is, by first saying what it is

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14 Patrick McKinley Brennan, 'Subsidiarity in the Tradition of Catholic Social Doctrine' in *Global Perspectives on Subsidarity* (Springer, 2014) 35.

15 Ibid.

16 Joseph Burke, 'Distributive Justice and Subsidiarity: The Firm and The State in the Social Order' (2010) 13(2) *Journal of Markets and Morality* 297, 297-8.

17 Tucker and Cadora, above n 5, 1-4.

18 Burke, above n 16, 302.

not. He says, 'It is not primarily about forgiveness or reconciliation.'[19] It is not about 'mediation'[20] or reducing the crime rate,[21] although all of these may be by-products. Zehr goes on to add that it is not intended to be a replacement for the legal system.[22]

Zehr argues that the legal system focuses on 'society's interests and obligations as represented by the state,'[23] while ignoring the 'personal and interpersonal aspects of crime.'[24] 'By focusing on and elevating the latter "private" dimensions of crime, restorative justice seeks to provide a better balance in how we experience justice.'[25]

Restorative justice seeks to expand the number of stakeholders involved in the crime and in its effects. It involves victims and community members as well as the offender and the state. It would focus particularly on the needs of the victim and Zehr identifies four main areas: the victims need real information about what happened; they need to be able to re-tell their story in 'significant settings'[26] to get 'public acknowledgement;'[27] they need to feel some 'empowerment'[28] in their lives as the effects of crime can create a feeling of lack of control; restitution or vindication where the victim can get a sense that the offender has tried to 'make right the harm.'[29]

19 Howard Zehr, *The Little Book of Restorative Justice* (Good Books, 2015) 6.
20 Ibid 7.
21 Ibid 8.
22 Ibid 10.
23 Ibid.
24 Ibid 11.
25 Ibid.
26 Ibid 13.
27 Ibid.
28 Ibid.
29 Ibid 14.

Restorative justice also focuses on the offenders by way of getting them to acknowledge and take responsibility for the harm they have caused the victim which is consistent with the Western Australian principles of sentencing as outlined in s 6 of the Sentencing Act WA (1995). Interestingly, contrary to the principles of sentencing, Zehr argues that the adversarial nature of the criminal justice system 'requires offenders to look out for themselves. Offenders are discouraged from acknowledging their responsibility and are given little opportunity to act on this responsibility in concrete ways.'[30]

Zehr sees interconnectedness as the fundamental basis on which restorative justice is founded: 'we are all connected to each other, and to the larger world, through a web of relationships. When this web is disrupted, we are all affected.' [31] But interconnectedness must be balanced by the idea of particularity, because although 'we are connected, we are not the same.' [32] Particularity is about diversity, it highlights 'individuality and the worth of each person.'[33] The Justice system must respect both dimensions.[34]

Underpinning these notions of subsidiarity, restorative and distributive justice is the complex idea that the human being is a free agent with a social nature. The criminal justice system tends to focus on the first attribute and to neglect the latter. Charles Taylor in 'Philosophy and the Human Sciences' makes the point that 'man is a social animal, indeed a political animal, because he is not self-sufficient alone (Aristotle's

30 Ibid.
31 Ibid 38.
32 Ibid.
33 Ibid.
34 Ibid.

autarkeia).'[35] He then contrasts this notion of the human being with the idea of man, or the individual, as being self-sufficient, and calls this viewpoint 'atomism'.[36]

According to Taylor the philosophy of atomism provided the foundation for the social contract theories of the 17th century (Hobbes and Locke are prominent proponents) which portrayed man as a self-sufficient individual freely consenting to join society for mutual benefit. This, in Taylor's view, has skewed the whole relationship between the individual and society. It presents a purely instrumental view of society, where individual rights have priority and the individual's obligations to society are secondary. It also tends to see the person as a single, individual, autonomous being without having proper recognition of the social and community context in which the person is embedded.[37] Finally, it is this concept of the human being that lies behind the fundamentalist approach of the 'national dependence on mass incarceration.'[38]

It would be a mistake, however, to think that Taylor is anti-individual human rights or that he is attacking the concept of human freedom per se. He is not. He is seeking to restore a proper philosophical balance to the concept of the human person that underlies society's laws and constitutions. For Taylor, the human person can only exercise his/her individual rights and make free choices in a society that is free, and thus he insists that individuals have an obligation to contribute to keeping that society free as a necessary condition for their own freedom and their enjoyment of their individual rights. Herein lies the paradox: human

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35 Charles Taylor, *Philosophy and the Human Sciences – Philosophical Papers 2* (Cambridge University Press, 1985) 189.

36 Ibid.

37 Ibid 187-198.

38 Tucker and Cadora, above n 5, 2.

beings can only become human in society; individual human rights and the freedom that goes with them can only be had and exercised in a free society.[39]

The problem for Taylor, with Hobbes' and Locke's state of nature, is that it is an abstraction, a logical construct. The idea of self- sufficient individuals freely consenting to joining society for mutual benefit begs the question of how they became self-sufficient in the first place. As Taylor puts it, 'Living in a society is a necessary condition for the development of rationality, in some sense of this property, or of becoming a moral agent in the full sense of the term, or of becoming a fully responsible, autonomous being.'[40]

Taylor is insisting here on the reciprocal relationship between the individual and society, and. to devalue or underemphasise the importance of one of them is to create an unbalanced philosophy of the human person. Fergus Kerr in his article, 'The Self and the Good: Taylor's Moral Ontology,' argues that Taylor sees that the atomism inherent in the thinking of Hobbes and Locke has come to dominate western political thought and practice, 'that takes as fundamental and unchallengeable the primacy of the individuals interests and rights, while simultaneously over-looking and even denying pre-modern assumptions about the primacy of our obligations as human beings to society.'[41]

Taylor's emphasis on the obligations that individuals have to the society in which they live, has a great deal in common with the notion of social justice that Joseph Burke develops in his article, 'Distributive Justice and

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39 Taylor, above n 35, 197-198.

40 Ibid 191.

41 Fergus Kerr, 'The Self and the Good: Taylor's Moral Ontology' in Ruth Abbey (ed), *Charles Taylor*, (Cambridge University Press, 2004) 88.

Subsidiarity: The Firm and the State in the Social Order.' Burke states that, 'A person who has the virtue of social justice has the habit of fulfilling his obligations to the common good of the community or communities to which he belongs.'[42] Social justice then in this view deals with what person owes to his community, and Burke goes on to quote Pius XI in his encyclical, 'Divini Redemptoris', 'Now it is of the very essence of social justice to demand for each individual all that is necessary for the common good.' [43] While the focus here is on the obligation of the individual to the common good of his community, it is also true that the promotion of the common good will create the conditions for the individual to flourish.[44]

This conception of social justice does not in any way infringe on the human rights of the individual, nor does it in any way imply a slide towards a totalitarian view of the state or society in which an individual would be subservient. What it does in fact is to restore the delicate balance in the relationship between the person and the community in which they live, which has been skewed by the philosophy of atomism of Hobbes and Locke.[45] It restores the balance by highlighting the reciprocal nature of the relationship between the individual and his/her community and by emphasising the fact that an adequate philosophical account of the human person must recognise and describe this reciprocity.

III WESTERN AUSTRALIA

According to the Australian Bureau of Statistics, 'Prisoner numbers in Australia increased by six percent from the June Quarter 2014, with

42 Burke, above n 16, 300.
43 Ibid.
44 Ibid 300-1.
45 Taylor, above n 35, 187-8.

males increasing by six percent and females by seven percent.' [46] Aboriginal and Torres Strait Islander incarceration numbers also increased by 6 percent. 'The Aboriginal and Torres Strait Islander imprisonment rate was 12 times higher than the overall imprisonment rate …'.[47] 'There were increases in the number of persons serving sentenced probation, community service orders, restricted movement orders and parole.'[48]

These figures indicate that nationally, 'the average daily imprisonment rate was 196 prisoners per 100,000 adult population in the June quarter 2015.'[49] However, in Western Australia the average daily imprisonment rate was '277 prisoners per 100,000 population.'[50] 'The prison population grew rapidly from 2009 to 2012 but in 2012-2013 fluctuated between 4,900 and 5,000.' [51] In 2014, the prison population increased rapidly to over 5,250. Such an increase has led to prison overcrowding. In particular Bandyup Women's Prison, Hakea and Casuarina prisons were the most affected.

While the prison population numbers rose, the number of people on community orders decreased. Interestingly, the spread of the prison population was very uneven with women, remandees and Aboriginal

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46 Corrective Services Australia, 'Community-based Corrections on the Rise' (Media Release, 4512.0, 9 June 2016) 1 <http://www.abs.gov.au/ausstats%5Cabs@.nsf/mediareleasesbyCatalogue/01A3C2BE96FA6185CA2568A90013631C?Opendocument>.

47 Ibid.

48 Ibid.

49 Corrective Services Australia, 'Community-based Corrections on the Rise Summary of Findings' (Media Release, 4512.0, 9 June 2016) 1 <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>.

50 Ibid 2.

51 Office of the Inspector of Custodial Services, Government of Western Australia, *Annual Report* (2013/14) 7 <http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3912222ab0f527946ed0218948257d6300111e57/$file/2222.pdf>.

people being the three areas that saw the greatest growth.[52] Women prisoners have increased in numbers by 50 percent since 2009 compared with a 25 percent increase of male prisoners.

A tougher stance by the Prisoner Review Board on prisoners being released on parole contributed to these increases as well as a significant increase on prisoners being held on remand. In the 2014 annual report of the Inspector of Custodial Services, it was expressed that 'It is of very serious concern that more than one in five people in the state's jails is legally innocent.'[53] Remandees constituted 22 percent of the prison population in 2014 compared with 16 percent in 2010.[54]

Western Australia has the 'highest imprisonment rate of Aboriginal people in the country, with Aboriginal people being 21 times more likely to be imprisoned than non-Indigenous adults.'[55] What is of concern is that Aboriginal people make up 40 percent of the total prison population with over 2,000 Aboriginal prisoners in 2014, while 53 percent of the female prison population were Aboriginal women. Given that Aboriginal people make up only 3.8 percent of the Western Australian population, these figures indicate a huge over-representation of Aboriginal people in the prison population with approximately 3,000 prisoners per 100,000 Aboriginal population.

Recidivism figures show that 45 percent of prisoners return to prison within two years of being released. The rates of recidivism vary between different groups with young people and Aboriginal people making up the

52 Ibid 8.
53 Ibid 10.
54 Ibid 9.
55 Ibid.

higher numbers of re-offending. '61 percent of the people in prison in Western Australia in 2014 had been in prison previously.'[56]

The Western Australian prison system spends over $1 million a day on prisoners who had reoffended at a cost of $351 a day per prisoner. This indicates that rehabilitation services within the prisons were not effective.[57] According to the Office of the Inspector of Custodial Services, 'The key conclusion, then, is that prisoners are more likely to reoffend when they are released from prisons that have identified deficiencies in service provision.'[58] The daily cost to keep a prisoner in jail in Western Australia is 20 percent higher than the rest of the country.[59] These costs vary considerably between the different prisons and their geographic locations.

'Crime costs Australia approximately $36 billion dollars per year. Government spending on the criminal justice system accounts for approximately one quarter of these costs, distributed between the polices, the courts, and corrective services.'[60] Western Australia reflects the national trend of increasing expenditure on the criminal justice system. 'Over the past five years, the yearly cost of Corrective Services has increased by nearly $200 million (34%) with an additional $865 million

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56 Economic Regulatory Authority Western Australia, 'Discussion Paper: Inquiry into the Efficiency of Western Australian Prisons' (18 March 2015) 6 <https://www.erawa.com.au/cproot/13400/2/Inquiry%20into%20the%20efficiency%20and%20performance%20of%20Western%20Australian%20Prisons%20-%20Discussion%20Paper.pdf>.

57 Ibid 6.

58 Office of the Inspector of Custodial Services, Government of Western Australia, 'Recidivism rates and the impact of treatment programs' (September 2015) 10 <http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3912295a35b28230ed9c541e48257d730008d551/$file/2295.pdf>.

59 Economic Regulatory Authority, above n 56, 8.

60 Office of the Inspector of Custodial Services, above n 58, 1.

used on capital expenditure.'[61] These cost increases match the increase in the prison population.

Because of the increase in prison population, services within the prisons themselves have been unable to keep up with the demand. Stakeholders such as the Department of Corrective Services, Prisoners and their families and non-government organisations have expressed the view that 'some of the services provided in prisons are provided in insufficient quantities, are poorly designed, and are poorly targeted to the needs of certain prisoner populations.'[62]

The health issues of some prisoners are exacerbated by the time they spend in prison, in particular, mental health issues. This leads to the higher risk of prisoners reoffending after their release. Drug and alcohol abuse also contributes to the risk of reoffending with 80 percent of prisoners having a drug and/or alcohol dependency.[63] Needless to say, the links between drug dependency and criminal behaviour are very strong.

The services provided in the Western Australian prisons struggle to address the specific needs of individual prisoners. For example, cultural programmes and programmes for prisoners with intellectual disabilities. 'Aboriginal prisoners are more likely to respond to programmes that are culturally appropriate and, ideally, delivered by Aboriginal people. Submitters (such as the Aboriginal Legal Service of Western Australia) raised concern that there is a lack of culturally appropriate programmes available to Aboriginal prisoners, particularly in regional prisons.' [64]

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61 Ibid.
62 Economic Regulatory Authority, above n 56, 12.
63 Ibid 14.
64 Ibid 15.

Given the high percentage of Indigenous peoples in the prison system, lack of such programmes only increases the risk of recidivism.

The Department of Corrective Services does not acknowledge the significant overcrowding of prisons in Western Australia because it works on the basis of prison 'operational capacity' rather than the national benchmark of design capacity.[65] Prison cells designed for only one inmate have been installed with bunk beds, resulting in two prisoners crammed into a small space, programme capacities only available for prison design and inmates not being able to complete their rehabilitation programmes because of the lack of availability. If prisoners do not complete their rehabilitation programmes, they may be prevented from being released on parole. Casuarina prison, for example, was only designed for 397 prisoners but with changes to the 'operation capacity' with the installation of bunk beds, it now has a capacity of 1032 prisoners.[66] Programme services within the prison only have the space for 397 prisoners leaving over 400 prisoners with idle hands on a daily basis:

> Not everyone who is recommended to a programme is able to get access, nor is access equitable across the state. Prisoners in predominantly Aboriginal regional prisons have a higher proportion of unmet treatment needs due to programme unavailability than prisons in metropolitan prisons. Female prisoners also have less access to relevant programmes than males.[67]

It is not surprising that Aboriginal people are more likely to be sharing a cell than non-Aboriginal people. 'Most Aboriginal people felt that staff

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65 Office of the Inspector of Custodial Services, above n 51, 8.

66 Department of Corrective Services, *Casuarina Prison* <http://www.correctiveservices.wa.gov.au/prisons/prison-locations/casuarina.aspx>.

67 Office of the Inspector of Custodial Services, above n 58, 26.

neither respected nor understood their culture.'[68] With difficulties in cultural awareness, effective participation in treatment programmes would be adversely affected.

Another issue that exists in the Western Australian criminal justice system is the lack of data collection. 'A large portion of the planning and resource allocation problems in the prison system are a result of inadequate collection and management processes in the Department of Corrective Services. In particular, there seems to be poor data around the effect of rehabilitation programmes, the performance of individual prisons and the health needs of prisoners.'[69]

Consistent and proper procedures in the collection and management of data is essential in order for effective assessment of performance. 'Good data would provide important feedback to the Department of Corrective Services about its performance and the needs of its prisoners.'[70] The Office of the Inspector of Corrective Services has recognised that the lack of adequate data collection is a significant barrier in the attempt to improve performance within the criminal justice system.

'Despite more than twenty years of programme delivery, and despite criticism dating back many years of the lack of evaluations, the Department does not have any robust evaluations which can explain what works for whom, and why, by way of programmes in the Western Australian context.'[71] Areas of concern include the lack of basic data

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68 Office of the Inspector of Custodial Services, Government of Western Australia 'Prisoner and staff perceptions of WA custodial facilities from 2010 – 2012' (September 2014) 11 <http://www.oics.wa.gov.au/wp-content/uploads/2014/10/Staff-and-prisoner-perceptions-report.pdf>.

69 Economic Regulatory Authority, above n 56, 15.

70 Ibid 25.

71 Office of the Inspector of Custodial Services, above n 58, iii.

such as data on recidivism, prisoner characteristics and the effectiveness of rehabilitation programmes.

> However, the Department still lacks comprehensive evaluation of the programmes they deliver, which is a significant risk. Without this evaluation it is impossible to determine if one or more programmes delivered by the Department works as intended or makes the prisoner more likely to reoffend. This issues was raised in the Mahoney Inquiry in 2005, where it was stated that the Department is 'unable to advise with any confidence that its rehabilitation programmes are working'. Nearly a decade later, this still has not been adequately addressed.[72]

With increasing prison populations, overcrowding, cost increases, lack of adequate services and high rates of recidivism, the Western Australian criminal justice system is in crisis. Fortunately, other jurisdictions have already faced such difficulties and have implemented radical changes to their operational planning and management of corrective services. Western Australia could learn from these jurisdictions. Two interesting models that have proven successful are Texas and New Zealand.

IV TEXAS

If we don't change the course now, we will be building prisons forever and ever – prisons we can't afford.[73]

In 2007, the government of Texas was faced with a dilemma, either spend more than 2 billion dollars by 2012 to build more prisons or look for an alternative solution. Working with the Council of State Governments

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72 Office of the Inspector of Custodial Services, above n 58, 30.

73 State Senator John Whitmire, D-Houston, Chair, Senate Criminal Justice Committee in Council of State Governments Justice Centre 'Justice Reinvestment State Brief: Texas' (2007) <https://csgjusticecenter.org/wp-content/uploads/2012/12/TexasStateBrief.letter.pdf>.

Justice Center (Justice Centre), the Bureau of Justice and the Public of the Pew Charitable Trusts' Center on the States, the Texan policymakers decided to adopt a justice reinvestment strategy and use corrections spending on the conditions of neighbourhoods where most prisoners would return. The belief was that expanding treatment programmes and residential facilities in the community would increase public safety because of a reduction in recidivism.[74]

In Texas, as a result of a tough on crime approach, 'between 1985 and 2005, the prison population grew 300 percent, forcing the state to build tens of thousands of prison beds. From 1983 to 1997, the state spent $2.3 billion in construction costs.'[75] By 2007, there was a bed shortfall of 3,017 and it was projected that the shortfall would reach 17,332 by 2012.[76] 37.3% of the prison population were black, 31.8% were white and 39.3% were Hispanic.[77] This was projected to cost taxpayers an additional $523 million just between 2008 and 2009 for the building of more prisons and the ongoing operational costs with an additional cost of $184 million expected and by 2012 a cost of a minimum of $2 billion was projected.

In January 2007, state Senator John Whitmire and state Representative Jerry Madden led a joint hearing of the House of Representatives and Senate. The focus was to review the current penology strategies, look at the research findings and recommendations and explore policy options to

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74 Ibid.

75 Ibid.

76 Dr Tony Fableo, 'Texas Justice Reinvestment: Outcomes, Challenges and Policy Options to Consider', (The Council of State Governments Justice Center, Marcg 2011) <https://csgjusticecenter.org/wp-content/uploads/2012/12/TXJRStateReport32011v2.pdf>.

77 Texas Department of Criminal Justice, 'Statistical Report Fiscal Year 2007' (July 2008) <https://www.tdcj.state.tx.us/documents/Statistical_Report_FY2007.pdf>.

reduce recidivism and improve public safety. This bipartisan group of legislative leaders 'requested technical assistance from the Justice Centre to analyse corrections data'[78] and assist in developing new policy. The information collected for the analysis was crucial in not only recognising what the incarceration figures were but also the demographic characteristics of the inmates and the reasons behind the growth in prison population.

'An analysis of the prison population identified high rates of failure on community supervision, limited in-prison and community-based programme capacity, and inefficient use of parole as key factors driving the projected growth.'[79] Because of the impact of policies, there was a 17 percent increase in probation revocations and fewer offenders placed on probation between 1997 and 2006. There was a backlog in release programmes of 2000 and a reduction in parole of 2000 inmates in 2007.[80]

In the process of analysing the prison population, the Justice Centre identified that more than half the prison population came from just five counties at an annual cost to the taxpayer of more than $500 million. Harris County (Houston) provided the greatest number of prisoners. Understanding which communities provided the greatest number of prisoners was significant when considering a Justice Reinvestment strategy as it allowed planners to target prison diversion programmes specifically in those areas.

The Texas policymakers enacted a criminal justice policies package to try to stem the growth of prison population and reduce recidivism. This

78 Council of State Governments Justice Centre, 'Justice Reinvestment in Texas: Assessing the Impact of the 2007 Justice Reinvestment Initiative' (April 2009) <https://csgjusticecenter.org/wp-content/uploads/2012/12/Texas_Bulletin.pdf>.

79 The State Council of State Governments Justice Center, above n 74.

80 Fableo, above n 76.

package was to cost $241 million, an investment diverted from the building and operation of new prisons to expand treatment and diversion programmes, community supervision and the use of parole for low-risk offenders.[81] The Justice Reinvestment initiative had three main goals: address the key drivers of prison population growth; improve cost efficiency for the state; and reduce recidivism creating better public safety.

The new polices that emerged from the Texas Legislature in May 2007 were considered by some policymakers to 'be the most substantial redirection in state corrections policy since the early 1990s.'[82] These new policies included:

- 800 new beds for those on probation as part of a residential programme for those with substance abuse needs
- 3,000 substance abuse outpatient placements for those on probation
- 1,400 new beds in prison diversion facilities for probation and parole technical violators
- 300 new beds for parolees in halfway houses
- 500 new beds for in-prison treatment
- 1,500 new beds for substance abuse in prison treatment programmes
- 1,200 intensive substance abuse treatment programme placements.[83]

81 The State Council of State Governments Justice Center, above n 74.
82 Ibid.
83 Ibid.

As well as the increase in treatment programmes, there was also a significant focus on parole and probation policies. There was a provision in the new state corrections policies to build three new prisons at a cost of $233 million but only if the diversion programmes were not successful. 'We have embarked on bold initiative to rehabilitate non-violent felons to leave room to incarcerate the violent.'[84]

In 2008 and 2009, the state saved $210.5 million. With a continuation of the successful programmes, it was projected that the state would save the further $233 million if new prisons did not have to be built, a total saving of $443.5 million. The prison population in 2006 was 155,428, 155,062 in 2009 and 155,022 by 2010. This was significantly lower than the 2009 projected figure of 163 322.[85] Not only had the prison population stabilised, it had begun to decrease in numbers.

Because of the savings 'policymakers also reinvested in the expansion of the Nurse-Family Partnerships Programme, a nationally recognized model for improving outcomes for low-income families and reducing crime, to reach 2,000 families/children.'[86] The focus of the programme was to improve health and well-being with the provision of services.

The population of Texas increased by 3.67 percent between 2007 and 2009 from 23,904,380 to 24,782,302.[87] Crime decreased by almost 3 percent: The crime rate in 2008 was the lowest since 1985.[88] Between 2006 and 2008, there was a decrease of 4 percent in probation revocations

84 Ibid.
85 Fableo, above n 76.
86 The State Council of State Governments Justice Center, above n 74.
87 Texas Department of State Health Statistics, *DSHS Centre for Health Statistics* <https://www.dshs.state.tx.us/chs/>.
88 Ibid.

and there was an increase of 5 percent in supervised releases.[89] Prior to the reform there were 3,200 offenders in the prison diversion programme. This increased to 5,600 after the reform. 2000 more offenders were released on parole and there was a 27 percent decline in parole revocations.[90] By 2009, there were 8,260 fewer prisoners than what was projected. These figures are attributed to the Justice Reinvestment initiative.

Despite the new strategy, there were some challenges. Some members of the community were not in favour of some of the treatment programmes being placed within their neighbourhood. Though the capacity of residential facilities were set to be increased, some were behind schedule. These challenges were exacerbated by the lack of availability of suitably qualified counsellors and the Texan laws requiring public hearings and official approval before correctional residential centres could be expanded or located in a particular location.

V NEW ZEALAND

In 1992, a Crime Prevention Action Group (CPAG) was established by the New Zealand Government. The aim of the group was to 'develop a national crime prevention strategy.'[91] The CPAG explored four main areas:

1. The dimensions of crime in New Zealand

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89 Fableo, above n 76.

90 Ibid.

91 Judge David Carruthers, 'Crime Prevention and Social Justice Issues - A New Zealand Perspective' (Paper presented at Crime Prevention Conference convened by the Australian Institute of Criminology and the Crime Prevention Branch, Commonwealth Attirney Generals Department, Sydney, 12 – 13 September 2002) 1 <http://www.aic.gov.au/media_library/conferences/crimpre/carruthers.pdf>.

2. The main factors influencing the occurrence of criminal activities;

3. How offenders are dealt with; and

4. How victims are dealt with.[92]

The CPAG adopted a definition of crime prevention: 'all those measures which have the specific intention of minimising the breadth and severity of offending, whether via a reduction in opportunities to commit crime or by influencing potential offenders and the general public.'[93] Such a broad definition enabled CPAG to explore all areas of crime prevention that combined 'the active involvement of the community and the focussed management of government resources.'[94]

This was a bold approach as previously, the New Zealand criminal justice system only dealt with actual criminal events, whereas the new approach meant a conceptual framework that explored not only actual crime but also potential offending – thereby providing a sound base to properly address and develop crime prevention strategies. 'A preventative strategy for dealing with crime requires that the traditional reactive response to crime be expanded to take account of the social conditions which contribute to the increased likelihood of criminal events occurring.'[95] In other words, crime prevention strategies need to look at the communities where crimes occur and address the needs of that community – to look at the community rather than the individual.

The New Zealand model was much broader than the simple justice re-investment model. 'The conceptual model developed by CPAG takes

92 Ibid.
93 Ibid 2.
94 Ibid.
95 Ibid 3.

account of the need for examining preconditions to offending and victimisation as well as subsequent treatment of both offenders and victims. It also allows a detailed consideration of the complex interrelationships between the various parties involved in a criminal event.'[96] Such a model not only addressed the community needs for actual crime but also addressed the social-developmental needs of the community for long term crime prevention.

The CPAG explored models of crime prevention throughout the world both in analysing existing models and the study of criminology literature.

> CPAG noted that a comprehensive crime prevention strategy needs to take account of the range of criminal offences in the community, the varying circumstances of offending groups, and the preconditions which promote the likelihood of crime taking place. It also needs to be flexible and broad enough to encompass the need to support, protect and strengthen response to victims.[97]

CPAG also recognised the importance of taking into account the concerns of the local indigenous at both a central and local government level.

'Effectively, CPAG drew its final strategic framework from a distillation of available information on criminal events, offenders and victims. The priorities the committee selected were those which appeared to be the most likely to change significant influencing factors contributing to increased criminal offending.'[98] This holistic approach led to a strategic framework that was comprehensive, multi-focussed on both potential offending and actual offending as well as addressing potential and actual victims of crime. In other words, it was a strategy that looked at empowerment of the community and the individual.

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96 Ibid 4.
97 Ibid 5.
98 Ibid 6.

The mission of the strategic framework was 'to enhance community security by the development and implementation of a crime prevention strategy.'[99] Its goal was 'to develop and implement a crime prevention strategy which provides a strategic, co-ordinated, managed approach, and an opportunity for community involvement in crime prevention.'[100] This strategic, managed approach to crime prevention was 'an attempt to overcome the fragmentation and lack of co-ordination which characterises current responses to crime in New Zealand.'[101] It was an attempt to be more cost effective, to avoid duplication of resources and provide more consistencies in dealing with offenders and victims. A Crime Prevention Unit (CPU) was established by the New Zealand Government located in the Department of the Prime Minister and Cabinet.

One of the first tasks of the CPU was to inform the public. Community briefings were held right across the country to inform interested parties about the government's commitment to crime prevention. This was not just to inform the public but also to encourage the communities to get involved.

Despite all these efforts in 1995, there were 4,500 people incarcerated in New Zealand. This figure rose to 6,000 by 2001 and to 6,800 by 2004. In 2007 there were 8,300 people in New Zealand prisons.[102] It was projected that the prison population would increase by 15.6% by 2014 to a number of 9,000. Surprisingly, despite the rise in incarceration, the

99 Ibid.
100 Ibid.
101 Ibid 7.
102 Rod Allen and Vivien Stern (eds), *Justice Reinvestment – A New Approach to Crime and Justice* (International Centre for Prison Studies, 2007) <http://www.prisonstudies.org/sites/default/files/resources/downloads/justice_reinvest_9_high_res_0.pdf>.

crime rate had not increased. In 2006, the Prime Minister of New Zealand commented that 'Numbers at this level are neither financially nor socially sustainable in New Zealand.'[103] While recognising the need for public safety, the Prime Minister acknowledged that there must be a more efficient way to deal with the issue.

It was identified that, unlike other areas of public expenditure, the Department of Corrections' budget was demand led. In 2007, there was an 18% increase of expenditure from $600 million in 2006 to $778 million in 2008. Economists began looking at alternative ways to spend the money – to reinvest the money into the community on needs such as health and education. According to Andrew Coyle (2008) there needed to be a deeper, systematic reform – 'One that [was] rooted in a deepening recognition that the resolution of issues of public safety need to engage every institution in civil society.'[104]

Thus, the Ministry of Justice used a different approach. It combined its sectors to tackle crime as a united group.

> Working as a sector recognise[d] that there [was] a "pipeline" across the criminal justice system. It extend[ed] from the investigation of crime to arrest and prosecutions, through to courts, sentencing, and sentencing management and rehabilitation. It mean[t] policies and approaches in one part of the system can have significant effects on others. Joining up our services allow[d] agencies to identify these effects, and implement changes that [had] the best outcomes for the sector as a whole.[105]

The Government's approach was threefold to meet the needs of families and communities, reduce the impact of offenders and address the

103 Ibid.
104 Ibid 6.
105 Ibid.

consequences of crime through the delivery of effective justice. The Ministry of Justice developed a Result Action Plan to address the drivers of crime.

> Our Results Action Plan sets out a roadmap for achieving the targets – by reducing opportunities for crime, targeting vulnerable youth and youth offenders, reducing
>
> alcohol and drug abuse, and reducing reoffending.[106]

In 2013 as part of the process of producing better public services to reduce crime, the Justice Sector launched a Collective impact toolbox to enable communities to set up local initiatives for crime prevention. Supporting work was also underway across the justice sectors and social sectors[107] These included:

- Addressing the drivers of crime;
- Prevention first;
- Policing excellence;
- Improved rehabilitation and reintegration;
- Fresh start reforms;
- Reduce long-term welfare dependency;
- Support vulnerable children; and
- Boost skills and employment.

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106 Ture, Ministry of Justice - Tāhū o te, 'Achieving our Targets' (2015) <http://www.justice.govt.nz/justice-sector/better-public-services-reducing-crime/achieving-our-targets>.

107 Ibid.

According to the Result Action Plan 'New Zealand is a safe society with a strong justice system and falling crime. The recorded crime rate in 2011 was the lowest in 30 years, and volumes in our courts and prisons are decreasing.' [108] The plan recognised the importance of better public service targets to 'reduce crime, violent crime, youth crime, and re-offending.'[109]

The overall target set out in the Result Action Plan was that 'by June 2017, the Justice Sector action plan will deliver:

- an overall reduction in crime by 15 per cent;
- a reduction in violent crime by 20 per cent;
- a reduction in youth crime by 25 per cent;
- a reduction in re-offending by 25 per cent.'[110]

In its 2013-2014 Annual Report, the Department of Corrections announced that 'New Zealand [was] a safer place. The crime rate [was] the lowest it has been since 1979. Violent crime [was] falling, youth crime [was] falling, and fewer people [were] re-offending.'[111] According to the report, New Zealand was well on its way to achieving its task of reducing re-offending by 25% in 2017. According to the report 'The planning and delivery of services must not only focus on achieving

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108 New Zealand Government, 'Delivering better public services: Result Action Plan' (2012) <http://www.rethinking.org.nz/assets/Reducing_Crime/MOJ0026_Sector-Delivering%20BPS_v7.pdf>.

109 Ibid.

110 New Zealand Government, Department of Corrections ARA Poutama Autearoa 'Annual Report 1 July 2013-30 June 2014' (2015) 7 <http://www.corrections.govt.nz/__data/assets/pdf_file/0007/767923/Corrections_Annual_Report_2013-14_Full.pdf>.

111 Ibid.

outcomes, but must also be responsive to the individual needs of offenders – we call this our offender-centric approach, and it lends some complexity to the work we do.'[112]

'Corrections spent $1.19 billion in 2013/14, which was $28.3 million below the supplementary estimates.'[113] It seems the holistic approach that was first initiated in 1992 and then refined with the Result Action Plan and the uniting of all the justice sectors into one action group to tackle crime prevention has achieved its goal. However, it must be noted that it is still early days and the long term effects have yet to be fully evaluated.

The New Zealand model is much broader than justice re-investment which tends to focus more on the community from which an offender originates rather than the individual. The New Zealand model addresses all avenues – the community, the offender and the victim. It addresses drivers of crime in a united approach between government sectors as well as calling upon community and social groups to be involved.

VI CONCLUSION

Justice must always question itself… just as society can exist only by means of the work it does on itself and on its institutions.[114]

Across Australia, various justice reinvestment action groups are working with pockets of communities in an effort to prevent crime and thereby reduce the incarceration numbers, in particular, the incarceration of minority groups such as the Australian indigenous. Such efforts are commendable and just like the principle of the process of reconciliation,

112 Ibid 9.
113 Ibid 10.

114 Michael Foucault in Tom Koch, *Scarce Goods: Justice, Fairness, and Organ Transplantation*, (Greenwood Publishing Group, 2002) 26.

it takes the individual, the small groups to change government in the long term as the mills of government institutions grind slowly.

In Western Australia, the Bis Industries, Fairbridge and the Department of Corrective Services worked in collaboration to create a project known as the Fairbridge Bindjareb Project. The project, commenced in 2010 'provides Indigenous people currently engaged in the criminal justice system with training and employment in the mining industry.'[115] The objectives of the project is threefold: to improve the lives of Indigenous through effective training programmes that will lead to employment in the mining industry; to provide life skills tailored to individual needs; to provide sustainable change not only for the individual but also for their families and communities.[116]

The success of the Fairbridge project has secured further funding from all its funding partners for it to continue until 2016. It is a 16 week intensive programme and individual stories provide evidence of its success. One individual who is 42 years of age has spent 25 years of his life in incarceration. Since participating in the Fairbridge project, he has secure employment, a supportive family and is determined to remain out of jail.[117] The Fairbridge project 'changed his life.'[118]

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115 Government of Western Australia, Department of Corrective Services 'Fairbridge Bindjareb Project: Indigenous mining industry training and employment program' (2015) <http://www.bisindustries.com/media/documents/Bis%20Industries%20Fairbridge%20Bindjareb%20Project%20Brochure.pdf>.

116 Ibid.

117 Australian Broadcasting Commission 'WA prison skills program chaning lives as Government seeks new approach to Aboriginal incarceration rates' (8 October 2015) <http://www.abc.net.au/news/2015-10-08/wa-indigenous-inmates-making-the-most-of-binjareb-skills-program/6837666>.

118 Ibid.

In 2013, a pilot programme was implemented in Bourke NSW. This programme was developed by three groups working together: Justice Reinvest NSW, The Bourke Aboriginal Community Working party and the Australian Human Rights Commission.[119] After appealing to community and corporate groups as well as government sectors, the pilot programme began in 2014 through funding from Dusseldorp Forum, the Vincent Fairfax Foundation and some governmental support both state and federal.

The aim of the pilot programme is to provide a justice reinvestment framework as a demonstration to the government that such a model provides a real solution to preventing crime as well as creating alternative pathways for youth. 'From 2014 – 2016, Just Reinvest NSW is working in partnership with Maranguka to develop a justice reinvestment framework for Bourke, including the implementation of the first key phase of that framework.'[120]

Such projects reflect a determination by philanthropists and action groups to bring about change in a society that does not have clear government strategies on crime prevention. Tammy Solonec, Indigenous Rights Manager with Amnesty Australia said in her address on Justice Reinvestment at the Sir Ronald Wilson Lecture in Perth in 2014: 'The first stage of Justice Reinvestment involves a statistical mapping of the prison populations to determine where the offenders come from (their home community) and where the offences occurred.'[121] Unfortunately, in Australia, there is no standardised data collection. There is no way of

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[119] Justice Reinvest NSW 'Justice Reinvestment in Bourke' (2015) <http://www.justreinvest.org.au/projects/jr-in-bourke/>.

[120] Ibid.

[121] Tammy Solonec, 'Justice Reinvestment - What differences could it make in WA' (2014) <https://www.lawsocietywa.asn.au//wp-content/uploads/2015/09/2014-SRWL-Paper-Final.pdf>.

evaluating effectively where the problems lie in the criminal justice system.

It is interesting to observe that crime prevention strategies are not the only reason why intervention through investment in communities can impact upon social behaviour and expectation. The City of Kwinana, south of Perth, launched an innovative project called 'Looking Forward'. The project was aimed at improving the image of Kwinana which would encourage private and public investment in Kwinana. Carol Adams, the City's Mayor, was keen to clean up what was seen to be a poor image with aging infrastructure, lack of facilities and a shopping centre that did not encourage investors to the area. The $300 million revitalisation project was launched in May 2006 and the real estate interest in Kwinana was the first indication of success with housing stock becoming scarce.[122].

Professional surveys conducted by a reputed firm, Catalyse, enabled the Kwinana Council to ascertain the priorities for the residents: community safety and the environment. These surveys were conducted approximately every two years to maintain contemporary feedback from the community, in particular, what was working and where further investment needed to be done. There was also research undertaken through observing what other Councils had achieved. It was a major project that required cooperation from all sectors of government in the City of Kwinana.

In more recent times, the Red Cross provided funding which saw a night patrol initiative where Noongar Elders in partnership with paid youth engagement officers met with youth congregating after dark in the City

122 Maire Ni Mahuna, Interview with Mayor Carol Adams (Kwinana Looking Forward Project, 23 November 2015).

centre area. The patrol workers utilised a bus and collected the youth from the streets, ascertained where the youth were from and would return them home subject to a responsible adult being present. For many other youth, they were brought back to the Medina Aboriginal Cultural Centre where they were provided support, food, interactive activities and a safe and secure environment until they could be returned to their home.

The City's dedicated youth engagement team also patrolled shopping centres, engaging youth and liaising with store owners, providing a visible presence. This investment into the care of the youth was very successful and was brought about through the recognition that Kwinana had a large young community and a fundamental imperative to provide support to those in need.

A lot of investment was spent on community services throughout the City. One of the new investments in the City Centre was a Library and Resource Centre which housed many not for profit organisations as well as a dedicated privately operated 'Dome' café. It has been observed that the Dome, has become a central meeting place due primarily to its favourable location adjacent to the City's Recreation and Aquatic centre and library. The emphasis was on the needs of the people of Kwinana. Communication through a quarterly newsletter, 'Spirit of Kwinana' also raised the profile of the area and provides a regular and inclusive update on City activities.

Not only did the project provide somewhere for the youth to go, but a significant effort was invested in the environment with parks and gardens, wide open streets and a visual environment that was clean, spacious and attractive. The profile of the community lifted significantly attracting investors into the area. Interestingly 'Looking Forward' was a success,

not through statistical mapping but through the approach to know the community by the community: Where investment was to be placed was through what the community voiced in their feedback.

There needs to be this type of a united approach for a real difference to be achieved throughout Western Australia. Whether it be to follow the City of Kwinana's model, the justice reinvestment model like Texas, or whether it be to take on the challenge of a more holistic approach like New Zealand that is successfully implementing elements of all the various theories that have led to the current concept of justice reinvestment. Such a united approach would need to involve not just pockets of the Western Australian community but a whole government approach with the collaboration of both the public and private sectors.

Thus, the philosophy of the human person behind the approach of justice reinvestment is fully consistent with Taylor's thinking of the human person as a social being. It does not deny the autonomy of the individual, indeed it is very thorough in its insistence on the offender being made to confront all the consequences of his/her actions. However, like Taylor, it also takes full cognizance of the fact a human being is essentially a social being and therefore it realizes that to deal adequately with the problem of crime, it must not focus exclusively on the individual, but must broaden its scope to include the network of relationships and communities in which the offender is embedded.

FENCES IN OUTER SPACE: RECOGNISING PROPERTY RIGHTS IN CELESTIAL BODIES AND NATURAL RESOURCES

NICOLE NG*

ABSTRACT

The major space law treaties, agreed during the Cold War era, do not protect property rights crucial to responsible mining in outer space. While the technology to mine valuable resources in outer space is developing rapidly, international space law impedes outer space mining. This article evaluates the current legal framework and suggests two ways to recognise property rights in celestial bodies. The first, is for space miners to create a spontaneous order that will recognise and enforce each other's quasi-legal property rights. The second, is for States to establish an International Space Authority that will grant mining leases. Further, this article recommends amending the Outer Space Treaty to clearly recognise property rights in resources extracted for commercial purposes.

I INTRODUCTION

In Robert Frost's poem 'Mending Wall', one character remarks, 'good fences make good neighbours'.[1] His observation still holds true wherever people are found, whether on Earth or in outer space. Companies such as Planetary Resources and Deep Space Industries are planning to mine asteroids for valuable resources including: platinum group metals, industrial metals, silicates and water.[2] However, international space law

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1 Robert Frost, 'Mending Wall' in Louis Untermeyer (ed), *Modern American Poetry* (Harcourt, Brace and Howe, 1919).

2 Accenture, *Courage or Capital: The Final Obstacles for Sustainable Asteroid Mining* (2015) Accenture Consulting, 2 <https://www.accenture.com/us-en/insight-final-obstacles-for-sustainable-asteroid-mining?c=res_nrfy15twt_10000003&n=smc_0715>; Deep Space Industries, *Space Resources* (2015) <http://deepspaceindustries.com/space-resources/>.

currently does not provide sturdy fences for neighbours in outer space to mine asteroids and planets. To encourage responsible commercial development of outer space, the law should limit the notion of outer space as *res communis* – the community's shared property.[3] By clearly recognising and delineating property rights in celestial bodies and extracted resources, the law would provide certainty to pioneers of outer space mining.

This article explains how current international space law impedes commercial mining development by categorising outer space as *res communis*. It then analyses how the law affects the ability to mine celestial bodies and to own extracted natural resources. This article proposes two alternative approaches to recognising property rights in celestial bodies: first, allowing a spontaneous order to arise among space miners; or, second, creating an international space authority that would grant mining leases. In addition, this article recommends the protection of property rights in extracted resources. Finally, it explains how a clear recognition of property rights can benefit all countries.

In 2015, Planetary Resources successfully launched and deployed a demonstration spacecraft to test its asteroid mining technology: Planetary Resources, 'Planetary Resources' First Spacecraft Deployed' (Press Release, 16 July 2015). <http://www.planetaryresources.com/2015/07/planetary-resources-first-spacecraft-deployed/>. Outer space mining could begin within two decades: Philip T Metzger et al, 'Affordable, Rapid Bootstrapping of the Space Industry and Solar System Civilization' (2013) 26(1) *Journal of Aerospace Engineering* 18.

3 See Yun Zhao, 'An International Space Authority: A Governance Model for a Space Commercialization Regime' (2004) 30 *Journal of Space Law* 277, 280.

II COMMERCIAL DEVELOPMENT AND THE NOTION OF *RES COMMUNIS*

Describing outer space as 'the province of all mankind',[4] the *Outer Space Treaty* ('***OST***') recognises outer space as *res communis.* Under art I States are free to explore and use outer space and to access all areas of celestial bodies.[5] Under art II outer space including the Moon and other celestial bodies 'is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'.[6] Thus, States have no right to own outer space.

The historical context of the *OST* helps explain why its drafters designated outer space as *res communis.* The major space treaties, including the *OST*, were concluded during the Cold War when States were the only actors in outer space. The space powers and other States

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4 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967) art I. Herein referred to as ('the Treaty').

5 According to art I of the Treaty:

> The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.
>
> Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.
>
> There shall be freedom of scientific investigation in outer space, including the Moon and other celestial bodies, and States shall facilitate and encourage international cooperation in such investigation.

6 According to art II of the Treaty:

> Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

sought to prevent each other from asserting exclusive and conflicting claims to outer space.[7] They were hardly concerned about encouraging commercial private development of outer space.[8]

The notion of *res communis* hinders responsible commercial mining by promoting the tragedy of the commons.[9] When people can freely access and use a community's shared property, each person can exploit its resources for his or her maximum benefit yet spread the cost of exploitation, including future costs, across all users.[10] Consequently, individuals have no incentive to minimise shared costs. In contrast, owners of private property have an incentive to exercise good stewardship over their property. An owner who poorly manages a property bears the cost of its declining value; conversely, an owner who improves the property to yield future benefits profits from its increased value.[11]

Further, the notion of *res communis* discourages responsible mining by allowing people to free-ride on other people's labour.[12] Suppose Astrum, Nauta and Metallicus are three people interested in mining. If Astrum conducts surveys and tests to find a lucrative asteroid and opens a mine site, Nauta and Metallicus can take a 'free ride' on Astrum's investment by going straight to the mine site and helping themselves as quickly as

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7 Bin Cheng, 'The 1967 Space Treaty: Thirty Years On' (1997) 40 *Proceedings of the Colloquium on the Law of Outer Space* 17, 22; See also Benjamin David Landry, 'A Tragedy of the Anticommons: The Economic Inefficiencies of Space Law' (2012-13) 38 *Brooklyn Journal of International Law* 523, 528-31.

8 Ezra J Reinstein, 'Owning Outer Space' (1999) 20 *Northwestern Journal of International Law & Business* 59, 62.

9 See Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

10 See Ricky J Lee, *Law and Regulation of Commercial Mining of Minerals in Outer Space* (Springer, 2012) 218.

11 Ludwig von Mises, *Human Action: A Treatise on Economics* (Ludwig von Mises Institute, 1998) 651.

12 See Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621, 624.

possible to unextracted minerals there. All three people would therefore have little incentive to plan sustainable, long-term mining.

Investors in Astrum's position seek clear, secure property rights in mine sites and extracted resources so that they can reap the rewards of their risk-taking ventures.[13] Thus, property rights would motivate investors to commit the large sums of money required for outer space mining.[14] Further, property rights would encourage companies to pursue sustainable development rather than reckless, short-term gain.

III PROPERTY RIGHTS IN CELESTIAL BODIES

International space law is currently inadequate to protect the real property rights required for long-term mining development. Commentators generally agree that the *OST*'s notion of space as *res communis* prohibits all property rights in the Moon and other celestial bodies. The *travaux préparatoires* support this view.[15] Further, the *Moon Agreement* ('***MA***') expressly prohibits property rights in the Moon and other celestial bodies within the solar system, other than the Earth.[16]

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13 Virgiliu Pop, *Who Owns the Moon? Extraterrestrial Aspects of Land and Mineral Resources Ownership* (Springer, 2009) 116; Francis Lyall and Paul B Larsen, *Space Law: A Treatise* (Ashgate Publishing, 2009) 196; Fabio Tronchetti, *The Exploitation of Natural Resources of the Moon and Other Celestial Bodies: A Proposal for a Legal Regime* (Martinus Nijhoff, 2009) 237.

14 See President's Commission on Implementation of United States Space Exploration Policy, *A Journey to Inspire, Innovate, and Discover* (2004) 34 <http://govinfo.library.unt.edu/moontomars/docs/M2MReportScreenFinal.pdf>.

15 Pop, above n 13, 64-5.

16 *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, opened for signature 5 December 1979, 1363 UNTS 3 (entered into force 11 July 1984).

A *Private Appropriation and the Non-Appropriation Principle*

A few commentators argue that *OST* art II prohibits only 'national appropriation' and permits private appropriation. According to Gorove, the *OST* 'appears to contain no prohibition regarding individual appropriation'. [17] Thus, an individual, a private association or an international organisation can lawfully appropriate any part of outer space, including celestial bodies.[18]

Most commentators, however, argue that the *OST* implicitly prohibits private appropriation. Cheng writes that outer space, like the high seas, belongs to no State and is not appropriable by States or their nationals.[19] There are three main reasons for this view.

First, 'national appropriation' includes appropriation by non-governmental entities. Under *OST* art VI, States are internationally responsible for 'national activities' in outer space, including activities by non-governmental entities. States must also authorise and supervise the activities of non-governmental entities. Consequently, States cannot license non-governmental entities to privately appropriate what cannot be publicly appropriated.[20] If a State were to authorise a non-governmental entity's appropriation under art VI, the appropriation would constitute national appropriation 'by any other means', violating art II.[21]

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17 Gorove S, 'Interpreting Article II of the Outer Space Treaty' (1968) 11 *Proceedings of the Colloquium on the Law of Outer Space* 40, 42.

18 Ibid.

19 Bin Cheng, 'The Commercial Development of Space: The Need for New Treaties' (1991) 19(1) *Journal of Space Law* 17, 22.

20 P M Sterns, G H Stine and L I Tennen, 'Preliminary Jurisprudential Observations concerning Property Rights on the Moon and Other Celestial Bodies in the Commercial Space Age' (1996) 39 *Proceedings of the Colloquium on the Law of Outer Space* 50, 53.

21 Pop, above n 13, 65; Lee, above n 10, 166-7.

Second, *OST* art I, and possibly customary law,[22] implicitly prohibit property rights by protecting freedom of access to all areas of celestial bodies.[23] Returning to the hypothetical scenario above, Astrum cannot be said to have property rights in the mine site: Astrum has no control over access to the site and cannot exclude others from it. Since control over access is unlawful under art I, property rights in celestial bodies cannot exist.

Third, *OST* art II implicitly prohibits property rights by prohibiting State sovereignty in outer space. According to Lee, art II prohibits only the exercise of sovereign rights and does not address property rights in celestial bodies.[24] Nevertheless, the international community generally considers that property rights require a superior authority to enforce them.[25] Since art II and perhaps customary law[26] prohibit State sovereignty, no property rights can exist.[27]

The *MA*, which has only 16 State parties and thus has limited binding legal value,[28] repeats the *OST*'s prohibition of national appropriation.[29] In

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22 He Qizhi, 'The Outer Space Treaty in Perspective' (1997) 25 *Journal of Space Law* 93.

23 Pop, above n 13, 65.

24 Lee, above n 10, 179, 199.

25 Francis Lyall and Paul B Larsen, above n 13, 184; Pop, above n 13, 66; C Q Christol, 'Article 2 of the 1967 Principles Treaty Revisited' (1984) 9 *Annals of Air and Space Law* 217, 222-4; Lee, above n 10, 199.

26 Manfred Lachs, *The Law of Outer Space: An Experience in Contemporary Law-Making* (Martinus Nijhoff Publishers, first published 1972, 2010 ed) 42; Lee, above n 10, 171.

27 Pop, above n 13, 66; F G von der Dunk et al, 'Surreal Estate: Addressing the Issue of 'Immovable Property Rights on the Moon" (2004) 20 *Space Policy* 149, 153.

28 United Nations Office for Disarmament Affairs, *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* <http://disarmament.un.org/treaties/t/moon>.

29 *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, opened for signature 5 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) art 11(2).

addition, *MA* art 11 explicitly prohibits creating and asserting property rights over areas of celestial bodies.[30] Subject to an international regime to be established under art 11(5), the surface and subsurface of celestial bodies shall not become property of any governmental or non-governmental entity.[31]

To protect their investment, miners would wish to control access to and use of the mine site.[32] Such control would breach *MA* art 11. It may also violate the following provisions of the *OST*:

- art I by denying freedom of access and use to other entities;
- art II by asserting exclusive access amounting to national appropriation; and
- art IX by not having due regard to other States' corresponding interests in access to the resources.[33]

As a result, the *OST* and *MA* impede commercial mining of celestial bodies.

B *The Meaning of 'Celestial Body'*

According to Pop, if objects such as asteroids and comets are not 'celestial bodies', they will evade the non-appropriation principle.[34] Although the *OST* and *MA* refer to 'celestial bodies', they do not define the term.

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30 See Cheng, above n 19, 22; Lee, above n 10, 199.

31 *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, opened for signature 5 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) art 11(3).

32 Lee, above n 10, 165.

33 Ibid 196-7.

34 Pop, above n 13, 50.

Defining 'celestial bodies' is an 'extremely intricate' issue.[35] As the scientific reclassification of Pluto illustrates, a scientific definition would continually change with astronomers' taxonomy.[36] Consequently, commentators propose four kinds of definitions that use other criteria: human interest, size, control and function. Nevertheless, each definition suggested by commentators has both merits and shortcomings.[37]

In any case, the non-appropriation principle arguably applies to asteroids and comets. As De Man points out,[38] art II of the *OST* is worded broadly, covering '[o]uter space, including the Moon and other celestial bodies'. Outer space in a broad sense encompasses material phenomena that are not celestial bodies. Consequently, it may be prudent for space miners to assume that the non-appropriation principle governs all naturally occurring objects in space.

IV PROPERTY RIGHTS IN EXTRACTED RESOURCES

Real property rights in a mine site would be worthless to miners without personal property rights, specifically ownership, in the extracted natural resources themselves. Although the *OST* and *MA* prohibit appropriation

35 Ibid 58.

36 Ph De Man, 'The Commercial Exploitation of Outer Space and Celestial Bodies—A Functional Solution to the Natural Resource Challenge' in Mark J Sundahl and V Gopalakrishnan (eds), *New Perspectives on Space Law* (International Institute of Space Law, 2011) 43, 46.

37 For a discussion of the human interest definition, see Lee, above n 10, 190-1. For a discussion of the spatialist definition, see Pop, above n 13, 52. For discussions of the control definition, see Pop, above n 13, 54-5; Lee, above n 10, 189-91. For a discussion of the functional definition, see Pop, above n 13, 55-6. One drawback of the functional definition is that it appears to assume an object can only be used in one way at any given time.

38 See De Man, above n 36, 53.

of celestial bodies, they arguably allow commercial appropriation of natural resources extracted from celestial bodies.

A *Appropriation of Extracted Resources under the OST*

A few commentators argue that the *OST* prohibits appropriation of natural resources. Lafferranderie states that the *OST* does not distinguish between outer space and its natural resources.[39] As a result, the non-appropriation principle in art II applies to both outer space and its resources. Others argue that the *OST* allows appropriation of resources up to a certain threshold, but only for scientific purposes.[40] According to Brooks, 'the exclusive use of a scarce resource … would constitute an appropriation'. [41] Substantially depleting a celestial body's mass by extracting large quantities of material may constitute appropriation by 'destruction' or 'total consumption', thus contravening *OST* art II (and *MA* art 11(2)).[42]

Other commentators argue that *OST* art II allows States and nationals to appropriate resources in outer space, but not to appropriate outer space itself.[43] The *OST* is a promotional and enabling instrument.[44] By analogy with the freedom of the high seas, the freedom in *OST* art I to explore and

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39 G Lafferranderie, *Le regime juridique applicable aux materiaux provenant de la lune et des autres corps celestes - rapport introductif* (Groupe de travail sur le droit de l'espace du CNRS, 1970) 3, cited in Pop, above n 13, 136; See also Eugene Brooks, 'Control and Use of Planetary Resources' (1968) 11 *Proceedings of the Colloquium on the Law of Outer Space* 342.

40 Brooks, above n 39, 346.

41 Ibid.

42 Lee, above n 10, 200; Oscar Fernandez-Brital, 'Activities on Celestial Bodies, including Exploitation of Natural Resources' (1969) 12 *Proceedings of the Colloquium on the Law of Outer Space* 195, 197.

43 See, eg, Cheng, above n 19, 22.

44 Stephen E Doyle, 'Using Extraterrestrial Resources under the Moon Agreement of 1979' (1998) 26 *Journal of Space Law* 111, 116.

use outer space includes the freedom to appropriate natural resources.[45] Thus, Hertzfeld and von der Dunk argue that '[a]nything taken from space and returned to earth becomes the property of the [entity] that performs the action'.[46]

Nevertheless, it is debatable whether customary international law recognises a right to commercialise extraterrestrial material. In the 1970s, the United States and the USSR appropriated and exchanged samples collected by the *Apollo* and *Luna* missions without objections from other States.[47] In 1993, Russia auctioned three small particles of lunar material collected by a Soviet probe, and no States objected.[48] Still, Tronchetti disputes the existence of State practice. He observes that the United States and the USSR took only small samples primarily for scientific information, unlike a large-scale removal of natural resources for profit.[49]

Thus, although the *OST* arguably permits entities to use natural resources for non-scientific purposes, it is generally acknowledged that the law lacks sufficient certainty for commercial mining.[50]

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45 C W Jenks, 'Property in Moon Samples and Things Left upon the Moon' (1969) 12 *Proceedings of the Colloquium on the Law of Outer Space* 148, 148-9; Sylvia Maureen Williams, 'The Law of Outer Space and Natural Resources' (1987) 36 *International and Comparative Law Quarterly* 142, 147.

46 Henry R Hertzfeld and Frans G von der Dunk, 'Bringing Space Law into the Commercial World: Property Rights without Sovereignty' (2005) 6(1) *Chicago Journal of International Law* 81, 83. See also S Hobe, 'Adequacy of the Current Legal and Regulatory Framework relating to the Extraction and Appropriation of Natural Resources' (2007) 32 *Annals of Air and Space Law* 115, 126.

47 M G Markoff, 'Accords Particuliers et Droit International General de L'espace' (1972) 15 *Proceedings of the Colloquium on the Law of Outer Space* 67, 167; Gyula Gál, 'Acquisition of Property in the Legal Regime of Celestial Bodies' (1996) 39 *Proceedings of the Colloquium on the Law of Outer Space* 45, 47.

48 Pop, above n 13, 140-1.

49 Fabio Tronchetti, 'The Space Resource Exploration and Utilization Act: A Move Forward or a Step Back?' (2015) 34 *Space Policy* 6, 8.

50 See, eg, Henry R Hertzfeld and Frans G von der Dunk, above n 46, 83; Tronchetti, above n 13, 224-5.

B *The Effect of OST Art I(1) on Miners*

According to the majority view, the *OST* permits entities to use natural resources for non-scientific purposes so long as they comply with the provisions in the *OST*.[51] Article I(1) of the *OST* states, 'The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development'. According to Jasentuliyana, art I aims to 'require States to co-operate internationally in their space ventures' by 'calling attention to the essential needs of mankind and emphasizing the importance of co-operation'.[52]

Since art I(1) is worded vaguely,[53] the nature and extent of the cooperation obligation were long debated. Some argued that the 'benefit' must be specifically shared through transferring profits, materials or technology.[54] Others argued that the exploration and use of space need only be beneficial in a general sense – 'which might even encompass merely being non-harmful'.[55] According to Jasentuliyana and Cheng, the obligation to cooperate constituted 'more a moral and philosophical obligation' than a legal requirement creating specific legal rights.[56]

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51 Tronchetti, above n 13, 224.

52 N Jasentuliyana, 'Article I of the Outer Space Treaty Revisited' (1989) 17 *Journal of Space Law* 129, 139.

53 See ibid; Sylvia Maureen Williams, 'International Law and the Exploitation of Outer Space: A New Market for Private Enterprise?' (1983) 7(6) *International Relations* 2476, 2477.

54 See M A Ferrer in Council of Advanced International Studies of Argentina (ed), *Legal Framework for Economic Activities in Space* (1982) 92.

55 Francis Lyall and Paul B Larsen, above n 13, 63.

56 Jasentuliyana, above n 52, 130; Bin Cheng, *Studies in International Space Law* (Clarendon Press, 1997) 234-5.

When negotiating art I, the major space-faring States agreed that it set 'limitations and obligations to the use of outer space but did not diminish their inherent rights to determine how they shared the benefits and information derived from their space activities'.[57] According to the chief United States negotiator, art I was a statement of general goals.[58] The Soviet delegate to COPUOS stated that 'the principle of international cooperation … is given body through the conclusion of specialized treaties by States and international organizations'.[59]

Some commentators, including commentators from developing countries,[60] held a similar view. They argued that art I did not require a State which used a celestial body to 'provide for equal opportunity and means for such use by all other States' or to 'share all benefits of its use with all other States'.[61] 'Benefit' was 'an imprecise criterion' that countries interpreted differently based on their own interests at various times.[62] Further, the benefit and interests of 'all countries' included the scientific and commercial benefit and interests of the State conducting the space activity in question.[63]

Other commentators, however, emphasised art I's use of the plural word 'interests'. They argued that States conducting space activities might have

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57 N Jasentuliyana, 'Ensuring equal access to the benefits of space technologies for all countries' (1994) 10 (1) *Space Policy* 7, 8; *Treaty on Outer Space: Hearings Before the Senate Committee on Foreign Relations*, 90th Cong, Ist Sess 1 74 (1967).

58 *Treaty on Outer Space: Hearings Before the Senate Committee on Foreign Relations*, 90th Cong, Ist Sess 133 (1967).

59 Gennady Zhukov and Yuri Kolosov, *International Space Law* (1984) 77, cited in Jasentuliyana, above n 52, 140.

60 See, eg, Luis F Castillo Argañarás, 'Benefits Arising from Space Activities and the Needs of Developing Countries' (2000) 43 *Proceedings of the Colloquium on the Law of Outer Space* 50, 57.

61 Doyle, above n 44, 114.

62 Williams, above n 53, 2478.

63 Stephen Gorove, 'Implications of International Space Law for Private Enterprise' (1982) 7 *Annals of Air and Space Law* 319, 321.

to consider a particular set of identifiable interests of all States, not just the general interest of all States.[64] The obligation might require practical implementation through further guidelines, such as the *MA*.[65]

To settle the debate over the meaning of art I(1), in 1996 the United Nations General Assembly adopted the 'Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries'.[66] The Declaration 'can be regarded as an authoritative interpretation' of art I(1).[67] Adding to art I, it provides that '[p]articular account should be taken of the needs of developing countries'.[68] It exhorts spacefaring States to cooperate with developing States to promote the development of space science and technology and its applications, to develop appropriate space capabilities in interested States and to exchange expertise and technology.[69] Cooperation should occur on 'an equitable and mutually acceptable basis'.[70] Contracts in such cooperative ventures should be 'fair and reasonable' and fully comply with the parties' legitimate rights and interests.[71] The Declaration thus encourages developing and developed countries to direct their efforts towards mutually valued cooperation rather than mere redistribution of existing resources. Consequently, art I(1) does not compel miners to

64 Lee, above n 10, 157, citing Cheng, above n 56, 234-5.
65 Lee, above n 10, 158.
66 GA Res 51/122, UN GAOR, 51st sess, 83rd plen mtg, Agenda Item 83, UN Doc A/RES/51/122 (13 December 1996).
67 Hobe, above n 46, 126.
68 GA Res 51/122, UN GAOR, 51st sess, 83rd plen mtg, Agenda Item 83, UN Doc A/RES/51/122 (13 December 1996) [1].
69 Ibid [3]-[5].
70 Ibid [2].
71 Ibid.

redistribute their resources but instead articulates a general moral and philosophical obligation.

C *Appropriation of Extracted Resources under the MA*

Article 11 of the *MA* states that subject to a future international regime, no natural resources 'in place' shall become property of any governmental or non-governmental entity.[72] In addition, the *MA* imposes a requirement of 'equitable sharing'.

Some commentators state that the *MA* imposes a moratorium on exploitation for commercial purposes. Tronchetti argues that since art 6 only allows harvesting resources for scientific purposes, the *MA* prohibits harvesting for commercial purposes until the *MA*'s international regime is established.[73] In von der Dunk's view, the moratorium applies only to States that are party to the *MA*.[74]

However, the text and drafting history of the *MA* suggest that no moratorium exists. Unlike the *UNCLOS*,[75] the *MA* does not specifically provide for a moratorium on exploitation.[76] In addition, during the *MA*'s drafting the United States repeatedly stated that the *MA* imposed no moratorium.[77] Since other States did not contradict the United States' interpretation, its interpretation appears to express the views of the treaty's drafters.[78] Further, natural resources that have been extracted can

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72 *MA* art 11(3).

73 Tronchetti, above n 13, 43.

74 Frans G von der Dunk, 'The Dark Side of the Moon—The Status of the Moon: Public Concepts and Private Enterprise' (1997) 40 *Proceedings of the Colloquium on the Law of Outer Space* 119, 121-2.

75 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 28 July 1994).

76 Leslie I Tennen, 'Towards a New Regime for Exploitation of Outer Space Mineral Resources' (2010) 88 *Nebraska Law Review* 794, 814.

77 A/AC.105/PV.203 (3 July 1979) 22; see also the speech of Mr Petree, the US delegate to the Special Political Committee, A/SPC/34/SR.19 (1 November 1979) para 25.

78 Bin Cheng, 'The Moon Treaty: Agreement Governing the Activities of States on the Moon and Other Celestial Bodies within the Solar System other than the Earth, December 18, 1979' (1980) 33(1) *Current Legal Problems* 213, 232.

arguably be appropriated for commercial purposes because they are no longer 'in place'.[79]

Nevertheless, such appropriation is subject to the principle of the common heritage of mankind, which requires '[a]n equitable sharing by all States Parties in the benefits derived from those resources'.[80] In 2005, it was reported that United States companies had decided not to use Australian territory for their mining expeditions for fear that Australia, as a party to the *MA*, might confiscate any minerals brought from outer space.[81] None of the major spacefaring countries are inclined to sign the *MA*, and 'well founded rumour has it that at least one ratifying state (Australia) has seriously contemplated withdrawal'.[82] Although the *MA* likely does not impose a moratorium on commercial exploitation, it has created enough uncertainty to deter miners.

V PROPOSED LEGAL FRAMEWORK

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79 Pop, above n 13, 146; Doyle, above n 44, 121; Tennen, above n 76, 813; Hobe, above n 46, 124.

80 *MA* art 11(7)(d) requires the future international regime to ensure:

> [a]n equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon, shall be given special consideration.

It is beyond the scope of this paper to discuss art 11(7)(d), which was a major reason for the *MA*'s failure to gain international consensus: F G von der Dunk, 'The Moon Agreement and the Prospect of Commercial Exploitation of Lunar Resources' (2007) 32 *Annals of Air and Space Law* 90, 106. Doyle argues that *MA* art 11(7) contradicts *OST* art I(1) and *MA* art 4(1): Doyle, above n 50, 123.

81 Henry R Hertzfeld and Frans G von der Dunk, above n 46, 92.

82 Francis Lyall and Paul B Larsen, above n 13, 178-9.

A *Sovereignty and Ownership of Celestial Bodies?*

To encourage responsible commercial development, some commentators advocate recognising ownership and State sovereignty over celestial bodies.[83] However, since non-appropriation is a fundamental principle in space law, it is unlikely that States will soon agree to recognise ownership rights. Further, recognising State sovereignty over celestial bodies may create international conflict.

Non-appropriation is 'one of the most fundamental and universally recognised principles of international space law'[84] and possibly a norm of customary law.[85] Tronchetti believes that the commercialisation of outer space must not erode this principle.[86] However, the preambles to the *OST* and *MA* show that one purpose of the principle was to prevent conflict in outer space.[87] Pop argues that if the non-aggression tenets in the *OST* remain valid, perhaps the non-appropriation principle should be abrogated in its 'sovereignty over natural resources' context.[88]

If States denounce the non-appropriation principle, outer space would become *res nullius*:[89] States would be able to acquire sovereignty on celestial bodies and thus to recognise and enforce property rights, including ownership rights.[90] However, dividing celestial bodies into

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83 See, eg, Kurt Anderson Baca, 'Property Rights in Outer Space' (1993) 58 *Journal of Air Law and Commerce* 1041, 1084.

84 Lee, above n 10, 166. Tennen calls the non-appropriation principle '[a] cornerstone of international space law': Leslie I Tennen, 'Article II of the Outer Space Treaty, the Status of the Moon and Resulting Issues' (2004) 47 *Proceedings of the Colloquium on the Law of Outer Space* 520, 520.

85 Pop, above n 13, 38-9; Lachs, above n 26, 42; Francis Lyall and Paul B Larsen, above n 13, 71.

86 Tronchetti, above n 13, 217.

87 Pop, above n 13, 60. See also Tennen, above n 84, 522-3.

88 Pop, above n 13, 107.

89 Ibid 108.

90 Ibid.

national portions would likely produce conflicts over the size and location of each portion.[91] An alternative is sovereignty on a first-come, first-served basis. Some commentators reject this method, arguing that it encourages explorers to inefficiently focus resources on reaching celestial bodies first rather than on developing the celestial bodies productively.[92] To address this issue, Baca advocates reasonable use as a basis for national appropriation,[93] but reasonable use is a vague concept that would be difficult to enforce. Further, State sovereignty may encourage States to hasten to claim valuable celestial bodies. It may create conflict among space powers and between developed and developing countries.[94]

Consequently, political difficulties preclude recognising State sovereignty. States are also unlikely to recognise ownership of celestial bodies in the near future. Nevertheless, since responsible commercial development requires property rights, States may be amenable to recognising lesser property rights, which would erode the non-appropriation principle to a lesser extent.

B *A Spontaneous Order in Space*

In the Alaskan and Californian gold rushes, miners 'spontaneously' agreed on rules to establish and enforce property claims so that they could spend less time defending their claims.[95] Although the international

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91 Ibid.

92 David Collins, 'Efficient Allocation of Real Property Rights on the Planet Mars' (2008) 14 *Boston University Journal of Science and Technology Law* 201, 212-13; Robert P Merges and Glenn H Reynolds, 'Space Resources, Common Property and the Collective Action Problem' (1997) 6 *New York University Environmental Law Journal* 107, 117.

93 Baca, above n 83.

94 Tennen, above n 84, 523-4.

95 Lawrence A Cooper, 'Encouraging Space Exploration through a New Application of Space Property Rights' (2003) 19 *Space Policy* 111, 116; Robert P Merges and Glenn H Reynolds, above n 92, 118-19.

community generally believes that property rights require sovereignty,[96] a 'spontaneous order' could conceivably arise without an international regime to govern property rights in space.[97]

Salter and Leeson argue that private parties can enforce property rights in outer space without involving any sovereign entity.[98] The 'discipline of continuous dealings' encourages parties to respect each other's property rights. If Party A violates Party B's property rights once, Party B will retaliate by violating Party A's property rights. Thus, parties that continuously deal with each other will earn more in the long run by recognising rather than violating each other's property rights.

Salter and Leeson's economic analysis, which they illustrate using private arbitration of contractual disputes,[99] has limited application because contractual rights differ from property rights. Contractual rights that are *in personam* may be enforced against the contracting parties by an arbitrator chosen according to the parties' contract. In contrast, property rights are *in rem* rights enforceable against the whole world by an authority whom the alleged violators of property rights have not necessarily chosen. Consequently, property rights cannot always be enforced through contractual rights. As Epstein states, 'property rights … are intended to bind the rest of the world, and thus cannot depend on specific and repetitive interactions between a small class of individuals with a close working relationship … where denser understandings may

96 See above n 25.

97 For an explanation of spontaneous order, see F A Hayek, *Law, Legislation and Liberty—Volume 1: Rules and Order* (Routledge, 1973); Peter G Klein, *The Capitalist and the Entrepreneur: Essays on Organizations and Markets* (Ludwig von Mises Institute, 2010) 183.

98 Alexander W Salter and Peter T Leeson, 'Celestial Anarchy: A Threat to Outer Space Commerce?' (2014) 34(3) Cato Journal 581, 583.

99 Ibid 590-2.

arise from custom or from a repeated course of dealing'.[100] Nevertheless, since there are currently many asteroids and few asteroid miners, the pioneer miners may well be able to create a spontaneous order that respects each other's quasi-legal property rights.

Salter and Leeson acknowledge that political problems could arise if individuals of particular nationalities claim property rights contrary to sovereigns' interpretations of the *OST*.[101] For a spontaneous order to function peacefully, the countries and private entities concerned must not resort to brute force to enforce their claims. Further, legal problems could arise because the *OST* appears to prohibit private appropriation of celestial bodies. Unlike the miners in the Alaskan and Californian gold rushes, space miners have to contend with a pre-existing legal framework—a framework that holds States internationally responsible for activities of non-governmental entities and that protects freedom of access to all areas of celestial bodies.

In the real world, a possible resolution may involve pioneer miners establishing mine sites and forming extra-legal associations and rules, regardless of international law. In response, powerful States may choose to ignore the dominant interpretation of the space treaties and to instead encourage space mining that benefits their own interests. Thus, international law may eventually incorporate the pioneers' extra-legal arrangements.

But if a powerful State or group of States objects to the miners' activities, that State or group of States may force a more immediate legal resolution. Spacefaring States could enact their own domestic legislation, such as the

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100 Richard A Epstein, 'How Spontaneous? How Regulated?: The Evolution of Property Rights Systems' (2014-2015) 100 *Iowa Law Review* 2341, 2344.

101 Salter and Leeson, above n 98, 583-4.

United States' *Commercial Space Launch Competitiveness Act*,[102] but competing claims under different national laws may lead to political conflict.[103] In such circumstances, it would be more appropriate for States to create an International Space Authority ('Space Authority') responsible for granting mining leases.[104]

C *The International Space Authority*

In considering the role of a Space Authority, it is instructive to study the International Seabed Authority ('Seabed Authority'). Created under the *UNCLOS*, the Seabed Authority licences and regulates mineral exploration and exploitation of the deep seabed.

The Space Authority's method of allocating property rights would differ from the Seabed Authority's. The Seabed Authority grants exploration and exploitation applications for a fixed fee[105] on a first-come, first-served basis if several conditions are met.[106] In contrast, the Space Authority would grant leases to the highest bidder. Competition among bidders is likely the most efficient way to determine the price for a particular site because market prices would indicate the value that miners

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102 *US Commercial Space Launch Competitiveness Act*, 51 USC (2012 & Supp 2016).

103 Tronchetti, above n 49, 8.

104 See, eg, Cheng, above n 19, 43; Tronchetti, above n 13, 244; Lee, above n 10, 295.

105 See International Seabed Authority, *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area* (13 July 2000) 2, 12-13 <http://www.isa.org.jm/files/documents/EN/Regs/MiningCode.pdf>.

106 See *UNCLOS* art 162 para 2(x); annex III art 6 paras 1-4, art 10; *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, opened for signature 28 July 1994, 1836 UNTS 3 (entered into force 28 July 1996) annex s 1 paras 7, 13, s 6 para 7. See also Oxman, Bernard, 'Law of the Sea Forum: The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea' (1994) 88 *American Journal of International Law* 687, 692.

place on the site.[107] The bidder's payments would fund the Space Authority's mining-related activities such as recording leases and adjudicating disputes. To deter operators from damaging the environments of outer space and Earth, the Space Authority could also require an environmental bond.

An issue similar to the 'paper satellite' problem could arise if entities file frivolous applications.[108] To discourage 'paper mines', the Space Authority could set a floor price for bids and limit the duration of the lease to a reasonable time. When the lease for a site expires, the Space Authority would grant a new lease to the highest bidder.

The Space Authority would have a more limited role than the Seabed Authority. Under the *UNCLOS*, an entity applying for a licence from the Seabed Authority must identify two areas of equal estimated commercial value.[109] The Seabed Authority allocates one of the areas to the successful applicant and reserves the other for the Enterprise, which is part of the Seabed Authority, or for the developing States.[110] In direct competition with licencees, the Enterprise can mine resources in the reserved area.[111] The Enterprise's profits are to contribute to the Seabed Authority's budget and to be shared with the international community, particularly the developing States.[112]

Although the Enterprise bears the same obligations as commercial ventures and is supposed to begin mining operations through joint

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107 See F A Hayek, 'The Use of Knowledge in Society' (1945) 35(4) *American Economic Review* 519, 524-7.
108 See Lee, above n 10, 288.
109 *UNCLOS* annex III art 8.
110 Ibid.
111 Ibid art 170; Lee, above n 10, 248-9.
112 *UNCLOS* art 173; Lee, above n 10, 249.

ventures,[113] it is superfluous, unfair and economically inefficient for a regulator to compete with those it regulates.[114] The Seabed Authority can use money paid by licencees to exploit areas discovered by the licencees.[115] Further, in October 2012 a Canadian company proposed to negotiate a joint venture with the Enterprise to develop certain reserved areas.[116] The joint venture proposal was to be finalised in 2015,[117] but as at 20 April 2016 the Enterprise has never entered into any joint ventures.[118] The absence of joint ventures so far suggests that the Enterprise venture system is unprofitable. Further, the system impedes resource development by locking up reserved areas that commercial entities would like to develop. Consequently, unlike the Seabed Authority, the proposed Space Authority would not be both the mining regulator and a miner. Instead, its role would be to facilitate mining by processing applications.

The Space Authority could be created by amending the *OST* in accordance with art XV. Some space powers have stated that they have no interest in negotiating a new space treaty.[119] An amendment to the

113 UNCLOS Agreement s 2 para 4.

114 See Doug Bandow, 'UNCLOS III: A Flawed Treaty' (1982) 19 *San Diego Law Review* 475, 484-5; L E Viikari, 'The Legal Regime for Moon Resource Utilization and Comparable Solutions Adopted for Deep Seabed Activities' (2003) 31(11) *Advances in Space Research* 2427, 2431.

115 Marlene Dubow, 'The Third United Nations Conference on the Law of the Sea: Questions of Equity for American Business' (1982) 4 *Northwestern Journal of International Law & Business* 172, 188.

116 International Seabed Authority, *Proposal for a Joint Venture Operation with the Enterprise: Report by the Interim Director-General of the Enterprise*, 19th sess, UN Doc ISBA/19/C/4 (20 March 2013) 1.

117 Ibid 2.

118 International Seabed Authority <https://www.isa.org.jm>.

119 Tronchetti, above n 13, 242.

OST, which has a high number of ratifications and signatures,[120] appears more likely to receive widespread acceptance than a new, separate treaty.

Some commentators suggest that the Space Authority should grant licences as the Seabed Authority does.[121] However, leases would likely encourage miners to use the sites more profitably because leases, unlike licences, are alienable.[122] For example, if a commercial operator encounters financial difficulty or lacks the ability to exploit certain resources in the leased area, the operator could assign the lease to another operator capable of using the area more productively.

Nevertheless, there are risks in vesting an international body with exclusive authority to grant and withhold property rights in lucrative resources. Even if the Space Authority were to have external and internal accountability mechanisms, those mechanisms would only be as rigorous as the people who implement them.[123] Further, as with any public authority, public officials would have incentives to unproductively increase the Space Authority's powers and expenditures. For the Space Authority to facilitate rather than hinder responsible space development, the people who carry out the Space Authority's functions must act fairly and efficiently.

D *Clarifying Property Rights in Extracted Resources*

120 United Nations Office for Disarmament Affairs, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* <http://disarmament.un.org/treaties/t/outer_space>.

121 See, eg, Lee, above n 288; Tronchetti, above n 13, 245.

122 See Richard A Epstein, 'Property and Necessity' (1990) 13 *Harvard Journal of Law & Public Policy* 2, 4-5.

123 It is beyond the scope of this paper to address the composition of the Space Authority.

In November 2015, the United States enacted the *Commercial Space Launch Competitiveness Act*. It provides that United States individuals and entities are entitled to property rights, including ownership, in any asteroid resource or space resource obtained for commercial purposes.[124]

Although the United States' unilateral approach may be inconsistent with *OST* arts I and II,[125] it may encourage other States to recognise property rights in resources extracted for commercial purposes. If other States do not object to the United States' approach and if they enact similar legislation, their conduct may support a customary norm recognising ownership rights in extracted resources.

Nevertheless, a clear international legal framework may be needed to resolve conflicting claims between entities operating under different countries' laws. To clarify the *OST*'s effect on property rights in extracted resources, States could amend it to provide that natural resources which are not 'in place' may become property of any entity.

VI CONCLUSION: COMMERCIAL DEVELOPMENT FOR THE BENEFIT OF ALL COUNTRIES

By classifying outer space as *res communis* and failing to define key concepts, international space law currently hinders the responsible development of natural resources in outer space. The non-appropriation

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124 *US Commercial Space Launch Competitiveness Act*, 51 USC § 51303 (2012 & Supp 2016) states:

> A United States citizen engaged in commercial recovery of an asteroid resource or a space resource under this chapter shall be entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use, and sell the asteroid resource or space resource obtained in accordance with applicable law, including the international obligations of the United States.

125 Tronchetti, above n 49, 8.

principle, which applies to the undefined class of 'celestial bodies', prevents miners from securing exclusive access to mine sites. Nevertheless, the weight of authority indicates that the *OST* allows miners to gain property rights in resources that they extract without being compelled to redistribute their income, technology or resources. The *MA*, in contrast, requires an equitable sharing of benefits.

How real property rights should be recognised is a difficult question with no easy solution. A spontaneous order would require the countries and miners involved to be peaceful and reasonable rather than belligerent and disobliging. An International Space Authority that grants mining leases on a competitive basis would require its employees to be fair and efficient rather than biased and corrupt. The success of each solution ultimately depends on the people involved. As for property rights in extracted resources, amending the *OST* to clearly recognise personal property rights would provide legal certainty to miners.

Such recognition of property rights in celestial bodies and natural resources is consistent with carrying out the exploration and use of outer space 'for the benefit and in the interests of all countries'.[126] Commercial development of outer space can 'benefit all of humankind, directly or indirectly, as any other discovery or invention'.[127] Space technology innovations have already prompted inventions in fields such as medicine, transportation and consumer goods.[128] The extracted resources themselves may be used beneficially: for example, platinum group metals, which are scarce on Earth, are used in about a quarter of all

126 *OST* art I(1).
127 See Pop, above n 13, 116.
128 NASA Spinoff, *NASA Technologies Benefit Our Lives* <https://spinoff.nasa.gov/Spinoff2008/tech_benefits.html>.

manufactured goods.[129] The business of extracting resources would also create jobs in space technology and related industries.

Like other inventions, space technology is costly in its infancy. The car and the camera were once luxuries of the rich, but within decades entrepreneurs made them affordable for ordinary people.[130] With improvements in technology, space missions now cost less than they did during the space race.[131] Commercial activities such as mining would encourage technological development and likely reduce costs further. Meanwhile, entities in developing countries can and do pool their resources for joint space activities.[132] Developing countries have benefited and continue to benefit from the exploration and use of outer space – without the law compelling any redistribution of resources. Supported by a legal framework that provides good fences, neighbours in outer space have the potential to improve the lives of people around the world.

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129 Accenture, above n 2.

130 John Micklethwait and Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea* (Modern Library, 2003) 77.

131 Pop, above n 13, 133; Francis Lyall and Paul B Larsen, above n 13, 473.

132 Pop, above n 13, 155. See also Doyle, above n 80, 118-19; Marietta Benkö and Kai-Uwe Schrogl, 'History and Impact of the 1996 UN Declaration on ‘Space Benefits’' (1997) 13(2) *Space Policy* 139, 143; José Monserrat Filho, 'Brazilian-Chinese Space Cooperation: An Analysis of its Legal Performance' (1996) 39 *Proceedings of the Colloquium on the Law of Outer Space* 164.

AN IMPERIUM OF RIGHTS: CONSEQUENCES OF OUR CULTURAL REVOLUTION

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ABSTRACT

The 'empowerment of rights', whether domestically or globally, presents itself in at least a double aspect: both as a cultural revolution and as a political strategy. The strategy pursued by cultural revolutionaries who equate liberalism with secularism is to turn the basic values of the West into weapons against it so that its inherent defense mechanisms will be rendered ineffective. This strategy is most apt to succeed by provoking crises of conscience through redefinitions of human rights that, in the end, derived from to individual and institutional conversion. But, as Marcello Pera notes, political liberalism itself suffers from an 'ethical deficit'. Torn from its religious roots, it lacks the requisite thickness of moral authority needed to protect the rights of persons and resist threats to the very existence of civil society. Thus have we come to confuse despotism with liberty and undercut our capacity for self-government.

I INTRODUCTION

In *Democracy without Nations?* Pierre Manent describes the challenge facing the West:

> Philippe Raynaud has recently underscored the following important point: the original understanding on which the modern state was founded strongly linked individual rights and public authority or power. Today, however, rights have invaded every field of reflection and even every aspect of consciousness. They have broken their alliance with power and have even become its implacable enemy. From an alliance between rights and power we have moved to the

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> demand for an empowerment of rights. The well-known sovereign 'power of judges' claiming to act in the name of human rights is the most visible manifestation of this trend.[1]

Manent sees this elevation of rights over power as 'an increasingly decisive and debilitating factor at work in the political life of the European nations.'[2] This is the latest philosophical wrinkle in the use of individualism and identity politics to dissolve the cultural and civilizational structures that support 'civil liberty and self-government.'[3] Accordingly, international law and the concept of global governance have been among the major transmission belts driving this imperium of 'human rights' during the past generation.

What then becomes of individuals and their traditional liberties? This is the age-old problem of 'the one and the many': unity vs. diversity. We live particular lives at particular times and in particular places. We cannot go beyond this, as Chantal Delsol warns: 'The identification of the singular human being with a universal culture therefore would be equivalent to lessening him, perhaps even to destroying him.'[4] She notes

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1 Pierre Manent, *Democracy without Nations? The Fate of Self-Government in Europe* (ISI Books, 2007) 16.

2 Ibid 16. And not just in: 'Those keeping score on the new diplomacy game should watch for expansions of international law in three areas: (1) treaty-based law; (2) universal jurisdiction, as part of customary international law; and (3) international organizations and global governance. New diplomacy players are working for breakthroughs in all these aspects of international law. Taken together, these reforms could well revolutionize international law at the expense of national sovereignty.' David Davenport, 'The New Diplomacy Threatens American Sovereignty and Values', in *A Country I Do Not Recognize: The Legal Assault on American Values* (Hoover Institution Press, 2006) 124.

3 Francis Lieber, *On Civil Liberty and Self-Government* (J.B. Lippincott, 3rd ed, 1877). Lieber held the first chair of political science in America, launched the first encyclopedia, developed a code of military conduct that shaped the later Hague and Geneva conventions, and corresponded with Alexis de Tocqueville.

4 Chantal Delsol, *Unjust Justice: Against the Tyranny of International Law* (ISI Books, 2008) 84. At the beginning of his study of the Leftist ideologies and movements, Erik von Kuehnelt-Leddihn noted: 'we share with the beast the instinct to seek identity with another; we become fully human only through our drive and enthusiasm for diversity.' Erik von Kuehnelt-Leddihn, *Leftism*

that earlier bids for universal unity through ancient empires and Christendom left diversity in place. The real danger, instead, arose with the French Revolution with its 'notion of a world government deployed throughout the entire earth with all the prerogatives of what Christians called "temporal government."'[5]

II CULTURAL REVOLUTIONS

The 'empowerment of rights', whether domestically or globally, presents itself in at least a double aspect: both as a cultural revolution and as a political strategy.[6] The fundamental principle of the long-term strategies advocated by Antonio Gramsci, along with the Fabian Society, the Progressive movement, and the Frankfurt School, consists in turning the basic values of the West, along with its institutional supports, into weapons against it so that its inherent defense mechanisms will not work effectively.[7]

This process, of course, is not confined to Europe. In the American context, appeals are made increasingly to humanity at large, especially by the American political class.[8] As early as 2002 the United States

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Revisited: From de Sade and Marx to Hitler and Pol Pot (Regnery Gateway, 1990) 4.

5 Ibid 2.

6 Helmut Schelsky, 'The New Strategy of Revolution: The "Long March" through the Institutions', (Fall, 1974) 345-355. <http://www.mmisi.org/ma/18_04/schelsky.pdf>.

7 This strategy systematizes a Nietzschean 'transvaluation of all values.' Ralph de Toledano, *Cry Havoc! The Great American Bring-down and How It Happened* (Anthem Books, 2006); Paul Kengor, *Takedown: From Communists to Progressives, How the Left Has Sabotaged Family and Marriage* (WND Books, 2015); and John Fonte, *Why There Is a Culture War: Gramsci and Tocqueville in America*, Orthodoxy Today <http://www.orthodoxytoday.org/articles/FonteCultureWar.php?/articles/FonteCultureWar.shtml>.

8 It is a habit that was clearly on display in the Declaration of Independence: 'a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.'

Supreme Court began to cite international laws and decisions as constitutional precedents in specific cases.[9] James Kurth sought to analyze the impact of an increasingly secular humanitarianism on American foreign policy by identifying a series of six stages of declension exhibited by what he called the 'Protestant Deformation', culminating in 'universal human rights.'[10] David Sehat made a similar observation about the use of the social sciences to develop a Progressive replacement for the Protestant 'moral philosophy' that was once a standard undergraduate capstone course in nineteenth century American colleges.[11]

J. Budziszewski captures much of the subtlety of the process of changing from a Christian to a more secular ethic in his book, *The Revenge of Conscience*:

> As any sin passes through its stages from temptation, to toleration, to approval, its name is first euphemized, then avoided, then forgotten. A colleague tells me that some scholars call child molestation 'inter-generational intimacy': that's euphemism. A good-hearted editor tried to talk me out of using the term

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9 Julian Ku and John Yoo cite four examples of this practice, while adding: 'Foreign courts, of course, are usually interpreting their own constitutions or international law, not the U.S. Constitution.' Julian Ku and John Yoo, *Taming Globalization: International Law, the U.S. Constitution, and the New World Order* (Oxford, 2012) 228.

10 James Kurth, 'The Protestant Deformation and American Foreign Policy' (Paper presented at The Philadelphia Society 37th National Meeting, 22 April 2001). <http://phillysoc.org/kurth-the-protestant-deformation-and-american-foreign-policy/>.

11 See Peter J. Leithart, *Social Science v. Theology* (11 August 2015) First Things <http://www.firstthings.com/blogs/leithart/2015/08/social-science-v-theology-1>. An early study of the tradition of moral philosophy, which was typically taught by the college president, is D. H. Meyer, *The Instructed Conscience: The Shaping of the American National Ethic* (University of Pennsylvania Press, 1972).

> 'sodomy': that's avoidance. My students don't know the word 'fornication': that's forgetfulness.[12]

Breaking down the sacred/social interdicts[13] and conscientious barriers that inhibit social and sexual misconduct provokes crises of conscience and authority that may lead to demoralization and, under mounting social pressure, conversion from one side to another in the ensuing cultural revolution.[14] Using a natural law analysis, Budziszewski has summarized this dynamic process by identifying an attribute or mechanism by which a hostile takeover of the conscience may favor such a conversion:

> If the law written on the heart can be repressed, then we cannot count on it to *restrain* us from doing wrong; that much is obvious. I have made the more paradoxical claim that repressing it hurls us into *further* wrong. Holding conscience down does not deprive it of its force; it merely distorts and redirects that force ...
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> Here is how it works. Guilt, guilty knowledge, and guilty feelings are not the same thing; men and women can have the knowledge without the feelings, and they can have the feelings without the fact. Even when suppressed, however, the knowledge of guilt always produces certain objective needs, which make their own demand for satisfaction irrespective of the state of the feelings. These needs include confession, atonement, reconciliation, and justification.[15]

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12 J. Budziszewski, *The Revenge of Conscience: Politics and the Fall of Man* (Spence, 1999) 20.

13 Philip Rieff was one of the most profound thinkers upon our social science-promoted cultural revolution (*kulturkampf*) against the older sacred order with its system of moral obligations (interdicts), frequently by endorsing transgressions against it. Philip Rieff, *Sacred Order/Social Order, vol. 1: My Life among the Deathworks: Illustrations of the Aesthetics of Authority* (University of Virginia Press, 2006) xix.

14 A sampling of the relevant literature would include Mary Eberstadt, *It's Dangerous to Believe: Religious Freedom and Its Enemies* (Harper, 2016); David Gelernter, America-Lite: How Imperial Academia Dismantled Our Culture (and Ushered in the Obamacrats) (Encounter, 2012); as well as the Toledano and Kengor books noted above.

15 Budziszewski, above n 12, 27-28.

Where the 'force of conscience' leads with regard to the larger culture becomes evident when Budziszewski unpacks the four objective needs produced by a guilty conscience that lives in a state of denial: 'The need for *reconciliation* arises from the fact that guilt cuts us off from God and Man. Without repentance, intimacy must be simulated precisely by sharing with others in the guilty act ...'.[16] Thus step-by-step does the transgressive become empowered as a right.

In *What Is Secular Humanism?* (1982) James Hitchcock summarizes the West's transition from a Bible-based moral and political culture as follows:

> The moral revolution was achieved in a variety of ways. On the simplest level, it consisted merely of talking about what was hitherto unmentionable. Subjects previously forbidden in the popular media (abortion, incest) were presented for the first time.[17]

Resistance was gradually broken down by making these subjects increasingly familiar.[18] Marshall Kirk and Hunter Madsen, who developed a public relations campaign for gay rights, called this first stage 'desensitization'.[19] Similar stages of development are also identified by Hitchcock:

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16 Ibid 29. Thus a guilty conscience may be captured and converted; so, likewise, may an institution that faces a cognitive dissonance or crisis of confidence that leads it to abandon or modify its mission.

17 James Hitchcock, *What Is Secular Humanism? Why Humanism Became Secular and How It Is Changing Our World* (Servant Books, 1982) 83.

18 Familiarity has a disarming effect. Here is an excerpt from Aleksandr Solzhenitsyn's 1983 Templeton Lecture: 'Today's world has reached a stage which, if it had been described to preceding centuries, would have called forth the cry: "This is the Apocalypse!" Yet we have grown used to this kind of world; we even feel at home in it.' Edward E. Ericson, Jr., and Daniel J. Mahoney (eds) *The Solzhenitsyn Reader: New and Essential Writings, 1947-2005* (ISI Books, 2006) 578.

19 David Kupelian, *The Marketing of Evil: How Radicals, Elitists, and Pseudo-Experts Sell Us Corruption Disguised as Freedom* (WND Books, 2005) 25-26.

> The second stage of the revolution is ridicule, the single most powerful weapon in any attempt to discredit accepted beliefs. Within a remarkably brief time, values the media had celebrated during the 1950s (family, religion, patriotism) were subjected to a merciless and constant barrage of satire. Only people with an exceptionally strong commitment to their beliefs could withstand being depicted as buffoons ... Negative stereotypes were created, and people who believed in traditional values were kept busy avoiding being trapped in those stereotypes.[20]

This corresponds with 'jamming' in the Kirk-Madsen strategy.[21] It can be quite effective. Mary Eberstadt begins her new book, *It's Dangerous to Believe*, by citing numerous examples of it, culminating in the bewildered question: 'Where will we go?'[22] Of course, the culmination of the process should be familiar enough with the literature on 'brainwashing', the Stockholm syndrome, and related phenomena. Again, Hitchcock:

> The final stage of the moral revolution is the media's exploitation of traditional American sympathy for the underdog. Judaeo-Christian morality, although eroding for a long time and on the defensive almost everywhere in the Western

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20 Hitchcock, *What Is Secular Humanism? Why Humanism Became Secular and How It Is Changing Our World* (Servant Books, 1982) 83-84. Kenneth Minogue similarly offered a tripartite simplification of Marxism as a model or formula for developing an ideology: 1) 'the past is the history of the *oppression* of some abstract class of person'; 2) 'the duty of the present is thus to mobilize the oppressed class in the *struggle* against the oppressive system'; and 3) 'the aim of this struggle is to attain a fully just society, a process generally called *liberation*.' Kenneth Minogue, *Politics: A Very Short Introduction* (Oxford, 2000) 101.

21 David Kupelian, *The Marketing of Evil: How Radicals, Elitists, and Pseudo-Experts Sell Us Corruption Disguised as Freedom* (WND Books, 2005) 26. Tom Wolfe reported on a similar practice in *Mau-Mauing the Flak Catchers*, (Cosmopolitan, April 1971).

22 Mary Eberstadt, *It's Dangerous to Believe: Religious Freedom and Its Enemies* (Harper, 2016) ix-xvi.

> world, is presented as a powerful, dominant, and even tyrannical system against which only a few brave souls make a heroic stand on behalf of freedom.[23]

But a campaign of mounting pressure and growing public sympathy may finally elicit a 'bandwagon' effect that culminates in the Kirk-Madsen strategy's third stage: 'conversion'.[24] Above all, all of this illustrates J. Budziszewski's point about objective needs, such as the distortion of people's need for reconciliation that occurs when they substitute a new bond to compensate for a broken one:

> The need for reconciliation has a public dimension, too. Isolated from the community of moral judgment, transgressors strive to gather a substitute around themselves. They do not sin privately; they recruit. The more ambitious among them go further. Refusing to go to the mountain, they require the mountain to come to them: society must be transformed so that it no longer stands in awful judgment. So it is that they can change the laws, infiltrate the schools, and create intrusive social-welfare bureaucracies.[25]

This trend should be abundantly evident through the ideological conversion and transformation of the American culture into its present post-modern, post-Christian form. Alexander Salter notes:

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23 Hitchcock, *What Is Secular Humanism? Why Humanism Became Secular and How It Is Changing Our World* (Servant Books, 1982) 84. Mary Eberstadt updates this metanarrative: 'The faithful have been on the losing end of skirmish after skirmish for decades now—some would say centuries. Yet their adversaries nevertheless continue to treat them as practically omnipotent, and perpetually malevolent, social forces, even as one cherished cause after another—nearly all the vaunted issues of the so-called culture wars—chalks up as a loss.' Mary Eberstadt, *It's Dangerous to Believe: Religious Freedom and Its Enemies* (Harper, 2016) xxviii.

24 David Kupelian, *The Marketing of Evil: How Radicals, Elitists, and Pseudo-Experts Sell Us Corruption Disguised as Freedom* (WND Books, 2005) 27.

25 Budziszewski, above n 12, 29-30. Frederic Bastiat's concept of legal plunder – the ability to acquire ill-gotten gains under color of law – offers a parallel, especially when it is converted into 'universal plunder' so that the plundered classes become complicit in picking their own pockets. Bastiat, Frederic. *The Law* (Foundation for Economic Education, 1972). See also <http://bastiat.org/>.

> Progressivism manifested itself in the United States first as a desire for the alleviation of social ills, then in the educational establishment for discovering solutions to eliminate these ills, and finally culminated in the offices of the government for implementing these solutions. The importance of the two institutional categories, Academy and State, cannot be overstated when considering how Progressivism won the battle of world views.[26]

What Sherif Girgis calls the New Gnosticism is providing ideological tools for seizing Lenin's proverbial 'commanding heights' of public influence. Writing of the U.S. Supreme Court's decision in *Obergefell* v. *Hodges* (2015) to recognize gay marriage as the law of the land, Girgis contends that

> the Court implicitly made a number of other assumptions: that one-flesh union has no distinct value in itself, only the feelings fostered by any kind of consensual sex; that there is nothing special about knowing the love of the two people whose union gave you life, whose bodies gave you yours, so long as you have two sources of care and support; that what children need is parenting in some disembodied sense, and not mothering and fathering. It effectively had to treat contrary views as irrational.

That conclusion suggests that the body doesn't matter. When it comes to what fulfills us, we are not personal animals – mammalian thinkers, to put it starkly – who come in two basic forms that complete each other. We are subjects of desire and consent, who use bodily equipment for spiritual

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26 Alexander Salter, *Why Progressivism Will Win*, (June 26, 2016) The Imaginative Conservative <http://www.theimaginativeconservative.org/2016/06/why-progressivism-will-win.html>.

and emotional expression. Fittingly, then, has this new doctrine been called the New Gnosticism. [27]

III REVOLUTIONARY FAITHS

Eric Voegelin specifically used the term Gnosticism to stand for the 'ersatz religion' of modern mass movements, turning to Joachim of Flora's historical speculation of great three ages as a model. Voegelin identified four Joachitic symbols which he claimed to be characteristic of these mass movements: 1) the third realm, 2) the leader (or *dux*), 3) the prophet, and 4) the community of the chosen. Particularly relevant here is the third symbol: that of the prophet or precursor. 'With the creation of the symbol of the precursor, a new type emerges in Western history: the intellectual who knows the formula for salvation from the misfortunes of the world and can predict how world history will take its course in the future.'[28]

This third symbol, which plays a crucial role in the 'empowerment of rights', corresponds to what Joel Kotkin calls the Clerisy, 'which is based largely in the worlds of academia, media, government, and the nonprofit sector ... The power of the Clerisy stems primarily not from money or the

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27 Sherif Girgis, *Obergefell and the New Gnosticism* (6 June 2016) First Things <http://www.firstthings.com/web-exclusives/2016/06/obergefell-and-the-new-gnosticism>. Some of the early church heresies, such as Docetism, abhorred the gross physicality of embodiment. The great irony is that the authority of political bodies must be captured in order to denigrate the importance of the human body.

28 Eric Voegelin, *Science, Politics, and Gnosticism: Two Essays* (Henry Regnery, 1968) 97. Three ages, three stages: a secular trinitarianism has become formulaic, whether in terms of a Third Reich, a Third Way, or Auguste Comte's Law of the Three Stages. Voegelin here applies this template to an analysis of Marx and Engels, Dante, Hitler and Mussolini, Lenin and Stalin, Thomas More, Thomas Hobbes, and G. W. F. Hegel.

control of technology, but from persuading, instructing, and regulating the rest of society.'[29]

The U.S. Supreme Court is perhaps first among these arbiters of the prevailing public philosophy. Its chief role in the past was to act as a guardian of the Constitution of Limitations, as Edward S. Corwin characterized it, as it was devised by its framers in 1787. With the rise of the Progressive movement in the late nineteenth and early twentieth century, the academic establishment began to convert to Progressivism as an expression of what John Dewey called 'a common faith.' The Supreme Court took its plunge into this faith around 1937 when it began to uphold the vast restructuring of the federal government known as the New Deal.[30] Subsequent battles contributed to the further concentration of governing powers at the national level. Although Corwin called it a *Constitutional Revolution, Ltd.*, the revolution continues.[31] Indeed, revolutions follow their own logic, as Alexis de Tocqueville, Crane Brinton, and others have observed.

Girgis unpacks the logic of the situation in the wake of the Court's ruling in *Obergefell*: 'For decades, the Sexual Revolution was supposed to be about freedom. Today, it is about coercion. Once, it sought to free our sexual choices from restrictive laws and unwanted consequences. Now, it seeks to free our sexual choices from other people's disapproval.'[32] The

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29 Joel Kotkin, *The New Class Conflict* (Telos Press, 2014) 8.

30 Following President Roosevelt's failed attempt to 'pack' the Court with new members, this 'conversion' of the Court was humorously described as 'the switch in time that saved Nine.'

31 All of 'these developments spell a diminished importance for . . . Liberty *against* Government.' Edward S. Corwin, *Constitutional Revolution, Ltd.* (Claremont Colleges, 1941) 114.

32 Sherif Girgis, *Obergefell and the New Gnosticism* (6 June 2016) First Things <http://www.firstthings.com/web-exclusives/2016/06/obergefell-and-the-new-gnosticism>.

Court has arrogated to itself the role of theologian-in-chief, which Thomas Hobbes had earlier wished to reserve to the Crown:

> *Obergefell* is thus best seen as a religious bull from our national Magisterium, the Supreme Court, by the pen of its high priest, Justice Kennedy. With all the solemnity of a Chalcedon or Trent, it formalized new doctrines for our nation's civil religion—Gnostic ideas about the human person. Ideas that, *by their very nature*, create an obligation to recruit new adherents. (And ideas that—unlike true religion—could serve their purpose whether or not they were accepted *freely*.)[33]

One strategy that Girgis has identified for empowering rights is the awkwardly denominated concept of 'dignitary harms', which has roots that date back to the Civil Rights Act of 1964. The U.S. Supreme Court held in *Heart of Atlanta Motel, Inc*. v. *United States*, 379 US 241, 250 (1964) that 'the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"

> Unsurprisingly, given the tenets of the New Gnosticism, it has been invoked only in connection with conscience claims in the sex-and-reproduction culture wars. Until now free speech claims have been safe against such erosions, by a virtual consensus of our legal culture that political speech needs most protection precisely when it offends. But the consensus may soon be shattered by efforts to fight offensive speech on sex and marriage.[34]

As James Hitchcock anticipated more than three decades earlier, Girgis notes that the logic of the latest phase of the sexual revolution is to require the affirmative approval of behaviour that is censured in the Bible.

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33 Ibid.

34 Ibid.

> It's not that the New Gnostics are an especially vindictive bunch. It's that a certain kind of coercion is built into their view from the start. If your most valuable, defining core just *is* the self that you choose to express, there can be no real difference between you as a person, and your acts of self-expression; I can't affirm you and oppose those acts. Not to embrace *self-expressive* acts is to despise the self those acts express. I don't simply err by gainsaying your sense of self. I deny *your* existence, and do *you* an injustice. For the New Gnostic, then, a just society cannot live and let live, when it comes to sex. Sooner or later, the common good—respect for people as self-defining subjects—will require *social approval* of their self-definition and -expression.[35]

IV COSMOPOLITAN AS AN ELITE STRATEGY OF DIVIDE AND RULE

Human rights remain a fluid category, subject to negotiation and redefinition, both domestically and internationally.[36] The idea of global governance is associated with cosmopolitanism, but it can be characterized, as Ross Douthat does, as 'liberal Christianity without Christ.'[37] What passes for cosmopolitanism these days is the self-conceit of a rising power elite that has hitched its wagon to multinational corporations and transnational institutions.[38] Vilfredo Pareto's concept of the 'circulation of elites' offers some insights into how these processes work with respect to the flow of elite membership. Pareto drew upon

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35 Ibid.

36 *The Universal Declaration of Human Rights* (1948) added economic, social, and cultural rights (Art 22-28) to the earlier civil and political rights.

37 Ross Douthat, 'The Myth of Cosmopolitanism' *The New York Times* (online), 2 July 2016 <http://www.nytimes.com/2016/07/03/opinion/sunday/the-myth-of-cosmopolitanism.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0>.

38 Compare James Kurth above n 10. The economist Thomas Sowell characterizes this public ideology as a 'quest for cosmic justice' in a book by that title. His critical summary is wonderfully succinct: '1. The impossible is not going to be achieved. 2. It is a waste of precious resources to try to achieve it. 3. The devastating costs and social dangers which go with these attempts to achieve the impossible should be taken into account.' <http://tsowell.com/spquestc.html>.

Machiavelli to identify two 'residues' or types of individuals admitted to or excluded from elite status: Class I (Foxes) and Class II (Lions). As James Burnham summarizes: Individuals marked by Class I (Combinations) residues are Foxes that 'live by their wits; they put their reliance on fraud, deceit, and shrewdness. They do not have strong attachment to family, church, nation, and traditions (though they may exploit these attachments in others)'. On the other hand,

> Individuals marked by Class II (Group-Persistences) residues are Machiavelli's "Lions." They are able and ready to use force, relying on it rather than brains to solve their problems. They are conservative, patriotic, loyal to tradition, and solidly tied to supra-individual groups like family or Church or nation. They are concerned for posterity and the future. In economic affairs they are cautious, saving and orthodox. They distrust the new, and praise "character" and "duty" rather than wits.[39]

Pareto analyzed both the United States and European nations just prior to the First World War and found that the circulation of elites during the previous century had 'brought most of these nations into a condition where the ruling classes were heavily over-weighted with Class I residues, and were subject to debilitating humanitarian beliefs.'[40] Under the increasing dominance of the Foxes, the "individual comes to prevail, and by far, over family, community, nation ... The impulse is to enjoy the present without too much thought for the morrow."[41] Moreover, Foxes

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39 James Burnham, *The Machiavellians: Defenders of Freedom* (Henry Regnery, 1943) 238.

40 Ibid 245-46. 'Residues' are 'constant or only very slowly changing psychic tendencies, much like instincts.' Daniel Kelly, *James Burnham and the Struggle for the World* (ISI Books, 2002) 105-06.

41 Ibid 247. Such improvidence is evident in political liberalism's use of entitlement spending (similar to Bastiat's universal plunder) to weaken resistance to the wholesale transformation of society. It is also evident in its inability to seriously address threats to the survival of the West. By 1960, Burnham characterized liberalism as 'the ideology of Western suicide.' Daniel Kelly, *James Burnham and the Struggle for the World* (ISI Books, 2002) 287.

protect their positions by hamstringing possible sources of opposition via red tape. One consequence is what Paul Rahe has called a 'politics of distrust',[42] which tends to favor a strategy of 'divide and rule.'

We see a counterpart to this Machiavellian politics of distrust in American foreign policy with the 'secession of elites', which Walter Russell Mead noted with regard to alliances, referring to it as 'a loss of support from this key class of opinion leaders.'[43]

During the Cold War, and even subsequently, the political elites of American

> Allies performed a critical task that Americans cannot do: they argued the case for the American alliance and for cooperating with the United States in their own countries ... Even when from time to time such leaders disagreed with specific aspects of American policy, they were a force for mutual understanding, for limiting the fallout of policy disagreements and, in the last analysis, for doing the hard and necessary work to keep the alliances strong.[44]

The prospects for such a fallout are compounded when these elites adopt what Michael Polanyi called the principle of 'moral inversion'[45] and

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42 Unpublished paper: 'Don Corleone, Multiculturalist.'

43 Walter Russell Mead, *Power, Terror, Peace, and War: American Grand Strategy in a World at Risk* (Alfred A. Knopf, 2004) 150.

44 Ibid 149-50.

45 Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (Harper Torchbooks, 1964) 231-35. Polanyi described Marxism as 'a fanatical cult of power' (231). Roger Scruton used the phrase 'culture of repudiation' to characterize the phenomenon:

> The message of the media, the academy, and the opinion-forming elite is feminist, anti-patriarchal, and opposed to traditional sexual prohibitions such as those governing abortion, homosexuality, and sex outside marriage. More importantly, the culture of the elite has undergone a kind of 'moral inversion,' to use Michael Polanyi's idiom. Permission turns to prohibition, as the advocacy of alternatives gives way to a war against the former orthodoxy. The family, far from enjoying the status of a legitimate alternative to the various 'transgressive' postures lauded by the elite, is dismissed out of hand as a form of oppression.

promote the making of a counterculture. In *Silent Revolution* (2014) Barry Rubin showed how what he called the 'Third Left' was able to 'manufacture false consciousness as an asset for the cause.'

> By such methods, the Third Left proved Marx wrong. It convinced people by a cultlike total immersion in its own doctrine. The children of corporate executives could be turned into revolutionaries in the classroom. Ideas could overcome material conditions; getting people to read the right books might have more effect on them than the surrounding reality because the surrounding reality would be interpreted through the left's ideas.[46]

By now it should be evident that something much larger than a sexual revolution or a mere political movement is at work. So let us now apply these observations to the European project as the Italian philosopher Marcello Pera has described it.

As Pera notes in *Why We Should Call Ourselves Christians*, the 'positive' values that are proposed by Jürgen Habermas (his 'constitutional patriotism' toward the European Charter) to replace religion and nationality are democracy, welfare state, environment, and peace.[47] This is an updating of Immanuel Kant's prescription of 'liberal

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Roger Scruton, *The West and the Rest: Globalization and the Terrorist Threat* (Intercollegiate Studies Institute, 2002) 71.

46 Barry Rubin, *Silent Revolution: How the Left Rose to Political Power and Cultural Dominance* (Broadside Books, 2014) 82-83. Theodore Dalrymple has stated the dynamic very clearly:

> Political correctness is communist propaganda writ small. In my study of communist societies, I came to the conclusion that the purpose of communist propaganda was not to persuade or convince, nor to inform, but to humiliate; and therefore, the less it corresponded to reality the better. When people are forced to remain silent when they are being told the most obvious lies, or even worse when they are forced to repeat the lies themselves, they lose once and for all their sense of probity. To assent to obvious lies is to co-operate with evil, and in some small way to become evil oneself. One's standing to resist anything is thus eroded, and even destroyed. A society of emasculated liars is easy to control. I think if you examine political correctness, it has the same effect and is intended to.

<http://archive.frontpagemag.com/readArticle.aspx?ARTID=7445>.

47 Marcello Pera, *Why We Should Call Ourselves Christians: The Religious Roots of Free Societies* (Encounter Books, 2011) 89. It revives on a much larger scale the ideal of the classical republic with its own civil religion.

cosmopolitanism': the disappearance of traditional national boundaries, citizenship extended to everyone (such transnationalism shapes the immigration debate), the 'kingdom of ends of ends in themselves', and a vision of perpetual peace.[48]

But Pera finds this program to be too generic and abstract. It divorces itself from its historical foundation in Christianity. The 'secular equation' of liberalism with secularism – with its rejection of Christianity – breeds what he calls the 'ethical deficit of constitutional patriotism.'[49] Pera argues that constitutional patriotism is no substitute for Christianity because it, likewise, contains a deficit or vacuum it cannot fill:

> Here we draw closer to the crux of constitutional patriotism, political liberalism, and secular Europe. Where does the concept of the person originate? It does not derive from the practice of argumentation, because it is a presupposition for that practice. It does not derive from democratic procedures allowed by institutions, because these take the idea of the person as their point of reference. Clearly it derives from *outside* the practice of argumentation or democratic procedures. The concept of the person, or the end in itself, i.e. that each individual must be respected because as an individual he is endowed with dignity, is a *pre*-political and obviously *non*-political concept. It is a concept of an *ethical-religious* nature, and more precisely it is a *Christian* concept. It follows that, just as liberalism cannot be self-sufficient, constitutional patriotism cannot separate itself from pre-political elements. If constitutional patriotism is

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48 Ibid 86-87. At the outset of his analysis, Pera warns of the dangers of secular liberalism:

> For the destinies of Europe and the West, this ideology is no less dangerous [than Nazism or communism]; it is far more insidious. It does not wear the brutal face of violence, but the alluring smile of culture. With its words, liberal secularism preaches freedom, tolerance, and democracy, but with its deeds it attacks precisely that Christian religion which prevents freedom from deteriorating into license, tolerance into indifference, democracy into anarchy.

Ibid 5.

49 Ibid 94-95.

> to support the European Charter, it cannot set aside the pre-political elements of European history, and particularly its ethical Christian and religious elements.[50]

Rather than recognize Christianity, however, 'liberal European culture accepts the secular equation and rejects Christianity.' As Pera concludes: '[L]iberal European culture can produce no notion of European identity, either religious or secular. In the end, it opposes the very thing it wishes to promote: the unification of Europe.'[51]

Amidst a long and anguished identity crisis, the West suffers a deficit in the moral character – a loss of the requisite thickness of authority – that is required to protect the rights of persons and to resist militant ideologies and their shock troops. The West instead has chosen to unilaterally disarm itself. Even in the early nineteenth century, Alexis de Tocqueville already had a sense of the danger – early during the democratic experiment – of what is variously called tyranny of the majority (or by those ruling in the name of the majority) and soft despotism.[52]

So, today, the French revolutionary nationalism that broke with the Old Regime has at last given way more recently to yet another secular faith: the revolutionary cosmopolitanism of global governance erected and managed by a Rousseauan Legislator that has given rise to complaints about a 'deficit of democracy' and, most recently, 'Brexit.' At its heart lies a contradiction, as Chantal Delsol describes:

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50 Ibid.

51 Ibid. Pascal Bruckner offers further insight into the impetus toward denial while ironically echoing Edward Said's notion of Orientalism: 'Europe against itself: anti-Occidentalism, as we know it, is a European tradition that stretches from Montaigne to Sartre and instills relativism and doubt in a serene conscience sure that it is in the right.' Pascal Bruckner, *The Tyranny of Guilt: An Essay on Western Masochism* (Princeton University Press, 2010) 9.

52 See Alexis de Tocqueville, *Democracy in America* (University of Chicago Press, 2000) 239-42, 661-65; Paul Rahe, *Soft Despotism, Democracy's Drift: Montesquieu, Rousseau, Tocqueville, and the Modern Prospect* (Yale University Press, 2009) 173-74.

> International justice is de-localized, de-temporalized. Where then will the international law it proclaims be renewed, debated, qualified, or amended? In fact, international justice merely lives an artificial life among a small coterie of cosmopolitan intellectuals. But can one judge real human beings who committed crimes in particular places and times, in particular circumstances, with laws written in Heaven? To want to realize the universal, to grant it real existence, to establish it as a policy and a tribunal—this is to dis-incarnate humanity, to compel it to live in abstract kingdoms.[53]

Delsol's complaint appears likewise to be about a New Gnosticism. Perhaps this is a key to understanding the challenges we face. The problem is not 'the universal.' The real danger arises from a spurious utopian sort of universality promoted by ideologues.[54] We have chosen to embrace utopian abstractions that tend to dissolve the human dimension even as our would-be benefactors seek to bring heaven down to earth.[55] The result has too often been what R. J. Rummel has called

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53 Chantal Delsol, *Unjust Justice: Against the Tyranny of International Law* (ISI Books, 2008) 86. Julien Benda, Thomas Molnar, and Robert Nisbet wrote earlier indictments of betrayal by a clerisy of intellectuals. See also Thomas Sowell, *The Vision of the Anointed: Self-Congratulation as a Basis for Social Policy* (Basic Books, 1995).

54 René Girard's concept of mimetic desire is helpful to an understanding of utopian schemes and other types of spurious universality. Girard contends that in mythology and history, persecutors covered their tracks by blaming their victims, as with the Oedipus story, the Dreyfus affair, and various founding myths. It is the Bible that repeatedly exposes what he calls a victim mechanism that conceals the violent truth, such as the persecution of the prophets, behind a bodyguard of lies.

> The victim mechanism is not a literary theme like many others; it is a principle of illusion ... To be a victim of illusion [that is, to believe the lie] is to take it for true, so it means that one is unable to express it as such, an illusion. By being the first to point out persecutory illusion, the Bible initiates a revolution that, through Christianity, spreads little by little to all humanity without really being understood by those whose profession and pride are to understand everything.

René Girard, *I See Satan Fall Like Lightning* (Orbis Books, 2001) 146, 47.

55 'The attempt at constructing an eidos of history will lead to a fallacious immanentization of the Christian eschaton.' Eric Voegelin, *The New Science of Politics: An Introduction* (University of Chicago Press, 1952) 121.

'democide'.[56] Aleksandr Solzhenitsyn, who was exiled by one of these utopias, stated the problem in universal terms:

> [T]he events of the Russian Revolution can only be understood now, at the end of the century, against the background of what has occurred in the rest of the world. What emerges here is a process of universal significance. And if I were called upon to identify briefly the principal trait of the *entire* twentieth century, here too I would be unable to find anything more precise or pithy than to repeat once again: "Men have forgotten God."[57]

V FINAL CONSIDERATIONS: ABSOLUTISM DRAPES ITSELF IN THE MANTLE OF LIBERTY

Global governance and the human rights movement are likewise part of this 'process of universal significance.' As Todd Huizinga has put it: 'Neither the global governance movement nor the human rights movement associated with it accepts, in principle, any limits handed down by tradition or by the human experience of reality.'[58] Once custom is converted into law, your right becomes my duty. Politics today may be most aptly characterized as the hue and cry of 'gusts of passion' that dream of world peace and soft utopias. As Shelley said of the sculptor in 'Ozymandias', we may say that Francis Lieber 'well those passions read.' We would do well to take his counsel and heed his warning: 'Absolutism in our age is daringly draping itself in the mantle of liberty, both in Europe and here. What we suffer in this respect is in many cases the

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56 See R. J. Rummel, *Death by Government* (Transaction, 1997).

57 Solzhenitsyn's Templeton Lecture, 10 May 1983, is reprinted in Edward Ericson Jr and Daniel Mahoney (eds), *The Solzhenitsyn Reader: New and Essential Writings, 1947-2005* (ISI Books, 2006) 577.

58 Todd Huizinga, *The New Totalitarian Temptation: Global Governance and the Crisis of Democracy in Europe* (Encounter Books, 2016) xiv.

after-pain of Rousseauism, which itself was nothing but democratic absolutism.'[59]

We have forgotten our creaturely limits. Out utopian aspirations, which threaten civil society and our capacity for self-government, can only dehumanize and spiritually imprison us. Writing at a time of what he called 'depressed public min' on the cusp of the American Civil War, Francis Lieber acknowledged that 'Truth becomes irksome, and while it is deemed heroic boldly to speak to a monarch, he who censures the sovereign in a republic is looked upon as no friend of the country.' What he said in his inaugural lecture at what is now Columbia University is just as true today:

> [I]t is a characteristic of our present public life that almost every conceivable question is drawn within the spheres of politics ... Fair and frank discussion has thus become emasculated and the people submit to dictation. There is a wide class of topics of high importance which cannot be taken in hand even by the most upright thinker without its being suspected that he is in the service of one party or section of the country and hostile to the other.[60]

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59 Francis Lieber, 'The Ancient and Modern Teacher of Politics' in *Reminiscences, Addresses, and Essays, vol. 1, Miscellaneous Writings* (J. B. Lippincott, 1880) 383.

60 Ibid 385. The confusion of political with despotic means in the form of 'political moralism' is the thread that runs through Kenneth Minogue's Politics and, for that matter, the growing imperium of rights: 'It can be seen working in a number of different areas, and we may illustrate the way it works by looking at the project that the nationally sovereign state should be replaced by the emerging international moral order.' Kenneth Minogue, *Politics: A Very Short Introduction* (Oxford, 2000) 104.

THE GLOBAL LEGACY OF THE COMMON LAW

Ermanno Calzolaio*

I INTRODUCTION

This last year we celebrated the 800th anniversary of the promulgation of Magna Carta. Amongst the great number of initiatives for this event, Professor Mark Hill QC and the Reverend Robin Griffith-Jones have edited an interesting book, which gives a detailed account about the origins of Magna Carta, the social and political context of the time, and the religious background which forms the very foundation of the main principles of the Great Charter.[1]

I am neither an historian of law, nor a specialist in public law, nor an expert in the field of law and religion. I try only to be a humble comparatist,[2] although comparative law, unlike other fields of law studies, it is not a body of rules but a way of looking at law as a phenomenon which is relative and universal at the same time, and trying to identify the profound features which characterize the form and substance of a legal system. I dare to venture gingerly into the debate and

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1 Robin Griffith-Jones and Mark Hill (eds), *Magna Carta, Religion and the Rule of law* (Cambridge, 2015). See also, Lady Hale, *Magna Carta: Our Shared Heritage*, in <https://www.supremecourt.uk/docs/speech-150601.pdf>.

2 Rudolph Schlesinger et al, *Comparative Law: Cases, Text, Materials* (St. Paul, 7th ed, 2009) 2:

> Comparative Law is not a body of rules and principles. It is primarily a *method*, a way of looking at legal problems, legal institutions, and entire legal systems. By the use of the method of comparison, it becomes possible to make observations and to gain insights that would be denied to one whose study is limited to the law of a single country.

to discuss some aspects of the 'global legacy of the common law', whose origins, to my understanding, are closely interconnected with Magna Carta.

First, I will depart from the assumption that one of the most important aspects of Magna Carta is the idea of law as a limit of the sovereign's power. In reality, this concept was not new, nor was it peculiar to English law, as it had been developed on the Continent by the efforts of medieval jurists, but it was fixed in 'black letters' in Magna Carta at the end of a difficult period of controversies and can be said that it is at the origin of the doctrine of the rule of law.

Second, I will consider the process of codification of law taking place on the Continent between the end of the XVIII and the beginning of the XIX century and in particular the idea of *Rechtsstaat*, which was shaped on different basis than the conception of the rule of law that flows from the Magna Carta and continues to characterize, at various degrees, the common law legal mentality.

Third, I will concentrate on the main legacies of the conception of law which underlies the doctrine of Rule of law, focusing on some features which still connote the common law tradition as opposed to the civil law tradition: the idea of the primacy of the unwritten law over statutory law and the unity of jurisdiction; the attitude of judges towards the interpretation of statutes; the circulation of precedents in a vibrant legal tradition. At the end, I will draw some conclusions.

II MAGNA CARTA AS AN ICON OF AN IDEA OF LAW

At the time of its drafting (the beginning of the 13th century) Magna Carta was 'far from unique, either in content or in form'.[3] For instance, many statutes of Italian cities and provinces contained rules and principles which are very similar to those written in Magna Carta: the ideas about the protection of the Church, about the conduct of officials, about the availability of justice in courts and, in general, about limitations on the power of the political authority can be said to be a pan-European phenomenon.[4]

Gino Gorla's fundamental studies make clear that the principle according to which '*iura naturalia*' (natural rights) limit the power of the 'prince' is essentially a creation of the glossators and the commentators.[5] In fact, § 11 of the Institutes of the *Corpus Iuris* did not contain any limitation on the power of the *Princeps*. The original meaning was rather an acknowledgment of an historical fact, determined by divine will. The relevant text provides:

> The laws of nature, which are observed by all nations, inasmuch as they are the appointment of the divine providence, remain constantly fixed and immutable.

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3 R Helmholz, 'Magna Carta and the law of nations' in Robin Griffith-Jones and Mark Hill (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge, 2015) 71.

4 M Ascheri, *The Laws of Late Medieval Italy (1000-1500)* (Leiden, 2013) 140.

5 G Gorla, *'Iura naturalia sunt immutabilia'. I limiti al potere del 'principe' nella dottrina e nella giurisprudenza forense fra i secoli XVI e XVIII*, in AA.VV., *Diritto e potere nella storia europea, Atti del quarto congresso internazionale della Società Italiana di Storia del Diritto in onore di Bruno Paradisi*, vol. 2, 629. A reduced version of this study has been published with the title: *'Iura naturalia sunt immutabilia' Limits to the power of the 'Princeps' (as sovereign) in legal literature and case law between the 16th and 18th centuries*, in A Pizzorusso (eds), *Italian Studies in Law* (Dordrecht, 1992) 1, 55.

> But those laws, which every city has enacted for the government of itself, suffer frequent changes, either by tacit consent, or by some subsequent law, repealing a former.[6]

Since the time of the Glossa, the *ius gentium* was related to the problems of the limits to the power of the *Princeps* and it was conceived as the '*naturalis ratio inter omnes homines costituit*'.[7] For the medieval jurists, the *ius gentium* (the law of the people) included the *ius divinum* (the divine law) and it formed part of the *ius civile* (civil law) or *ius positivum* (positive law) of the different states.

Without going into further detail, we can state that, notwithstanding the fact that the roman texts are not clear about the concept of *ius gentium*, there is no doubt that 'the conception of a higher law pervades the Middle Ages'.[8] This 'higher law' was not a vague or generic concept. On the contrary, it identified some natural rights (*iura naturalia*) which limited the power of the *Princeps*, such as the right to be heard (in the courts, but also administrative action), the right of property (which cannot be forfeited without a *juxta causa*), the right of imposition of taxes, which was limited by public utility and necessity (*publica utilitas sive necessitates*) and so on.[9] It is worth noting that these ideas continued to be developed during the period between the XVI-XVIII centuries and the

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6 'Sed naturalia quidem iura quae apud omnes gentes peraeque servantur, divina quadam providential constituta semper firma atque immutabilia permanent: ea vero, quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata' (Instit., I, II, § 11).

7 Gorla, *"Iura naturalia sunt immutabilia" Limits to the power of the 'Princeps' (as sovereign) in legal literature and case law between the 16th and 18th centuries*, in A Pizzorusso (eds), *Italian Studies in Law* (Dordrecht, 1992) 1, 58.

8 E.S. Corwin, 'The "Higher Law" Background of American Constitutional Law', (1928-1929) *Harvard Law* Review 164.

9 Gorla, above n 7, 59; referring also to Baldo's definition of *iura naturalia*: '*res decisae et determinatae naturali lege vel moribus gentium*'.

limits to the power of the *Princeps* were considered to concern not only the monarch, but also every authority which had the power to legislate.[10]

From these brief reflections we can conclude that the principles laid down in Magna Carta are not peculiar to English law and that they derived from continental sources.

If Magna Carta is not unique and the principles it contains not peculiar to English law, where does its importance really lie? An answer to this question can be drawn, again, from the chapters in the volume under discussion. What is really special in Magna Carta is its later history, that is, the uses to which it was subsequently put.[11] The title of Griffith-Jones and Hill's book provides a clue for answering our question, as it emphasizes the connection between Magna Carta and the rule of law. I think that this is one of the keys not merely to simply celebrate an anniversary, important though it may be, but primarily to identifying a legal mindset.

In this sense, one of the main legacies of Magna Carta, through the recognition of the role of religion and the respect due to the Church, can be seen in the acknowledgment that law is something more than the King's will. The enduring principles of Magna Carta, such as no taxation without representation, due process, fair trial, effective restraint upon the executive, can only be understood with a fuller understanding of these underlying principles.

10 Ibid.

11 Helmholz, above n 3, 71; referring to Professor Thomson's researches.

III RECHTSSTAAT (ETAT DE DROIT, STATO DI DIRITTO) AND THE RULE OF LAW.

Following these reflections, we can now make a further step. If we can find in Magna Carta the formulation of an idea of law which was familiar to the entire European legal tradition, why was this idea abandoned over subsequent centuries on the Continent, whereas in England and in the common law world it continued to flourish? It is useful to concentrate on the difference between the common law and continental conceptions of rule of law.

It is neither possible, nor useful, to rehearse the impact of the codification movement, which took place in Europe soon after the French Revolution of 1789. But it is still worth noting, from a general comparative perspective, that with the codifications a real discontinuity took place on the Continent with the previous conception of law. Law had never been conceived merely as the product of the will of the political authority, whereas from that time the situation changed radically with law becoming identified with legislation enacted by the state.

The theory of *Rechtstaat* is clearly an effect of this great change. Shaped in Germany by Robert von Mohl in the thirties of the XIX century,[12] but developed only after the restoration after the riots of 1848, the idea of *Rechtstaat* accomplishes a kind of compromise between liberal doctrine (supported by the enlightened bourgeoisie) and the authoritarian ideology of the conservatives (the monarchy at first). In fact, the *Rechtssaat* is opposed to the absolutist state, through elaboration of the two classical liberal principles of public enforcement of individual rights and

12 R von Mohl, *Die Polizeiwissenschaft nach den Grundsatzen des Rechtsstaates* (Tubingen, 1832-4).

separation of powers. On one side, individual rights are conceived as a creation of the state and they limit its power; so, in contrast with the French revolution view, the source of individual rights is not the people's sovereignty, but the legislative power of the State itself, which expresses the spiritual identity of the people. On the other side, the principle of primacy of law is transformed into the principle of legality: the system of rules given by Parliament is to be respected rigorously by both the executive and the judiciary, as a condition of the legality of their acts. In this perspective, an arbitrary use of legislative power is not contemplated, because the assumption is that there is a perfect correspondence between state's will, legality and moral legitimacy.[13] So, the *Staatsrecth*, in its original and complete understanding, is the State which limits itself through statute law).[14] With substantial variation, this concept was later followed also in France[15] and in Italy and we can say that it characterizes all the civil law countries.

If we compare the *Rechtsstaat* with the common law conception of the rule of law, we can realize that they share the same aim, that is, the need to subject the exercise of public powers to legal regulation, in order to protect the rights of citizens. But the ways through which this aim is pursued are very different. In the common law tradition, the limitation of state power is achieved through a 'law' which does not derive from the state itself, but from a law which develops autonomously from the state (case law).[16] It is worth remembering the ancient dictum contained in the

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13 D Zolo, 'Teoria e critica dello Stato di diritto' in P. Costa-D. Zolo, *Lo Stato di diritto. Storia, teoria, critica* (Milano, 2002) 21.

14 G Sartori, 'Nota sul rapporto tra Stato di diritto e Stato di giustizia' in AA.VV, *Dommatica, teoria generale e filosofica del diritto* (Milano, 1964, Vol. 2) 310.

15 A. Laquièze, 'Etat de droit e sovranità nazionale in Francia' in P. Costa-D. Zolo, *Lo Stato di diritto* (Milano, 2002) 284.

16 For a full discussion, see L. Moccia, *Comparazione giuridica e diritto europeo* (Milano, 2005) 219.

year books and expressed in the language of the time (the so called 'law French'), according to which: '*La ley est la plus haute inheritance que le Roi ad; car par la ley il meme et touts ses sujets sont rulés, et si le ley ne fuit, nul Roi, et nul inheritance sera'*.[17] As we can readily see, the idea at the basis of this formulation is that law preexists the sovereign's authority and binds him.

This concept, of course, is characterized by a slow and gradual process of adaptation of the medieval inheritance to the needs of modern society, culminating in the 19th century contribution of Albert Venn Dicey. But it still remains the core idea at the basis of the rule of law in the common law tradition.

As a consequence of the substantial difference between *Rechtstaat* and the rule of law, in the civil law systems administrative law is conceived as a distinct branch of law, a 'special' one, with a completely separate judicial structure (administrative courts). On the contrary, in the common law 'the citizen's remedies against the state have been enhanced by the development of a system of administrative law based on the power of the court to review the legality of administrative action'.[18] So, in contrast with the continental *Staatsrecht*, characterized by the submission of public authorities to a check of legality of their acts in the context of separation of jurisdictions, the common law rule of law implies and

17 19 Hen. VI. 63. 'The law is the highest inheritance which the King has; for by the law he himself and all his subjects are governed, and if there were no law, there would be neither King nor inheritance'.

18 J. Beatson, 'Has the common law a future' (1997) *Cambridge Law Journal* 291, 296.

postulates a unity of jurisdiction (i.e., the submission both of private individuals and of public authorities to the same judge).[19]

IV THE MAIN LEGACIES.

Having all this in mind, we can now focus schematically on some features which identify the main legacy of a concept of law which has its remote origins in Magna Carta and, through a long line of modifications and adaptations over history, is still visible in the common law experience, in contrast with the civil law tradition.

A *The Primacy of 'Unwritten Law' on Statute Law.*

If we go back to Magna Carta, we find the first formulation of a principle, whose basis has been well summarized as follows: 'the law of the realm should be written down to guide the king in ruling the kingdom' and 'due process facilitated by the judgment of peers and guided by the law of the land should be applied not only in the king's courts but *also to the king himself*'.[20]

This idea, according to which the 'king' is bound by a law which is not created by himself, continues to characterize the English tradition, in a never-ending variation of scenarios. Only in this perspective can we understand something which sounds alien to a continental jurist: English 'constitutional law remains a common law ocean dotted with islands of

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19 L. Moccia, *Comparazione giuridica e diritto europeo* (Milano, 2005) 247. For an account of the recent debate in the United Kingdom concerning the utility of a bill of rights, foremost after the Human Rights Act 1998, see Lady Hale, *UK Constitutionalism on the March*, in <https://www.supremecourt.uk/docs/speech-140712.pdf> and N Walker, 'Our Constitutional Unsettlement' (2014) *Public Law*, 529.

20 J.W. Baldwin, *Due process in Magna Carta. Its sources in English law, canon law and Stephen Langton*, in Robin Griffith-Jones and Mark Hill (eds), *Magna Carta, Religion and the Rule of law* (Cambridge, 2015) 51.

statutory provisions […] Whether we like it or not, the common law is the responsibility of the courts'[21] as well as the *dictum* of an eminent English judge: 'In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law'[22]. So, according to the common law experience, 'the rule of law recognizes two sovereignties, not one and not three'.[23]

This aspect cannot be underestimated, because it is essential to understand that the hallmark of a common law system is the importance accorded to the decisions of judges as sources of law. In this sense, the common law is 'unenacted', and so 'unwritten' law,[24] although it binds not only private individuals but also public authorities. This does not mean that case law can contradict statute law, nor that judges are not bound by statute law: it simply means that the idea of the 'two sovereignties' is at the basis of a cultural attitude, still present in the common law tradition, according to which the relationship between the common law and statute law tends to be considered in terms of separateness, as between oil and water.[25] In this perspective, the close relationship between the rule of law and case law, ensures the protection of the individuals against the state by subjecting of the action of public authorities to the scrutiny under the jurisdiction of the common law courts.

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21 S Sedley, 'The sound of silence: Constitutional Law without a Constitution' (1994) *Law Quarterly Review* 270, 273.

22 *X v Morgan-Grampian Ltd* [1991] AC 1 (Lord Bridge of Harwich).

23 Sedley, above n 21, 291.

24 Beatson, above n 18, 295.

25 Ibid 300.

B *The Attitude of Common Law Judges Towards the Interpretation of Law: A Recent Example.*

As a result, it is worth noting that even if the considerable increase in statute law in all fields has a great impact in England and in other common law countries, the weight of the common law tradition is still clearly visible. There is a strict approach to matters of statutory interpretation. 'Psychologically, if not statistically, statutes can still appear to many lawyers as exceptions rather than the rule'.[26]

The most striking emergence of this attitude lies in the tendency to confine statutory provisions to a restrictive reading. A very recent example can be drawn from a case decided by the UK Supreme Court in 2015, in the 800th anniversary of Magna Carta.[27] Very briefly, a journalist employed by a newspaper sought disclosure (under the Freedom of Information Act 2000 and the Environmental Information Regulations) of correspondence sent by Prince Charles to various Government Departments between 1 September 2004 and 1 April 2005. Those Departments refused disclosure and the Information Commissioner upheld that decision. The Upper Tribunal ordered that Mr Evans was entitled to disclosure of 'advocacy correspondence' falling within his requests, including advocacy on environmental causes, on the ground that it would generally be in the overall public interest for there to be transparency as to how and when Prince Charles sought to influence government. But subsequently the Attorney General used the statutory 'veto', according to section 53(2) of the *Freedom of Information Act 2000*, enabling him to block disclosure. Under section 53(2), the Attorney

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26 Ibid 301. For a full analysis, see L. Moccia, *Comparazione giuridica e diritto europeo* (Milano, 2005) 593.

27 *R (on the application of Evans) v Attorney General* [2015] UKSC 21.

General can decide that an order against a government department shall cease to have effect. The Supreme Court, dismissing the appeal against the decision of the Court of Appeal, upheld a very strict interpretation of the relevant statutory provisions.

It is obviously impossible to examine this decision in depth, but it is useful to quote the dictum of Lord Neuberger (for the majority), focusing on

> two constitutional principles which are also fundamental components of the Rule of law. First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinized statutory exceptions, reviewable by the court at the suit of an interested citizen.[28]

For this reason, it is worth noting that the right of citizens to seek judicial review of actions and decisions of the executive has 'its consequences in terms of statutory interpretation', in the sense that '[t]he courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear'.[29]

Another matter which emphasizes the English approach to statute law is the presumption against the alteration of the common law, so that even if Parliament is sovereign and can alter the common law, in order to do so it must expressly enact legislation to that end. If there is no express

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28 Ibid [51]–[52].

29 Ibid [56], quoting *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, [159] (Lady Hale).

intention, courts assume that a statute is to be interpreted in a manner which does not introduce any change to the common law.[30]

This is another example which shows quite well the persistent attitude of common law judges towards statute law, together with the relevance of the doctrine of Rule of law examined above, which continues to characterize the common law experience and mindset.

C *A Communicating Legal Tradition: The Circulation of Precedents.*

A third aspect I would like to focus on can be illustrated by reference to the following statement: 'In the Commonwealth … the law of England is frequently cited to establish the "context" or "historical background" of the legal issues and to place the issue within the overall structure of the common law'.[31] This means that even if the common law tradition is sometimes seen as an historical heritage, anchored in the past and incapable of guaranteeing a uniform development of various national laws, it continues nevertheless to be vital and visible through the circulation of precedents. Note the continuous recourse of judges to the relevant case law of other common law countries: 'Although common law systems do not require Judges to examine foreign law many Judges have used foreign law, especially English law, as a source of possible solutions to a problem'.[32] Without being binding, recourse to foreign common law precedents contributes to the development of a continuous dialogue and source of inspiration, which strengthens the idea of common

30 For a recent case in this field, see *R v Hughes* [2013] 1 WLR 2461.

31 Thomas Allen and Bruce Anderson, 'The Use of Comparative Law by Common Law Judges' (1994) *Anglo-American Law Review* 435, 439.

32 Ibid 443.

law as case law, and so as an unwritten law which keeps the common law tradition away from identifying the law with the will of an authority.

This idea of belonging to a common legal tradition is well expressed by an Australian judge sitting in the High Court of Australia: 'Our inheritance of the law of England does not consist of a number of specific legacies selected from time to time for us by English courts. We have inherited a body of law. We take it as a universal legatee. We take its method and its spirit as well as its particular rule'.[33] Very recently, speaking extra-judicially, another eminent Australian judge observed:

> The method and spirit of the common law apply as much to our legal institutions and courts as well as to the rules of law … The pragmatism which marks the development of the common law is part of a culture which we share with the English and which marks out our judicial method. I do not expect that that culture to change significantly in the near or long term. Even if the English or our common law is eventually replaced by codes or statutes we are also still likely to apply the rules of statutory interpretation developed by the common law.[34]

V FINAL CONSIDERATIONS

The quotations above show the legacy of a concept of law: the sense of belonging to a community of jurists, the awareness of adhering to a common methodology and spirit, the continuous circulation of ideas and solutions are features which characterize the common law tradition, with the advantage of sharing a common language.

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33 *Skelton v Collins* [1966] 115 CLR 94, 134-135 (Windeyer J).

34 J Douglas, 'England as a Source of Australian Law: For How Long?' (2012) *Australian Law* 333, 349-350. See B Häcker, 'Divergence and Convergence in the Common Law. Lessons from the ius commune' (2015) *Law Quarterly Review* 424.

Magna Carta can be regarded, to a certain extent, as the starting point of this cultural attitude, which is linked to a very strong idea of government under the law. In fact, through the claim of the respect of the autonomy of the Church, the medieval jurists were not solely animated by a partisan goal, but they pursued a far deeper one: law is more than the will of the king and it acts as a limit on him. This idea was deeply rooted in a conception of man and of life, whereas 'ours is a mobile and deracinated generation. The custodians of ancient traditions and principles that have for centuries undergirded our polity do not now earn respect or attention through that wardship alone'.[35]

The question which arises now, in our complex and multi-cultural society, is how do we ensure that these deep roots do not dry up. This question is the central point on which it is essential to confront each other as men, and so as jurists, in order to go in search of possible answers.

[35] Robin Griffith-Jones and Mark Hill (eds), *Magna Carta, Religion and the Rule of law* (Cambridge, 2015) 8.

DUE DILIGENCE OBLIGATION OF A STATE TO CHILDREN HARMED BY PORN: A CRITICAL APPRAISAL

By Andrea Tokaji*

ABSTRACT

This article looks at the rise of children sexually abusing other children as a result of watching porn on line, and the need for restorative justice measures to be applied in the context of the State's due diligence obligations to protect children from harm.

I INTRODUCTION

36% of Internet content is pornographic, and there has been a recorded rise in the viewing of pornography on line by children. Not only is harmful, violent and degrading sexual images accessible to children[1] on their smartphones, their tablets and computers[2], many Australian children

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1 'How the dark world of pornography is damaging kids' lives forever', News.com.au (online), 13 February 2016 <http://www.news.com.au/technology/online/how-the-dark-world-of-pornography-is-damaging-kids-lives-forever/news-story/bec519e56373f344adb95c8c2113c8db>.

2 The *Australian Medical Association* has stated that: 'children and young people are being exposed to a vast range [of] pornography, which is readily available on the internet' in their Submissions: Senate Standing Committees on Environment and Communications, Australian Parliament House, *Harm being done to Australian children through access to pornography on the Internet* (2016):

now live in households alongside large-scale pornography users. The result is that children are recklessly being exposed to pornography and even masturbation in the family home, as seen in the case of *Corby & Corby*,[3] heard by the Federal Circuit Court of Australia last year.

The law is inconsistent, however, in relation to the protection of children to the exposure to pornography in the private or household sphere,[4] and Australian institutions do not appear to recognise the abusive nature of these forms of exposure inflicted on children in households, unless they are part of schemes of grooming to facilitate sexual abuse.[5] Legislative provisions against 'exposure to indecent materials' should be strengthened in Australia, and no longer only be subject to the act of 'grooming'.[6]

The Australian Childhood Foundation[7] state that over 90% of boys under the age of 16 have visited a pornography site online, and that 93% of males and 62% of females aged 13 to 16 had seen pornography online.[8]

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Online_access_to_porn/Submissions>.

3 *Corby & Corby* (No.2) [2015] FCCA 3213.

4 For example, the *Criminal Code 1995* (Qld) criminalises too weakly activities that facilitate children's exposure to pornography in households.

5 In other jurisdictions – such as NSW, i.e., the *Crimes Act 1900* (NSW) s 66EB(3) – criminalises only the pornography exposure that is part of a scheme to acculturate a victim to sexual abuse.

6 As in the case of s66EB(3) of the *Crimes Act 1900* (NSW) and s226(1) and (2)(d) of the *Criminal Code 1995* (Qld).

7 The Australian Childhood Foundation, <http://www.childhood.org.au/>.

8 M Fleming et al, '*Safety in Cyberspace: Adolescents' Safety and Exposure Online'* (2006) 38 *Youth and Society,* 135-154.

Professor Freda Briggs revealed that during interviews with more than 700 children for an Australian Research Council study, young boys[9] between the ages of six and eight admitted that they and their dads watched pornography together for 'fun' because 'that's what guys do.'[10]

Consequently, there has also been a reported rise in children sexually abusing other children[11] as a result of 'acting out' the images that they see on porn sites.[12]

One little boy's behavior has become so over sexualised, he has to be chaperoned at all times because of the risk that he may start playing "sex

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9 *Love and Sex in an Age of Pornography* (Directed by Crabbe and Corlett, 2013): in their ground-breaking Australian research show clearly that young men actually believe that what they are watching provides real templates for sexual activity.

10 'Professor Freda Briggs tackled the systemic problem of child sexual abuse', *The Sydney Morning Herald* (online), 12 June 2016 <http://www.smh.com.au/comment/obituaries/professor-freda-briggs-tackled-the-systemic-problem-of-child-sexual-abuse-20160609-gpfz92.html>.

11 Lorna Knowles and Alison McClymont, 'Rise in Number of Preschoolers Sexually Abusing Peers, University of South Australia Expert Says', *ABC* (online), 31 Jul 2014 <http://www.abc.net.au/news/2014-04-30/rise-in-number-of-pre-schoolers-sexually-abusing-peers:-expert/5419214>.

12 A submission from Children's eSafety Commissioner Alastair MacGibbon notes: 'The proliferation of smartphones, tablets and devices [has] changed the amount and ease of access to sexually explicit content' in Senate Standing Committees on Environment and Communications, Australian Parliament House, *Harm being done to Australian children through access to pornography on the Internet* (2016) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Online_access_to_porn/Submissions>.

games" with other children. The reason? His young mind viewed online pornography, and now - he simulates oral and anal sex at play time.[13]

Professor Briggs' Submission,[14] tabled in the Senate,[15] lists a 'litany of attacks on children by classmates' including a six-year-old boy who forced oral sex on kindergarten boys in the school cubby house.[16] She also cited a group of boys who followed a five-year-old girl into the toilets, held her down and urinated in a 'golden shower'.[17]

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13 Mamamia (29 February 2016) <http://www.mamamia.com.au/porn-and-young-children/>.

14 The Senate's environment and communications committee is to report its findings in the inquiry into Harm being done to Australian children through access to pornography on the Internet# by 1 December 2016.

15 Senate Standing Committees on Environment and Communications, Australian Parliament House, *Harm being done to Australian children through access to pornography on the Internet* (2016) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Online_access_to_porn/Submissions>.

16 'Porn turning kids into predators', *The Australian* (online), 2016 <http://www.theaustralian.com.au/subscribe/news/1/index.html?sourceCode=TAWEB_WRE170_a&mode=premium&dest=http://www.theaustralian.com.au/national-affairs/education/porn-turning-kids-into-predators/news-story/7f665119f267490ab3c2595bd329e9b1&memtype=anonymous>.

17 Senate Standing Committees on Environment and Communications, Australian Parliament House, *Harm being done to Australian children through access to pornography on the Internet* 2016 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Online_access_to_porn/Submissions>.

In January this year, the prestigious Trinity Grammar School[18] made headlines when a six-year-old boy was removed from the school following a series of 'sexualized' incidences where boys were getting naked and performing sex acts on each other in the school toilets and playground.[19]

The number of children sexually abusing other children has risen steeply, with treatment services such as the Royal Children's Hospital Gatehouse reporting that pornography and family violence are fuelling the trend, and saw 350 new cases in the past financial year – more than double the previous year. Of those children, 60% were abusing a sibling. The seriousness of the sexual acts have also escalated in recent years, as online pornography is being used as a 'technical manual' for abuse.

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18 Although the viewing of pornography, and the assault and abuse of children takes place at their schools with children as the perpetrators, some parents have specifically been asked not to report child sexual abuse to police to protect "the good name of the school, recognising that abuse by a child can be as traumatic for victims as abuse by adults –Emeritus Professor Freda Briggs AO, Foundation Chair of Child Development, University of South Australia, Magill Campus 5072, Submission for the Inquiry into the harm being done to Australian children through access to pornography on the internet: <file:///D:/Downloads/sub02.pdf>.

19 Nelson Groom, 'Six-year-old boy removed from prestigious private school after Year One pupils were found to be "getting naked and performing sex acts on each other"', *Daily Mail Australia*, 16 January 2016 <http://www.dailymail.co.uk/news/article-3401279/Group-Year-One-Students-public-school-Sydney-caught-performing-sex-acts-other.html>.

II WHAT IS THE HARM TO CHILDREN ACCESSING PORN ONLINE?

Researchers confirmed that the age of the offender does not determine the degree of harm caused to victims. Abuse by a school peer or sibling can be just as frightening and harmful as abuse by an adult.[20]

A growing body of research demonstrates the harmful impact of pornography on children and young people's attitudes and beliefs, sexual behaviour, sexual aggression, self-concept and body image, social development, and brain development[21], and there is sufficient evidence to indicate that children's exposure to pornography can adversely affect their developmental capacity to form trusted, reciprocal relationships with others.

Anxiety, fear, and suicidal ideas and behaviour have also been associated with a history of childhood sexual abuse, and male victims of child sexual abuse show disturbed adult sexual functioning[22], and there is evidence that compulsive viewing of pornography, particularly in adolescents, changes the brain chemistry – that pornography affects the brain in much the same way as drugs. Watching porn can become addictive.

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20 Submission for the Inquiry into the *Harm being done to Australian children through access to pornography on the internet*, Emeritus Professor Freda Briggs AO, Foundation Chair of Child Development, University of South Australia, Magill Campus 5072, Submission for the Inquiry into the harm being done to Australian children through access to pornography on the internet: <file:///D:/Downloads/sub02.pdf>.

21 Eric Owens et al, 'The Impact of Internet Pornography on Adolescents: A Review of the Research (2012) 19 *Sexual Addiction and Compulsivity* 19.

22 Joseph Beitchman, 'A review of the long-term effects of child sexual abuse' (1992) 16 *Child Abuse & Neglect* 1, 101–118.

The Royal Australian and New Zealand College of Psychiatrists has revealed that children and adolescents who are exposed to porn can 'exhibit inappropriate and distorted behaviour', and that 'anecdotally, exposure to pornography is an element of some presentations at child and adolescent mental health services'.[23]

Cyber-safety expert and former police officer Susan McLean[24] has told the Porn Harms Kids Sydney Symposium in February this year that 'the results of early exposure and engagement [of porn] can vary from bed-wetting to triggers for child-on-child sexual assaults, which are on the rise'.[25]

Jason Huxley[26] travels the country teaching people about the effects of pornography, as a recovered addict himself. He recently stated in a government submission: 'We repeatedly see that porn viewing during childhood changes behaviour and perspectives of normality, ultimately leading to addiction and/or harmful habits in adulthood'.[27]

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23 Senate Standing Committees on Environment and Communications, Australian Parliament House, *Harm being done to Australian children through access to pornography on the Internet* 2016 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Online_access_to_porn/Submissions>.

24 <http://www.cybersafetysolutions.com.au/more-about-susan.shtml>.

25 Susan McLean, (Speech delivered at the Porn Harms Kids Sydney Symposium, Sydney, February 2016).

26 Founder and Director of Guilty Pleasures <http://guiltypleasure.org/>.

27 Senate Standing Committees on Environment and Communications, Australian Parliament House, Guilty Pleasures Submission 2016 <file:///C:/Documents%20and%20Settings/John/My%20Documents/Downloads/sub107.pdf >.

Pornography changes children's attitudes toward women and sex. According to Paolucci and others in A Meta-Analysis of the Published Research on the Effects of Pornography, they state that there is: '…clear evidence confirming the link between increased risk for negative development when exposed to pornography. These results suggest that the research in this area can move beyond the question of whether pornography has an influence on violence and family functioning', and that

> exposure to pornography is one important factor which contributes directly to the development of sexually dysfunctional attitudes and behaviours. The results are clear and consistent; exposure to pornographic material puts one at increased risk of developing sexually deviant tendencies, committing sexual offences, experiencing difficulties in one's intimate relationships, and accepting the rape myth.[28]

The United Nations Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy, has stated that

> [p]ornography in itself glamorizes the degradation and maltreatment of women, and asserts their subordinate function as mere receptacles for male lust, ... causes more violence against women … significantly increases attitudinal measures known to correlate with rape and self-reports of aggressive acts – measures such as hostility towards women, propensity to rape, condoning rape, and predicting that one would rape or force sex on a woman if one knew one would not get caught.[29]

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28 Elizabeth Oddone Paolucci, Mark Genius and Claudio Violato, 'A Meta-Analysis of Published Research on the Effects of Pornography' 1997 *ResearchGate*.

29 Radhika Coomaraswamy, United Nations Special Rapporteur on violence against women, its causes and consequences, Report 50 Session, Agenda Item 11(a).

The Australian Federal Police have identified children's exposure to inappropriate content and sexually explicit material, including pornography, as a critical challenge of the digital age,[30] and the Victorian Police report that the number of young child sex offenders has increased and victims are getting younger and younger,[31] and children as young as three and four were referred for treatment for sexual aggression.[32]

Victoria Police warned that adolescent access to child porn was a growing problem that had become 'a premier threat to child protection in the community'. By 2008 there were more adolescent sex offenders reported than adults.[33]

The rate of children viewing pornography, and acting what they see out in harmful ways is on the rise, and is deeply affecting not only its victims, but also the perpetrators by setting them up on a trajectory of unhealthy and abusive sexual behaviour and assault. Parents are not sure how to respond, and Schools seems to be sweeping these incidences under the carpet, for fear of litigation, and a bad reputation.

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30 Australian Federal Police, 'ThinkUKnow' (Media Release, Corporate Report 2015).

31 All members of America's paedophile club NAMBLA (advertised on the internet) who were interviewed for their YouTube clip said they were sexually abusing younger boys from the age of eight.

32 Emeritus Professor Freda Briggs AO, Foundation Chair of Child Development, University of South Australia, Magill Campus 5072 <file:///D:/Downloads/sub02.pdf>.

33 C Crawford and G Wilkinson, 'Teenagers are becoming major makers of child pornography in Victoria, new statistics show' *Herald Sun* (online), 2 July 2008.

Because of a lack of capacity of a child recognised under criminal law, and the required criminal element of mens rea[34] in any conviction, the actions of the child perpetrator are at the moment being ignored as 'normal childhood developmental sexual experimentation', which has a risk of being normalised in the child's minds. This may lead to the perpetrator child reoffending into their adolescence and adulthood – given a lack of action to deter, condemn or discus their harmful behaviour at the time of the incident.

The State is not intervening, and children are not being held accountable for their actions. So, what should the State be doing? What can wider society do?

III CURRENT LEGAL PROTECTIONS

The existing regulation of pornography is governed by the Broadcasting Act 1992 (Cth).[35] A range of material is deemed prohibited content under the Act,[36] and for a website to be deemed as 'prohibited content', a number of conditions must be met. Media is regulated in Australia by the

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34 Division 7 of the *Criminal Code 1995* (Cth) deals with Circumstances involving lack of capacity, stating in 7.1 that: 'a child under 10 years old is not criminally responsible for an offence', and at 7.2 that'a child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong'. The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

35 *Broadcasting Services Act 1992* (Cth) sch 7 pt 1.

36 Including content that is: i, classified as MA15+ if commercially available (i.e., for a fee) but not behind an age restriction scheme ii, classified as R18+ content if it is not behind an age restriction scheme iii, classified as X18+ and iv. classified as RC.

Classification Board, and explicit material is classified into ratings categories.[37]

For a website to be classified as 'prohibited content', the website must be hosted in Australia, and a complaint must be lodged with the Australian Communications and Media Authority (ACMA) – the ACMA must then refer the website to the Classification Board for formal classification. Once it is deemed as prohibited content by the classification board, ACMA is then able to issue the website owner with a takedown notice and direct the content provider to remove or restrict access to the content.

Complaints about content hosted overseas are assessed for classification by ACMA itself, or referred to the Classification Board when there is any doubt. Overseas-hosted prohibited content is added to the list which is provided to third party filter companies for use in content filtering systems.

Overseas hosted 'prohibited content' is therefore accessible unless a third party filter is installed. Additionally, the Australian Federal Police now compel ISPs, in accordance with their obligations under the Telecommunications Act 1997, to block websites featuring child pornography and abuse, using a blacklist maintained by Interpol.

Those attempting to access a blocked URL see a page giving information on why it was blocked. The blacklist only includes websites featuring

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37 Eros Parliamentary Information Guide, *Censorship, Public Opinion and Adult Retailing in Australia* <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/censorshipebrief>.

content considered by Interpol to be 'severe', and the Interpol list only targets pornography involving children under the age of 13.[38]

A large part of overseas-hosted pornography does not require age verification, which leaves Australian children potentially exposed to overseas hosted hard-core pornography, except where a filtering application is installed on a device or network. The current regulatory framework, therefore, leaves the majority of children in Australia exposed to material that is harmful to them.

Child Exploitation Material is currently blocked at ISP level under the Telecommunications Act 1997. Content that is Refused Classification (RC) or classified X 18+ is prohibited, so children accessing explicit adult content: RC content - may be reported to the eSafety Commissioner.[39]

IV WHY AUSTRALIA SHOULD INTRODUCE A NATIONAL CLEAN-FEED ISP STANDARD

The UK introduced[40] clean-feed internet by default last year, and it is a model that Australia should replicate. The Online Safety Bill [HL] 2016-

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38 Criteria for Inclusion in the Worst of List, Interpol <http://www.interpol.int/Crime-areas/Crimes-againstchildren/Access-blocking/Criteria-for-inclusion-in-the-Worst-of-list>.

39 eSafety Commissioner Complaints and Reporting Page <https://www.esafety.gov.au/complaints-and-reporting/offensive-andillegal-content-complaints/i-want-to-report-offensive-or-illegal-conten>.

40 In July 2013 David Cameron announced voluntary agreement with major ISPs to implement a 'default-on' filter. A quote from his speech:

> a free and open internet is vital. But in no other market and with no other industry do we have such an extraordinarily light touch when it comes to

17[41] promotes online safety, and requires internet service providers and mobile phone operators to provide an internet service that excludes adult-only content; requires information to be provided about online safety by internet service providers and mobile phone operators; makes provision for parents to be educated about online safety; makes provision for the regulation of harmful material through on-demand program services; and introduces licensing of pornographic services, for connected purposes.[42]

This should be Australia's standard – ISPs should provide a default option of a pre-filtered service to block pornography and other sites harmful to children, and require provable age verification for all pornography websites.

The ISP filter should be by default, where adults who wish to view adult material on their PC's, Tablets or smart-phones can opt-out of the Nation-wide standards of clean feed internet provided to all Australians – with the objective of protecting children.

These measures would be consistent with international best practice in the best interest of the child, as held in the Convention on the Rights of the Child.[43]

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protecting our children. Children can't go into the shops or the cinema and buy things meant for adults or have adult experiences; we rightly regulate to protect them. But when it comes to the internet, in the balance between freedom and responsibility we've neglected our responsibility to children.

41 *Online Safety Bill 2016-17* (UK), [House of Lords] <http://services.parliament.uk/bills/2016-17/onlinesafety.html>.

42 Summary of the *Online Safety Bill 2016-17* (UK), [House of Lords] <http://services.parliament.uk/bills/2016-17/onlinesafety.html>.

43 *Convention on the Rights of the Child*, art 3, 13, 17–19, 27, 34, 36.

V AUSTRALIA'S DUE DILIGENCE OBLIGATION TO PROTECT CHILDREN FROM ALL HARM UNDER INTERNATIONAL LAW

Following the rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence,[44] emphasised in international case law, and in soft law, through Rapporteur Recommendations, and the interpretation of international instruments such as the Committee's Commentary on the Convention of the Elimination of Discrimination Against Women (CEDAW) in various International Commentaries, it is clear that the State has an obligation to protect its citizens from harm, and to ensure any foreseeable harms is prevented.

The case of *Osman v United Kingdom*,[45] as well as Commentary of the CEDAW Committee conclude that a state can be found complicit in human rights abuses perpetuated by non-State actors.[46] In the landmark cases of *Bevacqua and S. v Bulgaria*[47] and *Opuz v Turkey*,[48] both cases held national governments responsible for failing to exercise due diligence to adequately protect individuals from domestic violence,

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44 Yakin Erturk, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: the Due Diligence standard as a Tool for the Elimination of Violence Against Women*, ESC Res 2005/41, (29 January 2006).

45 *Osman v United Kingdom*, 1998-VIII Eur. Ct. H.R. 3124.

46 Lee Hasselbacher, 'State Obligations regarding Domestic Violence: The European Court of Human Rights, Due diligence, and International Legal Minimums of Protection' (2010) 8 *Northwestern Journal of International Human Rights* 2, 200.

47 *Bevacqua v Bulgaria* (2008) Eur Court HR.

48 *Opuz v Turkey* (2009) Eur Court HR.

recognising that a state's failure to exercise due diligence to protect women against domestic violence is gender-based discrimination, violating women's right to equal protection of the law.[49]

The foundation for State responsibility was established in the case of *Velasquez Rodriguez v Honduras*,[50] in which it was articulated that: the extent of the State's due diligence responsibilities extended to effective responses from law enforcement, formal measures of protection, including civil protection orders, and punishment and prosecution of perpetrators.[51]

The ruling in *M.C. v Bulgaria*[52] affirmed and strengthened the State responsibility standards, noting that the State has a positive obligation to first enact criminal law provisions that criminalise non-consensual sex and then 'apply them in practice through investigation and prosecution'.[53]

Within the context of the international principle of the best interest of the child[54], children have a right not to be harmed psychologically, emotionally and physically, as laid out in the Convention on the Rights of the Child (CRoC). As signatories to this international convention,

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49 Hasselbacher, above n 46.

50 *Velasquez Rodriguez v Honduras* (1988) Inter-American Court of Human Rights (Ser. C).

51 Hasselbacher, above n 46, 195.

52 *M.C v Bulgaria* (2003) Eur Court HR.

53 Citing *Osman v United Kingdom* (1998) Eur Court HR, and General Recommendation 19 of the Committee on the *Convention on the Elimination of Discrimination Against Women.*

54 As also expressed in art 21 on the *Convention on the Rights of the Child* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

Australia has a due diligence responsibility to protect children from non-State actors perpetrating such harm against them.

In the Convention on the Rights of the Child, the State is called to take all appropriate measures to protect the child from all forms of violence, injury or abuse, including sexual abuse, including through forms of prevention.[55]

The connection between the State's obligations under the international principles of due diligence, and the State's responsibility to not only protect children from harm, but also prevent harm from occurring to children is clear and evident. There is therefore a strong argument to be made for the application of a Nation-wide opt-out Clean feed Internet Service Provision to all homes, tablets, smartphones and other devices that have the potential to host harmful material online which can be viewed by children.

VI RESTORATIVE JUSTICE - A POTENTIAL WAY FORWARD

Of course, children harming other children do not meet the criminal threshold required for criminal liability through the requirement of mens rea and actus reus – given their lack of capacity.[56] Their actions have to be acknowledged as wrong nonetheless - and rehabilitation programs

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55 *Convention on the Rights of the Child*, art 19.

56 *Criminal Code 1995 (*Cth) 1995, div 7: deals with Circumstances involving lack of capacity, stating at 7.1 that: 'a child under 10 years old is not criminally responsible for an offence', and at 7.2 that 'a child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong'. The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

through education for both the child victim and the child perpetrator should be provided in all instances.

Even though rape and sexual assault are known to have one of the lowest conviction rates among all of the criminal justice matters, the use of restorative justice is a positive way forward for both child victim and perpetrator. The benefits of the use of restorative justice have been laid out in various academic studies in the criminal justice system – particular in its use with young offenders.

A 2015 study by the University of Bedfordshire consisting of a web-based survey of 121 community members, 40 of whom identified themselves as survivors of sexual violence, indicated that both survivors and non-survivors of sexual violence express positive attitudes towards the use of restorative justice in these cases.[57]

Restorative justice is known to have a general deterrent impact on crime, and is instrumental in developing 'restorative communities', particularly amongst communities that are fractured by high rates of crime,[58] it substantially reduces repeat offending for some offenders, and reduces recidivism more than prison.[59]

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57 Francesca Marsh and Nadia M. Wager, 'Restorative Justice in Cases of Sexual Violence: Exploring the views of the public and survivors' (2015) *Probation Journal* <https://www.academia.edu/12276208/Restorative_Justice_in_Cases_of_Sexual_Violence_Exploring_the_views_of_the_public_and_survivors>.

58 Ibid.

59 The Smith Institute, *Restorative justice: The Evidence* <http://hdl.handle.net/10149/600940>.

The restorative justice process permits the victim to tell their story, which is so often desired by survivors,[60] and the process of restorative justice is more likely to encourage admissions of guilt by the perpetrator.

Where restorative justice is used as an adjunct, it has been suggested that the process will address survivors' needs that are left unmet by, or go some way to ameliorate the harm done by the secondary victimisation arising from engagement with the adversarial system.[61]

VII FINAL CONSIDERATIONS

The Australian Government needs to consider a restorative justice model of reconciliation and accountability for children's actions when sexually abusing other children. In doing so, the child perpetrator will understand the social norm that this behaviour is harmful, and not acceptable in our society. Within the restorative justice process, the child should face their victim to say sorry, and the perpetrator should be encouraged to engage in community service of some sort at their school or local community centre under guardian or parental supervision as an acknowledgment for their wrong actions. I am not supporting the idea that children obtain a criminal record for these acts, but only to acknowledge the wrong they have done, and apologise to their victim.

If we don't do something fast, we will have a generation of young people who are deeply affected and traumatised by their exposure not only to harmful images online, but victims also to experiencing these abuses first hand. Indeed, Liz Walker,[62] sex educator with YouthWellbeing Project, states that the lack of action by governing bodies and ISPs to respond to

60 Ibid.
61 Ibid.
62 Liz Walker, Youth Wellbeing Project <http://www.youthwellbeingproject.com.au/>.

children accessing adult pornography draws parallels to the once ignored but ‘now important’ Royal Commission into Institutional Responses to Child Sexual Abuse. The reports of children negatively impacted by pornography flood in, yet its harms are often overlooked and underplayed. Children are exploiting other children and childhood sexual exploitation has reached new peaks and without targeted strategies, this trend is unlikely to reverse.

So what are the responses our community can have to the rise of this abhorrent abuse of children?

Firstly, the Commonwealth Government needs to legislate a universal, by-default, ISP-level ’clean-feed’ internet regime, filtering out adult content and thereby protecting children from harmful exposure, for both fixed line and mobile services. Provision should be made for adult customers to opt out of the ‘clean-feed’ on request to their ISP or mobile provider, using an age verification process.

Secondly, the ACMA should conduct an annual review of ‘clean-feed’ services being provided by ISPs and mobile operators, and publish the result of the review, along with recommendations – in the best interest of the child, under the State’s obligation to protect children from harm and provide mechanisms to prevent such harm. Legislative provisions against ‘exposure to indecent materials’ should also be strengthened in Australia, and no longer only be subject to the act of ‘grooming’.

And thirdly, restorative justice responses need to be set up for the victim and perpetrator children who have engaged in, or experienced harmful, abusive, sexual abuse or misconduct by other children, followed up by a thorough education program around healthy sexuality, healthy relationships and the harms of abusive behaviour.

Let us do all we can to protect our most innocent.

SAME-SEX MARRIAGE AFTER OBERGEFELL:

THE STATE OF THE UNION IN THE U.S. AND INTERNATIONAL IMPLICATIONS (INCLUDING JUSTICE KENNEDY'S TOP 10 ERRORS)

Patrick M. Talbot, J.D.*

I INTRODUCTION

This is the first of two articles dealing with same-sex marriage ('SSM') and religious liberty in America, following *Obergefell v. Hodges*[1] in the Supreme Court of the United States ('SCOTUS'). However, I write also with a global context in mind. I initially presented this material as a symposium paper on religious liberty at Petra Christian University in Surabaya, in May, 2015.

This article addresses the issue of the mandatory legalization of SSM in America in *Obergefell*, and the lack of solid jurisprudence to support it. The second article will address religious liberty issues facing Christian wedding vendors who are opposed in conscience to SSM, according to their sincerely held religious beliefs. That article will survey some of the recent cases involving bakers, florists, planners, photographers (and even clergy), and discuss some current developments (like the gender-neutral toilet and locker-room wars in America today). As of this writing, SCOTUS has not decided this second issue facing vendors. It will do so soon.

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1 576 US 11 (2015).

Shortly after the initial paper presentation in Indonesia, SCOTUS, acting against all dictates of common sense and sound reason, ruled in *Obergefell v. Hodges* that all Fifty States in the U.S. must now allow same-sex couples the right to marry (i.e., issuing actual State marriage licenses). Accordingly, SCOTUS has taken this decision away from the voters in every State, trampling on democracy in the process. The vote was five Justices to four, and so came down to one vote. Justice Kennedy wrote the majority opinion and is often considered the 'swing vote' in SCOTUS on this sort of issue. The decision has boiled over into heated, angry responses not only in America, but around the world. I will discuss some of *Obergefell's* specifics below. This outcome would not have happened without a general worldview shift to secular humanism within the constitution of SCOTUS' Justices, as simply reflected in American culture.

In this article, I consider the now extinguished right of one nation's citizenry, after *Obergefell*, to define marriage in the traditional way (i.e., historically and/or religiously), as the lifelong union of a man and a woman. This of course also involves the right to establish a marriage definition through the legislative (democratic) process. Still greater issues underlie the rights of a people to decide this issue for themselves, in regard especially to any religious views they have on the matter, amidst what is a growing secularist view of marriage in America.

Consider some of these underlying issues, for instance: Is it an improper entanglement of Church and State for a State in the U.S. to support a religious view of marriage? Is there even such a thing as a non-religious view of marriage? Does legislation of an historical, religious view of marriage improperly discriminate against same-sex couples? Are attacks and threats against Christians who hold to the traditional view of

marriage justified? Is this like the civil rights movement? Is SSM a human right? Should supporters of traditional marriage be called bigots and be harassed at every turn for expressing their view? In terms of lawmaking and the democratic political process, should LGBT activists' attempts to exclude the Christian and multi-religious view of marriage in that law-making process be applauded (as it is in America's media, educational, and secular legal institutions); or, is that stringent effort to eliminate the Christian view of marriage in the democratic lawmaking process an invidious attack on the religious liberty of Christians (or of Jews, Muslims, Hindu's and other religious persons for that matter)? How should this work in a pluralistic society, like America, Australia, and in Asia?

I suppose you may already guess some of my suggested answers to these questions. In any event, this specific jockeying for supremacy of secular humanism (as ideology in its own right) against Christianity (and other religions) in a society, to determine the correct view of marriage, is an important introductory theme I wish to explore in this article.

II SECULAR HUMANISM'S OWN RELIGIOUS INDOCTRINATION ON MARRIAGE AND OTHER SOCIAL ISSUES

Some who argue against the traditional view of marriage do so historically on the ground the traditional view of marriage is a religious one, violating a so-called separation of Church and State. In this article, I take the view secular humanism itself, as an antagonist of Christianity, and including its underlying atheism, is its own brand of religious ideology. So this topic is in some ways really an issue of competing religious views on marriage and other social issues. Secular humanism is

a religious belief system since it makes claims about ultimate reality. It even claims a supreme being (man) as the highest order of intelligence. It disavows any others.

I thus assail in this paper the fiction that secularism is somehow 'neutral', and can give us a trustworthy and just definition of marriage, while conventional religions like Christianity, cannot. Some say the Christian view is *biased*, but that says nothing more valuable than saying to a secularist, *secularism is biased*. The real issue is which view better reflects the truth on a given point. The truth includes, of course, that neutrality itself is a myth, and no laws are ultimately neutral in their values. Everyone, including the secular humanist, or atheist, believes in something. She has her own doctrinal beliefs – a creed, as it were, and is biased toward it. So this charge of bias says nothing helpful.

To understand how secular humanism is a belief about ultimate reality, with its own formal creed, just see the Humanist Manifestos, I, II, III, and the churches of atheism springing up in record numbers in California and England.[2] Secularism is not religiously neutral, but is itself a religious ideology, and attacks Christianity among others. Secular ideology is highly involved in the political and lawmaking process, and in the specific move toward SSM. Its proponents in fact seek to silence and injure those with deviant viewpoints, such as Christians.

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[2] The American Humanist Association (AHA) website has links to all three Humanist Manifestos. The Humanist Manifesto I (to some extent II also) specifically describes humanism as religious throughout; although some secularists today seek to separate the word 'religious' from secular humanism, I consider such semantics essentially unconvincing. See <http://americanhumanist.org/Who_We_Are/About_Humanism>. AHA's website also shows a logo and supporting connection to the LGBTQ Humanist Council; see <www.lgbthumanists.org>. See also Gillian Flacus, 'Atheist "Megachurches" Crop Up Around the World', *Huffington Post* (online), 11 November 2013 <http://www.huffingtonpost.com/2013/11/10/atheist-mega-church_n_4252360.html>.

That is an underlying subject I wish to address in this set of articles, since the very notion of SSM is steeped in a secularist mindset. I cannot deny that some supposed Christians have joined the so-called SSM crusade. I do say they have simply adopted the secularist mindset in doing so, and are completely deceived on this issue, or perhaps just ignorant.

Secularists of course say marriage is whatever we want to call it. It is a fluidly defined, genderless institution, about sexually involved grown-ups of either sex committing to each other at some level, for some unspecified period of time (not always for life), and who receive some social status conferred upon them by their government. Christianity, along with most faiths, holds biological sex or gender (male and female) is intrinsic to marriage. It is historically so understood as part of God's created order, honoring the complementarity of the two sexes.

III STRUCTURING THE ISSUES IN AMERICA AND INTERNATIONALLY

I note this clash of Christian and secular worldviews has led to the two very hotly contested issues on SSM, comprising precisely the subject matter of each of my two articles. These issues can be separated along U.S. Constitutional lines, each lining up neatly with the two religion clauses in the First Amendment of the Constitution (the Establishment and Free Exercise of Religion clauses). So for instance, the subject of this first article, concerning the right of American citizens to define marriage in the States or in the Nation as a whole in the traditional way, potentially involves, among several constitutional issues, the question of establishing a religion. The subject of the second article, concerning the right of individuals and small businesses to decline participation in same-sex

weddings and similar events in accordance with their sincerely held religious beliefs, involves the free exercise of religion.

Both the Establishment Clause and Free Exercise Clause of the First Amendment are essential components of American constitutional jurisprudence on religious liberty and human rights. I will discuss some of these constitutional principles and other laws in more detail below, setting the stage for showing *Obergefell's* inadequacies. I am also aware of the spreading internationalization of SSM and LGBT issues, and of *Obergefell's* likely influence in heating up or starting debates in several countries, including in my present domicile, Indonesia.

For instance, this clashing of values between secular[3] and Christian religious views on marriage and other social issues is a hot issue not only in America, but now in Australia, Asia, and around the globe. Australia is getting ready for its referendum on SSM in a matter of months, and at the religious liberty symposium in Indonesia, another speaker was already discussing the theme of persecution against religious businesses in America because of SSM (and this was prior to *Obergefell*, in the world's largest Muslim-populated nation, and on the other side of the world from America). It is a central claim in this paper, however, that *Obergefell* is an unreliable piece of jurisprudence to affect any international policy or changes on this issue in any nation. In order to see *Obergefell's* shortcomings, a delving into the American legal system is necessary.

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3 I use the term 'secular' in this article a bit 'tongue in cheek', in its assumed, common use, as depicting 'non-religious' stuff. As said, any divide between 'secular' and 'religious' is actually just artificial, as secularism *is* itself a religious view. I appreciate readers keeping that in mind while going ahead in this article.

IV CONSTITUTIONAL AND STATUTORY FRAMEWORK PROTECTING RELIGIOUS LIBERTY IN AMERICA CURRENTLY

A *Constitutional Provisions*

The US Constitution contains a couple of key religious freedom principles in its First Amendment. In short, the First Amendment provides: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .'.[4]

The first clause of the First Amendment (up to the comma), is known as the Establishment Clause. Its initial intent was to prevent the U.S. Congress from establishing a State Church; that is, 'institutionalizing' a single national Church (i.e., one of the various Christian ones). It served to prevent Congress from establishing and institutionalizing an official state religion under that Church (such as Germany and England have had at times, and which some of the individual States at one point had).[5] I see it as something that can loosely be characterized as a 'freedom from a state religion' provision, in the strictest sense of freedom from an institutional religion imposed upon everyone at the national level. This was so people could practice their own religions (again contemplating this within one of the versions of Christianity).

The second clause (after the comma) is known as the Free Exercise clause, and is available to all citizens. I could characterize it more as a 'freedom to exercise one's religion' clause, without imposition or

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4 *United States Constitution* amend I (1791).

5 See John Eidsmoe, *God and Caesar, Biblical Faith and Political Action* (1997) 19-24 (giving an excellent history, including the First and Fourteenth Amendments (applying the religion clauses to the States)).

interference from a national or state religion. I deal with this more in my second article, concerning Christian wedding vendors being able to carry on their businesses according to their sincere religious convictions. This first article relates more to the Establishment Clause, since many seem to feel that support for traditional marriage amounts to establishing a state religion. This is incorrect, as I discuss this below.

In addition, several States in the U.S. have similar religious provisions. Virginia's Constitution for instance, provides:

> SEC 16: That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[6]

B *Statutes*

In 1996 the United States Congress passed the *Defense of Marriage Act* ('DOMA'), signed into law by then President Clinton after enjoying widespread, bipartisan political support. The Act preserves the traditional definition of marriage as the union of one man and one woman for purposes of federal law and government.[7] Regrettably, this definition, as part of DOMA, was overturned in 2013 in *United States v Windsor*,[8] a case I discuss in significant detail below.

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6 *Virginia Constitution* §16 (1776).

7 *Defense of Marriage Act* 110 Stat. 2419 (§ 3, containing the traditional marriage definition, was stricken).

8 570 US 12, (2013).

In 1993, the Congress passed the first ever national *Religious Freedom Restoration Act* ('RFRA'). [9] A subsequent *Religious Land Use and Institutionalized Persons Act 2000* ('RLUIPA') expands upon RFRA and helps interpret its application in corporate settings.[10] Several States have also passed (or are now debating) their own State RFRAs. In the meantime, many state, local, and city governments have recently passed Sexual Orientation, Gender Identity ('SOGI') laws, seeking to prohibit discrimination on the basis of sexual orientation or identity. It is not hard to see the imminent clash between RFRAs and SOGIs. As these laws involve more the issue of free exercise of religion, however, I will discuss them chiefly in the second article.

In addition to Constitutional provisions and statutes, countless local and municipal laws, rules, and ordinances also relate to the Establishment Clause. Case law from SCOTUS, and at the federal and state levels also forms a huge part of America's jurisprudence on the issues of either establishing religion or its free exercise. All laws and cases, however, are subject to final constraints imposed by the Constitution's First Amendment, as interpreted by SCOTUS.

C *Synopsis in America Today*

At present, America is plagued by a serious secular-leftist-humanist anti-Christian purging effort, seen in her educational, legal, social and even corporate institutions. The idea is to cleanse from American life the Christian view of just about anything, including marriage. Non-establishment of religion is no longer about escaping a state-imposed religion (the intended meaning), and not even just about keeping religious

9 107 Stat. 1488, 42 USC. § 2000bb.
10 114 Stat. 803, 42 USC. § 2000cc.

views out of the public square (an incorrect view in the first place), but it goes deeper now to keeping religious views entirely to oneself (certainly an impermissible view). Secular humanism's social agenda is to keep Christian views from influencing conversations on important social issues, and to keep it in its special *religious worship* box. America seems to have shifted from the very limited idea of freedom from a state-imposed religion or an institutionalized national Church, to the idea of freedom from religion in every aspect of American life, save for what elite consensus will allow inside the walls of a church, and even this is subject to secular attack now.

Secularism is successfully causing the Establishment Clause to stray so far from its intended meaning that it is turning into a monster, swallowing up the second clause on free exercise of religion altogether. Freedom of religion is now being replaced with freedom from religion in virtually all aspects of American life. This is unsupportive of the intent of the First Amendment, and violates basic human rights and justice. But just how did America get herself onto this secular slide; how did she manage to stray so far from the First Amendment's intentions?

V THE SLIDE TOWARD A SECULAR AMERICA AND LOSS OF RELIGIOUS LIBERTY

I believe a short but sure answer to these questions is a growing trend toward Statism in America. She has moved increasingly in recent decades to a view of life that sees a greater role for the State than in the past, causing far too much blending of the government and private sectors. In large part, this is due recently to the growing regulatory apparatus of government over commercial enterprises, in turn due to the economic meltdown and recession in 2008 and 2009. In some sense, then, the

business world is also largely responsible for this trend, but Statism started long before this crisis. Still, big banks and financial institutions clearly sparked the financial crisis in 2008, in significant part due to their greed and avarice in the sham mortgage-backed-securities industry, which led to a stunning rash of new government regulations. This in turn strengthened the intertwining of government and big business.

In addition, America is still in its second term with its most socialist-inclined President to date, Barak Obama. The idea of Statism, like Socialism, is to increasingly hand over to the government many of the functions in society intended for handling in the private sector, such as by businesses, families, and even the Church (consider Abraham Kuyper's sphere sovereignty). In my view, this ends in confusion in the minds of the average person, as the norms in a State, intended as applying to government, tend to get swept into the private sector as well, becoming new norms everywhere, applicable to all. A separation of Church and State, once understood to limit the reach of government, now more easily seeps slowly but ever so surely into a separation of Church (and religion) from society: i.e., business, schools, culture, and just about every inch of society outside one's family and individual life or one's actual house of worship.

Simultaneously, America's media, cultural, and educational systems are very secular and clearly hostile to religious viewpoints. Media and educational elites have been leaders in promoting homosexuality as a normal lifestyle, which they say must not be criticized or even challenged. If someone voices a criticism, she/he is automatically (but incorrectly) accused of religious bigotry. In this setting, it is hard to imagine religion, specifically Christianity, ever getting a fair shake.

Since most of American legal education now is avowedly secular (just a product of its culture) it is not really surprising to see judicial decisions continually going against religious persons in court on these issues. This, of course, only exacerbates the slide away from truth, since the judicial and legal systems give legal and social support to restrictions against religious liberty on questions like SSM and other social issues, reinforcing the speed of this secular slide.

This growing secularism has resulted in a twisting of the First Amendment's Establishment and Free Exercise Clauses. Its incorrect application of the Establishment Clause asserts that traditional definitions of marriage are discriminatory against gays and promote a view of religion improperly imposed by the State on others. Such marriage laws, they say, must be stricken under the Establishment Clause. This view is incorrect.

VI THE SEMINAL ISSUE: IS A STATE'S DEFINITION OF NATURAL (TRADITIONAL) MARRIAGE REALLY A VIOLATION OF THE CONSTITUTION?

A *Short Answer*

The answer of course is no, but several scholars and jurists sincerely (or some not so sincerely) think otherwise. I suppose they are simply deceived, and some are just being dishonest. In any event, SCOTUS in the *Obergefell* case has concluded State natural marriage laws do indeed violate the Constitution. Just how remains a bit of a mystery for many scholars.

B *Justice Kennedy's Concoction of SSM*

Justice Kennedy, who wrote the majority opinion, appears to use a strange amalgam of various intertwined (he says that) Due Process (he means substantive due process, ('DP')) and Equal Protection ('EP')) rights in the Fourteenth Amendment. His conclusion takes at least two steps. In the first step, he mixes substantive DP and EP together to create a general liberty interest, which he says everyone is given, to define and dignify their own sexual identities. It is a right, this liberty interest, of seeking and finding one's human destiny – one's very own core identity, or what it means to be human for that person (the italicized words are his own, and show a culmination of his thinking over several years). Notably, however, this destiny/identity interest, as a liberty interest, is spelled out only in very limited terms, based solely one's so-called sexual identity. It seems Kennedy views sexual identity as the core and essence of one's human identity (a shallow view), and he avers it is fixed (it's one's destiny). In both assumptions he is incorrect. Meanwhile, he suggests a person's actual sex is something incidental, or fluid – perhaps a bunch of appendages we have to work around, sometimes surgically, to achieve that real identity. He insists no stigmas shall attach to such identities, nor to anyone's liberty interest in pursuing them.

In a second step, he adds something he calls marriage as a necessary ingredient to vindicate the initial liberty interest in one's identity (i.e., sexual identity). Succinctly, he says the liberty interest/right in one's sexual identity can only be vindicated by a second right of marriage. To him this is the only viable way to dignify someone's sexual destiny (again his words); nothing short of marriage will do. This is Justice Kennedy's human rights recipe for his SSM creation.[11] It comes not as one product

[11] Justice Scalia, in dissent, took J. Kennedy to task for his special rights concoction. *Obergefell*, 576 US at ___ (Scalia J dissenting at 6-8), available at <http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf>.

off the Constitutional shelf but is a bunch of ingredients mashed together to serve up a new rights dish. Justice Kennedy's SSM rights recipe also has another very important ingredient in it: he says it is simply time to allow this. Very convincing, isn't it?

Indeed, the SCOTUS decision is so chock full of errors in law, philosophy, and U.S. Constitutional interpretation, I am sure it deserves the attention of a treatise to address it. Someone else can have the honor. I will give a shorter list of criticisms and analysis here. I will address this case on a couple of levels of constitutional analysis, first involving the Establishment Clause, and second the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

VII INCORRECT INTERPRETATIONS OF THE ESTABLISHMENT CLAUSE AND CORRECTIONS

To give some credit, I suppose if any is due, Justice Kennedy's majority opinion in *Obergefell* is not grounded on a claim that State traditional marriage definitions violate the Establishment Clause of the First Amendment. Instead, the majority grounded its view mostly on the Fourteenth Amendment's EP and DP clauses. Still, I discuss the arguments based on the Establishment Clause because they have been common in this debate, and undergird the thinking that has brought it this far.[12] This refrain from use of the Establishment Clause to support arguments in favor of SSM is a small consolation, in any event.

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12 The Establishment Clause of the First Amendment is applicable to the States by the Fourteenth Amendment. Each State also has its own constitutional version of an establishment and free exercise clause. The arguments in each are essentially the same, and I treat them as such.

A *Establishment Clause Arguments*

A summary of the Establishment Clause arguments made by many SSM adherents typically goes something like this: The traditional definition of marriage is that of the union of a man and a woman, and although many people having sincere religious beliefs hold this view (i.e., Christians, etc.), they may not assert it as the basis of legislation; this, say the SSM supporters, violates the separation of Church and State (it violates the Establishment Clause).

As noted, the argument then expands to say a traditional view of marriage not only violates the separation of Church and State, but also improperly discriminates against homosexuals. SSM advocates accordingly claim the historical view violates the Equal Protection and Due Process Clauses in the Fourteenth Amendment, which applies to all the States.[13] In short, if religious views are even allowed in the lawmaking process, they must not violate the DP and EP Clauses of the Constitution. Religiously supported views simply cannot be superimposed in society via legislation, say SSM supporters, especially if those laws might improperly discriminate against certain groups, such as homosexuals.

SSM activists see the traditional marriage laws as mainly conservative in viewpoint, acrimoniously targeting gays (how they get there is sometimes very strange), and they would oppose those laws even if they were not based on religion. Even Justice Kennedy acknowledged other secular (non-religious) arguments have been raised in good faith, to support traditional marriage laws.[14] This does not mean however, Establishment

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13 A Due Process Clause exists in the Fifth Amendment also, but applies chiefly to actions of the federal government (some contend it also contains some equal protection elements as well).

14 *Obergefell*, 576 US at ___ (4, 23).

Clause arguments against traditional marriage have evaporated. They undergird the discussion. SSM advocates, including those in this Court, know this. Consequently, I address these. This sort of argument is of course where the secular liberal side gets it so wrong. I offer some illustrations:

In *Varnum v Brien*, 763 NW 2d 862 (Iowa, 2009), the Supreme Court of Iowa indicated many Iowans reject same-sex marriage as a civil institution 'due to sincere, deeply ingrained – even fundamental – religious belief.'[15] The Court said that while religious institutions and individuals may continue to abide by their religious views of marriage in their own religious institutions and practices, those views are not apt for the civil and secular institution of marriage. It said incorporation of a religious view of marriage into Iowa's state, civil institution of marriage violates the establishment clause in its own Constitution (art I, § 3), and violates the entire doctrine of separation of Church and State:[16] '[O]ur task [is] to prevent government from endorsing any religious view. State government can have no religious views, either directly or indirectly, expressed through its legislation ... This proposition is the essence of the separation of Church and State.'[17] If so (and it isn't), Iowa would also have to scrap its laws against murder, theft, child abuse, rape, incest, deceit, contract breaches, and so on, since religious views against these harmful things surely shaped those laws.

The Iowa Supreme Court's statement is simply incorrect, but it suffices to show its garbled view that a religious definition of marriage, if applied in the secular, civil realm, somehow impermissibly establishes a religion.

15 763 NW 2d, 904.
16 Ibid 905-906.
17 Ibid 905.

But when has marriage ever been completely irreligious; isn't it spiritual? The Iowa Supreme Court improperly confused the idea of religious influence in law with the idea of an institutional separation of Church and State.

Similarly, theologian Wayne Grudem, in his book, *Politics According to the Bible* highlighted the statements of David Boies, a lawyer opposing the traditional definition of marriage in California's notorious 'Proposition 8' cases.[18] Attorney Boies incorrectly stated that while many Californians have genuine religious beliefs that marriage should be between a man and a woman, 'the Establishment Clause . . . says that a majority is not entitled to impose its religious beliefs on the minority.'[19] I guess his side is entitled to impose theirs?

B *Incorrectness of Establishment Clause Arguments*

The views expressed above are fundamentally incorrect on several grounds.

First, it is impossible to extract out from any nation's laws their religious and philosophical, ideological underpinnings, and erase them. Law is inherently a moral inquiry. It absorbs and then encapsulates moral and religious viewpoints and principles. (I am speaking here of course about the many valuable ethics in religion systems as valid contributors to human law, in contrast to institutionalized rituals and ceremonies, which is a different matter.)

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18 See Wayne Grudem, *Politics According to the Bible* (2010) 31, citing 'Prop. 8 Defenders Say Plaintiffs Attacked "Orthodox Religious Beliefs"' *Wall Street Journal*, 10 February 2010. Proposition 8 was one of the most prolific and controversial constitutional referenda, upholding the traditional definition of marriage in California. It was stricken by the Ninth Circuit Court of Appeals in 2012, and appealed to SCOTUS. See *Hollingsworth v Perry* 570 US 12 (2013) (SCOTUS declining, however, to examine the actual merits of the case).

19 Wayne Grudem, *Politics According to the Bible* (2010) 31.

Human law is born of the cultural and societal norms of any people it serves, and these cultural and societal norms are influenced by the religious ideology of its people. Morals and values shape laws, and morals and values are shaped by religious ethics in some important ways too. Separating law from religion (for its ethical ideology) is not realistic, nor should it be attempted. Ideologies can replace each other, but they are never absent in crafting basic human values, and the laws that come from those values.

Both in terms of its influence in society over time (sometimes over several generations), as well as its influence on specific pieces of legislation in a society, religion plays an essential role. Sometimes it is not an obvious one. In its broader influence in society over time, religious ethics have a leavening effect on social values, like yeast in bread. Since human laws are inherently derived from morality (ultimately), it would be the height of hypocrisy to allow viewpoints to shape laws from one aspect of society, say secular humanists and atheists, while excluding the perspectives of Christians and those from other religions.

The First Amendment was never intended to promote that kind of invidious viewpoint discrimination against Christian and similar religious perspectives in policy and legal debate. Religious values and ethics have infiltrated and deeply shaped this rather mythical creature known as 'secular society.' As indicated, the Establishment Clause (including any State's version thereof) was only designed to prevent the Congress from institutionalizing and imposing a formal State Christian religion, that is, a State Church. Instead, the proper approach in democratic, pluralistic societies is this: we should consider all serious moral values coming to the table on a particular social issue (such as SSM, abortion, stem-cell use, cloning, and so on), coming from virtuous, reliable ethical sources;

then, we should consider the merits of those positions in healthy debate; next, our lawmakers, with our input, should choose among those perspectives, crafting a law they think works best. That is, they try to craft laws they think promote the greatest good, happiness and justice for the people. Sociologically speaking, we should then monitor that situation, and if what is passed as law does not promote happiness, welfare and justice as it should – something we can empirically measure over time – we have to consider changing that law.

Congress has passed laws that sounded good but did not work (Prohibition of alcohol, was likely one of them, and exceeded the demands of biblical virtue).[20] Then it had to repeal the law. Since repeal is difficult to do, this gives all the more reason we need the inclusion of a variety of interested and reliable, time-tested values and perspectives at the beginning of the lawmaking process. Allowing only a secular humanist ideology, as a religious viewpoint in itself, to control all the outcomes in the political, legislative landscape, while ignoring ethical ideologies born of virtuous religions such as Christianity, is blatant viewpoint discrimination that is likely itself a violation of the Constitution.

As one scholar explains it, the sources of moral influence in lawmaking can come from any variety of springs. Come they will, and we should allow those voices that intend good in a democratic society to speak. So, any individual's ethical sources might be the inspirational poetry of Henry Wadsworth Longfellow, the lyrics of Bob Dylan, or views of Freud, or Nietzsche, or Plato, or Aristotle, or common sense, or Gandhi, or the Magna Carta, or the Humanist Manifestos, or the Universal Declaration of Human Rights, or lessons from history, or science, or Karl

[20] Ibid 63.

Marx, or Scripture, or the Ten Commandments.[21] All of these sources make claims about ultimate reality and impact the conscience, and so are inherently religious in nature; a conscience is also something a lawmaker must use, if s/he is to do the job correctly.

Some ideas and sources we will inevitably accept as good and valid, while others we will reject as incorrect and flawed in the lawmaking process, viewed in the hindsight of history as one of our greatest teachers. To reject Christian viewpoints on social issues, however, as somehow establishing a religion, is simply incorrect. It is viewpoint discrimination and smacks of deep hypocrisy, and is also terrible interpretation of the Constitution. The First Amendment disestablishes a State Church (States' establishment clauses do not differ); it has never meant the exclusion of moral viewpoints on social issues embodied in great religions (i.e., those containing excellence in moral values), such as Christianity.

I have included an Appendix diagram illustrating the above values-driven lawmaking process. It illustrates why viewpoint exclusion of Christians and other sincere religions is wrong. Instead, we should be considering their ethical and moral values as real sources and contributions to law, and not do so simply as an accommodation, but because it is inevitably so and valuable. Let the best system of moral sources win in the end.

Second, if the views of the Iowa Supreme Court, attorney Boies, and similar views on the establishment of religion are correct (which they are not) then most of the good laws in society would not even survive. As I already stated, States would have to strike their statutes criminalizing murder, homicide, grand larceny (stealing), adultery, and rape, among so

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21 Ibid 33-34 (specifically citing Bob Dylan, Confucius, and others; tying this also to free speech rights of their adherents).

many others, since these all have religious sources supporting them. Notably, all such laws have supporting structures in religion including something as common as the Ten Commandments and similar Scriptures. Such laws are not merely somehow coincidentally similar with ancient religious values, they were shaped by them in history, and such laws are easily supported by other religious ethics as well. And yet we do not strike such laws because of their supportive religious underpinnings and connections, as somehow impermissibly establishing a religion. This is why cases like *Varnum* are so deeply incorrect.

Lastly, this exclusion of Christian viewpoints on morality from lawmaking cannot be the intended meaning of the Establishment Clause since it would simply be too easy to get around. All that proponents of traditional marriage would have to do is articulate secular reasons in support of traditional marriage and other social issues. Such an approach, which is not really necessary and slightly saddening to see, is exactly what many Christian advocates are trying to do. They do this in order to avoid the threat of confusion with religious issues their simple-minded opponents cannot seem to avoid. I suggest their approach still has some merit, but should work alongside ethical and religious values, instead of replacing them. After all, valid social science and valid religious ethics should affirm each other in the long run, and do. Examples of such more 'secular-sounding' arguments include historical, cultural, traditional, and very importantly, simple biological reasons for supporting marriage as the union of a man and a woman. Sociologically and scientifically speaking, for instance, it is simply good secular policy to have laws steering sexual intercourse among individuals in society into an enduring male-female parenting relationship for the security of children and all involved, including the mates. This social arrangement is ideal for building strong

families, which in turn builds strong societies, and this has been shown historically as truly optimal, especially when families have both a mother and father in a low-conflict setting.[22]

VIII A SHORT HISTORY OF THE LAW ON SSM IN AMERICA

This section is an interlude, introducing the setting for Equal Protection and Due Process Clause analysis on SSM. In order to understand this section, it is helpful for international readers to keep in mind the US has both the federal and state legal systems. Interaction between the two can be complex, and SCOTUS has the final say on what is or is not constitutional.

A *DOMA and Its State Renditions*

Prior to June 2013, the United States had a federal definition of marriage in the DOMA. Individual States passed similar laws or constitutional amendments, or already had them for some time. About thirty-seven States still had enactments existing as of 2013; all States had the traditional, natural definition in some form prior to 2003.[23] Each of these laws defined marriage traditionally as a male-female union. DOMA had

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22 Arguments such as these have been raised in *Obergefell* and the cases preceding it. *See Obergefell*, 576 US at ___ (Kennedy J at 23), (Roberts J dissenting at 6-7) (citing Noah Webster's first American Dictionary and others); (Alito J dissenting at 4, 6); *DeBoer v Snyder*, 772 F 3d 388, 404-405, 408 (6th Cir. 2014) (see 19-20, 23). Social science studies are now a very important factor in the SSM cases. I suggest its underdeveloped data on the impact of children in same-sex parent households is another reason SCOTUS should have decided to wait this out, allowing the States to sort out the data and decide. See *Obergefell*, 576 US at ___ (majority opinion) (see 23-24) (noting but dismissing the point).

23 See *DeBoer*, 772 F 3d, 396 (see 7) (giving a breakdown of recent changes); Robert Barnes, 'Supreme Court Agrees to Hear Gay Marriage Issue', *Washington Post* (online), 16 January 2015 <http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/> (showing changes in gay marriage States between 2012 and 2015 as a result of *Windsor* and providing a handy geographical map of these changes).

been a part of federal legislation since 1996. It was virtually unanimously passed by both Houses of Congress, it enjoyed widespread bipartisan support, and was signed into law by President Clinton.[24] It also defined marriage traditionally as 'the legal union between one man and one woman as husband and wife.'[25] SCOTUS overturned this definition in *United States v Windsor*, 570 US__ (2013), by a slim 5 – 4 margin. Justice Kennedy again wrote the majority opinion of the Court.

B *Windsor's Impact*

In *Windsor*, Edith Windsor and Thea Spyer were long time domestic partners in a relationship dating back to the 1960s, and living in New York. When Spyer became ill, the couple sought to wed, and did so in Canada in 2007. New York recognized their same-sex marriage as of that date, but the federal government (including the IRS) did not, on account of the federal definition of marriage in DOMA as the legal union of only a man and a woman. This meant that after Spyer died, Windsor had a very large tax burden to pay on her inherited income, since technically, she was not the spouse of Spyer under federal law, but was under N.Y. State law. She claimed this violated equal protection, and due process under the Fifth Amendment of the Constitution.[26]

The SCOTUS majority held DOMA's traditional view of marriage was unconstitutional as violating the Fifth Amendment of the U.S. Constitution. The rationale of Justice Kennedy's majority opinion was that DOMA conflicted with the New York State definition of marriage, which by this time had changed, allowing Windsor and Spyer to be

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24 See <http://www.alliancedefendingfreedom.org/page/SCOTUS-Marriage-Decision/DOMA-Loss>.

25 1 USC § 7 (the *Dictionary Act*).

26 See *Windsor*, 570 US__ (slip op, 3, 20, Parts I, IV).

married. And this, said Justice Kennedy, improperly trounced on a valid N.Y. State marital status conferred on the couple, by depriving them of marriage benefits at the federal level (i.e., as to inheritance tax exemption rights). SCOTUS said this disparity between a State's valid definition and the different federal one had worked an injustice for the lesbian couple that traditional married couples would not have experienced. Central to Justice Kennedy's rationale was the highest value he placed on the separate States being able to determine the definition of marriage as they saw fit. That is, there should not be a uniform definition of marriage (traditional or newfangled) at the federal level: the States can each decide who can and who cannot marry, and what a marriage is.[27] Strangely, and prophetically, Justice Kennedy added some language to the opinion seemingly supporting the New York definition as a fair and reasonable one, suggesting perhaps it is the one all States should adopt.[28]

However, the centerpiece of his decision was clearly that the definition of marriage is a state law issue, not a federal one, and a national definition would not be allowed. In *Obergefell*, Justice Kennedy then proceeded to ignore his own holding, imposing a national definition of marriage on all the States (the one allowing same-sex couples to marry instead of the

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27 I do not wish to imply by anything I say in this article that a national definition of marriage is inappropriate, or that *Windsor* was correctly decided. A sovereign nation indeed has a right to set a uniform marriage law and policy (especially if it is godly), and most nations of the world have one. So did the US in DOMA. Sovereigns can also legitimately adopt a traditional view of marriage as their national standard and most do (nothing in the Cosmos prevents it). So, a different holding in *Windsor*, affirming DOMA, would have been entirely legitimate in theory, albeit a bit confusing in application within our federalism system, since States can define marriage separately. If uniformity is the goal, a correct national standard should apply and abide. DOMA had that.

28 Ibid 2693. Setting a requirement for all the States to allow SSM is really the same as creating a federal definition, as it requires striking the traditional ones and making new SSM-agreeable ones. *Windsor* did not go this far; *Obergefell* did. I am again not saying *Windsor* was correct in all respects. It did support States' rights on this issue, however. It did not last long.

traditional one), showing himself irresistibly incapable of honoring his own holding in *Windsor*. Seeing a Supreme Court Justice engage in such blatant self-contradiction in this important line of cases was surprising to many, but not to some.[29]

In the *Windsor* decision, Justice Kennedy also stated the purpose of DOMA was to injure a class of individuals (homosexual couples wishing to marry), but he cited no support for this. Essentially he and the majority failed to acknowledge solid, rational arguments in support of the traditional definition of marriage (as indicated above) – ones that are not based on hate or animus against homosexuals, but on the best interests of society and its children.

An important practical purpose of DOMA was to preserve the status quo of a uniform, historical, and time-honored definition of marriage, so that thousands of items of federal laws and regulations, such as tax and inheritance laws, would have a single uniform definition of marriage (and similar terms) applicable to them. DOMA's intent was not to injure, as seen in its wide support (and Justice Kennedy was incorrect in saying it was). Still, in a Christian-rooted country, it would hardly seem necessary to codify a traditional view of marriage. In all likelihood, DOMA's supporters initiated the law anticipating strong challenges from LGBT activists to redefine marriage so that it could be changed into something entirely new: a gender-irrelevant institution suiting their interests.[30] Interestingly, many of the supporters of DOMA and similar laws included

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29 See concerns of Judge Martin Feldman in a Federal District Court case after *Windsor*, *Robicheaux v Caldwell* 2 F Supp 3d, 910, 917,7 (ED La, 2014) (see 9) (noting an 'amorphous but alluring' redefinition of equality in *Windsor*); see also *Windsor*, 570 US__ (Scalia J dissenting) (see 16, Part II.A, 22, Part II.B.) (Justice Scalia calling this right from the start, and seeing Kennedy's hypocrisy in advance).

30 See *Windsor*, 570 US__ (see 21); see Scalia J, dissenting (see 20) (explaining Congress' rationale was to preserve valuable social definitions, and not injure).

prominent liberals like Bill and Hillary Clinton, and Barak Obama (signing a similar Illinois state law). Such supporters suddenly changed their views immediately prior to the *Windsor* decision, saying they were wrong in opposing SSM initially.[31] Such changes are hypocritical, and betray any principled and honest approach in these so-called leaders on SSM.

Windsor's aftereffects were dramatic, and also confusing. After Windsor, there was no longer a federal definition of marriage and this threw into confusion the definition not only of that term, but such other terms as 'married', 'marital', and 'spouse' contained in over a thousand federal laws and regulations. After *Windsor*, the meaning of the term 'marriage' (and similar words) in federal law would likely have to fluctuate with the States – not an ideal situation.[32] I suppose it can be said now, via *Obergefell*, Justice Kennedy has virtually single-handedly solved the confusion of various State marriage definitions by making SSM part of a new uniformity imposed on all States. And he was not even elected. Still, this hardly justifies *Obergefell* (in fact, Kennedy J never mentioned uniformity as a rationale, but I am sure it was in his mind all along).

C *States of Confusion*

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31 See Juliet Eilperin and Robert Barnes, 'Obama's Words in Same-Sex Marriage Filing to Court is a Major Shift for Him', *Washington Post* (online), 6 March 2015 <http://www.washingtonpost.com/politics/obamas-words-in-same-sex-marriage-filing-to-court-is-a-major-shift-for-him/2015/03/06/83940fa0-c339-11e4-9271-610273846239_story.html>; see Ali Elkin, 'Hillary Clinton's Evolution on Same-Sex Marriage: Sounds a Lot Like Some Republicans', *Bloomberg Politics* (online), 28 April 2015. <http://www.bloomberg.com/politics/articles/2015-04-28/hillary-clinton-s-evolution-on-same-sex-marriage-sounds-a-lot-like-the-gop>; Taylor Berman, 'Bill Clinton Calls the Anti-Gay Marriage Act He Signed Into Law Unconstitutional', *Gawker* (online), 7 March 2013. <http://gawker.com/5989353/bill-clinton-calls-the-anti-gay-marriage-act-he-signed-into-law-unconstitutional>.

32 Justice Scalia raised such concerns in *Windsor* (see 19-21).

Immediately after *Windsor*, LGBT activists and activist judges began claiming a major victory. In a rash of irrational opinions by sympathetic judges in various States, state laws with traditional marriage definitions were overturned almost overnight. In a swift stampede spanning less than two years, twenty-two States had their traditional marriage definitions swept away by anxious judges supportive of the homosexual and secularist agenda. It was like watching falling dominoes. Homosexual couples flocked in droves to civil magistrates to immediately get their marriage licenses.

However, none of this was a consequence intended or authorized by *Windsor*. The case only overturned the federal definition of DOMA, saying emphatically our Constitution leaves the determination of marriage rights and restrictions up to the individual States. It is a matter of state law. In the US, we moved from a slight number in 2013 of about thirteen States incorporating the genderless definition of marriage (and 37 staying in favor of traditional marriage), to then about 38 (including D.C.) adopting the genderless definition in that short time span.[33] Just prior to *Obergefell* in 2015, only a handful of States were still left standing for traditional marriage. It was a complete change of events. But the changes were mostly illegal. Traditional marriage laws were thrown out in serial fashion typically without any real voting by citizens either in constitutional referenda or through the statutory process. The

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33 See Robert Barnes, Robert Barnes, 'Supreme Court Agrees to Hear Gay Marriage Issue', *Washington Post* (online), 16 January 2015 <http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/> (showing maps and comparisons between 2012 and 2015); *see DeBoer v. Snyder*, 772 F 3d, 396, 405, 416 (see 7, 20, 35) (claiming 19 States actually in favor of SSM, and 31 against, according to actual state-based determinations, and excluding recent federal judicial interference). In only 11 States and the District of Columbia, however, have the citizens of any State actually voted in some way for SSM. *See Obergefell*, 576 US at ___ (Roberts J dissenting at 9).

executioners were primarily activist judges and attorney generals indoctrinated in their secularist ideology (this being the daily diet served up at most American law schools since the last several decades).

D *The Faithful Few States Surviving After Windsor, and Their Superior Reasoning*

After *Windsor*, only a handful of courts kept the sane view that each State should be entitled to craft its own marital laws though the democratic process (as *Windsor* said). Some went on to give cogent and sound analysis, showing how keeping a traditional view of marriage is rationally based in furtherance of a legitimate state interest. This is because it has the most proven capacity for building strong families and societies. And this is an important constitutional analysis, which most courts seemed to overlook, even though this rational basis conclusion is something most people instinctively know is true. The Sixth Circuit Court of Appeals, was the first and only federal appeals court (since *Windsor*) to issue a smartly articulated decision to this effect, in *DeBoer v Snyder*.[34] *DeBoer* involved an issue of whether four States, Ohio, Michigan, Tennessee, and Kentucky, could keep their traditional definitions of marriage, or whether the Constitution of the United States required abandoning them.[35] An earlier Eighth Circuit appellate decision, *Citizens for Equal Protection* v *Bruning* 455 F 3d 859, 864–868 (8th Cir. 2006) also contained some

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34 Cert. granted, 83 USLW 3315 (16 January 2015).

35 *DeBoer* was a consolidated appeal from a set of four Federal District Court cases in each of those States. *DeBoer v Snyder*, *Obergefell v Hodges, Tanco v Haslam* 7 F Supp 3d 759 (Tennessee 2014), and *Bourke v Beshear* 996 F Supp 2d 542 (Kentucky 2014). In the appeal of *DeBoer v. Snyder* to SCOTUS the case was renamed to *Obergefell v. Hodges*, 576 U.S. 11 (2015) (the case coming from Ohio).

initial valuable insights, showing a rational basis for traditional marriage, in stabilizing homes.[36]

Because these cases affirmed each State's traditional marriage definitions, this created a conflict with some other federal appellate courts which struck down traditional marriage (these are the Fourth, Seventh, Ninth, and Tenth Circuits, and we have eleven main ones in the U.S plus two special Circuit Courts). This 'split in the Circuits' required SCOTUS to address this issue, by hearing an appeal from *DeBoer*, and this appeal is the *Obergefell* case we now have handed down to us from SCOTUS.[37]

In two of the four Federal Circuit Courts of Appeal just noted (the Fourth and Tenth Circuit Courts), there were split decisions. In each case a single dissenting justice stood out and wrote a sound and well-reasoned opinion explaining why those States' statutes or Constitutional Amendments, keeping a traditional view of marriage, should not be stricken.[38]

In the Federal District Court level (which is the one immediately below the Appellate Circuit Courts I have mentioned above), a couple of sound, post-*Windsor* opinions also existed, and I mention them only for their sturdy articulation of what SCOTUS should have reasoned, which was

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36 455 F 3d, 864–868 (noting the constitutionally rational basis of a State's legitimate interest in channeling procreative human sexual intercourse into stable family relationships, through the historical concept of marriage).

37 The four Federal Circuit Courts examining the issue, and agreeing with lower courts in overturning state traditional marriage definitions are: *Bostic v Schaefer*, 760 F 3d 352 (4th Cir. 2014); *Baskin v Bogan*, 766 F 3d 648 (7th Cir. 2014); *Latta v Otter*, 771 F 3d 496 (9th Cir. 2014), rehearing en banc denied, 771 F 3d 496; *Bishop v Smith*, 760 F 3d 1070 (10th Cir. 2014); *Kitchen v Herbert*, 755 F 3d 1193 (10th Cir. 2014). The Sixth Circuit alone sought to preserve four States' traditional definitions in *DeBoer*. The Fifth, Eleventh and other Circuits seemed to be awaiting the SCOTUS decision. I already mentioned the Eighth Circuit above.

38 See *Bostic*, 760 F 3d, 385-98 (Niemeyer J dissenting); *Kitchen*, 755 F 3d, 1230-40 (Kelly J concurring in part and dissenting in part).

ignored in *Obergefell*. Specifically, a very good opinion came from Judge Feldman in *Robicheaux v Caldwell* from the Eastern District of Louisiana in 2014.[39] *Robicheaux* soundly indicated the States have legitimate interests in keeping a traditional view of marriage, including the importance of channeling sexual activities of individuals into the confines of a traditional marriage to raise children; this helps reduce illegitimacy and strengthens families and society. Similarly, each State has a legitimate interest in linking children to intact and thriving families formed by their own biological parents, as the ideal.[40] Said traditional marriage definitions and rationales are of course rationally related to those legitimate government interests I have just mentioned (more on the importance of this italicized wording immediately below).

XIX OBERGEFELL V HODGES: WHAT SCOTUS SHOULD HAVE DECIDED IN A REAL EP, DP CLAUSE ANALYSIS

In a thoroughly principled approach, SCOTUS should not have voted to impose SSM on all Fifty States. It should have allowed each State to determine the issue itself, as it has historically, and as mandated again in *Windsor*. This is because the Equal Protection (EP) and Due Process (DP) Clauses in the U.S. Constitution do not require SSM. DP Clause

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39 2 F Supp 3d 910 (Louisiana 2014); see footnote 29 (information and cases).

40 *Robicheaux* (slip op, 8, 15). Only three other Federal District Courts issued similar opinions, with good and sound reasoning, including the importance of States' rights in support of traditional marriage: *Conde-Vidal v Garcia-Padilla*, 54 F Supp 3d 156 (DPR 2014); *Merritt v Attorney General*, No. 13-215, 2013 WL 6044329 (Louisiana 14 November 2013); *Sevcik v Sandoval*, 911 F Supp 2d 996 (Nevada 2012) (a case decided actually before *Windsor*). However, the vast majority of Federal District Courts addressing the issue could not act quickly enough to overturn state traditional marriage definitions in their hot pursuit to change culture after *Windsor*, probably illegally at the time. See *Robicheaux* (see 7-8).

arguments had been virtually abandoned by advocates in recent SSM cases, until Justice Kennedy sought to resurrect them in *Obergefell*.[41] Although EP Clause arguments are considered by some to have greater importance, I (with the dissenters in *Obergefell*) do not believe that Clause should have afforded anyone a right to SSM.[42] I will address the typical EP and DP Clause arguments in basic detail especially for the sake of informing international colleagues.

A *Equal Protection Analysis*

The Equal Protection Clause in the U.S. deals with classifications of people (individuals or groups) to see if they are either being deprived of a fundamental right,[43] or are otherwise being treated unequally in the law. In short, the EP Clause may strike down a law if it deprives someone of either of these guarantees. It states in relevant part: 'nor shall any State . . . deny to any person equal protection of the laws.' It requires that similarly situated persons be treated similarly in the law. It employs three

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41 *Obergefell* (see 10, 18-20); see (Roberts J dissenting at 9) (noting the Solicitor General basically dropped any DP arguments in oral argument).

42 See *Conde-Vidal*, 54 F Supp 3d, 167-68 (citing and explaining *Baker v Nelson*, 409 US 810 (1972) (SCOTUS dismissing an appeal from the Minnesota Supreme Court's holding that marriage is between a man and a woman, having been so since the time of Genesis)). While *Baker* is not a full merits opinion, it clearly affirmed the Minn. Supreme Court's indications there is no such thing as a constitutional right to same-sex marriage, and indicated an alleged right to same-sex marriage is not even a federal question. See *Baker*, 810 (*overruled in Obergefell* (see 23)).

43 Resort to 'fundamental rights' verbiage (and the meaning of this) in the EP test is itself suspect since it tends to blur any intended line between the DP and EP Clauses, which Justice Scalia had warned about, and I tend to agree with him. See *Obergefell* (Scalia J dissenting at 8-9). Since SCOTUS has in fact used this fundamental rights prong in EP Clause analysis (sometimes), I include it here as part of this analytical framework, like it or not. I also note that Justice Alito in *Windsor* separates this prong, saying nothing about it in his EP analysis. See 133 S.Ct. (Alito J dissenting at 10-13). Some of the Justices have also criticized the use and span of implied 'fundamental rights' championed under the vague idea of 'substantive due process' in the DP Clause. (Scalia J dissenting at 17); (Alito J dissenting at 7) (expressing caution about substantive due process).

levels of scrutiny to determine if a law violates equal protection, according to the classification of people impacted by the law. In short, these are:

a) Heightened, or strict scrutiny. If a law burdens (negatively affects) either:

(i) someone's fundamental rights (like a right to educate one's own children, or voting);[44] or

(ii) a suspect (protected) class of people (i.e., African Americans or other ethnic groups),

then the classification singled out in the law must be *narrowly tailored to achieve a compelling state interest* (i.e., the law must have a compelling state interest to justify and single out a certain class of people or to impact one of their fundamental rights). If the law does not meet that standard of strict scrutiny, it is unconstitutional and will be stricken (few laws that are examined under strict scrutiny survive).

b) Intermediate scrutiny (used typically only in gender classifications): if a law burdens a quasi-suspect class (i.e., it uses a gender-based classification) then the classification in the law must be substantially related to an important government interest (these laws are easier to pass muster).

c) Rational basis review or scrutiny: If a law does not burden someone's fundamental right, or a suspect class (or a quasi-suspect class), then the classification in the law need only be rationally related to a legitimate state interest to be valid; i.e., generally, a specific law that does not single

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44 Note again the concern I have with the imprecise meaning of this prong and its inclusion in EP Clause analysis.

out a suspect or protected class of people, nor threaten a fundamental right, will survive if there is a rational basis for its existence, serving a legitimate government interest (these laws are the easiest to survive).[45]

If a law is not subject to strict scrutiny, it is usually then reviewed under the easier, rational basis standard. SSM was never a fundamental right (until *Obergefell* invented it) and actually still lacks that quality of a right, and traditional marriage laws have not targeted a 'suspect class'. Homosexuals have never been found to constitute a suspect class, and even Justice Kennedy in *Obergefell* did not say they were (to the disappointment of SSM advocates). First, a fundamental right is only one that is deeply embedded in the nation's history and traditions; it is a right so valuable and essential to the concept of ordered liberty that justice and fairness could not exist without it.[46] Marriage (like also raising a family, educating one's children, and several others) is considered a fundamental right, but same-sex marriage is not. It is new.[47] It is not even considered a right by all in the homosexual community. Some gays oppose it because they cherish unshackled promiscuity, and could care less about identifying with 'marriage', while others oppose it on religious grounds, sharing the same true meaning of marriage in traditional Christianity, and still others oppose it as not ideal for raising a family.[48]

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45 *Windsor* (Alito J dissenting at 10-13).

46 *Washington v Glucksberg* 521 US 702 (1997) (no right to suicide; listing traditional rights of marriage, procreation, etc.).

47 It would also be circular and improper reasoning to attempt to construct a new definition of marriage by incorporating SSM into it, and then saying it is a fundamental right to marry, but that is exactly what Justice Kennedy and the majority in *Obergefell* attempted to do. *See* 576 U.S. at ___ (see 17, 22-23).

48 D Mainwaring, 'I'm Gay and I Oppose Same-Sex Marriage', (2013) *Public Discourse*, The Witherspoon Institute. Find at <http://www.thepublicdiscourse.com/2013/03/9432/>.

Second, sexual identity/orientation has never been accepted by SCOTUS as a suspect and specially protected class, in contrast to race, ethnicity, etc. In order to qualify as a suspect class, sexual identity or orientation would have to characterize a group which 'exhibits obvious, immutable, or distinguishable characteristics that define them as a discreet group.'[49] Those with alternative sexual identities lack these attributes. As the American Psychiatric Association (APA) explained, sexual orientation covers a wide range of sexual desires and is not an immutable characteristic (like one's race or skin color).[50] Sexual orientation can change and no evidence exists to show people are born gay. Sexual identity consists of a mixture and range of various sexual inclinations on a wide spectrum (i.e., it is not a discreet group); it is a behavioral characteristic, and might include sexual experimentation or curiosity growing up.[51]

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49 *Bowen v Gilliard* 483 US 587, 603 (1987).

50 Nevertheless, Kennedy J twice claimed sexual orientation is immutable in *Obergefell* (see 4, 8). His lack of support, except for a smack of agendized, biased 'science' does not count for anything. For a good discussion of the legal analysis, see Gene Schaerr and Ryan Anderson, 'Legal Memorandum, Memo to Supreme Court: State Marriage Laws Are Constitutional (no. 148)', *Heritage Foundation* (online), 10 March 2015, 6-7 <http://www.heritage.org/research/reports/2015/03/memo-to-supreme-court-state-marriage-laws-are-constitutional>.

51 Gene Schaerr and Ryan Anderson, 'Legal Memorandum, Memo to Supreme Court: State Marriage Laws Are Constitutional (no. 148)', *Heritage Foundation*, 10 March 2015. Some SSM advocates, like the Justices in *Obergefell*, say SSM should be allowed under *Loving v Virginia* 388 US 1 (1967). In that case, SCOTUS struck down a Virginia marriage law forbidding interracial marriages. But the Court still considered marriage to be the union of a man and woman, never doubting it. Also, one's sex and gender are intrinsic to marriage and define it; race does not. Ryan Anderson, '7 Reasons Why the Current Marriage Debate Is Nothing Like the Debate on Interracial Marriage', *The Daily Signal* (online), 27 August 2014 <http://dailysignal.com/2014/08/27/7-reasons-current-marriage-debate-nothing-like-debate-interracial-marriage/>.

Marriage laws supporting the traditional definition of marriage should not be subject to strict scrutiny (i.e., for targeting a suspect class or fundamental right), but should only be analyzed under a rational basis standard for their support. Such an articulated, rational basis of course exists. It is to channel sexual intercourse into a structure that supports child rearing, and builds strong traditional families that benefit society; many other supporting rationales exist.[52] Since traditional marriage is rational, state laws supporting it should have been allowed to stand.

B *Due Process Analysis*

As indicated, the Due Process Clause of the Fourteenth Amendment had not been getting much air time before *Obergefell* as an argument in support of SSM (the Solicitor General in that case did not rely on it in oral argument).[53] Since Kennedy decided to revitalize it, combine it with equal protection, and extract out of it new, fundamental, liberty interests in (i) one's sexual identity and (ii) dignifying that identity through SSM, it is a good idea to shed some light on it.

Essentially, in order to constitute a due process violation, the right claimed as being violated must be (1) articulated with particularity, and (2) fundamental (in the order of magnitude discussed above, as deeply rooted in the nation's history and traditions, so that ordered liberty could not exist without it).

Supporters of SSM cannot simply argue marriage is a fundamental right (it is, we all know), and say gay couples should thus have it. Instead, they

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52 See *DeBoer* (see 19) (marriage constructively directs sexual intercourse in society); *Robicheaux*, 2 F Supp 3d (see 8, 15) (marriage channels sexual intercourse into stable male female relationships and ideally links children with their biological parents, a mom and a dad).

53 Transcript of Oral Argument, *Obergefell v Hodges* (28 April 2015), available at <www.scotusgblog.com>.

must show *SSM* itself is a fundamental right. It is incorrect for them to try to establish it as so: (a) start by simply reiterating marriage is a fundamental right, as all cases say it is, (b) then injecting that same-sex couples should also have it, and (c) voilà, safely concluding marriage is a fundamental right for same-sex couples. This is sheer legal 'bootstrapping' (insufficient, circular reasoning). It leaves open the question still to be answered and assumes what has yet to be shown: why should same-sex couples[54] be allowed to marry in the first place? The answer (says Kennedy J) is because they want to, and have said so in no uncertain terms, and are also generally good people entitled to it.[55] Is that indicative of a fundamental right, however? It is not. But this circularity of argument is precisely what SSM advocates say all the time, and it is the very essence of Justice Kennedy's majority's opinion in *Obergefell*; the entire holding is grounded in circular reasoning. It is sheer judicial bootstrapping.[56] *Obergefell* casts aside all definitions of what a marriage is (in its essence), and is a reflection again of simple Court politics; one view of morality is simply substituted for another according to who is in charge. If we change the Court's composition we can change the result, but a genuine fundamental right to SSM was never shown in this case.

As I noted, the very best the majority could come up with is (i) some kind of individual, self-autonomy right to follow one's sexual identity (destiny) (as if this sexual side is all there is to someone's identity), and (ii) solemnizing and recognizing that right through nothing short of marriage, on equal terms with complementary-sex couples (as if it could

54 The term opposite-sex couples as suitable for marriage (juxtaposed against same-sex couples) sounds slightly ignoble. I think a better term in conveying the truth of marriage is to say it is for complementary-sex couples.

55 *Obergefell* (see 5, 15).

56 Ibid (see 6, 10, 12-18, 22-33) (saying, in sum, it is time to confer on same-sex couples the same dignifying and economic state benefits that have been enjoyed by couples in traditional marriage).

ever be the same thing).[57] Justice Kennedy insists marriage is a necessary second step, so it shall be given, he says. It is as if marriage is some sort of status thing a State can dole out to certain candidates, rather than a thing already defined in itself, inherently, as a male-female union.[58]

I should ask: does the Constitution equally give anyone a right to a career of his/her choosing, one that best suits their self-identity and expresses who they are, and dignifies that identity with an actual job? I ask because careers, skills, talents, and socio-economic roles can shape a person's identity just as much if not more so than his/her sexual identity? Is this suitable career match a right given in the Constitution? It is not.

C *Summary and International Implications*

Justice Kennedy and the majority in *Obergefill* did not ground their decision on a straightforward analysis of either equal protection or due process. Instead Kennedy resorted to a creative mixture of ideas in both clauses, intermingling them, to shape a new liberty interest in seeking out one's sexual identity, as a kind of fundamental right to individual autonomy and self-expression. It is a right to be all you think you are, sexually speaking, followed by a necessary second right of marriage to solemnize and approve the first right. Regrettably, Justice Kennedy failed to see that marriage has already been exclusively defined in nature, and that simply changing the label of something cannot change what it is. Marriage is not a creature of any State legislative process, and is not designed to injure and harm. Its existence precedes statutes, even if incorporated into them only for definitional purposes. It is what it is and always will be, all clever wordplay aside. So-called 'same-sex marriage'

57 *Obergefell* (see 2, 10, 13).
58 Ibid (see 10, 13-14).

is really just an imitation of actual marriage; it is not real marriage, and never can be.

Kennedy's analysis is shaky ground to rest new rights upon, given the sweeping implications for every State across the nation. It is also not one likely to be embraced very widely internationally.[59] As evidence of this weak foundation, Justice Kennedy's critics are not only the case dissenters, nor the millions of Americans with similar views, but even liberal scholars expressing serious concerns about the basis of this decision. They question vaguely included 'dignity rights', the absence of a straightforward EP Clause analysis, and implications of all this to our nation.[60] Dignity is something we already have as humans anyway. I next

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59 The results in Western Europe are a little bit mixed. States like the UK and Ireland (summer 2015) have voted to allow SSM, and Norway has approved it since 2000. But the European Court of Human Rights has made it abundantly clear in several cases that SSM is not a fundamental human right under Article 12 of the European Convention on Human Rights (examining other provisions too). It has said so again more recently in regard to Finland and a transgender marriage case there. See Stefano Gennarini, 'European Court: Gay marriage is not a human right', *LifeSite* (online), 25 July 2014 <https://www.lifesitenews.com/news/european-court-gay-marriage-is-not-a-human-right>. The European Court has decided this is essentially a matter left up to each country (but all this was pre-*Obergefell*). Since Justice Kennedy is notorious for trying to apply international law in important cases, he should have at least followed that same reasoning before ignoring States' rights in *Obergefell*.

60 *Obergefell* (Scalia J dissenting at 8-9); (Alito J dissenting at 2-8); see Jeffrey Rosen, 'The Dangers of a Constitutional "Right to Dignity"' *The Atlantic* (online), 29 April 2015 <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/> ('expansion of the constitutional right to dignity may produce far-reaching consequences that [gay couples] will later have cause to regret'); see also Jonathan Turley, 'Obergefell and the Right to Dignity', Blog, Columns (online), 5 July 2015 <http://jonathanturley.org/latest-column/> (noting the elusiveness of a right to dignity in this context, and that Justice Kennedy failed to consider homosexuality as a protected class, raising concerns over harms to other freedoms, like religion and speech). So it seems many liberals should also feel cheated by *Obergefell*, since it stopped short of defining sexual orientation as a protected class. It is too elusive to measure and call a class.

summarize much of what I have already said, adding some things into a short list of errors.

XX A SHORT TOP 10 LIST OF GLARING ERRORS IN KENNEDY'S OPINION AND IN HIS WORLDVIEW

As I said, an entire treatise should be devoted to this subject. I intend here only to summarize some arguments I have already made, and to include Justice Kennedy's most glaring mistakes in the majority opinion. I state these in the third-person singular for convenience sake:

1) Justice Kennedy has failed to comprehend that inherent in the definition of marriage is a male-female union. It is essential to it; it is not marriage without that; this is simple etymology and biology. It is as if in Kennedy's mind, a circle asked to be a square: we can pretend to give it that so-called 'right', and label the circle a 'square', and even give it equal status with a square, but it will always be a circle.[61] SSM, similarly, will never actually be marriage.

2) Justice Kennedy consistently confuses the incidents and benefits of marriage, with the institution itself. It is as if he actually defines marriage as some sort of status conferred upon individuals by the State, attaching to it a series of benefits and civil rights the recipients of the status are intended to enjoy. I saw no clear definition of marriage from him, and what this 'right to marry' is, apart from his status concept, giving same-sex couples the same treatment as complementary-sex couples. Surely, if

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61 Squares and circles are both shapes, but marriage does not exist at this level of generality; it has a much more specific meaning, as if a specific kind of shape itself. Several internet sites showing a simple etymology of the word marriage are available. Since the male-female union is distinct in so many ways, it should have its own distinct label. It has earned it.

marriage is a fundamental right, it should be carefully defined by this Court. It is not.[62]

3) Justice Kennedy confuses sameness with equal treatment; the latter can be achieved, if society so chooses, without trying to redefine what something is to make it the same as something it is not.[63] A simple illustration is voting rights given to women. In that instance, we did not rename women, 'men' simply to give them the same voting rights as men. Similarly, in the American civil rights movement, we did not deem African Americans 'white' in order to give them the same rights as white Americans. Similarly, gay couples are inappropriately called 'married' in order to achieve similar rights of married couples. Statutes can address inequalities, if necessary, but they can't actually create sameness of actually different things. Same-sex couples and complementary ones are simply not the same, and no amount of state treatment and relabeling can change that. Get over it.

4) In several places Kennedy says marriage is something for couples of either sex. He assumes two people for marriage, without giving any rational basis for so limiting it to two, since it is all about one's sexual identity. Some people's identity may cause them to want many spouses, choosing marriage with either sex and in any amount of spouses they wish. If Kennedy intends marriage as only for couples, he should have

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62 *Obergefell* (see 15, 17).

63 It is very strange that in *Obergefell*, Kennedy never seriously addressed the idea of civil unions, as potentially giving gay couples the same rights and equal treatment as traditional, married couples, since it is the benefits of marriage it seems he is after. This was the solution initially reached by the California Supreme Court in the Proposition 8 cases, and by the European Court of Human Rights in its jurisprudence. It is as if Kennedy cannot see the benefits of marriage as something distinct from marriage itself (see point 2). Again, we cannot simply turn different things into the same thing by giving them the same label. SCOTUS has no magic wand to change this reality. It is only pretending in a world of judicial make-believe. So the decision is hollow in the end.

supported this with a solid rationale. But his rationale supporting SSM cannot support his own assumption of couples, since it assumes validity of any sexual unions, in and among each of the sexes. This effectively permits various combinations of sexual interrelationships, in some vague set of commitments to each other, including group marriages.[64] Sexual identity would seem to allow just about anything: pedophilia, incest, and multiple partners with all of it. It is one's identity, after all, and who are we to judge that? So it is a sinless issue for Kennedy and the majority.[65] Anything should go.

5) In some places, Kennedy says homosexuality is 'immutable'. Scientifically, this is sheer nonsense. Sexual identity is not even clear-cut, but can and often does reflect a wide variety in a spectrum of sexual attractions and experiences, and sometimes involves sheer experimentation or youthful curiosity. It can fluctuate over an individual's life span, and can also honestly change completely.

6) Kennedy essentially says gender or sex is irrelevant to the institution of marriage (I am using his terms interchangeably, indicative of his intent). But if one's sex is irrelevant to marriage, why is it virtually everyone has a biological sex (intersex variants aside)? If it doesn't matter in marriage, when would it matter? Every individual owes his/her very existence to

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64 The case has scores of references to couples or two people. *Obergefell* (see 2, 3, 12-19, 22, 23, and so on).

65 Justice Kennedy also inexplicably intones sexual identity is morally alright if it is for gay and straight couples, specifically of the adult variety (this would seem to alleviate some concerns of Kennedy's willingness to embrace incest, bestiality, pedophilia and other variations usually considered immoral). But who gave him the moral authority to judge which sexual identities are approved and which are not, or to so limit these identities to straight and gay adult couples? He has no authority to say which sexual identities are approved, and to draw a line around the approved ones against the others, does he? Kennedy certainly has no authority and no expertise to determine an informed public consensus on the issue, if that is all there is to it, which it is not. Such authority is not his to assume.

the coupling of a singular male and female, to two sexes. The same individual will also likely inherit a distinct male or female sex from his/her biological parents. Sex and gender are thus indispensable to human existence itself. It matters. Human life cannot exist without the male and female sexes. To disparage sex as irrelevant to marriage is an insult to the species. Although Kennedy claims his neutering of marriage in no way harms opposite-sex couples, in fact he insults everyone whose inherited biological sex and identity as a male or a female actually matters in their marriage.[66] If one's sex as male or female is irrelevant to marriage, when would it ever matter? It would not. So, America is also embroiled now in a toilet and locker room sharing conundrum, confusing itself as to whether being a male or female makes any difference inside the toilet or shower.

7) Justice Kennedy, the majority, and countless SSM advocates have had the hardest time grasping another important distinction: asserting conduct is immoral is not equivalent to hating the people doing it (it should be so easy to get). I can call my friend's sinful lifestyle immoral, and this is not hating him. But force me to accept it as moral and good when I think it is not, then we have a problem. Animus, however, lies in the hearts of those who encounter others who will not accept their conduct, instead considering it immoral. So, who hates who in this discussion? It is the LGBT advocates and their sympathizers who hate those who will not agree with them.[67]

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66 So now there are efforts to eliminate male and female toilets and locker rooms, ban terms like Mr. and Mrs., man and woman in some college campuses in the U.S., and even some court documents in child care cases are being changed to 'Parent 1' and 'Parent 2' (instead of the terms Mother and Father), infuriating many parents.

67 I can give some credit to Justice Kennedy in *Obergefell* for seeming to graduate beyond his silly idea in *Windsor* that opponents of SSM are homophobic bigots,

8) Kennedy's insistence on avoiding stigma for children of same-sex-couple households (by giving the parents a dignified status of marriage), is hollow, ineffectual (it does not actually achieve this), and is insulting to single-parent and similarly situated families having children but no marriage. Stigma is not the issue for any of these children; sympathy is.[68]

9) The case is an oozing self-contradiction in Kennedy's career. In *Windsor*, Kennedy clearly stated the definition of marriage is a matter left to the States. So he struck down a single, federal definition of marriage (DOMA) in that case. In an act of supreme judicial hypocrisy, he and the majority, have now instituted a single federal definition of marriage (it is the one in California, or Massachusetts, or New York mandating SSM). He has betrayed the very thing he said he and the Congress could not do: impose a national definition. He did it, and he knows it.[69]

10) The decision simply is not true. SSM is a lie; it is not marriage. And the greater lie in *Obergefell* suggesting we can simply change things in the law by relabeling them, sets a bad precedent and message to all, including our children and future generations. It speaks a message that it is alright to conjure legal fictions, not based on what is real, in order to manipulate and twist the legal meaning of things, so someone can achieve

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and by acknowledging sincere, good faith arguments in favor of traditional marriage (see 4). But vestiges of this sentiment still sadly remain (see 19), and secularists are quick to exploit this for shallow political gain, especially through social and mainstream media.

68 Several related issues surround Kennedy's stigma argument and show its insufficiency: What about cohabitating couples with children, straight and gay, who do not want to get married? Can SCOTUS just deem them married, with some swipe of its judicial wand, and solve the stigma their children might face? Isn't that what it has attempted in this case? And what about single gay parents, who do not want to marry, but insist on living an active gay lifestyle? How do we solve that child's stigma; how can the Court solve any such stigmas?

69 I intend nothing about the importance of this violation by placing it ninth on this list (it is only a matter of sequence). Its severity is unimaginably profound and the dissenters have rightly taken Justice Kennedy to task for his switch.

their cherished agenda. Isn't this what communism did? We may as well throw out the welcome mat for complete corruption in our legal system (if we have not already). This word-shuffling game is a bad approach. It lacks legal integrity, and has serious implications for all sorts of social institutions. It does not inspire hope toward a good and just society. If we can do this with marriage, we can do it with anything.

I am not sure how Justice Kennedy sees himself after his historical decision in *Obergefell*. I imagine he considers himself a champion in some great social cause, and perhaps a hero of sorts in this case and what it achieves. I suggest however, if history survives another hundred years, he and his supporting cast of four other Justices in *Obergefell* will be seen in hindsight not as the heroes of this case, but as its goats.

XXI CONCLUSION

Secular humanism is the ideological underpinning that gave us SSM, and specifically ushered in *Obergefell*, with its imposed new sort of marriage applicable now in all Fifty States. Far from being neutral, as it claims to be, secular humanism is just another religion, an ideology seeking to supplant the Christian worldview (along with other similar religions) on important social and legal issues of the day. It seeks to inform the law itself and shape it. This is impermissible viewpoint discrimination. Christian ethics belong at the table of public discourse on important social issues, not just because this is right in a pluralistic society, but because its ethics are superior, time-tested, and usually indicate what is best for society. A Christian ethic would not twist marriage into a shape called same-sex marriage which the framework of marriage itself cannot hold. Secular humanism, in the end, will irreparably harm society, if left unchecked.

Justice Kennedy and the majority in *Obergefell* invented new sexual identity and marriage rights and contorted the Fourteenth Amendment's EP and DP clauses to somehow locate these so-called rights in the Constitution. SSM is a concocted creation not having the status of a fundamental right (a human right), and is especially not a sweeping right, if one at all, to be imposed all across the nation as somehow commanded in our Constitution. Kennedy even betrayed his own holding in *Windsor* (confirming that issues of marriage or SSM are left for the States to decide), to achieve his contrary result in *Obergefell*.

I hit most of the problems in a Top 10 list of his jurisprudential and worldview mistakes immediately above. In short, they show Kennedy's non-comprehension of what marriage is. In a sincere Equal Protection Clause analysis (i.e., not the one SCOTUS' majority craftily invented), state traditional marriage laws should have easily survived the applicable rational basis review.

In the end, for Justice Kennedy and the majority, this case is really about legitimating homosexuality in our society. Marriage (and having children) seems to be the instrument for getting that done. I don't believe *Obergefell* can or should accomplish this. Certainly, legalizing something has some impact on public perception and gaining acceptance of it. I assume this legalization of SSM will cause many more in the public to accept homosexuality as morally acceptable conduct, and this state mandated marriage status proves it. But not everyone will be so easily fooled, and not everyone should be compelled to agree, nor forced to act contrary to their beliefs, nor to accept or participate in something they feel is wrong (and in fact, is).

In order to get the universal change of mind Kennedy and his companions seek, we would have to eviscerate the First Amendment entirely and make it illegal for someone to believe that homosexual conduct (and not just its inclinations) is a sin, and that SSM is its supporting, institutional, immoral counterfeit. Even something that drastic cannot succeed in changing minds, however. It can't take away what people really believe in their consciences, in the religion of their hearts and in Scripture, and in how they raise their children to think accordingly. An effort that severe is likely to cause a civil war, a real one. It is absurd in any case to seriously suggest the legalization of anything controversial (like SSM) requires everyone's support of it.[70]

Something else should be said about the manner of Justice Kennedy (and the majority) reaching his agenda via this case. If his objective was to have a uniform national policy implementing SSM, this has got to be the least effective way to make it stick. This is the most divisive, underhanded, and unprincipled way of going about it. The States, and citizens, should have had a vote and say on this issue. This whole case might implode one day under the enormous weight of its sheer invalidity.

I believe in history this case will be regarded as a huge mistake. Intelligent nations around the world would do well to soundly scrutinize the *Obergefell* case, and flatly reject it. This article is aimed at informing and influencing American and international audiences toward higher, better thinking about so-called SSM.

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70 The growing, recent, despicable weaponising of *Obergefell* into a bullwhip to injure and humiliate other Americans of good conscience, character and will, especially small vendors in the wedding industry, is the subject of the second article.

AN OPPORTUNITY MISSED? A CONSTITUTIONAL ANALYSIS OF PROPOSED REFORMS TO TASMANIA'S 'HATE SPEECH' LAWS

Joshua Forrester,* Augusto Zimmermann,** and Lorraine Finlay***

ABSTRACT

The Tasmanian government has proposed reforms to the 'hate speech' provisions in the Anti-Discrimination Act 1998 (Tas). However, these reforms are unsatisfactory. They do not address, and in fact compound, the constitutional invalidity of Tasmania's 'hate speech' laws. In this article, we demonstrate that Tasmania's present 'hate speech' laws, like equivalent provisions in other States and Territories, impermissibly infringe the implied freedom of political communication. We also demonstrate that certain proposed reforms further infringe the implied freedom of political communication. We will conclude by proposing elements of a constitutionally valid law against incitement to enmity.

I INTRODUCTION

In September 2016, the Tasmanian government introduced to the Tasmanian Parliament the *Anti-Discrimination Amendment Bill 2016* (the 'Bill'). The Bill proposes amending Tasmania's 'hate speech laws found in its *Anti-Discrimination Act 1998* (Tas) (the 'Act') (we refer below to these proposed amendments as the 'proposed reforms'). In this article, we

argue that the proposed reforms are entirely unsatisfactory. This is because the proposed reforms do not overcome the constitutional invalidity of sections 17(1),[1] 19,[2] 20[3] and 55[4] of the Act.

Our argument is broken into the following parts. In Part II, we provide background to the proposed reforms. In Part III, we outline the proposed reforms. In Part IV, we argue that those parts of s 17(1) that make unlawful (amongst other things) certain acts that offend, insult, ridicule or humiliate, are unconstitutional. This is because these parts of s 17(1) impermissibly infringes the freedom to communicate about government and political matters implied from the *Commonwealth Constitution*.[5]

In Part V, we argue that s 55, which provides exceptions to s 17(1), does not overcome s17(1)'s difficulties but actually worsens them. Further, s 55 impermissibly infringes the implied equality of political communication for which we argued in our book *No Offence Intended: Why 18C is Wrong*.[6] In Part VI, we analyse the proposed reforms in light of our analysis of ss 17(1) and 55. We also comment on the proposed

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1 Subsequent mentions of s 17(1) of the Act will be to just 'section 17(1)' or 's 17(1)' as the case requires.

2 Subsequent mentions of s 19 of the Act will be to just 'section 19' or 's 19' as the case requires.

3 Subsequent mentions of s 20 of the Act will be to just 'section 20' or 's 20' as the case requires.

4 Subsequent mentions of s 55 of the Act will be to just 'section 55' or 's 55' as the case requires.

5 We refer to this freedom below as 'the implied freedom of political communication'.

6 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) ('*No Offence Intended*').

reforms to s 64 of the Act,[7] which provides for the rejection of complaints made under the Act.

In Part VII, we argue that s 19, which makes unlawful certain public acts that incite hatred, serious contempt or severe ridicule, is unconstitutional. This is because s 19 impermissibly infringes the implied freedom of political communication. In this Part, we also examine similar 'hate speech' provisions in the *Anti-Discrimination Act 1977* (NSW) (the 'NSW Act') and the *Racial and Religious Tolerance Act 2001* (Vic) (the 'Victorian Act'). We conclude that, like s 19, the NSW and Victorian provisions impermissibly infringe the implied freedom of political communication. In Part VIII, we argue that s 20, which makes unlawful promoting discrimination and prohibited conduct (including that made unlawful by ss 17(1) and 19) is unconstitutional. Like ss 17(1) and 19, s 20 impermissibly infringes the implied freedom of political communication. In Part IX, we suggest elements of an alternative laws that would be less restrictive of freedom of expression while targeting enmity and incitement to violence.

Before going further, we should note that this article is intended to build upon the work in our book *No Offence Intended*.[8] In *No Offence Intended* we examined, amongst other things, whether or not s 18C of the *Racial Discrimination Act 1975* (Cth) ('RDA')[9] impermissibly infringes the implied freedom of political communication. Section 18C can be considered the Commonwealth's 'hate speech' law. In this article, we extend our analysis to whether State 'hate speech' laws impermissibly

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7 Subsequent mentions of s 64 of the Act will be to just 'section 64' or 's 64' as the case requires.

8 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016).

9 Subsequent mentions of s 18C of the RDA will be to just 'section 18C' or 's 18C' as the case requires.

infringe the implied freedom of political communication. It should be noted from the outset that our analysis in this article is based on that found in *No Offence Intended*. However, we will summarise (and, where needed, refine) the arguments presented in *No Offence Intended* when required.

II BACKGROUND TO THE PROPOSED REFORMS

In September 2015, Martine Delaney lodged a complaint under the Act with Tasmania's Anti Discrimination Commissioner (the 'Commissioner') against the Catholic Church and, in particular, Archbishop Julian Porteous.[10] This complaint concerned *Don't Mess With Marriage*,[11] a Pastoral Letter issued by the Catholic Bishops of Australia concerning the same-sex marriage debate in Australia. *Don't Mess With Marriage* stated, amongst other things, that 'marriage should be a "heterosexual union between a man and a woman" and changing the law would endanger a child's upbringing'.[12] The complaint was later dropped.[13] However, the complaint prompted the Tasmanian government to consider reforming its 'hate speech' laws.[14]

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10 Australian Broadcasting Corporation, 'Anti-discrimination complaint "an attempt to silence" the Church over same-sex marriage, Hobart Archbishop says', *ABC News* (online), 28 September 2015 <http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>.

11 Australian Catholic Bishops Conference, *Don't Mess With Marriage: A Pastoral Letter from the Catholic Bishops of Australia to all Australians on the 'Same-sex Marriage' Debate* (Australian Catholic Bishops Conference, 2015).

12 Australian Broadcasting Corporation, 'Anti-discrimination complaint "an attempt to silence" the Church over same-sex marriage, Hobart Archbishop says', *ABC News* (online), 28 September 2015 <http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>.

13 Andrew Drummond, 'Transgender rights activist Martine Delaney drops complaint over Catholic Church's marriage booklet', *The Mercury* (online), 5 May 2016 <http://www.themercury.com.au/news/tasmania/

III THE PROPOSED REFORMS

The proposed reforms seek to, amongst other things, amend the Act to:

- Add 'religious purposes' to the exemptions in s 55.[15] Presently, s 55 exempts public acts done for 'academic, artistic, scientific or research purposes'.[16]

- Amend s 64 to require the Commissioner to reject a complaint in certain circumstances.[17]

Before going further, we should note that an earlier version of the Bill added a 'reasonableness requirement' to s 55. Presently, s 55 provides that a public act be done 'in good faith'.[18] However, this reform would have meant that a public act would have to be done 'reasonably and in good faith'.[19] This reform was removed from the Bill after public consultation.[20] However, we will examine it below because a 'reasonableness requirement' may ultimately be added to s 55, either as the result of the Bill's current passage through Parliament or as the result of some future reform.

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transgender-rights-activist-martine-delaney-drops-complaint-over-catholic-churchs-marriage-booklet/news-story/d8d9079bf932526b27e5f094e57dbe84>.

14 Andrew Drummond, 'Tasmania tussles over free speech debate', *news.com.au* (online), 20 September 2016 <http://www.news.com.au/national/breaking-news/tas-govt-tables-free-speech-amendment/news-story/ac35b8f5e2fff4991e86f1e4aa9dce70>.

15 Bill cl 4.

16 Act s 55(c)(i).

17 Bill cl 5.

18 Act s 55(c).

19 This reform was contained in cl 4 of the version of the Bill released for public comment.

20 See the second reading speech for the Bill: Tasmania, *Parliamentary Debates*, Legislative Assembly, 22 September 2016, (Michael Ferguson) <http://www.parliament.tas.gov.au/ParliamentSearch/isysquerydb2b1433-fcb9-4565-881f-f3bcde3fd261/2/doc/>.

Putting the 'reasonableness' requirement aside, the proposed reforms presently in the Bill are unsatisfactory. They overlook that significant parts, if not all, of ss 17(1) and 19 impermissibly infringe the implied freedom of political communication. Further, the reforms to s 55 further infringe the implied freedom of political communication by adding more complexity and uncertainty to laws whose scope is already uncertain. Finally, the changes to s 64 entail no consequences to the Commissioner for failing to dismiss a complaint, thereby exposing all parties to unnecessary costs in time, money and stress. We will now consider these issues in greater depth.

IV SECTION 17(1)

Section 17(1) presently provides:

> A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

The attributes mentioned in s 16 of the Act to which s 17(1) refers are (in the order they appear in s 17(1)): gender, race, age, sexual orientation, lawful sexual activity, gender identity, intersex, disability, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities.

In *Lange v Australian Broadcasting Corporation*,[21] the High Court noted that the implied freedom of political communication applies to State as

[21] [1997] HCA 25; (1997) 189 CLR 520 ('*Lange*').

well as Commonwealth laws.[22] As presently drafted, s 17(1) impermissibly infringes the implied freedom of political communication. The test for determining whether or not a law impermissibly infringes the implied freedom of political communication is that stated in *Lange* as modified in *McCloy v New South Wales*[23] (which we refer to below as the 'modified *Lange* test'). The modified *Lange* test is as follows:

1. Does the law effectively burden the implied freedom of political communication in its terms, operation or effect?

2. If 'yes' to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?

3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? If not, then the measure will exceed the implied limitation on legislative power.[24]

We now examine each step of this test with respect to s 17(1).

A *Does s 17(1) burden the implied freedom of political communication?*

Section 17(1) burdens the implied freedom of political communication in its terms, operation and effect. However, it is important to understand the *nature* of the burden that s 17(1) imposes. This is because, in *McCloy*, members of the High Court held that the impugned law's overall burden on the implied freedom of political communication was relevant to

22 Ibid 567.
23 [2015] HCA 34 ('*McCloy*').
24 Ibid [2] (French CJ, Kiefel, Bell and Keane JJ).

determining whether or not it was impermissibly infringed. The majority in *McCloy* noted that such a determination required comparing 'the positive effect of realising the law's proper purpose with the negative effect of the limits on constitutional rights or freedoms', and that '[l]ogically, the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate…'.[25]

Gageler J stated that judicial scrutiny of the relevant law should be 'calibrated to the degree of risk to the system of representative and responsible government established by the Constitution that arises from the nature and extent of the restriction on political communication that is identified at the first step in the analysis.'[26] Nettle J observed that 'a direct or severe burden on the implied freedom requires a strong justification'.[27] Gordon J stated that whether a law impermissibly infringes the implied freedom of political communication 'is a question of judgment about the nature and extent of the effect of the impugned law on the maintenance of the constitutionally prescribed system of representative and responsible government'.[28]

Section 17(1)'s burden on the implied freedom of political communication is *direct*, *heavy*, and *sweeping*. We will explain what we mean by these terms.

1 *A direct burden*

Section 17(1) directly burdens the implied freedom of political communication. This is because legislation made under various

25 Ibid [87] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).
26 Ibid [150] (Gageler J).
27 Ibid [255] (Nettle J).
28 Ibid [336] (Gordon J).

Commonwealth heads of power necessarily entails communication involving attributes that s 17(1) purports to protect from, amongst other things, offence, insult, ridicule or humiliation.

For example, one of the protected attributes in s 17(1) is race. Section 3 of the Act defines 'race' as including colour, nationality, descent, ethnic, ethno-religious or national origin, and the status of being or having been an immigrant.[29] Commonwealth legislation with respect to the following heads of power may well involve discussing race, colour, ethnicity or nationality:[30]

- 'the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth';[31]
- 'quarantine';[32]
- 'naturalisation and aliens';[33]
- 'the people of any race~~, other than the aboriginal race in any State,~~ for whom it is necessary to make special laws';[34]

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29 Act s 3 (definition of 'race').

30 The following lists are taken from Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 119-20.

31 *Commonwealth Constitution* s 51(vi).

32 Ibid s 51(ix). This is not a fanciful inclusion. During the Ebola outbreak in Africa in 2014, commentators noted racial aspects to restricting travel to and from countries in which the Ebola outbreaks were located, and the treatment of those afflicted with Ebola: see, for example, Hannah Kozlowska, 'Has Ebola Exposed a Strain of Racism?', *New York Times* (online), 21 October 2014 <optalk.blogs.nytimes.com/2014/10/21/has-ebola-exposed-a-strain-of-racism/?_r=1>.

33 Ibid s 51(xix).

34 Ibid s 51 (xxvi) (the strike-through appears in official versions of the *Commonwealth Constitution*).

- 'immigration and emigration';[35]
- 'external affairs';[36]
- 'the relations of the Commonwealth with the islands of the Pacific';[37] and
- 'the influx of criminals'.[38]

Other heads of power that may involve discussing race, colour, ethnicity or nationality include:

- 'trade and commerce with other countries, and among the States';[39]
- 'fisheries in Australian waters beyond territorial limits';[40]
- 'census and statistics';[41] and
- 'foreign corporations…'.[42]

As we noted in *No Offence Intended*, legislation or policy made under the heads of power noted above, and especially those noted in the first-mentioned list, often involve discussing controversial issues. For example, the matters of border protection, refugee intake and immigration raise controversial issues concerning the level of refugee and immigrant

35 Ibid s 51(xxvii).
36 Ibid s 51(xxix).
37 Ibid s 51(xxx).
38 Ibid s 51(xxviii).
39 Ibid s 51(i).
40 Ibid s 51(x).
41 Ibid s 51(xi).
42 Ibid s 51(xx).

intake, the racial, ethnic or national composition of such intake and the level of integration expected of immigrants.[43]

In addition to Commonwealth legislation, the Commonwealth's executive government is responsible for implementing legislation as well as other executive functions.[44] The manner in which the Commonwealth's executive government does this with respect to matters involving race, colour, ethnicity or nationality may also raise controversial issues. For example, the manner in which Australia's executive government conducts border protection and administers refugee and immigration programs involve controversial issues. To conclude with perhaps the most dramatic (but not uncommon) example, Australia's prosecution of wars involves critical but controversial issues about the nature of the conflict and the enemy.[45]

As to issues at State level, matters local to a State, such as law and order, health, welfare, or education, may involve discussions involving race, colour, ethnicity or nationality.[46]

To take another example, Commonwealth legislation or policy with respect to the following heads of power may well involve discussing sexual orientation, lawful sexual activity, gender, gender identity, intersex status, marital status, relationship status, pregnancy, position on breastfeeding, parental status or family responsibilities.[47] These powers include:

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43 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 120.

44 *Commonwealth Constitution* s 61.

45 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 121.

46 Ibid.

47 These are protected attributes in s 17(1).

- Marriage;[48] and
- Parental rights.[49]

As to marriage, controversies can and do arise concerning who may marry, how many may marry, and over the consequences if a marriage fails.

As to parental rights, controversies can and do arise over such things as how a child is best raised and cared for, parental rights if a marriage fails, surrogacy arrangements, and who can adopt.

2 *A heavy burden*

As to the heaviness of the burden that s 17(1) imposes, this requires considering popular sovereignty, the general nature of laws and discussions about them, the uncertainty of the terms used in s 17(1), and the dispute resolution process that the Commissioner uses.

(a) Popular sovereignty

The *Commonwealth Constitution* provides for popular sovereignty. That is, under the *Commonwealth Constitution*, the Australian people are sovereign.[50] It is Australian electors who elect representatives to make laws on their behalf.[51] It is Australian electors to whom these

48 *Commonwealth Constitution* s 51(xxi).

49 Ibid s 51(xxii).

50 *Unions NSW v New South Wales* [2013] HCA 58; (2013) 252 CLR 530, 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *McCloy* [2015] HCA 23 [45] (French CJ, Kiefel, Bell and Keane JJ), [215] (Nettle J), [318] (Gordon J).

51 *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45; (1992) 177 CLR 106, 137-8 (Mason CJ).

representatives are ultimately answerable.[52] And it is Australian electors who have the power to amend the *Commonwealth Constitution*.[53]

The *Commonwealth Constitution* also provides for a Commonwealth Parliament that, along with State and Territory Parliaments, has what is known as the plenary power to make laws.[54] These plenary powers are extremely broad.[55] The Commonwealth Parliament is confined to legislating with respect to matters under specified heads of power. That said, the Commonwealth Parliament's plenary power to legislate under these heads of power is extremely wide. As to the State and Territory Parliaments, unless confined by the *Commonwealth Constitution*[56] or the respective State or Territory constitutions,[57] their plenary powers to legislate are *unlimited in scope* and extend to *any matter*.[58] In summary, Commonwealth, State, and Territory Parliaments may make laws with

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52 *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 47 (Brennan J). See also Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 122.

53 *Commonwealth Constitution* s 128.

54 Section 51 of the *Commonwealth Constitution* provides that the Commonwealth Parliament has the 'power to make laws for the peace, order, and good government of the Commonwealth' with respect to the various heads of power specified in s 51.

55 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ).

56 Such as *Commonwealth Constitution* ss 114, 115.

57 We are referring to "manner and form" provisions that may force State Parliaments to use certain procedures (special majorities, referendums, and the like) to legislate with respect to laws concerning the constitution, powers and processes of Parliament.

58 'A power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself': *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). The plenary power of the Tasmanian Parliament is not found in the *Constitution Act 1934* (Tas). However, it is found in the *Australian Constitutions Act 1850* (Imp) s 14, which provides that the Tasmanian Parliament has the authority 'to make laws for the peace, welfare and good government of Tasmania': see *Strachan v Graves* (1997) 141 FLR 283, 289.

respect to an extremely wide range of matters, including matters of great controversy. Further, the content of these laws may be what many would regard as extreme.[59]

The *Commonwealth Constitution* also provides for an executive answerable to Parliament[60] but who, in executing laws, may do acts that, likewise, many would regard as extreme. In discussing legislative and executive matters, the *Commonwealth Constitution* provides for Parliamentary privilege.[61] This is because members of Parliament must be able to fully, frankly and robustly discuss all matters before Parliament.[62]

It follows that, as sovereign, the Australian people must *also* be free to discuss controversial matters, or indeed any matter, fully, frankly and robustly.[63]

Put another way, it borders on absurdity to say that, under the *Commonwealth* Constitution, Parliament may *pass* outrageous laws, the executive may *do* outrageous things, and members of Parliament may *say* outrageous things. However, the people from whom Parliament, members of Parliament and the executive derive their authority may *not* speak

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59 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 122.

60 *Commonwealth Constitution* ss 61, 64.

61 Ibid s 49.

62 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 122.

63 Ibid 123. See also Lorraine Finlay, Augusto Zimmermann and Joshua Forrester, '18C is too broad and too vague, and should be repealed', *The Conversation* (online), 31 August 2016 <https://theconversation.com/section-18c-is-too-broad-and-too-vague-and-should-be-repealed-64482>.

outrageously.[64] If anything, in a democracy, a sovereign people must be free to speak even the unspeakable.[65]

To be clear, there are limits to freedom of expression. However, these limits are themselves strictly limited.[66] However, s 17(1) imposes a heavy restriction on freedom of expression, prohibiting even statements that offend another person or group of people on the basis of certain attributes.

(b) The general nature of laws and discussions about them

Legislative and executive action contemplated under the *Commonwealth Constitution* and respective State and Territory constitutions operates generally. That is, legislation rarely targets specific individuals.[67] Rather, legislation in all but rare cases concerns *groups* of people, ranging from small groups up to the entirety of Australia's population (or, in Tasmania's case, Tasmania's population). Executive action may concern individuals directly, but often concerns groups.[68]

Hence, when discussing matters that may be subject to government action, it is common to make general statements about an issue. It is also

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64 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 130.

65 Ibid. See also Lorraine Finlay, Augusto Zimmermann and Joshua Forrester, '18C is too broad and too vague, and should be repealed', *The Conversation* (online), 31 August 2016 <https://theconversation.com/section-18c-is-too-broad-and-too-vague-and-should-be-repealed-64482>. Indeed, this must be so with respect to *any* idea that may influence, or be the subject of, legislative or executive action. This must also be so with respect to *any* person or group of people who may influence, or be the subject of, legislative or executive action.

66 See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 130.

67 Although a Parliament can enact a law targeting a specific individual: see *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51, 64 (Brennan CJ), 73-4 (Dawson J), 109, 121 (McHugh J), 125 (Gummow J).

68 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 121.

common to refer generally to groups of people. Statements concerning groups may not apply to individuals in that group. However, that lack of specificity is the inherent price of discussions about proposed or past legislative or executive action.[69]

The 'chilling effect' of a law that makes unlawful offending, insulting, humiliating or ridiculing another person based on an attribute must not be underestimated. Much has been made of the chilling effect of defamation law, and rightly so.[70] However, in defamation, one must only consider whether or not their comment affects *a particular individual's own reputation*. Consequently, someone who wishes to comment on a political issue in which that particular person is involved may avoid mention of that person. By contrast, in our political system, it is far more difficult not to comment about *groups sharing certain attributes* in political issues. As noted above, in our system of representative and responsible government, there are often controversial issues concerning such things as race, colour, ethnicity, nationality and sexuality. Hence, making unlawful offending, humiliating, insulting or ridiculing another person based on an attribute has far more of a chilling effect.

Section 17(1) concerns acts that someone may find offensive, insulting, ridiculing or humiliating based on that person's race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex status, marital status, relationship status, pregnancy status, position on breastfeeding, parental status or family responsibilities. Hence, s 17(1) affects political discussions about groups with these attributes.

(c) The uncertainty of the terms used in s 17(1)

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69 Ibid 121-2.

70 Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979) 22-3 [37].

The terms 'offend', 'insult', 'ridicule' and 'humiliation' are not defined in the Act. We will assume for our analysis that they will be interpreted narrowly, that is, limited to serious instances of offence, insult, ridicule or humiliation.[71] However, even if they are interpreted narrowly, there is considerable uncertainty concerning their application to widely varied circumstances.[72] A statement that one person thinks is seriously offensive another may think is 'merely' offensive (or even inoffensive).

Further, s 17(1)'s use of an objective test (specifically, a reasonable person test) does not overcome these issues concerning uncertainty. This is because reasonable minds applying the same reasonable person test may come to different conclusions concerning whether or not a statement was seriously offensive as opposed to 'merely' offensive (or even inoffensive).

There are serious issues as to whether s 17(1) (either alone or in conjunction with s 55) is too broad and too vague to be constitutional. In *No Offence Intended*, we provided a detailed argument concerning the concept of vagueness.[73] What follows is a summary (and, where needed, a refinement) of our argument. We will include in our summary some observations about the concept of overbreadth that were not included in

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71 We are assuming that the approach to interpreting these terms would be similar to the approach that Kiefel J took in *Creek v Cairns Post Pty Ltd*. That is, 'To "offend, insult, humiliate or intimidate" are profound and serious effects, not to be likened to mere slights': *Creek v Cairns Post Pty Ltd* [2001] FCA 1007; (2001) 112 FCR 352, 356 [16] (Kiefel J). French J in *Bropho v Human Rights and Equal Opportunity Commission* endorsed this view: see *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16; (2004) 135 FCR 105, 124 [69]-[70] (French J) ('*Bropho*'). We would note, however, that unlike the RDA, the Act provides two civil provisions: ss 17(1) and 19. Section 19 covers more severe speech while s 17(1) covers less severe speech. The presence of s 19 may count against narrowly interpreting s 17(1).

72 We assume that, were s 17(1) interpreted broadly, our arguments would apply with greater force.

73 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 192-7.

No Offence Intended but are relevant to the constitutional validity of s 17(1) and other hate speech provisions.

Now to the summary: first, certainty is critical to the rule of law. As McLachlin J (in dissent) noted in *R v Keegstra* regarding the concept of vagueness:

> As a matter of due process, a law is void on its face if it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application'. Such vagueness occurs when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork.[74]

As to the concept of overbreadth, her Honour noted, relevantly:

> Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issued are overbroad because they grant such officials the power to discriminate – to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly.[75]

Her Honour noted:

> The rationale for invalidating statutes that are overbroad… or vague is that they have a chilling effect on legitimate speech. Protection of free speech is regarded as such a strong value that legislation aimed at legitimate ends may be struck down, if also tends to inhibit protected speech.[76]

Second, legal theorists such as Ronald Dworkin and Lon Fuller have spoken to the need for certainty. Dworkin noted that a vague law 'places a citizen in an unfair position of either acting at his peril or accepting a

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74 *R v Keegstra* [1990] 3 SCR 697, 818 ('*Keegstra*') quoting Laurence Tribe, *American Constitutional Law* (Foundation Press, 2nd ed, 1988) 1033-4.

75 *Keegstra* [1990] 3 SCR 697, 818 quoting Laurence Tribe, *American Constitutional Law* (Foundation Press, 2nd ed, 1988) 1056.

76 *Keegstra* [1990] 3 SCR 697, 819.

more stringent restriction on his life than the legislature may have authorized'.[77] Fuller noted that 'The desideratum of clarity represents one of the most essential ingredients of legality'.[78] Fuller warned that:

> [I]t is a serious mistake – and a mistake made constantly – to assume that, though the busy legislative draftsman can find no way of converting his objective into clearly stated rules, he can always safely delegate this this task to the courts or to special administrative tribunals'.[79]

Fuller further warned that some areas of the law were unsuited to creating rules on a case-by-case basis.[80] We noted that one such area was political discussion, given its range and complexity.[81]

Third, vagueness and overbreadth are concepts useful to determining whether a law impermissibly infringes the implied freedom of political communication. They are readily applicable to an analysis under the modified *Lange* test. The implied freedom of political communication is a restriction on lawmaking. It follows that laws that are too broad or too vague should be restricted.[82] Further, voiding laws for vagueness or overbreadth would create a "buffer zone" around the implied freedom of political communication as the concept of vagueness has around the First Amendment of the US Constitution.[83] This discourages vague or overbroad legislation being enacted.[84]

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77 Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 221-2.

78 Lon Fuller, *The Morality of Law* (Yale University Press, 1964) 63.

79 Ibid 64.

80 Ibid.

81 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 194.

82 Ibid.

83 See Note, 'The Void for Vagueness Doctrine in the Supreme Court' (1960) *University of Pennsylvania Law Review* 67, 75.

84 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 194-5.

Fourth, like freedom of expression at common law,[85] the common law principle of due process is of constitutional importance.[86] Common law due process includes the principle of certainty in the law. An individual must be certain what the law is in order to avoid unlawful conduct. Given that the common law informs the *Commonwealth Constitution*,[87] common law due process should inform whether a law impermissibly infringes the implied freedom of political communication.[88]

Fifth, vagueness and overbreadth have been employed with respect to both criminal and civil provisions. In *Taylor v Canadian Human Rights Commission,* [89] a Canadian Supreme Court case concerning a civil provision making unlawful communication likely to expose any person to hatred or contempt, McLachlin J noted*:*

> '[Hatred and contempt] are vague and subjective, capable of extension should the interpreter be so inclined. Where does dislike leave off and hatred or contempt begin? ... The phrase does not assist in sending a clear and precise

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85 *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203; (2007) 243 ALR 606 [113] (Black CJ, French and Weinberg JJ) ('*Haneef*'). See also *Evans v State of New South Wales* [2008] FCAFC 130; (2008) 168 FCR 576, 594 [72] (French, Branson and Stone JJ) ('*Evans*'); *Monis v The Queen* [2013] HCA 4; (2013) 249 CLR 92, 128 [60] (French CJ) ('*Monis*').

86 Due process is one of the fundamental common law principles Australia has inherited. Its sources are not only 25 Edward I (1297) *Magna Carta* ch 29, but also 28 Edward III (1354), and 3 Charles I (1627) *Petition of Right*. As with the *Magna Carta*, the latter statutes are either received law in certain states, or applied by Imperial Acts legislation in other states.

87 *Lange* [1997] HCA 25; (1997) 189 CLR 520, 564.

88 This appears to be a situation that Brennan J described in *Re Bolton; Ex Parte Beane*: 'Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.': see *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514, 520-1 (Brennan J).

89 [1990] 3 SCR 892 ('*Taylor*'). *Taylor* was decided along with *Keegstra* [1990] 3 SCR 697. Like *Keegstra*, the Canadian Supreme Court split 4:3, holding in *Taylor* that s 13 of the *Canadian Human Rights Act* did not violate the Canadian *Charter of Rights and Freedoms*.

> indication to members of society as to what the limits of impugned speech are. In short, by using such vague, emotive terms without definition, the state necessarily incurs the risk of catching, within the ambit of the regulated area expression falling short of hatred.[90]

We suggest that her Honour's comments apply to s 17(1)'s use of 'offend', 'insult', 'ridicule' and 'humiliate'. Her Honour further noted:

> [T]he chilling effect of leaving overbroad provisions "on the books" cannot be ignored. While the chilling effect of human rights legislation is likely to be less significant than that of criminal prohibition, the vagueness of the law means that it may well deter more conduct than can legitimately targeted, given its objectives.[91]

It is worth noting here another relevant Canadian Supreme Court case, *Saskatchewan Human Rights Commission v Whatcott*.[92] This case concerned s 14 of the *Saskatchewan Human Rights Code 1979* ('Code').[93] Section 14 in effect prohibited the publishing or display by various means material 'that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground'.[94] Section 3 of the Code listed prohibited grounds as including religion, creed, marital status, family status, sexual orientation, disability, age, colour, ancestry, nationality, place of origin, race or perceived race, receipt of public assistance, and gender identity.[95] As can be seen, there are similarities between s 14 and s 17(1).

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90 *Taylor* [1990] SCR 892, 961-2.

91 Ibid.

92 [2013] SCC 11; [2013] 1 SCR 467 ('*Whatcott*').

93 Subsequent mentions of s 14 of the Code will be to just 'section 14' or 's 14' as the case requires.

94 *Saskatchewan Human Rights Code 1979* s 14(1)(b).

95 Code s 2(1)(m.01) (definition of 'prohibited ground').

Writing for a unanimous Canadian Supreme Court, Rothstein J held that 'ridicules, belittles or otherwise affronts the dignity of' was overbroad.[96] He remarked:

> Restricting expression because it may offend or hurt feelings does not give sufficient weight to the role expression plays in individual self-fulfillment, the search for truth, and unfettered political discourse. Prohibiting any representation which "ridicules, belittles or otherwise affronts the dignity of" protected groups could capture a great deal of expression which, while offensive to most people, falls short of exposing its target group to the extreme detestation and vilification which risks provoking discriminatory activities against that group. Rather than being tailored to meet the particular requirements, such a broad prohibition would impair freedom of expression in a significant way.[97]

We suggest his Honour's comments readily apply to s 17(1).

The sixth and final point in our summary is that US or Canadian concepts concerning vagueness or overbreadth need not be imported into the modified *Lange* test for s 17(1) to be held unconstitutional. Sections s 17(1) and s 55 may, in any event, be considered too complex, intrusive and/or uncertain to be considered reasonably appropriate and adapted to the end they serve.

Given that an individual may breach s 17(1) *by the mere act of speaking*, it must be certain in its application. Presently, it is not.

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96 *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 519-20 [107]-[111] (Rothstein J).

97 Ibid 519 [109].

(d) The operation and effect of s 17(1)

Section 17(1)'s operation and effect also burdens the implied freedom of political communication. Hence, it is necessary to review the conciliation process as well as the powers of Equal Opportunity Tasmania ('EOT').

The dispute resolution process is set out in Part 6 of the Act. The Office of the Anti-Discrimination Commissioner outlines the procedure for handling breaches of the Act on the EOT website.[98] This process is as follows:

- A complaint is lodged with EOT.
- The complaint is referred to the Commissioner.
- The Commissioner conducts a conference with the aim of conciliating the complaint.
- If the matter is not resolved early, the Commissioner will investigate it and decide whether the complaint should be dismissed, proceed to conciliation, or be referred to the Anti-Discrimination Tribunal (the 'Tribunal') for an inquiry.

If the Commissioner refers the complaint to the Tribunal then the proceedings in this jurisdiction are civil, not criminal, and a civil standard of proof applies. However, even civil proceedings impose serious burdens. Unlike criminal proceedings, there is no prosecutorial discretion to drop a case. Rather, a civil litigant can press what may be frivolous or vexatious proceedings.[99] Further, a lower standard of proof applies,

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98 'What Happens After a Complaint is Made', Equal OpportunityTasmania,<http://equalopportunity.tas.gov.au/complaints/what_happens_after_a_complaint_is_made>.

99 Act s 71(3).

meaning a breach of a law affecting freedom of expression is easier to establish. Finally, the respondent incurs costs in time, money and stress in meeting cases.[100] As Mason CJ, Toohey and Gaudron JJ noted in *Theophanous v Herald & Weekly Times Ltd*,[101] 'a civil action is as great, if not a greater restriction than a criminal prosecution'.[102]

3 *A sweeping burden*

Section 17(1) imposes a sweeping burden on the implied freedom of political communication in two ways. First, s 17(1) may be breached in disputes over concepts that, largely or solely, are comprised of *ideas*.

For example, are 'race' and 'ethnicity' scientific facts or are they social, cultural and political constructs?[103] If race, ethnicity, or both, are social, cultural and political constructs then these constructs are, largely or solely, comprised of ideas.[104] Even supposing biology plays a role in the

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100 See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 176.

101 [1994] HCA 46; (1994) 182 CLR 104 ('*Theophanous*').

102 *City of Chicago v Tribune Co* (1923) 139 NE 86, 90 (Thompson CJ) cited in *Theophanous* [1994] HCA 46; (1994) 182 CLR 104, 130-1 (Mason CJ, Toohey and Gaudron JJ).

103 Australian Law Reform Commission, *The Protection of Human Genetic Information*, Report No 96 (2003) 922 [36.42].

104 The Explanatory Memorandum to the *Racial Discrimination Bill 1974* (Cth) stated that s 18C would use the definitions of ethnic origin in *King-Ansell v Police* [1979] 2 NZLR 531 ('*King-Ansell*') and *Mandla v Dowell Lee* [1983] 2 AC 548 ('*Mandla*'): Explanatory Memorandum, *Racial Discrimination Bill 1974* (Cth) 2. In *King-Ansell*, Richardson J stated that 'The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origin' and that ethnicity was defined as

> a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group.

determination of race or ethnicity, then the extent to which it influences law and policy are ideas open to dispute.

As to marriage, this is an institution that is solely comprised of ideas that are also open to dispute. For example, what are the spiritual aspects of marriage? What are its secular aspects? What are the rights and responsibilities of spouses? Who can marry? How many can marry? What are the consequences when a marriage fails?

If discussion about marriage or parental rights involves matters of gender or sexuality, then this raises further issues involving ideas. Is gender a social construct?[105] Is sexuality?[106] Is sexuality fluid, fixed, or some mix of the two?[107] What do different cultures and religions have to say about certain sexual practices? Should certain sexual practices be made

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See *King Ansell* [1979] 2 NZLR 531, 542-3 (Richardson J). In *Mandla*, markers of ethnicity were (among other things) a long shared history of the group; a cultural tradition of the group's own; and a common religion: see *Mandla* [1983] 2 AC 548, 562 (Lord Fraser of Tullybelton). However, as we noted in *No Offence Intended*:

> [t]he issue with incorporating religious, cultural, and historical factors is that each of these factors involves *ideas*. Put broadly, religion involves ideas concerning spirituality; culture involves ideas about how people should conduct themselves individually and socially; the history of a people involves ideas concerning their collective heritage and experiences. All of these ideas may be, and often are, contested.'

See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 135.

105 See, for example, Candace West and Don H Zimmerman, 'Doing Gender' (1987) 1(2) *Gender & Society* 125.

106 See, for example, Steven Seidman, *The Social Construction of Sexuality* (WW Norton & Company, 2003); Pepper Schwatrz, 'The Social Construction of Heterosexuality' in Michael Kimmel (ed), *The Sexual Self: The Construction of Sexual Scripts* (Vanderbilt University Press, 2007) 80.

107 For example, the Kinsey Scale posits that sexuality exists on a continuum, see Kinsey Institute, 'The Kinsey Scale', *Kinsey Institute* (online) <https://www.kinseyinstitute.org/research/publications/kinsey-scale.php>.

unlawful? Should others be encouraged? When should children be taught about matters of sexuality? And who should teach them?

In discussions amongst electors about these matters, views will differ sharply. Feelings will run high, and robust, heated discussion will occur. Positions will be attacked with all the logical and rhetorical weapons that opponents can muster, exposing them to withering critical scrutiny if not outright scorn. Arguments will be lost, and lost badly. Feelings will be hurt and pride will be wounded. Offence and insult, and even ridicule and humiliation, are inevitable incidents of such discussion in a democracy.

However, s 17(1) purports to limit discussion of concepts that are, largely or solely, comprised of ideas by imposing legal liability for offence, insult, ridicule and humiliation. This is a sweeping intrusion into the implied freedom of political communication.

Second, s 17(1) is sweeping because it burdens the implied freedom of political communication of *everyone in Tasmania*. Similarly, the law restricts common law freedom of expression – a freedom which itself has constitutional significance –[108] of *everyone in the Tasmania*. The law is not confined to time or place. Indeed, s 17(1) affects even private acts. This leads to an important question in the proportionality test: does s 17(1)'s purpose justify restricting a *fundamental freedom* held by *every Tasmanian*, even considering the alternatives available? This is a question to which we will return.

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108 *Haneef* [2007] FCAFC 203; (2007) 243 ALR 606 [113] (Black CJ, French and Weinberg JJ). See also *Evans* [2008] FCAFC 130; (2008) 168 FCR 576, 594 [72] (French, Branson and Stone JJ); *Monis* [2013] HCA 4; (2013) 249 CLR 92, 128 [60] (French CJ).

B *Is s 17(1)'s purpose legitimate?*

Section 17(1)'s purpose is not compatible with Australia's system of representative and responsive government. In this system:

> The provisions of the Constitution mandate a system of representative and responsible government with a universal adult franchise, and s 128 establishes a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is 'an indispensable incident' of that constitutional system.[109]

Applying the principles of statutory construction,[110] it appears that s 17(1)'s purpose is to prohibit, amongst other things, offence, insult, ridicule and humiliation[111] in pursuit of the Act's overall purpose of prohibiting discrimination.[112] However, this purpose is not an end compatible with Australia's constitutionally prescribed system of representative and responsible government.[113]

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109 *Aid/Watch Incorporated v Federal Commissioner v Taxation* [2010] HCA 42; (2010) 241 CLR 539, 556 [44] (emphasis and citations omitted) cited in *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1, 13 [20] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

110 In *Saeed v Minister for Immigration & Citizenship* [2010] HCA 23; (2010) 241 CLR 252, 264-5 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) it was noted 'Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning'.

111 Act s 17(1).

112 Act Long Title.

113 Section 17(1) makes unlawful intimidation on the grounds specified: see Act s 17(1). Given that intimidation contains an element of threat, making unlawful such conduct is compatible with Australia's constitutionally prescribed system of representative and responsible government. See also Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 115, 211.

To reiterate and summarise what we argued in *No Offence Intended*,[114] in *Coleman v Power*,[115] McHugh J noted that insults can be used as weapons of intimidation that may have a chilling effect.[116] However, McHugh J also stated that '[t]he use of insulting words is a common enough technique in political discussion and debates'[117] and '…insults are a legitimate part of the political discussion protected by the Constitution. An unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom.'[118] Gummow and Hayne JJ stated '[i]nsult and invective have been employed in political communication at least since the time of Demosthenes.'[119] Kirby J stated:

> One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas.[120]

In *Monis*, Hayne J stated:

> History, not only recent history, teaches that abuse and invective are an inevitable part of political discourse. Abuse and invective are designed to drive a point home by inflicting the pain of humiliation and insult. And the greater the humiliation, the greater the insult, the more effective the attack may be. The giving of really serious offence is neither incidental nor accidental. The communication is designed and intended to cause the greatest possible offence to its target no matter whether that target is a person, a group, a government or an opposition, or a particular political policy or proposal and those who

114 Ibid 126-30.
115 [2004] HCA 25; (2004) 220 CLR 1 ('*Coleman*').
116 Ibid 54 [105] (McHugh J).
117 Ibid.
118 Ibid.
119 Ibid 78 [197] (Gummow and Hayne JJ).
120 Ibid 91 [239] (Kirby J).

propound it.[121]

Offence, insult, ridicule and humiliation are inevitable incidents of discussion about government and political matters in Australia's constitutionally prescribed system of representative and responsible government. Section 17(1)'s purpose in making unlawful of such conduct fails this step of the modified *Lange* test. We will, however, analyse the third step of the modified *Lange* test.

C *Is s 17(1) reasonably appropriate and adapted to its purpose?*

As the majority noted in *McCloy*, to meet the third step in the modified *Lange* test the law must be 'proportionate' to its purpose.[122] This means that the law must be suitable, necessary and adequate in its balance.[123]

1 *Suitability*

All that is required is that there be a rational connection between the means used in s 17(1) and its purpose.[124] This requirement is met: prohibiting offence, insult, ridicule and humiliation has at the very least a minimal rational connection to the purpose of prohibiting discrimination.

2 *Necessity*

This step requires that there is no obvious and compelling alternative and reasonably practicable means of achieving the same purpose that has a less restrictive effect on the freedom.[125]

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121 *Monis* [2013] HCA 4; (2013) 249 CLR 92, 136-7 [85]-[86] (Hayne J).

122 *McCloy* [2015] HCA 34 [2] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

123 Ibid.

124 Ibid [80] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

125 Ibid [2] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

Here, we submit that, in assessing the necessity requirement, it is a mistake to focus on alternative drafting of the provision in question, or on one alternative law. Instead, when assessing a law of s 17(1)'s nature it is necessary to look at the following:

1. Whether one or more laws serve the purpose that s 17(1) serves in a way less intrusive to the implied freedom of political communication; and

2. Whether one or more alternative measures (not necessarily laws) serve the purpose that s 17(1) serves.

Hence, in the case of s 17(1), it is relevant to look at:

1. Existing criminal laws;

2. Existing anti-discrimination laws; and

3. Measures that may be undertaken in civil society.

(a) Existing criminal laws

There are already criminal laws that serve the purpose of protecting people from harassment and abuse. These are laws of equal application, that is, they apply to all in Tasmania and are not limited to those who have a listed attribute.

A common complaint is that minorities are subjected to bigoted abuse as they walk down the street or otherwise go about their business. However, s 12 of the *Police Offences Act 1935* (Tas) already prohibits the use of

threating, abusive or insulting words calculated to cause a breach of the peace or whereby a breach of the peace may be occasioned.[126]

Another common complaint is harassment of minorities in local neighbourhoods, where neighbours repeatedly abuse minorities at or near their home. This is in turn causes the victim to feel intimidated or otherwise fear for their safety. In such instances, s 192 of the *Criminal Code 1924* (Tas) prohibits stalking, which can readily be applied in these kinds of situations.

(b) Existing anti-discrimination laws

Another common complaint is discrimination or harassment occurs in environments such as in the workplace, in places of education, or when trying to obtain accommodation or goods or services. However, present laws already cover such instances, not least including a suite of Commonwealth anti-discrimination laws.[127]

(c) Measures that can be undertaken in civil society

In *No Offence Intended*, we noted that just because a government does nothing does *not* mean nothing is done.[128] Civil society itself provides measures to combat racism. According to Martin Krygier, civil society is:

> … comprised of multitudes of independent actors, going about their individual or freely chosen cooperative affairs, able to choose to associate and participate (or not) in an independent public realm, with an economy of disbursed actors

126 *Police Offences Act 1935* (Tas) s 12.

127 See, for example, Act ss 14, 15. As far as Commonwealth legislation is concerned, see RDA ss 11, 12, 13, 15; *Disability Discrimination Act 1992* (Cth) ss 35, 37, 39; *Sex Discrimination Act 1984* (Cth) pt II div 3.

128 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 204.

> and markets, undergirded by a socially embedded legal order, which grants and enforces legal rights.[129]

As regards offensive speech, non-state actors may challenge that speech by their own speech. Further, they may organise by free assembly to magnify their voice and to speak out on behalf of those who cannot speak for themselves. That is, in a common law system such as Australia's, those exercising their common law freedoms of speech and association counter others exercising their common law freedom of speech to make offensive remarks.[130]

People who are harassed may also pursue more direct, cheaper and faster private solutions. For example, online debates, such as those on news or opinion websites, often become heated. If bigoted slurs are used, then the best response (apart from a sharp response by the person slurred) is to report the slur to the website's moderators. However, if there is sustained online harassment, then there is recourse to the law against stalking, which covers a wide range of conduct, including online conduct.[131]

(d) Enforcement of existing laws

It could be argued that present laws are not enforced often enough, and s 17(1) must supplement them. However, if these laws are not adequately enforced then the appropriate response is to ensure the authorities responsible for the enforcing the law do their job. Here, individuals can work with representative organisations to monitor enforcement and encourage authorities to actually enforce the law. Justifying new laws by

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129 Martin Krygier, 'Virtuous Circles: Antipodean Reflections on Power, Institutions, and Civil Society' (1997) 11(1) *East European Politics and Societies* 36, 75.

130 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 154.

131 *Criminal Code 1924* (Tas) s 192.

reference to the failure to enforce existing laws is an entirely circular argument. Further, if existing laws aren't actually being enforced, this in itself gives rise to rule of law implications beyond the scope of this particular article.

Ultimately, there are existing laws (either alone or combined with measures in civil society) that already adequately achieve 17(1)'s purpose.

3 *Adequacy in its balance*

This criterion requires a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[132] It should be noted here that the implied freedom of political communication is a strong freedom.[133] We will turn to assessing the nature and extent of the burden. After this, we will turn to the purpose s 17(1) serves, which will include an assessing the nature and extent of the harm s 17(1) addresses.

(a) The nature of the burden

As demonstrated above, the burden that s 17(1) imposes on the implied freedom of political communication is direct, heavy, and sweeping. Section 17(1) affects a wide range of discussion relevant to government and political matters in Australia. It creates uncertainty about how it may be applied, leading to the chilling of debate where debate must occur. Unlike the law of defamation, s 17(1) restricts the discussion of groups

132 *McCloy* [2015] HCA 34 [2] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

133 See *Monis* [2013] HCA 4; (2013) 249 CLR 92, 141 [103]-[104] (Hayne J). See also *Coleman* [2004] HCA 25; (2004) 220 CLR 1, 49-50 [91] (McHugh J), 77 [195] (Gummow and Hayne JJ).

rather than particular individuals. This means its potential chilling effect is far greater than that of defamation law. Section 17(1) also restricts discussion of ideas relevant to government and political matters. It purports to limit the freedom of expression of all Tasmanians who, as Australians and part of a sovereign people, must be able to discuss government and political matters fully, frankly and robustly. For the reasons given below, s 55 does not adequately alleviate s 17(1)'s burden and, indeed, creates burdens of its own.

(b) The purpose that s 17(1) serves

Section 17(1)'s purpose of prohibiting discrimination is laudable. It is clear that s 17(1) was enacted to prevent certain harms. In *No Offence Intended*, we made a number of points concerning 'hate speech' laws, and the harms that they address, which we will summarise (and where needed, add to or refine) here:

First, the onus is on those justifying s 17(1) to demonstrate that the harm caused is to such an extent that it justifies *restricting the freedom of expression of every Tasmanian, even given the alternatives available*. As noted above, freedom of expression is a fundamental freedom, and one with constitutional significance. Freedom of expression must never be infringed lightly, and evidence for its restriction must be clear, if not overwhelming.[134]

Second, a justification for broadly drafted and applied laws is that minorities covered by such laws are protected from the harm that offence, insult, humiliation or ridicule may cause. However, offence, insult, ridicule and even humiliation are necessary incidents of a democracy

134 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 130.

such as Australia's, where views sharply differ, feelings run high, and robust debate must occur.[135]

Third, there have been a number of important reports concerning racism in Australia. These include the Royal Commission into Aboriginal Deaths in Custody in 1991; [136] the Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence* in 1991 ('Inquiry');[137] and the Australian Law Reform Commission's ('ALRC's) report, *Multiculturalism and the Law*.[138] However, *none* of these reports recommended that speech that offended, insulted, ridiculed or even humiliated be made unlawful.[139] Indeed, the Inquiry noted:

> The threshold for prohibited conduct needs to be higher than expressions of mere ill will to prevent the situation in New Zealand, where legislation produced a host of trivial complaints. The Inquiry is of the opinion that the term "incitement to racial hostility" conveys the level and degree of conduct with which the legislation would be concerned.[140]

Fourth, authors who have written on the harmful effects of racism do not argue for laws as extensive as s 17(1). For example, Richard Delgado proposed a cause of action where the plaintiff would need to prove that:

> Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to

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135 See ibid 101-2.

136 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

137 Human Rights and Equal Opportunity Commission, *National Enquiry into Racist Violence* (Australian Government Publishing Service, 1991).

138 Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992).

139 For the full discussion see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 96-9.

140 Inquiry 300.

> demean through reference to race; and that a reasonable person would recognise as a racial insult.[141]

Note here the requirement for intent, something that s 17(1) lacks. Mari Matsuda's proposed law would have the following elements:

1. The message is of racial superiority;
2. The message is directed against a historically oppressed group; and
3. The message is persecutorial, hateful, and degrading.[142]

The measures in s 17(1) are far wider than what Matsuda proposes. In her work, Matsuda provided a moving account of the effects of racism.[143] However, her research is not without its faults. Warren Sandmann noted the following with respect to Matsuda's work:

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141 Richard Delgado, 'Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling' in Mari J Matsuda, Charles R Lawrence III, Richard Delgado and Kimberlé Williams Crenshaw (eds), *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, 1993) 109.

142 Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2357. See also Mari Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' in Mari J Matsuda, Charles R Lawrence III, Richard Delgado and Kimberlé Williams Crenshaw (eds), *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, 1993) 36.

143 Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2337-8: 'As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance'. See also Mari Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' in Mari J Matsuda, Charles R Lawrence III, Richard Delgado and Kimberlé Williams Crenshaw (eds), *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, 1993) 25.

> Matsuda utilizes personal experience, narratives and oral histories as evidence to support a claim. While Matsuda also uses more traditional evidential sources (government reports and statistical findings), the heart of her argument – that hate speech causes real harm to individuals – is bolstered mainly by anecdotal evidence and behavioristic studies showing a relationship between hate speech and psychological and physiological harm. While there is no question that some targets of hate-speech suffer from these symptoms, nor that this suffering is great, there is a question concerning the strength of the relationship between the speech and the harm. … [Matsuda] offers little evidence that even the majority of recipients will respond to hate speech in the same way.[144]

Sandmann further noted:

> [M]ore importantly than the lack of evidence to support her claim is her dependence on the notion of a virtual cause-effect relationship between word and deed. … Contemporary theorists have strongly questioned the possibility of showing a direct link between word and response. To propose a restriction on certain forms of speech that have been shown only anecdotally and questionably to 'cause' harm is, at best, an overreach on Matsuda's part.[145]

We will return to Sandmann's criticisms shortly, as they are relevant to the next point.

Fifth, and lastly, the Australian Human Rights Commission has noted that there has been very little qualitative research on the lived experience of racism in Australia.[146] That said, Katherine Gelber and Luke McNamara have attempted to address this in their recent work concerning hate speech, its harms, and the need for broadly-drafted legislation to combat

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144 Warren Sandmann, 'Three Ifs and a Maybe: Mari Matsuda's Approach to Restricting Hate Speech Laws' (1994) 45 (3-4) *Communication Studies* 241, 250 (citations omitted).

145 Ibid (citations omitted). See 249-254 for Sandmann's other criticisms of Matsuda' approach.

146 Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40th Anniversary of the Racial Discrimination Act* (Australian Human Rights Commission, 2015) 6 [2.1] ('40th Anniversary Report').

it.[147] In particular, they aim to provide empirical evidence of the harms of hate speech.[148] However, and with the greatest of respect, Gelber and McNamara's analysis is unsatisfactory. Space precludes us from a detailed critique. However, we make the following points.

First, Gelber and McNamara interviewed 101 people across various racial, ethnic and religious groups concerning their experience of racism in Australia.[149] While the sample size is statistically significant, it is nevertheless relatively small, and thus prone to a substantial margin of error when extrapolated to Australia's population as a whole.[150]

Second, of the people interviewed, 32 were community spokespeople and 69 were ordinary community members.[151] A better sample would be randomly selected. This is because the 32 community spokespeople may skew the results. In fairness, community spokespeople may be more aware of what is going on in their community. However, it cannot be

147 Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324; Katherine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between Harms Occasioned and the Remedies Provided' (2016) 39(2) *UNSW Law Journal* 488.

148 Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 324; Katherine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between Harms Occasioned and the Remedies Provided' (2016) 39(2) *UNSW Law Journal* 488, 488.

149 Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 326.

150 There appear to be a number of sampling and non-sampling errors in Gelber and McNamara's work. For an overview of such errors see, for example, Australian Bureau of Statistics, 'Types of error', *Australian Bureau of Statistics* (online) <http://www.abs.gov.au/websitedbs/a3121120.nsf/home/statistical+language+-+types+of+error>; Queensland Government Statistician's Office, 'Survey methods', *Queensland Government Statistician's Office* (online) <http://www.qgso.qld.gov.au/about-statistics/survey-methods/>.

151 Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 326.

discounted that some may be motivated to describe an incident as racist when in fact it is not.

Third, Gelber and McNamara identify the rationale for the groups selected as follows:

> We drew on the available evidence regarding racism in Australia to identify the groups most likely to be subjected to racist hate speech. Relevant factors in identifying the groups included the historical and enduring racism experienced by Indigenous people, post 9/11 anxieties about terrorism, controversies over asylum-seekers and visibility of recently arrived immigrant communities. Interviews were conducted with Aboriginal and Torres Strait Islander, Afghani, Australian-born Arabic-speaking Muslim, Australian-born Arabic-speaking Christian, Chinese, Indian, Jewish, Lebanese-born Christian, Lebanese-born Muslim, Sudanese, Turkish Alevi, Turkish Muslim and Vietnamese people.[152]

Again, a better approach would have been to use a random cross-section of various racial, ethnic and religious groups.[153] The criteria that Gelber and McNamara used would skew the results. This is because the group selection appears, at least in part, to depend on whether or not there is a controversy associated with group. Matters such as Aboriginal welfare, terrorism and the level of refugee intake are matters that are, rightly, the subject of vigorous political debate. However, this also increases the likelihood of things being said about the racial, ethnic or religious group involved that may be taken as unflattering. The method used to create the sample risks portraying racism in Australia as a greater problem than it is.

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152 Ibid 326-7.

153 The sample could have included (for example), immigrants from Great Britain, Greece and Italy (in order to get a perspective of second and subsequent generations of immigrants). The sample could also have included other immigrant communities such as Kurds, Yazidis, Druze and Zoroastrians. These communities tend not to have controversies associated with them in Australia.

Fourth (and recalling Sandmann's criticism of Matsuda), the evidence that Gelber and McNamara collected is anecdotal. As we noted in *No Offence Intended*, from a legal standpoint, such evidence may be speculative, conclusory or hearsay.[154] There also may be issues whether the evidence is too vague, or makes sweeping generalisations.

Fifth, some of the evidence that Gelber and McNamara use to support their claims about hate speech do not meet the definition of hate speech that they provide. Gelber and McNamara use the following definition of hate speech:

> [W]e follow Parekh in emphasizing three defining characteristics. First, it is 'directed against a specified or easily identifiable individual or… a group of individuals based on an arbitrary and normatively irrelevant feature'. Secondly, 'hate speech stigmatizes the target group by implicitly or explicitly ascribing to it qualities widely regarding as highly undesirable'. Thirdly, 'the target group is viewed as an undesirable presence and a legitimate object of hostility'.[155]

However, while some statements they cite clearly meet the definition they provided, they also cite the following statements as evidence of 'hate speech':

> 'I've been called names and like that when I was at school, those sorts of things'
>
> When celebrating cultural and religious days and wearing national costumes, some people 'looked very strangely' at community members, who said the audience was 'even using some bad and unnecessary words'

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154 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 85.

155 Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 324 (citations omitted). The source that Gelber and McNamara cite is Bhikhu Parekh, 'Is there a case for banning hate speech?' in Michael Herz and Peter Molnar (eds), *The content and context of hate speech: Rethinking regulation and responses* (Cambridge University Press, 2012) 40-1.

> Check out operators at the supermarket, 'they will talk to the people and say, "Good morning", to the person in front of you or the three people in front of you, and they come to you, and say nothing.'
>
> A university newspaper contained a 'star sign guide' that included 'this interpretation that was derogatory of Aboriginal culture and dreaming'
>
> 'It's just a negative picture that you see in [the media] which actually portrays just the bad things about India. It never portrays the good things'[156]

Readers will note that the statements are vague, and some are conclusory. No specifics are given. There is simply no basis for concluding that the conduct described in these statements meet Gelber and McNamara's definition of hate speech.

Especially concerning is the way that Gelber and McNamara treat evidence of the media, of politicians and of children. As to the media, they as cite examples of 'hate speech' the following:

> 'Look, any time I pick up the paper and there's a story in there about Aboriginal people, it's nearly always negative. That hasn't changed and I don't know whether it will'
>
> 'we're portrayed right across the media as Aboriginal people in general being destructive'
>
> 'We feel very disappointed about the media's interest in reporting the negative side of China while there is so much… good news worth telling. There is a strong hostility and prejudice towards China behind the media reporting.'
>
> 'what danger is a mosque where people are going to go and pray in anyone's community? Would they object if there was a church?'

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156 This is a selection of quotes from Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 329, 331. We should note that we could have cited more instances of problematic statements than those we have selected for this article.

> 'if an individual does something negative, that's it, the whole community cops it'[157]

Once again, these are vague and conclusory statements. The reader is left guessing as to the evidence that forms the basis of these conclusions. As to statements of politicians, the statements cited include:

> 'Mr Howard stands there in parliament, "We don't want those kinds of people". I have been in Australia 30 years by then'

> 'So there always has to be the other and he has to be hated and he has be made aware of, be careful, be alert. Back to the… time when John Howard said to be careful, be alert and call up this number in case your neighbour is a Muslim'[158]

As to the first statement, it is vague. We guess that it is referring to Mr Howard's comments about the issue of asylum seekers gaining entry to Australia by boat and, in particular, his comments about the events regarding SIEV 4 (which later became known as the 'children overboard affair'). However, that's the point: we are guessing. As to the second comment, we are fairly certain (although, again, we are guessing) that they refer to the Commonwealth government's 'be alert but not alarmed' campaign in response to the September 11 terrorist attacks. However, if this is the case, the statement that Gelber and McNamara quote as evidence of hate speech is simply wrong. The 'be alert but not alarmed' campaign was not encouraging the reporting of Muslims, but the reporting of suspicious behaviour.[159] These issues aside, immigration and terrorism are clearly matters of public interest and debate, and are

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157 This is a selection of quotes from ibid 331, 332.

158 This is a selection of quotes from ibid 331.

159 Clips from the 'be alert but not alarmed' campaign can be found on YouTube. See, for example: CheesyTV, *'Be alert, but not alarmed' – Australian govt anti-terrorism TV ad (2002), YouTube* (online), 28 August 2013 <https://www.youtube.com/watch?v=HWwJThlHqjs>; see also actualperson34, *Howard government anti-terrorism ad (2004), YouTube* (online), 27 July 2014 <https://www.youtube.com/watch?v=tJDalHxp2i4>.

contentious. Vigorous debate is to be expected. In any event, it is unlikely that what Mr Howard actually said about these issues meet Gelber and McNamara's definition of 'hate speech'.[160]

As to the statements of children, Gelber and McNamara cite the following:

> Australian Indigenous Footballer Adam Goodes was called an 'ape' by a 13 year old girl in the crowd
>
> A teacher was giving a student a direction and the student replied 'Go back where you belong'
>
> Interviewee's child at school was told by another child 'The fucking Indians, you can go back to your country'
>
> Interviewee attended school where other students believed the stereotype that every woman in Afghanistan is uneducated and illiterate. When she told them she had been in Australia for two years, they expressed surprise at her level of education which they believed to have been achieved in only two years[161]

We'll put aside other problems with the cited evidence and focus on this one: in our view it is deeply problematic to cite evidence of what children say. This is because children are, rightly, recognised in law as having

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160 Mr Howard's remarks concerning SIEV 4 were 'I don't want in Australia people who would throw their own children into the sea. I don't.': samplenukes, 'John Howard Children Overboard…remember this?' *YouTube* (online), 23 November 2007 <https://www.youtube.com/watch?v=E3WJ10xGkas>. It was later found that those aboard SIEV 4 did not throw children into the sea: see Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, *Report – Select Committee for an inquiry into a certain maritime incident* (2002) xxiii-iv, chs 3-6. However, despite being wrong factually, Mr Howard's comments were nevertheless made in the context of a public debate about illegal immigration, and expressed an opinion, not about any particular race, ethnicity or nationality, but about the type of person who should not be admitted into Australia as an immigrant or as a refugee.

161 This is a selection of quotes from Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 329, 330.

diminished capacity. They are prone to say and do things that adults would not. Further, it cannot safely be assumed that what children say reflect what their parents have taught them or broader societal trends. Finally, such evidence is of minimal value when justifying laws that would restrict the freedom of every person in the relevant jurisdiction (be it Tasmania, or Australia). As regards children specifically, the better response is to educate them in the context of the particular environment in which the offending remark was made. So, for example, if the offending remark is made at school, then the school is best placed to handle it. This alternative is faster and more productive than bringing the child before the Tribunal.

Sixth, it is no answer to say that the quoted statements reflect the 'lived experience' of those saying them and thus should be excused from evidential standards that would otherwise apply.[162] 'Lived experience' does not render testimony immune from the infirmities that may attend testimony from any person. It is a conceit – and a dangerous one at that – to assume otherwise.

Seventh, some of the interviewees reported the effects of hate speech as follows:

> To me the saddest thing is [there] not a recognition of the special status of what we add to this country. We don't take away from; we add … but it's always put up there as a negative, that Aboriginals don't add to the fabric of this country, that we don't – and … I think that it is painful … Yes, it does hurt and it strikes at your very being.
>
> When you see the infection of that kind of hate, that's scary stuff.

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162 See ibid 337; see also Katherine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between Harms Occasioned and the Remedies Provided' (2016) 39(2) *UNSW Law Journal* 488, 489, 501, 507.

> We were worried about talking to girls, because it got to the stage where if you were to approach a girl, she could turn around and say, 'Lebanese, they are trying to rape me, go away'… it created paranoia.
>
> The media hate our community. They want South Sudanese to be frustrated and feel as if they are not Australians.
>
> If I'm in a busy train, I wouldn't read my Arabic newpaper, so people would not recognise me as a Middle Eastern.
>
> The media … has reinforced a lot of stereotypes that we're trying to break down.[163]

Gelber and McNamara state that 'The interviews powerfully document the range of harms experienced in public expressions of racist hate speech'.[164] However, Gelber and McNamara are begging the question.[165] That is, they assume these harms result from actions constituting hate speech.[166] However, they do not establish that these actions in fact meet their own (or any other) definition of hate speech.

Further, recalling Sandmann's criticism of Matsuda's work, Gelber and McNamara depend on a virtual cause-effect relationship between word and deed. As to the quoted statements, Gelber and McNamara fail to

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163 This is a selection of quotes from Katherine Gelber and Luke McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 333-5.

164 Ibid 336.

165 To avoid doubt, we use 'beg the question' in its traditional sense, that is, the logical fallacy where one makes an argument using a premise that has not been proved. We do not use it as it is now often used, as suggesting that a given statement 'raises a question'.

166 Gelber and McNamara distinguish between 'constitutive harm' and 'consequential harm; 'Constitutive harm' is the harm caused in the saying of hate speech; and 'consequential' harm caused in the saying of hate speech and 'consequential harm' is the harm resulting from hate speech; ibid 325. Gelber and McNamara further distinguish between face-to-face hate speech and hate speech that is genuinely circulated 'such as by the media'; ibid 325-6.

demonstrate the conduct resulted in the adverse effect.[167] Once again, the statements concerning the effect of the conduct (whatever that conduct is) are vague, speculative and conclusory.

Finally, Gelber and McNamara take a broad view of harm. They use this view to justify s 18C's broad approach to hate speech.[168] However, a broad approach to harm encounters problems with 'concept creep'. What do we mean by 'concept creep'? Psychology Professor Nick Haslam has noted that a number of psychological concepts have expanded 'horizontally' and 'vertically'.[169] 'Horizontal' expansion means a concept expands to include qualitatively different phenomena.[170] 'Vertical' expansion means a concept expands to include quantitatively different phenomena, and usually less severe phenomena.[171]

For example, in psychology, a traditional view of an event causing *trauma* would be one that would evoke 'intense fear, terror and helplessness'.[172] It would also be 'outside the range of usual human experience'[173] and 'would evoke significant symptoms of distress in

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167 In fairness, there are certain statements in Gelber and McNamara's work that do meet their definition of hate speech and from which harm can be readily inferred. However, and with respect, Gelber and McNamara should have only cited such clear instances and not the more questionable instances.

168 Katherine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between Harms Occasioned and the Remedies Provided' (2016) 39(2) *UNSW Law Journal* 488, 506-7.

169 Nick Haslam, 'Concept Creep: Psychology's Expanding Concepts of Harm and Pathology' (20016) 27(1) *Psychological Inquiry* 1, 2.

170 Ibid.

171 Ibid.

172 American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (American Psychiatric Association, 3rd revised ed, 1987) 250 cited in Nick Haslam, 'Concept Creep: Psychology's Expanding Concepts of Harm and Pathology' (2016) 27(1) *Psychological Inquiry* 1, 6.

173 American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (American Psychiatric Association, 3rd ed, 1980) 238 cited in Nick Haslam, 'Concept Creep: Psychology's Expanding Concepts of Harm and Pathology' (2016) 27(1) *Psychological Inquiry* 1, 6.

almost everyone'.[174] However, Haslam noted that the definition of trauma had expanded 'vertically downward' so that now:

> A traumatic event need not be a discrete event, need not involve serious threats to life or limb, need not be outside normal experience, need not be likely to create marked distress in almost everyone, and need not even produce marked distress in the traumatized person, who must merely experience it as 'harmful'. Under this definition the concept of trauma is rendered much broader and more subjective than it was even three decades ago.[175]

While noting that expanding certain psychological concepts had beneficial effects,[176] Haslam also noted:

> [A]pplying concepts of abuse, bullying, and trauma to less severe and clearly defined actions and events, and by increasingly including subjective elements into them, concept creep may release a flood of unjustified accusations and litigation, as well as excessive and disproportionate enforcement regimes.[177]

In liberal democracies, John Stuart Mill's 'harm principle'[178] has long been influential in determining when it is appropriate for a government to

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174 American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (American Psychiatric Association, 3rd ed, 1987) 238 cited in Nick Haslam, 'Concept Creep: Psychology's Expanding Concepts of Harm and Pathology' (2016) 27(1) *Psychological Inquiry* 1, 6.

175 Ibid 7.

176 Haslam noted benefits such as 'sensitizing people to harm and suffering': see ibid 14.

177 Ibid. See also Jonathan Haidt and Nick Haslam, 'Campuses are places for open minds – not where debate is closed down', *The Guardian* (online), 10 April 2016 <https://www.theguardian.com/commentisfree/2016/apr/10/students-censorship-safe-places-platforming-free-speech>; Conor Friedersdorf, 'How Americans Became So Sensitive to Harm', *The Atlantic* (online), 19 April 2016 <http://www.theatlantic.com/politics/archive/2016/04/concept-creep/477939/>.

178 The harm principle is stated thus:

> [T]he sole end for which mankind are warranted, individually and collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

make laws. However, Mill formulated this principle when 'harm' did not have the expanded meaning that some would give it today. A government protecting against these expanded harms may undermine its liberal democratic basis. For example, a government may purport to protect people against expanded harms by prohibiting offensive speech. However, doing so may well choke the freedom of expression necessary for effective liberal democratic government.

Likewise, Commonwealth, State or Territory laws purporting to protect against expanded harms may impede communications necessary to Australia's constitutionally-prescribed system of representative and responsible government. Hence, when determining whether or not a law impermissibly infringes the implied freedom of political communication requires assessing the *type* of harm that the law addresses. Laws prohibiting physical harm to people and property are more justifiable than laws prohibiting acts that offend, insult, ridicule or humiliate.

Eighth, and to conclude on Gelber and McNamara, we are *not* saying that racist incidents do not occur in Australia. Nor are we saying that people subject to racism are not adversely affected. As we stated in *No Offence Intended*, we believe that racism must be combatted.[179] We also believe that other forms of bigotry must be combatted. The issue is how best to combat bigotry. Our point remains this: does the harm rise to the level that it justifies restricting the freedom of expression of *every Tasmanian*, even given the alternatives available? In our view, the evidence fails to demonstrate this.

John Stuart Mill, *On Liberty* (Penguin Classics, first published 1859, 1985 ed) 68.

179 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 13-4.

Putting aside Gelber and McNamara' work, we'll be blunt about the concept of 'hate speech' overall. 'Hate speech' is next to useless as an analytic tool or as a descriptor. It is a vague, subjective, emotive term that is frequently used as an *ad hominem* slur in order to stop or forestall an argument. Laws, and courts interpreting the law, should avoid it. However, and regrettably, some courts – perhaps most notably the Canadian Supreme Court in *Whatcott* – have not. *Whatcott's* interpretation of hate speech, while admirably narrow,[180] is simply not how the term 'hate speech' is used in public discourse.[181] 'Hate speech' has become what George Orwell once said of 'fascism': a term that now

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180 *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 497 [44] (Rothstein J). To be clear, *Whatcott's* definition of 'hate speech' include (what it describes as) the 'hallmarks of hate'. In particular, certain groups are blamed for society's problems; that these groups conspire for global control; or plot to destroy Western Civilization: ibid. 'Hate speech' also suggests certain groups engage in unlawful activity, including conduct preying on children; or otherwise suggests that certain groups are less than human: ibid 497-8 [45].

181 So for example, Jonathan Haidt and Nick Haslam recounted the following event at Emory University in Atlanta:

> Students woke up to find that someone had written, in chalk, the words "Trump 2016" on various pavements and walls around campus. "I think it was an act of violence," said one student. "I legitimately feared for my life," said another; "I thought we were having a KKK rally on campus". Dozens of students met the university president that day to demand that he take action to repudiate Trump and to find and punish the perpetrators.

Jonathan Haidt and Nick Haslam, 'Campuses are places for open minds – not where debate is closed down', *The Guardian* (online), 10 April 2016<https://www.theguardian.com/commentisfree/2016/apr/10/students-censorship-safe-places-platforming-free-speech>. To avoid doubt, student groups expressly stated that chalking "Trump 2016" amounted to hate speech: see Susan Svrluga, 'Someone wrote 'Trump 2016' on Emory's campus in chalk. Some students said they no longer feel safe', *The Washington Post* (online), 24 March 2016 <https://www.washingtonpost.com/news/grade-point/wp/2016/03/24/someone-wrote-trump-2016-on-emorys-campus-in-chalk-some-students-said-they-no-longer-feel-safe/>. With due respect to these students, they appear unable or unwilling to grasp the nature of discourse in democracies, or the fact that reasonable minds can differ over such issues as illegal immigration. However, they appear altogether *too* willing to deploy a term that will silence debate.

has no meaning except for signifying 'something not desirable'.[182] We fear that the Canadian Supreme Court in *Whatcott*, while meaning well, has inadvertently lent its prestige to a deeply problematic and increasingly pernicious term.

Issues concerning the term "hate speech" aside, we will return to our analysis of the constitutional validity of s 17(1). Ultimately, for the reasons noted above, that s 17(1) makes unlawful acts that offend, insult, ridicule or humiliate appears greatly disproportionate to the purpose it serves. Hence, these parts od s 17(1) impermissibly infringes the implied freedom of political communication.[183]

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182 George Orwell, 'Politics and the English Language', *George Orwell* (online) <http://www.orwell.ru/library/essays/politics/english/e_polit/>. Orwell noted elsewhere the uses of the word 'fascist':

> It will be seen that, as used, the word 'Fascism' is almost entirely meaningless. In conversation, of course, it is used even more wildly than in print. I have heard it applied to farmers, shopkeepers, Social Credit, corporal punishment, fox-hunting, bull-fighting, the 1922 Committee, the 1941 Committee, Kipling, Gandhi, Chiang Kai-Shek, homosexuality, Priestley's broadcasts, Youth Hostels, astrology, women, dogs and I do not know what else.

Orwell did, however, go on to note, that people did appear to attach an emotional significance to it, saying 'By "Fascism" they mean, roughly speaking, something cruel, unscrupulous, arrogant, obscurantist, anti-liberal and anti-working-class.' However, he then noted 'almost any English person would accept 'bully' as a synonym for 'Fascist'. That is about as near to a definition as this much-abused word has come.': George Orwell, 'What is Fascism', *George Orwell* (online) <http://www.orwell.ru/library/articles/As_I_Please/english/efasc>. As 'fascist' suggests that someone is a bully, 'hate speech' suggests speech that bullies someone. However, also like 'fascist', 'hate speech' has become an emotive, imprecise term deployed in a wide range of circumstances that is frequently (ab)used as an 'argument stopper'. Just as no decent person likes being called a fascist, no decent person likes being called (in effect) a hater.

183 We should note, however, that s 17(1) also makes unlawful acts that intimidate on specified grounds: Act s17(1). As noted above, because intimidation contains an element of threat, making unlawful such acts does not impermissibly infringe the implied freedom of political communication.

V SECTION 55

Section 55 provides:

The provisions of section 17(1) and section 19 do not apply if the person's conduct is –

(a) a fair report of a public act; or

(b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or

(c) a public act done in good faith for –

(i) academic, artistic, scientific or research purposes; or

(ii) any purpose in the public interest.

Section 55 does not remedy those parts of s 17(1) that are constitutional invalidity. Indeed, s 55 contains critical defects which, if anything, compound their constitutional invalidity. Further, these defects raise issues about the constitutional validity of s 55 itself. As presently drafted, s 55 contains the following critical defects:

1. Truth is not an exception to s 17(1).

2. Fair comment is not an exception to s 17(1).

3. It imposes a ‘good faith’ requirement on exceptions.

4. It purports to extend a greater range of free speech protections to certain vocations or ‘classes’.

We now turn to examining these issues.

1 *Truth is not an exception*

This is a fundamental defect in s 55. Any law that directly affects freedom of expression, over the range which s 17(1) covers, *must* have truth as a defence. Truth (or facts, or correct information, or however one conceptualises verity) is absolutely critical to the functioning of any democracy, including Australia's. The ALRC noted the following with respect to the defence of truth in defamation that are also relevant to s 17(1).

> The very fact of self government, of individual responsibility for community affairs, imposes a greater need for freedom of speech. But there is no value in falsehood; intelligent participation in civic affairs depends upon correct information.[184]

Defamation law provides a defence of truth for good reason. A defamatory statement against a person, no matter how demeaning or how hurtful, cannot be remedied if it is true. The same principle should apply to s 17(1). This is especially so given, as noted above, in Australia's political system, discussions about contentious issues involving groups are common.

In *Whatcott*, the Canadian Supreme Court held that the absence of a defence of truth was not fatal to s 14. The crux of Rothstein J's reasoning was as follows:

> As Dickson C.J. stated in *Keegstra*, at p. 763, there is "very little chance that statements *intended to* promote hatred against an identifiable group are true, or that their vision of society will lead to a better world". To the extent that truthful statements are used in a manner or context that exposes a vulnerable group to hatred, their use risks the same potential harmful effects on the vulnerable groups that false statements can provoke. The vulnerable group is no

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184 Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979) 19 [33].

> less worthy of protection because the publisher *has succeeded* in turning true statements into a hateful message. In not providing for a defence of truth, the legislature has said that even truthful statements may be expressed in language or context that exposes a vulnerable group to hatred.[185]

However, with the greatest of respect to Rothstein J and the Canadian Supreme Court, this reasoning contains grave errors. First, Rothstein J applied Dickson CJ's reasoning in *Keegstra*. However, *Keegstra* concerned a law that *did* contain an element of intent to incite hatred.[186] It is one thing to use truth in a manner intended to incite hatred. It is quite another for a tribunal or court to 'deem' a true statement as inciting hatred *despite* the speaker's intentions.

Second, Rothstein's use of this phrase is concerning: 'The vulnerable group is no less worthy of protection because the publisher *has succeeded* in turning true statements into a hateful message.' The phrase 'has succeeded' suggests that the speaker *wanted* to turn a true statement into a hateful message. Again, this suggests an element of intent on the part of the speaker. Once again, with respect to a law like s 14, a speaker may not have intended a truthful statement to expose anyone to hate. Further, it should not be assumed that, because a court has held that a true statement was hateful, the speaker had a malevolent motive.

Third, the logic that Rothstein J employs is problematic. He endorses Dickson CJ's view in *Keegstra* that statements intending to incite hatred have little chance of being true in the first place, or of leading to lead to a

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185 *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 531 [141] (emphasis ours).

186 Section 319(2) of Canada's *Criminal Code* (the provision under scrutiny in *Keegstra*) provides that 'Every one who, by communicating statements, other than by private conversation, *wilfully* promotes hatred against an identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction' (emphasis ours).

better world. Hence, there is little lost in deeming true statements as hateful. However, when applied the operation of s 14, Rothstein J is in effect saying with respect to truth: 'When a court deems a statement to be hateful, the statement is unlikely to be true even if the statement is true.'

In defamation, the defence of truth assists defendants where they did not intend make a defamatory statement, but a court later holds that the statement did in fact expose the plaintiff to hatred, contempt or ridicule by ordinary, reasonable members of society.[187] The law of defamation is perhaps the closest analogue to hate speech laws. Once again, if a person defamed must bear the hurt of a truthful statement, the same applies to a group.[188]

2 *Fair comment is not an exception*

Compounding s 55 problems is the fact that fair comment is not an exception. This is a defect that even s 18D of the RDA does not have.[189]

Fair comment is an important defence in defamation. 'The right of fair comment is one of the fundamental rights of free speech and writing … it is of vital importance to the rule of law on which we depend for our personal freedom'.[190] The scope of what can be considered 'fair' is wide: 'it can be "fair" however exaggerated or even prejudiced be the language of the criticism'.[191]

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187 *Parmiter v Coupland* (1840) 151 ER 340, 352.

188 For further exploration of defamation's comparison with hate speech laws see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 186-9.

189 And there are significant problems with s 18D as regards the implied freedom of political communication. See ibid 159-73.

190 *Lyon v Daily Telegraph* [1943] 1 KB 746, 753 (Scott LJ) quoted in Patrick Milmo and WVH Rogers (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 9th ed, 1998) [12.1].

191 Ibid [12.22].

We should note here that *Lange* examined how defences affect a law's burden on the implied freedom of political communication. In *Lange*, the High Court held that the *Defamation Act 1974* (NSW) ('the NSW Defamation Act') was consistent with the implied freedom of political communication. It noted that the NSW Defamation Act had defences of truth and fair comment in a matter of public interest, fair comment about parliamentary and similar proceedings, and both common law and statutory qualified privilege.[192] The High Court noted, however:

> Without the statutory defence of qualified privilege, it is clear enough that the law of defamation, as it has traditionally been understood in New South Wales, would impose an undue burden on the required freedom of communication under the Constitution.[193]

The High Court further noted that, once the common law was developed to incorporate '*Lange* qualified privilege',[194] the NSW Defamation Act did not unduly burden the implied freedom of political communication.[195]

Section 17(1)'s scope is wider than defamation's, protecting groups as well as individuals. Unlike the NSW Defamation Act[196] examined in *Lange*, it does *not* have truth or fair comment (or, we might add, common law or statutory qualified privilege or *Lange* qualified privilege) as exceptions. Given the High Court's comments that the NSW Defamation Act would have been constitutionally invalid were it not for the range of defences available, there is some precedent for suggesting that s 17(1) is constitutionally invalid.

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192 *Lange* [1997] HCA 25; (1997) 189 CLR 520, 569.

193 Ibid.

194 Which is developed in ibid 571-4.

195 Ibid 575. The High Court went on to note that, even if *Lange* qualified privilege did not apply, the operation of s 22 of the NSW Defamation Act would mean that NSW's defamation law was constitutional.

196 The NSW Defamation Act has now been repealed.

3 *The 'good faith' requirement*

'Good faith' is a vague term. It is used in a number of statutory and general law contexts, but has been considered in the context of anti-discrimination legislation. In *Delaney v Liberal Party of Australia (Tas)*,[197] the Tribunal appeared to endorse the view that good faith 'implies the absence of spite, ill will or other improper motive'.[198]

However, apart from *Delaney*, senior appellate courts in other Australian jurisdictions have considered what 'good faith' means in equivalent legislation. In *Bropho*, the Full Court of the Federal Court considered good faith in the context of s 18D of the RDA.[199] French J noted that a good faith exercise of the exemptions provided in s 18D 'will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict.'[200] In the same case, Lee J was prepared to go further:

> The words 'in good faith' as used in s 18D import a requirement that the person doing the act exercise prudence, caution and diligence, which, in the context of the Act would mean due care to avoid or minimize consequences identified by s 18C.[201]

In *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*,[202] the Victorian Court of Appeal took a different approach. In the context of whether or not an exception applied under s 11 of the Victorian Act, Nettle JA (with whom Neave JA agreed) held that good faith required no

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197 [2008] TASADT 2 ('*Delaney*').
198 Ibid [22].
199 Subsequent mentions of s 18D of the RDA will be to just 'section 18D' or 's 18D' as the case requires.
200 *Bropho* [2004] FCAFC 16; (2004) 135 FCR 105, 131-2 [95] (French J).
201 Ibid 143 [144] (Lee J).
202 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284; (2006) 15 VR 207 ('*Catch the Fire*').

more than 'a "broad subjective assessment" of the defendant's intentions'.[203] Further, good faith would be established where the defendant 'engaged in the conduct with the subjectively honest belief that it was necessary or desirable to achieve the genuine [purpose]'.[204] In *Sunol and Collier (No 2)*,[205] Bathurst CJ of the New South Wales Court of Appeal agreed with Nettle JA's interpretation of good faith.[206]

Hence, a Tasmanian faces a dilemma if they want to speak about a contentious matter involving a person or group that s 17(1) protects. If a complaint went to the Tribunal, would it follow *Delaney*? Or would it follow *Bropho*, which is a very persuasive authority from a senior appellate court? Or would the Tribunal follow *Catch the Fire*, a very persuasive authority from another appellate court? Presently, good faith in *Bropho* requires considerably more of a respondent than the good faith of *Delaney* or *Catch the Fire*. Specifically, '*Bropho* good faith' requires a harm minimisation approach, that is, the respondent must conscientiously endeavour to minimise harm. By contrast, '*Delaney* good faith' requires only that the respondent not be motivated by ill will, spite or improper motive; and '*Catch the Fire* good faith' only that the respondent have the subjective honest belief that their act is necessary or desirable to achieve the excepted purpose. The split in senior appellate authorities over this issue creates considerable uncertainty. What's a Tasmanian to do?

Of course, the High Court would provide authoritative guidance on what constitutes 'good faith' were this issue litigated before it with respect to s 55 or a similar provision. However, three points should be made here.

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203 Ibid 240 [92] (Nettle JA), 262 [197] (Neave JA).

204 Ibid. The purpose Nettle JA was referring to was a religious purpose. It should be noted that the exception under the Victorian Act s 11(1)(b)(i) applies to 'any genuine academic, artistic, religious or scientific purpose'.

205 *Sunol v Collier (No 2)* [2012] NSWCA 44; (2012) 289 ALR 128 ('*Sunol*').

206 Ibid 137 [36]-[40] (Bathurst CJ).

First, the High Court's determination will only be binding with respect to the provision before it. It will be highly persuasive with respect to similar provisions. However, similar provisions may nevertheless have text, origins, purpose, or structure relevantly different to the provision the High Court interprets. Hence, the High Court's interpretation of one provision is not necessarily definitive for all similar provisions. Second, and in any event, it is patently unreasonable to expect people to litigate matters all the way to the High Court to get final determinations on such issues.[207] Third, given the different uses of good faith in legislation,[208] it should be for Parliament to decide what it means when it uses this term in a particular provision. We will return to this last point when we consider below the issue of courts 'reading in' terms to legislation.

4 *Expanded free speech protections for certain 'classes'*

Section 55 presently provides exception to s 17(1) regarding public acts done in good faith for 'academic, artistic, scientific or research purposes'.[209] The problem here is that these exemptions tend to benefit those routinely engaged in such work. Those not so engaged must rely on more uncertain exemptions, such as whether their act is done for 'any purpose in the public interest'.[210] The effect of the law is that certain

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207 Indeed, following Fuller (noted above), it is unreasonable to expect any people to litigate *at any level* in order to determine the meaning of terms. Parliament should provide such meaning when a law is enacted. This not only provides certainty in the law, it also minimises the risk that a matter will be litigated (thereby incurring costs in time and money to all concerned).

208 In *Bropho*, French J noted that the term 'good faith' is used in 154 Commonwealth statutes: *Bropho* [2004] FCAFC 16; (2004) 135 FCR 105, 129 [84] (French J).

209 Act s 55(c)(i).

210 Ibid s 55(c)(ii).

vocations or 'classes' of people enjoy greater free speech protections than those falling outside these classes.[211]

In *No Offence Intended*, we argued that the *Commonwealth Constitution* implies an *equality* of communication about government or political matters (which we refer to below as 'the implied equality of political communication').[212] What follows is a summary of this argument.

First, the implied equality of political communication means that Australian electors are equal concerning (i) the *range of issues* they may discuss concerning government and political matters, and (ii) the *range of language* they may employ when discussing these issues.[213]

Second, the implied equality of political communication arises from the same provisions in the *Commonwealth Constitution* giving rise to the implied freedom of political communication. [214] These sections

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211 Dan Meagher quotes Michael Chesterman in noting that the interpretation of the term 'reasonably' in s 18D is concerned with incivility in style and content, and not so much with racist content itself. This leads to 'a two-tier approach: chilling of blue-collar muck and preservation of upper-class mud': Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32(2) *Federal Law Review* 225, 249 quoting Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000) 226. Meagher goes on to note 'In other words, protection is accorded to racist communications so long as it is made articulately, using scholarly language or socially acceptable conventions': see Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32(2) *Federal Law Review* 225, 249.

212 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 164-9.

213 Ibid 164.

214 *Lange* [1997] HCA 25; (1997) 189 CLR 520, 567. These sections are *Commonwealth Constitution* ss 7, 24, 64 and 128. We also noted that ss 51 and 52 provide for the matters in respect to which the Commonwealth may legislate. This necessarily implies that Australian electors must have an equal range of issues and range of language to discuss these matters: see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 164. We would add that the plenary powers conferred by the various State and Territory constitutions on their respective Parliaments means Australians may communicate about a very wide range of

necessarily imply that, in addition to the freedom to communicate about their representatives and about Commonwealth executive government, Australian electors must have an equal range of political issues they can discuss and an equal range of language to discuss these issues.

In addition, equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by the *Commonwealth Constitution*.[215] In *McCloy,* Gageler J endorsed Harrison Moore's observation that the 'great underlying principle' of the *Commonwealth Constitution* was 'that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power'.[216] The equality of opportunity to participate in the exercise of political sovereignty, plus each person's equal share in political power, further support the implied equality of political communication.

Third, the implied equality of political communication extends beyond Australian electors to others in the Australian community. This is because political matters not only affect Australian electors but those members of the Australian community who cannot vote, such as children, people disqualified from voting, corporations, unions and other entities.[217]

Fourth, the implied equality of political communication does *not* include equality in the *means* by which views may be communicated or the

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issues. Indeed, Australians may speak about *any* matter with respect to which a Parliament may legislate (which is, in effect, anything and everything).

215 *McCloy* [2015] HCA 34, [45] (French CJ, Kiefel, Bell and Keane JJ).

216 Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329 cited in *McCloy* [2015] HCA 34, [110] (Gageler J). See also *McCloy* [2015] HCA 34, [27] (French CJ, Kiefel, Bell and Keane JJ), [219] (Nettle J), [318] (Gordon J).

217 *Lange* [1997] HCA 25; (1997) 189 CLR 520, 571. See also *Unions NSW* [2013] HCA 58; (2013) 252 CLR 530, 551-2 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also 580-1 [145] (Keane J).

capacity to express those views. The means by which Australian electors may broadcast their views, and the capacity to express those views, may differ greatly. However, whatever means adopted or capacity for expression, from the editorial of a broadsheet newspaper to discussion at the pub, the range of issues and range of language that may be employed should be equal.[218]

Fifth, the implied equality of political communication is perhaps already foreshadowed in '*Lange* qualified privilege',[219] which applies to all equally no matter whether they are a natural person or a major media company. Further, the common law[220] defences for defamation apply to all equally,[221] as do the statutory defences to defamation.[222]

Excepting members of Australian Parliaments,[223] there is no reason to grant greater legal protection to members of certain classes when discussing government or political matters affecting Australia.[224] In such matters, the perspectives of electricians, nurses or architects are as valuable as those of artists, academics or scientists. Indeed, each person will have *their own* perspective on government or political matters. Each person should be equal regarding the range of issues they may discuss,

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218 See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 166.

219 *Lange* [1997] HCA 25; (1997) 189 CLR 520, 574.

220 Which, it should be recalled, informs the Commonwealth Constitution: ibid 564.

221 See, for example, *Silkin v Beaverbrook Newspapers* [1958] 1 WLR 743, 746 (Diplock J): 'Who is entitled to comment? The answer to that is "everyone". A newspaper reporter or a newspaper editor has exactly the same rights, neither more or less, than every other citizen'.

222 See, for example, *Defamation Act* 2005 (WA) pt 4 div 2. Australia now has uniform defamation laws in its States and Territories.

223 Members of Australian Parliaments should, as law-makers and the people's representatives, be free to robustly discuss proposed laws. They should be entitled to the highest possible free speech protections while doing so, particularly when they are actually in the parliamentary chamber.

224 See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 167-8.

and the language they may use to discuss these issues.[225] Put another way, unless there is very good reason,[226] either all Australians are bound by the same restriction on freedom of expression, or none of them are.[227]

VI THE PROPOSED REFORMS

The proposed reforms make s 55 *worse*. This is because:

1. It adds 'religious purposes' to the vocations or 'classes' that enjoy a greater range of free speech protections.[228]

2. The proposed reforms to s 64 do not go far enough to protect people in the complaints process.

We will examine these issues in turn. However, as noted above, we will also consider issues arising from inserting a 'reasonableness requirement'.

A *Adding 'religious purposes' as a protected 'class' to s 55*

Adding an additional protected 'class' does not overcome the problems noted above with respect to those classes that s 55 presently covers. If anything, adding a class compounds the problems. In addition, determining what constitutes a 'religious belief'[229] may create further uncertainties about the scope of the law.

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225 For further discussion see ibid 168-9.

226 Such the protection of secrets vital to national security.

227 We would note that if s 17(1)'s prohibition on intimidation is constitutionally valid, then s 55 creates an absurd result. That is, certain classes of Australians may be able to intimidate minorities whereas others would be prohibited. Such a prohibition on intimidation should apply to all Australians equally.

228 Ibid.

229 See, for example, *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* (1943) 67 CLR 116, 124 (Latham CJ) ('*Jehova's Witnesses Case*'; *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983)

B *Section 64*

As noted above, the proposed reforms amend s 64 to require the Commissioner to reject a complaint in certain circumstances.[230] We have two points here. First, the reform is a step in the right direction. The Commissioner should not be able to 'punt' a doubtful case to the Tribunal on basis that an applicant might be able to prove their case. The cost of Tribunal proceedings in time, money and stress is considerable.

However, it is exactly for this reason that we make our second point. There appear to be no consequences to the Commissioner for breaching their obligations under s 64 as amended. This proposed amendment therefore provides cold comfort to a respondent who has had to incur costs in meeting a case that the Commissioner should have dismissed earlier.

Hence, we suggest that, where the Tribunal finds under s 99 of the Act as amended that the Commissioner ought to have dismissed a complaint, then the Commissioner should be liable to pay the costs of all parties to the complaint. This recommendation is similar to that proposed by Tony Morris QC with respect to s 18C.[231]

C *Should a 'reasonableness requirement' be added to s 55?*

Amending s 55 to include a 'reasonableness requirement' would create further difficulties. As with 'good faith', senior appellate courts are split

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154 CLR 120, 136 (Mason ACJ, Brennan J), 150-1 (Murphy J), 173-4 (Wilson and Deane JJ).

230 Bill cl 5.

231 Tony Morris, 'There will never be winners under s 18C as it stands', *The Australian* (online), 24 August 2016 <http://www.theaustralian.com.au/opinion/there-will-never-be-winners-under-section-18c-as-it-stands/news-story/1bacb30956b99217e34116f222196ff2?login=1>.

concerning what 'reasonable' means in similar legislation. In *Bropho*, French J stated the term 'reasonably' means an objective assessment of whether an act bears a 'rational relationship' to a protected activity and whether the act is 'not disproportionate' to what is necessary to carry out the activity.[232] This assessment, however, allows for the possibility that there was more than one way of doing things 'reasonably'.[233] In *Sunol*, it appears that Bathurst CJ (with whom Basten JA concurred) agreed with French J' approach.[234]Allsop P noted that '"reasonably and good faith are sufficiently elastic to encompass "trenchant, robust, passionate, indecorous even rancorous" communications'.[235]

In *Catch the Fire*, Nettle JA adopted a different approach. His Honour held that determining what is reasonable 'must be decided according to whether it would be so regarded by reasonable persons in general judged by the standards of an open and just multicultural society'.[236] Nettle JA elaborated:

> [O]ne is entitled to assume that a fair and just multicultural society is a moderately intelligent society. Its members allow for the possibility that others may be right. Equally, I think, one is entitled to assume that it is a tolerant society. Its members acknowledge that what appears to some as ignorant, misguided or bigoted may sometimes appear to others as inspired. Above all, however, one is entitled to assume that it is a free society and so, therefore, one which insists upon the right of each of its members to seek to persuade others to his or her point of view, even if it is anathema to them. But of course there are limits. Tolerance cuts both ways. Members of a tolerant society are as much entitled to expect tolerance as they are bound to extend it to each other. And, in

232 *Bropho* [2004] FCAFC 16; (2004) 135 FCR 105, 128 [79] (French J).
233 Ibid.
234 *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 138 [41] (Bathurst CJ), 145 [79] (Basten JA).
235 Ibid 143 [71] (Allsop P) (citation omitted).
236 *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 241 [94] (Nettle JA).

> the scheme of human affairs, tolerance can extend each way only so far. When something goes beyond that boundary an open and just multicultural society will perceive it to be intolerable despite its apparent purpose, and so judge it to be unreasonable for the purpose for which it was said.[237]

In Nettle JA's view:

> It is only when what is said is so ill-informed or misconceived or ignorant and so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable.[238]

Once again, what's a Tasmanian to do? Which approach is to be followed? In any event, no matter which approach is followed, there is additional uncertainty. As to '*Bropho* reasonableness', there is considerable uncertainty about what 'reasonably' means when applied to various circumstances. One person's idea of reasonableness may vary substantially with another's, even when a 'reasonable person' test is used. In any event, the freedom of political communication extends to speech that is done *unreasonably and in bad faith*. 'Cheap shots' and 'hits below the belt' are common.[239] As noted above, in political argument all logical and rhetorical weapons are brought to bear on an opponent's position. In such arguments, a person may think they are simply presenting their side of the argument. By contrast, their opponent may think that person is being hyperbolic, disingenuous or tendentious, and hence advancing their purpose in a 'disproportionate' way.[240]

'*Catch the Fire* reasonableness' creates its own uncertainties. Reasonable minds may well differ about whether a particular statement is so ill-

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237 Ibid 241 [96] (Nettle JA) (citation omitted).
238 Ibid 242 (Nettle JA) [98].
239 See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 50.
240 Ibid 162.

informed or misconceived or ignorant as to be regarded as unreasonable in an open and just multicultural society. Further, this test encounters a difficulty we noted in *No Offence Intended*. Specifically, multiculturalism is a longstanding (and largely successful) policy of the Commonwealth government. However, multiculturalism is, nevertheless, *still a policy*.[241] The policy, and the laws and executive actions by which it is implemented, is subject to debate – and to change – in Australia's constitutionally prescribed system of representative and responsible government.

Consequently, any reasonable person tests in legislation affecting the implied freedom of political communication should account only for those things presently 'hard wired' into the *Commonwealth Constitution*. The reasonable person we proposed in *No Offence Intended* was as follows:

> [A] citizen of Australia who is aware that Australia has a constitutionally prescribed system of representative and responsible government and the need to communicate about matters related to politics and government fully, frankly and robustly.[242]

The test we proposed reflects the High Court's observation in *Lange* that 'The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form 'one system of jurisprudence"',[243] and that the Commonwealth Constitution influences, and is influenced by, the common law.[244] The *Commonwealth Constitution* therefore influences the construal of statutes and common law principles affecting the implied freedom of political communication.

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241 Ibid 207.
242 Ibid 224.
243 *Lange* [1997] HCA 25; (1997) 189 CLR 520, 564 (citations omitted).
244 Ibid.

Reasonable person tests affecting the implied freedom of political communication – no matter whether in statute or common law – should be modified so they, as far as possible, do not infringe upon the implied freedom of political communication.

Of course, were the *Commonwealth Constitution* amended to (like Canada's Constitution) include multiculturalism, then it may influence reasonable person tests in the manner Nettle JA described.

Ultimately, however, the proposed 'reasonableness' requirement creates difficulties in a manner similar to the present 'good faith' requirement. Parliament must provide more clarity concerning how the term 'reasonably' is to be interpreted.[245] Otherwise any such requirement creates a real risk of chilling discussion and debate.

VII SECTION 19

Section 19 of the Act is entitled 'Inciting hatred' and presently provides:

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –

(a) the race of the person or any member of the group; or

(b) any disability of the person or any member of the group; or

(c) the sexual orientation or lawful sexual activity of the person or any member of the group; or

245 Bill cl 4.

(d) the religious belief or affiliation or religious activity of the person or any member of the group.[246]

Section 19 appears modelled closely on equivalent provisions of the NSW Act and, in particular, ss 20C[247] and 49ZT[248] of the NSW Act.[249] It is also similar to ss 7(1) and 8(1)[250] of the Victorian Act.[251] It is also worth noting that NSW's racial vilification legislation served as the model for s 18C.[252] Hence, case law relevant to ss 20C, 49ZT, 8(1) and 18C will be referred to in this Part as well as case law concerning s 19. As with s 17(1), we will apply the modified *Lange* test.

A *The burden on the implied freedom of political communication*

Like s 17(1), s 19 burdens the implied freedom of political communication. Section 19 is more tightly drafted than s 17(1), being confined to prohibiting 'public acts'[253] that incite 'hatred', 'serious contempt', and 'severe ridicule'.[254] However, even so drafted, s 19 burdens the implied freedom of political communication in a way that is direct, heavy, and sweeping.

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246 Act s 19.

247 Subsequent mentions of s 20C of the NSW Act will be to just 'section 20C' or 's 20C' as the case requires.

248 Subsequent mentions of s 49ZT of the NSW Act will be to just 'section 49ZT' or 's 49ZT' as the case requires.

249 We should note, however, that unlike s 19, the NSW Act has no provisions for vilification on the grounds of disability, or of religious belief, affiliation or activity.

250 Subsequent mentions of s 8(1) of the Victorian Act will be to just 'section 8(1)' or 's 8(1)' as the case requires.

251 See also *Discrimination Act 1991* (ACT) s 67A; *Anti-Discrimination Act 1991* (Qld) s 124A.

252 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3341 (Michael Lavarch).

253 Act s 3 (definition of public act') provides that 'public act' includes – (a) any form of communication to the public; or (b) any conduct observable by the public; or (c) the distribution or dissemination of any matter to the public

254 Act s 19.

1 *A direct burden*

Similarly, to s 17(1) as noted above, s 19 imposes a direct burden on the implied freedom of political communication as regards race and sexuality. In addition, s 19 imposes a direct burden as regards to religion and disability.

As to religion, the Full Court of the Federal Court noted in *Evans* that 'Religious beliefs and doctrines frequently attract public debate and sometimes have political consequences reflected in government laws and policies'.[255] The political character of religious belief has long been recognised. In the *Jehovah's Witnesses Case Incorporated*,[256] after observing that early Christians, as well as Anabaptists and Jehovah's Witnesses, refused to participate in civil government, Latham CJ went on to observe:

> It cannot be said that beliefs upon such matters founded upon Biblical authority (as understood by those who held them) are not religious in character. Such beliefs are concerned with the relation between man and the God whom he worships, although they are also concerned with the relation between man and the civil government under which he lives. *They are political in character, but they are none the less religious on that account*.[257]

Those whose political positions are informed by their religious views may express those religious/political views and, in turn, have them subject to criticism.

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255 *Evans* [2008] FCAFC 130; (2008) 168 FCR 576, 578 [2] (French, Branson and Stone JJ).

256 [1943] HCA 12; (1943) 67 CLR 116.

257 Ibid 125 (Latham CJ) (emphasis ours). It should be noted that, while he added his own brief reasons, McTiernan J agreed with the Latham CJ's reasons overall: see ibid 156 (McTiernan J).

As to disability, communications about government and political matters may involve discussing the physical or mental capacity of persons directly involved with government. Alternatively, such communications may involve laws or policies affecting the mentally or physically disabled. Of course, it cannot be overlooked that arguments about government or political matters may involve epithets about mental capacity being thrown about freely. For example, it may be said of an advocate of a law, policy, position or idea that they are 'crazy', 'insane', 'bonkers' or 'nuts'. While these descriptors have long been used, to some they may be regarded as ableist slurs.[258]

2 *A heavy burden*

The issues we noted with respect to s 17(1) apply here.

(a) Popular sovereignty

Again, the Australian people as sovereign must be able to discuss any matter that may be the subject of Commonwealth or State legislative or executive action fully, frankly and robustly. This may include discussing matters in a way that incites hate, serious contempt or severe ridicule towards an idea, a position, or even a person or group of people. Such discussion is an inevitable incident of Australia's constitutionally prescribed system of representative and responsible government. As noted above, in this system ideas, positions, or particular persons or groups of people are the subject of (at times) withering public scrutiny.

(b) The general nature of laws and discussions about them

258 For further discussion of about this particular issue see Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69(4) *Modern Law Review* 543, 566-9.

As with s 17(1), s 19 ultimately may involve discussing groups. This entails the same kind of chilling effect as noted with s 17(1).

(c) The uncertainty of the terms used in s 19

The uncertainty of the terms used in s 19 raises serious concerns about its constitutional validity. Presently, s 19 is interpreted as follows:

- It is not necessary to prove that there was an intention to 'incite' or that people were actually incited to hatred, serious contempt or severe ridicule. Rather the test is whether the public act was capable of inciting others to feel hatred or serious contempt or severe ridicule. Merely engaging in conduct that conveys hatred or expresses serious contempt or severe ridicule is not unlawful.

- The words 'hatred', 'contempt' and 'ridicule' are to be given their ordinary meaning noting that the latter two are qualified by the adjectives 'serious' and 'severe' respectively. Thus the public act must be capable of inciting intense dislike or hostility towards a person or group of persons or grave scorn for a person or extreme derision of a person or group of persons. The conduct must be capable of arousing reactions at the extreme end of the scale.

- The aspect of the conduct complained of must be assessed within the context of the entire statement or publication.

- It must be established that the offending public act must incite hatred towards, serious contempt for or severe ridicule of a person or a group of persons *on the ground of* one of the attributes listed in sub-paragraphs (a) - (d) of s19 of the Act. The phrase 'on the ground of' means a 'significant factor', 'a substantially contributing factor' and 'a casually operative effect' or 'an

> operative ground'. There must be a causal connection between the attribute and the feelings of hatred, serious contempt or severe ridicule that are incited by the public act."[259]

We will focus on two particular problems with s 19:

- Does s 19 apply to public acts that *actually* incite, or public acts that *could* incite?
- The meaning of 'hate', 'serious contempt' and 'severe ridicule'

We will now examine each of these problems in turn.

(i) Does s 19 apply to acts that actually *incite, or* could *incite?*

The definition of incite is uncontroversial. The word 'incite', given its ordinary and plain meaning, means '[T]o urge on; stimulate or prompt to action.'[260] Case law has employed a similar definition.[261] However, when used in the context of s 19 an ambiguity appears. Specifically, s 19 provides that 'A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons'. In this context, does 'incite' mean public acts that:

- *Actually* incite hatred, serious contempt or severe ridicule; or
- *Could* incite hatred, serious contempt, or severe ridicule?

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259 *Wood v Gerke* [2007] TASADT 3 [85] ('*Wood*') (emphasis in original).

260 Butler, Susan (ed), *Macquarie Concise Dictionary* (Macquarie Dictionary Publishers, 6th ed, 2013) 750.

261 See, for example, *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77 [23] ('*Kazak*'); *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 211 [13] (Nettle JA); *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 135 [26]-[27] (Bathurst CJ).

Case law suggests the latter interpretation. That is, 'incite' means public acts that *could* incite hatred, serious contempt or severe ridicule. However, the cases that hold this appear to demonstrate a common – and critical – error of law, specifically the failure to account for the principle of legality.

The principle of legality is a principle of statutory interpretation. Under this principle, there is a presumption that Parliament does not intend to invade fundamental rights, freedoms and immunities.[262] This presumption 'can be displaced by *clear* and *specific* provision to the contrary'.[263]

Section 19 indeed invades a fundamental freedom: freedom of expression. As noted above, it is a freedom of constitutional importance. However, s 19's use of 'incite' is neither clear nor specific. As shown above, incite may be interpreted two ways.

Interpreting 'incite' to include public acts that *could* incite hatred, serious contempt and severe ridicule is a far more sweeping intrusion into freedom of expression than interpreting 'incite' to mean public acts that *actually* do these things. Had Parliament wanted 'incite' to have this wider operation, it could have easily included a phrase like 'reasonably

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262 *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1, 17-8 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, 436-7 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309, 329 [21] (Gleeson CJ); *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501, 520 [47] (French CJ); *South Australia v Totani* [2010] HCA 39 [31] (French CJ); *Harrison v Melham* [2008] NSWCA 67 [7] (Spigelman J).

263 *R v Secretary of State to the Home Department; Ex parte Pierson* [1998] AC 539, 587 (Lord Steyn) (emphasis ours).

likely to incite'.[264] However, it did not. Hence, in the absence of such words, the narrow interpretation of 'incite' should be preferred.

It is no answer to say (as certain cases have) that, in criminal law, incitement includes acts that could incite criminal activity. In criminal law, the basis for making incitement unlawful is to prevent others being exhorted to undertake an unlawful activity.[265] Further, the person doing the inciting would be aware that what was being incited was unlawful.[266]

However, hate, serious contempt and severe ridicule – even on the basis of those attributes described in s 19 – are *not* themselves crimes or otherwise unlawful. Rather, they are emotional states. Again, it must be noted that freedom of expression – a freedom with constitutional importance – is being infringed. It is one thing to limit a person's freedom to speak when that person would be aware they are encouraging criminal activity (an assault, a theft, or the like). It is quite another to limit it on the basis that the person may create emotional states that are not themselves unlawful. Further, a person making the public act may not even be aware

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264 A revised s 19 could read 'A person must not engage in a public act reasonably likely to incite hatred …'. The use of 'reasonably likely' is based on s 18C's use of this phrase to cover acts that could offend, insult, humiliate or intimidate: see RDA s 18C(1)(a). Of course, the use of this phrase in 18C creates problems of its own: see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 156-7, 191-2.

265 Hence, in *R v Quail* (1866) 176 ER 914, 915 there was incitement to rob; in *R v Krause* (1902) 18 TLR 238, 247-8 there was incitement to murder; in *R v Assistant Recorder of Kingston-Upon-Hull; Ex parte Morgan* [1969] 2 QB 58, 62 there was incitement to gross indecency with a child; in *R v Dimozantos* (1991) 56 A Crim R 345, 349-50 there was incitement to murder; and in *R v Eade* (2002) 131 A Crim R 390, 401-2 there was incitement to supply drugs. In all cases what was being incited was a criminal offence.

266 This is an application of the principle that ignorance of the law is no excuse. The defendants in the cases cited in the previous footnote would have been aware that the actions being incited were criminal offences.

that their act could create such emotional states.[267] Finally, even if a person was aware that their act may incite such emotional states, the uncertainty concerning the relevant tests used to determine incitement (examined further below) means that they could not confidently predict whether or not their conduct would be held to be incitement.

However, narrowly interpreting 'incite' in s 19 creates problems of its own regarding certainty. It will, of course, be necessary to prove that the public act resulted in someone hating a person or group of people on the ground of the protected attribute, or otherwise holding that person or group of people in serious contempt or severe ridicule. However, the legal liability of a speaker would then depend on the subjective reactions of their audience. This means the operation of this law would be greatly uncertain. People would have great difficulty predicting whether their public act would inspire hatred, serious contempt or severe ridicule in certain members of their audience. Hence, the narrow interpretation of 'incite' is too vague. It would therefore impermissibly infringe the implied freedom of political communication.

Before going further, we would note that the narrow interpretation of s 19 would be saved if s 19 had an intent requirement. Relevant case law has (rightly) held that, as presently drafted, s 19 and similar provisions do *not*

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267 As we noted in *No Offence Intended*, '[i]t It is one thing to attach legal liability on a state of mind that the accused has consciously created, like knowledge or volition. It is another to attach legal liability to an emotion: a state of mind whose origins may not be conscious but visceral. Of course, individuals are responsible for controlling their own emotions. Hence, a law could (but not necessarily *should*) impose liability for expression *manifesting* an emotion. However, it is legitimate to ask whether the law should impose liability on expression that *creates* an emotional response in *other* people.': See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 39 (citation omitted, emphasis in original).

require intent to incite.[268] However, were an intent requirement be included in s 19, then it would sufficiently narrow its scope despite the subjective response of the audience. That is, if someone *intended* to incite hatred, severe contempt or severe ridicule, and the audience (whatever its composition) *was* incited, then a breach could be determined.[269] That said, even if s 19 did expressly include an intent requirement, other issues remain concerning its constitutional validity, such as whether terms 'hate', 'severe contempt' and 'severe ridicule' are sufficiently certain (see below).

This then leaves the alternative, wide interpretation of 'incite', meaning public acts that *could* incite hate, serious contempt or severe ridicule.[270] However, there are significant difficulties with this interpretation. The first is that it, in effect, 'reads words into' s 19. As Lord Mersey observed in *Thompson v Goold & Co*[271] 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.'[272]

The case law concerning s 19 and similarly worded provisions bear out Lord Mersey's observation. In these cases, 'incite' has been taken to mean public acts that:

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268 *Wood* [2007] TASADT 3 [85]; *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 135-6 [30]-[31], 137 [41] (Bathurst CJ), 140 [55] (Allsop P), 145 [79] (Basten JA); *Jones v Trad* [2013] NSWCA 389; (2013) NSWLR 241, 253 [49]-[52] (Ward JA), 270-1 [155] (Emmett JA), 274 [175] (Gleeson JA).

269 This would, of course, require proof of intent (which may require employing a test), and proof of incitement.

270 This interpretation would be open on the principle that a provision should be interpreted so that it is not inconsistent with the *Commonwealth Constitution*: see *Monis* [2013] HCA 4; (2013) 249 CLR 92, 208 [327] (Crennan, Kiefel and Bell JJ) and the cases referred to in this paragraph.

271 [1910] AC 409.

272 Ibid 420 (Lord Mersey).

- Are *capable of* inciting.[273]
- *Could* incite.[274]
- Have a *tendency* to incite.[275]
- Are *likely* to incite.[276]
- *Would* incite.[277]
- That the ordinary reasonable reader *could understand* that he/she is being incited.[278]

These phrases give rise to markedly different 'incitement thresholds'. For example:

- *Would* incite suggests that the public act be near certain to incite.
- *Likely* to incite or *tendency to incite* suggests that the public act have a greater than 50% possibility of inciting.
- *Could* incite or *capable of* inciting suggests that the public act need not have a greater than 50% probability of happening, but nevertheless be a real possibility.
- An ordinary reasonable reader *could understand* that they are being incited suggests that all that is needed is that such a reader have an

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273 *Williams v 'Threewisemonkeys' and Durston* [2015] TASADT 4 [32]. See also *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 254 [154] (Neave JA).
274 *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 135 [28] (Bathurst CJ).
275 *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 255 [160] (Neave JA).
276 Ibid 255 [161] (Neave JA).
277 *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 136 [32] (Bathurst CJ).
278 *Veloskey & Anor v Karagiannakis & Ors* (EOD) [2002] NSWADTAP 18, [28] ('*Veloskey*').

> understanding that they are being incited (despite the possibility that they will be incited).

In *Burns v Laws (No 2)*,[279] the NSW Anti Discrimination Tribunal ('NSW Tribunal') noted that the use of the terms 'capacity' and 'capable' 'have the potential to understate what must be proved'.[280] The NSW Tribunal noted that

> A test that required no more than proof that the relevant public act had the potential or possible effect of urging an ordinary reasonable person to experience one or more of the relevant reactions would in our view be unduly broad.[281]

It stated an alternative test:

> [W]ould the relevant 'public act' have had the 'effect' of inciting, *in the sense of urging or prompting*, a hypothetical "ordinary reasonable person" to experience one or more of the relevant reactions [hatred, serious contempt or severe ridicule] on the [specified ground]?'[282]

Unfortunately, the NSW Tribunal's views appear to have been largely overlooked in favour of the 'unduly broad approach'.

Ultimately, Parliament must determine the standard by which a law is breached. This is especially important in laws that invade a constitutionally important and fundamental freedom, and which may be breached *by the mere act of speaking in public*. For all of s 18C's many faults, at least the Commonwealth Parliament gave the courts some level

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279 [2007] NSWADT 47 ('*Laws*').
280 Ibid [110].
281 Ibid [112].
282 Ibid [111] (emphasis ours). The NSW Tribunal's comments were in relation to s 49ZT, but is applicable to equivalent provisions. See also *Brinkley v Davis Bros Ltd* [2008] TASADT 07 [210].

of guidance by including in s 18C the phrase 'reasonably likely'.[283] Stephen J in *Marshall v Watson*[284] said:

> [I]t is no power of the judicial function to fill gaps disclosed in legislation; as Lord Simonds said in Magor and St. Mellons R.D.C. v. Newport Corporation (1952) AC 189, at p 191, 'If a gap is disclosed, the remedy lies in an amending Act' and not in a 'usurpation of the legislative function under the thin disguise of interpretation'.[285]

However, the uncertainties do not stop at 'reading in' words to s 19 and similar provisions regarding the 'incitement threshold'. Courts have, in turn, created tests based on these words. Hence, with regards to s 19, in determining 'whether the public act *is capable of* inciting others to feel hatred':[286]

> The proper approach is to consider the impact upon an ordinary, reasonable person. The range of people captured by this test includes people who are not immune from susceptibility to incitement but excludes those who hold prejudiced views or are malevolently inclined.[287]

However, and once again, views about this test differ at the senior appellate level. In *Catch the Fire*, Nettle JA stated the test should not use an 'ordinary, reasonable reader' test.[288] Rather, the test should assess 'the effect of [the] conduct on a reasonable member of the class of persons to

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283 Although, once again, there are significant problems with this phrase: Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 156-7, 191-2.

284 [1972] HCA 27; (1972) 124 CLR 640 ('*Marshall*').

285 Ibid 649 (Stephen J).

286 *Wood* [2007] TASADT 3 [85] (emphasis ours). The point of our emphasis is to make clear that the test is being built upon words being 'read into' s 19.

287 Ibid.

288 *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 212 [15] (Nettle JA).

whom the conduct is directed'.[289] That is, the particular audience is to be taken into account.[290]

By contrast, in the same case, Neave JA (with whom Ashley JA agreed) stated that the test should assess 'the effect of the words or conduct on an "ordinary" member of the class to which it is directed, taking into account the circumstances in which the conduct occurs'.[291] Ultimately, the test was 'whether the natural or ordinary effect of the conduct is to incite hatred or other relevant emotions [in an ordinary member of the class to which the conduct is directed] in the circumstances of the case.'[292] In *Sunol*, Bathurst CJ (with whom Allsop P and Basten JA agreed) endorsed the approach of Neave JA and Ashley JA in *Catch the Fire*.[293]

Hence, when assessing whether or not conduct (depending on the authority applied) could/would/is likely to incite, or otherwise is capable of/could be understood as inciting, the effect is judged by either:

- The ordinary, reasonable person; or
- A reasonable member of the class of persons to whom the conduct is directed;[294] or
- An ordinary member of the class to which the conduct is directed.[295]

As regards all three approaches, the effect is also judged in the circumstances of the case.[296]

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289 Ibid 212 [18] (Nettle JA).
290 Ibid 212 [16]-[18] (Nettle JA).
291 Ibid 255 [158] (Neave JA), 249 [132] (Ashley JA).
292 Ibid.
293 *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 136-7 [34] (Bathurst CJ), 140 [55] (Allsop P), 145 [79] (Basten JA).
294 *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207, 212 [18] (Nettle JA).
295 Ibid 249 [132] (Ashley JA), 255 [158] (Neave JA).

We'll no longer ask 'What's a Tasmanian to do?' because, at this point, they've probably concluded that it's safer to just be quiet. But we'll plough on.

There is no certainty as to which approach the Tribunal would follow. Would it follow previous Tribunal decisions, or one of the approaches of senior appellate courts? As with 'good faith', with the 'incitement threshold', and potentially with 'reasonably', there are a number of approaches to the appropriate 'hypothetical person'.

Again, Parliament must determine the 'incitement threshold' and the appropriate 'hypothetical person'. Lest it be thought that this is asking too much of Parliament, recall that, for all its faults, at least s 17(1) provides this:

> A person must not engage in any conduct… in circumstances in which a *reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.*[297]

That Parliament has not provided such guidance for s 19 gives especial force to the remarks of Stephen J, noted above, regarding leaving to courts to 'fill the gaps'. This is because Parliament's failure to provide an 'incitement threshold' has meant that the courts have 'read in' one. Further, courts have then 'read in' a 'hypothetical person' test to determine whether or not the 'incitement threshold' has been met. Again recalling Stephen J's remarks, it appears that gaps in the legislation have resulted in courts (and tribunals) being engaged in (albeit unwittingly) the

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296 Ibid; see also ibid 213 [19] (Nettle JA). This also appears to be the approach when using the ordinary, reasonable person test: see *Kazak* [2000] NSWADT 77 [71], but see *Veloskey* [2002] NSWADTAP 18 [32]-[35].

297 Act 17(1) (emphasis ours).

'usurpation of the legislative function under the thin disguise of interpretation'.[298] Such usurpation, at the very least, is prone to cause uncertainty concerning how the law may be applied in particular circumstances.

However, State Parliaments ultimately having courts develop 'incitement thresholds' and 'hypothetical person' tests may also create an issue under Chapter III of the *Commonwealth Constitution*.[299] As noted above, in *Catch the Fire* and *Sunol*, the Victorian and NSW Courts of Appeal respectively 'read in' words and then based tests on these 'read in' words. This could be taken as an exercise of legislative power that Chapter III courts (as these Courts of Appeal no doubt are) should not be exercising. As was noted in *Western Australia v Commonwealth*:[300]

> Under the Constitution, the Parliament cannot delegate to the Courts the power to make law involving, as that power does, a discretion or, at least, a choice as to what that law should be.[301]

As also noted above, an 'incitement threshold' that must demonstrate a member of the audience is being urged to experience hatred is far different from one that need only demonstrate that a statement is capable of inciting hatred. The latter threshold has a far more limiting effect on freedom of expression than the former. Such determinations are better left to Parliaments.

Overall, we express no firm conclusion on the 'Chapter III issue'. Ultimately, it is the uncertainties generated by Parliaments leaving to courts the task of defining terms that is our principal concern.

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298 *Marshall* [1972] HCA 27; (1972) 124 CLR 640, 649 (Stephen J).
299 The same issue arises for Territory Parliaments.
300 [1995] HCA 47; (1995) 183 CLR 373.
301 Ibid 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

(ii) The meaning of 'hatred', 'serious contempt' and 'severe ridicule'

In *Wood*, the Tribunal held that conduct said to incite hatred, serious contempt and severe ridicule 'must be capable of arousing reactions at the extreme end of the scale'.[302] This is an approach similar to that taken by the Canadian Supreme Court in *Whatcott* to the terms 'hatred' and 'contempt':

> [T]he legislative term "hatred" or "hatred or contempt" is to be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.[303]

However, and once again, senior appellate authorities as well as the practice of Anti-Discrimination Tribunals in other Australian jurisdictions appear to adopt a less strict approach to what constitutes hatred, severe contempt or severe ridicule. In any event, reasonable minds may differ about what constitutes 'mere' dislike, contempt or ridicule on the one hand, and hatred, severe contempt and severe ridicule on the other, even when using a 'reasonable person' test or the like.[304] Even if the test is confined to the 'extreme end of the scale', reasonable minds may differ about what is or is not 'extreme'. Again, this creates an unacceptable amount of uncertainty in the law. People do not know in advance where the line is drawn so they can avoid crossing it. We will illustrate this last point with two examples from case law.

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302 *Wood* [2007] TASADT 3 [85].

303 *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 502 [57] (Rothstein J).

304 As we noted above, there are a number of 'hypothetical person tests' identified in case law.

In *Burns v Dye*,[305] a case concerning homosexual vilification under s 49ZT, the NSW Tribunal recounted an incident as follows:

> Mr Dye, throughout the evening of September 1 1999, kicked Mr Burns' front door and in a loud voice repeatedly abused Mr Burns using offensive names including 'cocksucker', 'faggot cunt' and other abusive names.[306]

The majority of the NSW Tribunal held that this incident did *not* constitute incitement to hatred, serious contempt or severe ridicule, stating:

> [W]e are not comfortably satisfied that this abuse would have incited [hatred, serious contempt or severe ridicule] in third parties, including those not immune from susceptibility to incitement or prejudice. In our view, an observably drunk Mr Dye who, from the evidence available, from outward appearances would not appear to enjoy any position of respect or influence, would be unlikely to influence, urge on or prompt, any witness to this assault to feelings of ill will towards Mr Burns. This is not to suggest that it is necessary to establish that the vilifier commands a position of influence or power over the victim or his/her audience (or potential audience) but rather that in certain situations this may be a relevant consideration.[307]

The majority's view was not shared by fellow NSW Tribunal member Tony Silva, who reasoned:

> I believe use of the words "cocksucker", "faggot cunt", "you're a fucking faggot aren't you", "Faggot Burns come out and talk to me." Etc, especially the first two are of such extreme ridiculing nature that an ordinary reasonable person not immune from susceptibility to incitement nor holding prejudicial view about homosexuals would be incited to serious ridicule. I believe this incitement to serious ridicule could take place independent of whatever unpleasant feeling or even ridicule, they may have for Mr. Dye, the abuser. I believe people react to

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305 [2002] NSWADT 32.

306 Ibid [54]. We note that this incident was one of a number covered in this case.

307 Ibid [65].

> what they see and hear, straightaway and though they may have second thoughts about their feelings later. Being late evening/late night it adds to the incitement to serious ridicule.

Our point is this: members of the NSW Tribunal came to different conclusions about whether the use of vile epithets constituted incitement to hatred, serious contempt or severe ridicule.

In *Burns v Corbett*,[308] a local newspaper, the *Hamilton Spectator*, published a story about Tess Corbett, who was standing as a candidate for Bob Katter's Australia Party. The story referred to a number of issues about which Ms Corbett had commented, including 'the Labor Government's controversial Anti-Discrimination Bill'.[309] The NSW Tribunal then stated:

> Immediately following a quoted statement by Ms Corbett that people 'should be able to discriminate', the following passage then appeared in the article:-
>
> "I don't want gays, lesbians or paedophiles to be working in my kindergarten.
>
> "If you don't like it, go to another kindergarten."
>
> When asked if she considered homosexuals to be in the same category as paedophiles, Ms Corbett replied "yes".
>
> "Paedophiles will be next in line to be recognised in the same way as gays and lesbians and get rights," she said.[310]

In holding that Ms Corbett's comments constituted incitement to hatred, serious contempt or severe ridicule in breach of s 49ZT, the NSW Tribunal reasoned:

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308 [2013] NSWADT 227.
309 Ibid [18].
310 Ibid [19].

> The main consideration underlying these conclusions is that, as Mr Burns pointed out, Ms Corbett encouraged people to regard homosexuals as 'in the same category as' paedophiles. For highly distressing reasons, the Australian public at the present day is being made particularly aware of the serious and long-lasting psychological damage suffered by victims of paedophilia. At any time, and especially at this time, any pronouncement that 'brackets' (for want of a better term) homosexual people with paedophiles is 'capable of', or has the effect of, 'urging or 'spurring on an 'ordinary member of the class to whom it is directed' to treat homosexuals as deserving to be hated or to be regarded with 'serious contempt'. Ms Corbett's claims that these two groups are 'in the same category' and that in due course the latter group will 'be recognised in the same way as' the former group and will 'get rights' are pronouncements of this kind. They do not merely offend or insult: they 'incite' these negative reactions.[311]

Before going further, we wish to make it absolutely clear that we each personally strongly object to equating homosexuality with paedophilia. However, with the greatest of respect to the NSW Tribunal, Ms Corbett's remarks consisted of:

1. A brief statement about who she did not want working at a kindergarten; and

2. A one word reply to a question followed by a brief elaboration.

The 'bracketing' of homosexuals with paedophiles is hardly a new phenomenon, and even today is not uncommon. To a not inconsiderable number of people, homosexuality, paedophilia and bestiality are all abnormal sexualities, and are grouped together as such. Further, Ms Corbett's remarks related to issues of public concern, specifically who should teach children, and to whom rights should be extended. Given all this, along with the brief nature of Ms Corbett's comments, even an

311 Ibid [37].

'ordinary member of the audience' would have difficulty being incited to hatred, severe contempt or ridicule. This is so even if the 'incitement threshold' is a public act 'being capable of' inciting (which is the threshold the NSW Tribunal used in this case).

Overall, however, our point again is this: reasonable minds will differ concerning whether Ms Corbett's comments breached s 49ZT. This is an unacceptable level of uncertainty. As the ALRC noted with respect to defamation law, while the law 'defies simplicity it nonetheless demands it'.[312] The same can be said for 'hate speech' laws.

3 *A sweeping burden*

Again, the issues we noted with respect to s 17(1) apply here. In addition to race and sexuality involving ideas, religion itself concerns ideas concerning spirituality.[313] As to disability, mental infirmities often consist of a conflict between a person's perception of reality (that is, their idea (or ideas) of reality) and actual reality.[314]

B *Is s 19's purpose legitimate?*

Applying the principles of statutory construction noted above, s 19's purpose appears to be to prohibit hatred on the grounds of race, disability, sexual activity or religion, to reduce discrimination, or both. The issue is whether these purposes are legitimate: that is, consistent with Australia's

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312 Australian Law Reform Commission, *Unfair Publication: Defamation and privacy, Report No 11* (1979) 28 [49].

313 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 135.

314 Mark Leary observed that 'virtually every theory of mental health assumes that having an accurate view of reality is a hallmark of psychological adjustment.': Mark R Leary, *The curse of the self: Self-awareness, egotism, and the quality of human life* (Oxford University Press, 2004) 72.

constitutionally prescribed system of representative and responsible government.

We will assume for the purposes of this analysis that prohibiting hatred, serious contempt and severe ridicule on the grounds of race, disability, sexual activity or religion and reducing discrimination are legitimate ends. However, it is beyond the scope of this article to fully explore the issue.[315]

C *Is s 19 reasonably appropriate and adapted to its purpose?*

1 *Suitability*

This requirement is met. As with s 17(1), there is at the very least a minimal rational connection between making unlawful incitement to hatred, serious contempt and severe ridicule and the purpose of prohibiting discrimination.

2 *Necessity*

As with s 17(1), there are alternative measures in existing legislation and in civil society that can address the problems that s 19 addresses.

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315 We noted above that offence, insult, ridicule and humiliation are inevitable incidents of Australia's system of representative and responsible government. A question arises as to whether hatred, serious contempt and severe ridicule are also inevitable incidents. It is not uncommon in our political system for people to hate or hold in serious contempt their political opponents, or to mock them mercilessly. Further, the effect of *Commonwealth Constitution* s 116, which provides for the free exercise of religion – including expressing beliefs about practices that a religion may find abhorrent – may have an effect on the implied freedom of political communication. Further, as we note below, discriminatory laws may be enacted under the *Commonwealth Constitution* and the Australian people must be free to discuss such laws. However, as we noted, a full examination of these issues is beyond the scope of this article.

3 *Adequacy in its balance*

Once again, s 19 purports to restrict the freedom of expression of every person in Tasmania. It is legitimate to ask whether the harm of hate speech justifies such a restriction. For the reasons we gave with respect to s 17(1), the answer with respect to s 19 is no.

Section 19 has an admirable purpose: to prevent racial vilification and reduce discrimination. However, as noted above, s 19's burden on the implied freedom of political communication is direct, heavy and sweeping. There is considerable uncertainty regarding s 19's operation. Section 19 is too vague, and thus impermissibly infringes the implied freedom of political communication.

There are a number of justifications for sections like s 19 that we should address at this stage. First, it is argued that laws like s 19 can prevent 'climates' being created that make people feel unsafe. However, as we noted in *No Offence Intended*:

> [A]rguments justifying restrictions on freedom of expression on the basis that its exercise creates a "climate" where people feel unsafe must be treated with caution. Restricting freedom of expression requires a clear-eyed risk analysis of the perceived threat. What is the source of the perceived threat? Is it a direct threat against an identified person or group of people? Or (at the other end of the spectrum) does the perceived threat stem from someone hearing comments they simply don't like? A person's emotional reaction can be disproportionate to the conduct about which they complain. Care must be taken to ensure that claimed threats are not vague, speculative, exaggerated, or contrived.[316]

316 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 85.

Second, in *Whatcott*, Rothstein J noted that hate speech[317] may reduce the standing of groups in society:

> Hate speech, therefore, rises beyond causing emotional distress to individual group members. It can have a societal impact. If a group of people are considered inferior, subhuman, or lawless, it is easier to justify denying the group and its members equal rights or status. As observed by this Court… the findings in *Keegstra* suggest "that hate speech always denies fundamental rights". As the majority becomes desensitized by the effects of hate speech, the concern is that some members of society will demonstrate their rejection of the vulnerable group through conduct. Hate speech lays the groundwork for later, broad attacks on vulnerable groups. These attacks can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide….[318]

To Rothstein J, the effect of hate speech was relevant to the question of whether a law restricting hate speech was proportional to its objective:

> [T]he focus must be on the likely effect of the hate speech on how individuals external to the group might reconsider the social standing of the group. Ultimately, it is the need to protect the societal standing of vulnerable groups that is the objective of legislation restricting hate speech.[319]

Rothstein J's focus was on the effect of hate speech. That is, hate speech may create a climate where discrimination could occur.

In *No Offence Intended*, we noted that Canada's Constitution has provisions concerning multiculturalism and equality.[320] For example, s 27

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317 Once again, it should be noted that Rothstein J uses "hate speech" in a narrowly confined way: see *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 497-8 [44]-[46] (Rothstein J). We reiterate the overall conceptual problems with "hate speech" that we noted above.

318 Ibid 506-7 [74] (Rothstein J) (citations omitted).

319 Ibid 510 [82] (Rothstein J).

320 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 79.

of Canada's *Charter of Rights of Freedoms* ('Charter') provides that it 'shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians'.[321] Section 15(1) of the Charter provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[322]

There are no provisions equivalent to these in Australia's Constitution. In *No Offence Intended*, we noted that:

> Unlike Canada, there is no need to 'read down' freedom of expression in Australia with reference to constitutionally-prescribed values. Indeed, if anything, the implied freedom of political communication… appears directed to ensuring the free and robust exchange of information concerning government and political matters in order to effect Australia's constitutionally-prescribed system representative and responsible government.[323]

We will now expand on this statement. As we noted above, under the *Commonwealth Constitution*, the Commonwealth Parliament has plenary powers to legislate under its various heads of power. Provided a matter falls under a head of power, the Commonwealth Parliament can pass laws that discriminate on virtually any basis. Commonwealth laws presently discriminate on bases such as age and mental capacity.[324] However, there

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321 Charter s 27. Ibid s 25 also recognises rights and freedoms conferred on aboriginal peoples provided by treaty or land claim agreement.

322 Ibid s 15(1). Ibid s 28 also guarantees rights and freedoms to males and females equally.

323 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 79.

324 See, for example, the *Commonwealth Electoral Act 1918* (Cth) s 93(1)(a) regarding the age qualification for voting; *Criminal Code* (Cth) div 7 regarding legal capacity to commit a crime.

is nothing stopping the Commonwealth Parliament passing laws that discriminate on bases such as race,[325] sex[326] or sexuality.[327] As also noted above, State and Territory Parliaments also have the plenary powers to make laws subject to the *Commonwealth Constitution* and manner and form provisions. Unless so restrained, State and Territory Parliaments may also pass laws that discriminate on bases such as age, mental capacity, race, sex, sexuality and religion.

Given this, and given that the Australian people are sovereign, the implied freedom of political communication extends to matters where Australian Parliaments may pass discriminatory laws. That is, Australians may discuss, and indeed may advocate, discriminatory views, policies and laws. The fact that Australians can do this is relevant to whether s 19 (and similar hate speech laws) impermissibly infringe the implied freedom of political communication.

It is no answer to say that treaties like the *Convention on the Elimination of All Forms of Racial Discrimination* ('Convention') prohibits Australia from passing discriminatory laws. This is because, while Australia is a signatory to these treaties, it remains a sovereign state in the international system. Australia may therefore make laws that (say) breach the Convention, but are nevertheless constitutionally valid and enforceable

325 *Commonwealth Constitution* s 51(xxvi), providing for special laws for people of any race, makes this explicit. Historically, the laws and policies implementing the White Australia Policy can be taken as an example of the Commonwealth Parliament enacting (and the Commonwealth executive enforcing) racially discriminatory laws.

326 For example, the historical restrictions on women serving in certain roles in the military.

327 Ibid s 116 may prohibit laws being passed that discriminate on the basis of religion.

upon Australians.[328] That Australia breaches the Convention by doing this entails no consequence for it other than sanctions from other states in the international system and from international bodies. In any event, even if the Australian government complies with the Convention, the implied freedom of political communication extends to the Australian *people* advocating discriminatory views, policies and laws. By such advocacy, and the democratic processes which the *Commonwealth Constitution* provides, the Australian government may 'change course' on the Convention and other treaties.

To be absolutely clear, we are *not* saying that Australians *should* advocate discriminatory views, policies and laws. We are saying that, given the lawmaking powers of Commonwealth, State and Territory Parliaments and the principles of popular sovereignty, Australians *can* do this. No doubt many will feel uncomfortable that the *Commonwealth Constitution* and State and Territory constitutions allow this. The solution is to amend these constitutions. Ultimately, however, the differences between the Canadian and Australian Constitutions mean that this justification of hate speech laws in *Whatcott* cannot be readily applied to Australia.

Third, in *Whatcott*, Rothstein J noted that hate speech[329] could silence groups affected by it:

> [H]ate propaganda opposes the targeted group's ability to find self-fulfillment by articulating their thoughts and ideas. It impacts on that group's ability to

328 Whatever the effect of international law on the development of the common law or on constitutional interpretation (and we venture no view here), the power to make laws binding on Australians ultimately resides in the Commonwealth Parliament under the *Commonwealth Constitution*. Hence, the Commonwealth Parliament may, by express provision, override the common law and inconsistent international law.

329 Once again, it should be noted that Rothstein J uses 'hate speech' in a narrowly confined way: see *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 497-8 [44]-[46] (Rothstein J).

> respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy. Indeed, a particularly insidious aspect of hate speech is that it acts to cut off any path of reply by the group under attack. It does this not only by attempting to marginalize the group so that their reply will be ignored: it also forces the group to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy.[330]

Rothstein J repeatedly refers to the silencing effect of hate speech.[331] However, while this effect is repeatedly asserted, it is not demonstrated: Rothstein J does not offer any evidence supporting this claim. This is a problem that has been repeated in Australia where, in *Sunol*, Basten J asserted the following without providing evidence:

> Conduct by which one faction monopolises a debate or, by rowdy behaviour, prevents the other faction being heard, burdens political discourse as effectively as a statutory prohibition on speaking. A law which prohibits such conduct may constrain the behaviour of the first faction, but not effectively burden political discourse; on the contrary, it may promote such discourse.[332]

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330 Ibid 507 [75] (Rothstein J) (citation omitted).

331 Ibid; see also ibid 517 [104], 522 [117] (Rothstein J).

332 *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128, 146-7 [86] (Basten JA) (citation omitted). Arguments to the effect that 'regulating' freedom of expression enhances public debate must be treated with extreme caution. While superficially appealing, such arguments encounter the same difficulties with uncertainty as arguments against 'hate speech'. Once again, reasonable minds may differ concerning whether a particular statement was a forthright opinion on the one hand, or a coarse or unseemly statement that detracts from public debate on the other. Forcing a speaker to state their position more politely may in fact rob them of their freedom of expression. As Daniel Ward observed such a position 'ignores the extent to which one's sentiments are inseparable from the manner in which they are expressed 'F**k war' is simply not the same as 'Down with war'': Daniel Ward 'Scepticism, human dignity and the freedom to offend' (2013) 29(3) *Policy* 15, 19 citing *Cohen v California* 403 US 15 (1971). Cass Sunstein has spoken in favour of a regulated "marketplaces of ideas": see Cass Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993) 18-9, 251-2. With respect, Sunstein's arguments do not overcome the difficulties we have noted concerning uncertainty. Indeed, his belief in the

We grant that the silencing effect of hate speech is plausible, and that hate speech no doubt *has* silenced individuals. However, the onus is on those supporting the law that infringes the implied freedom of political communication to establish that the infringement is permissible. Further, with laws like s 19, they must establish that the infringement is permissible even though the law restricts the freedom of expression of *everyone in the jurisdiction*. Repeatedly asserting there is a silencing effect does not overcome the apparent paucity of evidence that this effect happens to a significant extent,[333] let alone to the extent that it justifies universally restricting freedom of expression of everyone in (in s 19's case) Tasmania.[334]

Finally, Canada and Australia are liberal democracies with common law legal traditions. Each has well-developed civil societies. Each also have numerous groups organised by such attributes as race, colour, ethnicity, nationality, sex, sexuality, disability and religion whose purpose is to defend their members' interests and advocate on their behalf.[335] The fact

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capacity of government to effectively regulate freedom of expression demonstrates a naivety only a technocrat could have.

333 This contrasts with the 'chilling effect' of defamation law, for which there is evidence from media outlets: see Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979) 22-3 [37].

334 Rothstein J did note that the Saskatchewan legislature was entitled to make the law based on a 'reasonable apprehension of societal harm as a result of hate speech': see *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 529 [135] (Rothstein J); for Rothstein J's discussion of reasonable apprehension of harm more generally see ibid 526-9 [128]-[135] (Rothstein J). However, once again, the Australian Constitution does not contain the prohibitions on discrimination that are found in the Canadian Constitution. Further, as noted above, care must be taken concerning what constitutes 'hate speech' and harm.

335 *In No Offence Intended*, we noted that a large number of groups participated in AHRC hearings leading up to the publication of the 40th Anniversary Report: see 40th Anniversary Report 55-8 cited in Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 141 fn 522.

that these organisations regularly and unflinchingly engage in public debate counts against the suggestion that minorities are silenced.

Fourth, in *Whatcott*, Rothstein J noted the following:

> The majority in *Keegstra* and *Taylor* reviewed evidence detailing the potential risks of harm from the dissemination of messages of hate, including the 1966 *Report of the Special Committee on Hate Propaganda in Canada*, commonly known as the Cohen Committee. The Cohen Committee wrote at a time when the experiences of fascism in Italy and National Socialism in Germany were in recent memory. Almost 50 years later, I cannot say that those examples have proven to be isolated and unrepeated at our current point in history. One need only look to the former Yugoslavia, Cambodia, Rwanda, Darfur, or Uganda to see more recent examples of attempted cleansing or genocide on the basis of religion, ethnicity or sexual orientation. In terms of the effects of disseminating hateful messages, there is today the added impact of the Internet.[336]

In *No Offence Intended*, we noted the following about comparing Canada to Nazi Germany:

> We'll be blunt: the remarks of the Cohen Committee and Dickson CJ [in *Keegstra*] are astonishingly condescending to Canada's citizenry. They engage in speculation, 'slippery slope' reasoning and a *reductio ad Hitlerum*, all of which are historically suspect when applied to Canada. In the lead-up to the Second World War, with dire economic circumstances and fascism on the rise in Europe and elsewhere, *Canada did not go fascist*. Indeed, Canada, along with other nations with a common law legal tradition, fought to defeat fascism. In addition, after the Second World War the horrific results of fascism were widely known. With that experience, why was it a sound assumption that Canada (of all places) may well go backwards?[337]

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336 *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 505-6 [72] (Rothstein J).

337 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 83-4 (emphasis in original).

Our point is this: there were substantial social, cultural, political and philosophical differences between Canada and Nazi Germany even in the 1930's.[338] Such differences also exist between Canada and the former Yugoslavia, Cambodia, Rwanda, Darfur, and Uganda. It should be noted that Canada's civil 'hate speech' law, s 13 of Canada's *Human Rights Act*, was repealed in November 2014. Since the repeal, Canada has not become a racist hellhole, to the complete surprise of absolutely no one.

Canada and Australia are both liberal democracies with common law legal traditions. As to Australia, it should be noted that, like Canada, it has fought against totalitarian ideologies such as fascism and communism. It should also be noted that, since Federation, Australia has done the following:

- Extended the franchise to women and Aboriginals;
- Amended the *Commonwealth Constitution* so the Commonwealth Parliament could legislate with respect to Aborigines;
- Abolished the White Australia Policy;
- Decriminalised homosexuality in all States and Territories;

338 It appears that social, cultural, political and philosophical differences between Canada and other members of the British Empire on the one hand, and Germany on the other, had been emerging for some time. Mervyn Bendle gives a fascinating account of the ideological dimension behind the First World War. In short, during the 19th century an anti-liberal 'Germanic ideology' had emerged in Germany. This ideology contained a narrative of Germanic supremacy and grievance, and was fundamentally at odds with the British Empire's predominantly liberal philosophy. These differences came to a head in the lead up to the First World War. After the First World War, this 'Germanic ideology' formed the basis of Nazi ideology. See Mervyn F Bendle, 'Beyond Good and Evil: Germany, 1914', *Quadrant* (online), 28 July 2014 <https://quadrant.org.au/magazine/2014/07-08/beyond-good-evil-german-mind-1914/>.

- Enacted a range of anti-discrimination legislation at the State and Commonwealth level;

- Pursued a largely successful policy of multicultural immigration.

Each of these successes were achieved without 'hate speech' legislation.[339] They speak to the strength of the arguments supporting them. They also speak to the political and philosophical ability of the Australian people to debate and enact them. Given this, the claim that 'hate speech' laws are necessary to prevent Australia from sliding into fascism is suspect given the historical evidence. (It is also, well, offensive to the Australian people.)

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339 Indeed, it should be noted that Weimar Germany *did* have 'hate speech' laws (specifically laws against 'insulting religious communities') and prosecuted members of the Nazi Party (including Joseph Goebbels) under them. The Nazis turned their prosecutions to their advantage, painting themselves as political victims: see Brendan O'Neill, 'How a Ban on Hate Speech Helped the Nazis', *The Weekend Australian*, 29 March 2014, 16 cited in Augusto Zimmermann and Lorraine Finlay, 'A Forgotten Freedom: Protecting Freedom of Speech in an Age of Political Correctness' (2014) 14 *Macquarie Law Journal* 185, 191. It also cannot be discounted that passing laws forbidding insulting religious communities encouraged intellectual laziness in Weimar Germany. That is, citizens of Weimar Germany relied on the law to stop extremists like the Nazis, instead of challenging them in debate. As we noted in *No Offence Intended*, one of the advantages of the 'marketplace of ideas' is the *discipline of competition*: That is, the need to respond to criticism and/or other perspectives keeps ideas alive and vital: see Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 81. To give an example of an effective alternative approach, Great Britain's tradition of freedom of expression allowed Nazi ideas to be *ridiculed*: see Mark Steyn, Lights Out: Islam, free speech and the twilight of the west (Stockade Books, 2009) 196. As Steyn noted

> [I]f Adolf Hitler were to return from wherever he is right now, what would he be most steamed about? That in some countries there are laws banning Nazi symbols and making Holocaust denial a crime? No, that wouldn't bother him: that would testify to the force and endurance of his ideas – that 60 years on they're still so potent the state has to suppress them. What would bug him most is that on Broadway and in the West End Mel Brooks is peddling Nazi shtick in *The Producers* and audiences are howling with laughter: ibid 195.

As a final point, we are aware that in *Catch the Fire* and *Sunol*, the Victorian and NSW Courts of Appeal respectively held that the relevant vilification provisions did not impermissibly infringe the implied freedom of political communication.[340] However, these Courts of Appeal considered the issue prior to the development of the modified *Lange* test in *McCloy*. Further, and with the greatest of respect to these Courts of Appeal, they did not consider the following:

1. The principle of legality when interpreting the relevant provision;

2. Whether or not it was permissible for the relevant Tribunal, or Court of Appeal, to 'read in' words to the relevant provision, and then base tests on the words 'read in';

3. The concepts of vagueness or overbreadth (or otherwise issues concerning uncertainty) with respect to the following:

    a. The 'incitement threshold' of the relevant provision;

    b. The 'hypothetical person' test used in the relevant provision;

    c. The terms 'hatred', 'serious contempt' or 'severe ridicule';

    d. What comprises 'good faith'; and

    e. What comprises 'reasonableness'.

4. The effect of the absence of defences such as truth and fair comment on the constitutional validity of the relevant provision.

5. With respect to the issues noted in points 1 to 4:

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340 *Catch the Fire* [2006] VSCA 284; (2006) 15 VR 207; *Sunol* [2012] NSWCA 44; (2012) 289 ALR 128.

a. The direct, heavy and sweeping burden placed on the implied freedom of political communication;

b. Whether alternative legislative and other mechanisms perform the same role as the relevant provision but with less burden on the implied freedom of political communication; and

c. Whether the nature of the harm that the relevant provision addresses rises to the level that it justifies restricting the freedom of expression of every person in the relevant jurisdiction.

VIII SECTION 20

According to section 20(1) '[a] person must not publish or display, or cause or permit to be published or displayed, any sign, notice or advertising matter that promotes, expresses or depicts discrimination or prohibited conduct.'

Essentially, there are two aspects of s 20(1): the first is making unlawful promoting discrimination, the second is making unlawful promoting prohibited conduct. As to the second aspect, assuming that 'prohibited conduct' includes that provided in ss 17(1) and 19, then s 20 encounters the same constitutional difficulties as ss 17(1) and 19.

This leaves the first aspect. Running through the modified *Lange* test briefly, making unlawful the promotion of discrimination burdens the implied freedom of communication. The end of prohibiting

discrimination [341] is an end compatible with Australia's system of representative and responsible government.

However, the first aspect of s 20(1) fails the third step of the modified *Lange* test. Making unlawful promoting, expressing or depicting discrimination is a broad, and vague prohibition. What comprises discrimination? If s 14 of the Act is taken as a guide, then discrimination is treating someone less favourably on the ground of a particular attribute. However, political discussion and debate often involve making unfavourable comparisons on bases such as race, colour, ethnicity, nationality, sexuality or religion. If s 15 of the Act is taken as a guide as to what constitutes indirect discrimination, advocating particular policies may have an indirectly discriminatory effect. For example, advocating laws applying equally to all may be taken as 'indirectly discriminatory' because they affect unequally certain groups identifying by race, colour, ethnicity, nationality, sexuality, gender, or religion.

In any event, and as noted above, Australia's system of representative and responsible government allows for the advocacy of discriminatory views, policies and laws. To prohibit the expression or advocacy of such views, without more, impermissibly infringes the implied freedom of political communication.

IX RECOMMENDED REFORMS

In light of our analysis, we recommend that ss 17(1), 19, 20, and 55 be repealed. In place of these sections, there should be a criminal law provision against the incitement to enmity. This provision has two essential elements. First, that there be intent to incite enmity or violence.

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341 As opposed to prohibiting the *advocacy* of discriminatory views, policies or laws.

Second, that enmity be defined as either hatred or contempt 'creating an imminent danger of violence' against persons or property.[342] The provision could be drafted with respect to not only race and ethnicity but sexuality and other matters covered by s 17(1) and s 19.

The reform we suggest applies to a narrower range of language. However, we suggest that this reform would survive constitutional challenge. The proposed provision, combined with other legislative and non-legislative measures already available in Tasmania, will provide sufficient protection against conduct that should properly be the subject of prohibition by law.

X CONCLUSION

Unfortunately, the proposed reforms to Tasmania's 'hate speech' laws appear to be a missed opportunity. They will not fix the vulnerabilities to constitutional challenge presently found in s 17(1), 19, 20, and 55. Further, the proposed reforms pose no real consequences for a Commissioner who refers a complaint to the Tribunal when they should not have. We hope that, if Tasmania does not reform its laws to remove constitutionally invalid restrictions on freedom of expression, another State or Territory will take the initiative.

342 See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016) 214.

SHORT ESSAYS

MAGNA CARTA, LIBERALISM, AND THE HUMAN RIGHTS AGENDA

BENJAMIN ADAMSON*

I INTRODUCTION

> When looking back so far, it is always necessary to beware of that imperialism of the present by which contemporary values and perspectives are imposed upon the past.[1]

As a constitutional text, Magna Carta provides a partial description of a system of government at a particular instance in time.[2] However, no constitutional text can provide a complete picture of a country's laws and system of government.[3] In the case of the United Kingdom and Australia, there are a number of documents and customs that fit together to form the political system and shared constitutional heritage. Magna Carta is one such document.

Magna Carta was a formal grant of liberties by a European medieval monarch, and is now more famous than ever.[4] Its fame however tends to obscure its original context and purpose. Magna Carta expressed

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1 James Spigelman, '*Magna Carta* in its Medieval Context' (Speech delivered at the Banco Court, Supreme Court of New South Wales, Sydney, 22 April 2015).

2 Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2nd ed, 2007) 3.

3 Ibid.

4 Dan Jones, *Magna Carta, The Making and Legacy of the Great Charter* (Head of Zeus, 2014).

recognisably liberal ideas,[5] and is therefore relevant on some level because the political doctrine of liberalism exists in contemporary Australia.[6] Magna Carta's real meaning however has been misused and corrupted.

This essay will link Magna Carta to liberalism and limited government, and argue that these political doctrines are still relevant to contemporary Australia. It will then examine how the human rights movement in Australia has replaced religion with human rights.

II LIBERALISM IN MAGNA CARTA

Part of Magna Carta's relevance to contemporary Australia lies in its recognisably liberal themes.[7] Liberal themes are key to understanding Australia's representative democracy and constitutional monarchy.[8] This is because liberalism is contemporaneous with limited government.[9] That is, the government is not absolute; it is limited by a constitution.[10]

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5 Roger Scruton, *A Dictionary of Political Thought* (Macmillan Press, 2nd ed, 1983) 269.

6 David Clark, 'The Icon of Liberty: The Status and Role of *Magna Carta* in Australia and New Zealand Law' (2000) 24 *Melbourne University Law Review* 891.

7 Scruton, above n 5, 269. Liberalism here is used to mean a loose political doctrine encompassing themes such as limited government, belief in the supreme value of the individual (his freedom and his rights), individualism in its metaphysical sense, belief that the individual has 'natural rights' which exist independent of government and advocacy of toleration of religion. Liberalism should be differentiated from libertarianism, which is an even looser term that can be said to be liberation of people from social constraints of traditional institutions, for example those of religion, family, and the customs of social conformity like sexuality.

8 John O'Sullivan, 'Democratising Rights Magna Carta in the Modern World' (2015) 518 *Quadrant Magazine* 67.

9 Scruton, above n 5, 269.

10 Ibid.

Magna Carta was a written deal that outlined the extent to which the monarch could levy taxes without the consent of those being taxed.[11] It is conceded here that in 1215 Magna Carta was simply a narrow compact between king and barons,[12] and its failure meant that Magna Carta was an unsuccessful attempt at curtailment of sovereign power. However, the idea that the liberties of the individual constrain relations between the state and the individual had begun.[13] In 1216 the Magna Carta was reissued but omitted clauses significantly reducing interference on the King.[14] Again, after the failure of a French invasion force in 1217, the King attempted to restore normality.[15] In this instance the King's hand was not forced, with the 1217 Magna Carta resembling something of a statement of good government.[16] This theme continued with the significant 1225 Magna Carta, where the King adopted the Magna Carta so he could wage war, appealing to his Barons to secure what he needed.[17] The result was the final Magna Carta, not forced upon King, as had been the case in the earlier issues, but as the King declared: his concessions were 'spontaneous and [with] good will'.[18]

Importantly, the 1216 and 1217 reissues did not contain the 'security clause', which is arguably the most important clause of the 1215 Magna

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11 Australian Broadcasting Corporation, 'Big Ideas: Democracy and Human Rights', *Radio National*, 15 July 2015 (Professor Paul Pickering).

12 James Spigelman, 'Magna Carta in Its Medieval Context' (2015) 518 *Quadrant Magazine* 56.

13 Justice Susan Crennan, '*Magna Carta*, Common Law Values and the *Constitution*' (2015) 39(1) *Melbourne University Law Review* (advance).

14 Spigelmann, above n 12, 56.

15 Dan Jones, *Magna Carta, The Making and Legacy of the Great Charter* (Head of Zeus, 2014) 94. 1217 also saw the 'Charter of the Forest', which, to differentiate it, gave Magna Carta its name.

16 Spigelmann, above n 12, 56.

17 David Carpenter, *Magna Carta* (Penguin Books, 2015) 419. And the 1225 issue is significant because it was enrolled on the statute books by Edward I in 1297.

18 Ibid.

Carta.[19] Clause 61 seeks to find a way to bind the monarch to his word, and this mechanism goes to the heart of Magna Carta. The community of the realm now possessed the foundation stone of constitutional monarchy: the ability to override the monarch's universal authority. The barons now had licence for civil war should the monarch repudiate.[20]

Another important aspect of the 1225 issue is that it extended the limited liberties seen by the 1215 issue to 'everyone' – free and unfree. So it was 'everyone' who supposedly granted the tax that secured the concessions.[21] Whether the peasants could really be said to have had a stake in 'granting' a tax is debatable, but importantly they were now recognised in it.[22] The failure of the early charters was then on account of coercion. The early charters say that they had been given by the hand of the King, however, the 1225 Magna Carta ends with it saying that it was given by no one in particular.[23] The recognisably liberal ideas in the 1217 and 1225 Magna Carta of limited government, curtailment of power, and forms of representation to guarantee individual rights, had begun.

In response to Stuart tyranny in the 17th century, Sir Edward Coke reinvigorated Magna Carta's relevance and rediscovery as a constitutional document.[24] He expanded the idea of 'liberties' in Magna Carta, to arrive at an idea of individual liberties believed to be under threat from the monarch.[25] Coke put forth that Magna Carta 'was declaratory of the

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19 Ibid. 'Clause' here is used here as it is popularly used, as instigated by Sir Edward Coke. The original text of the Magna Carta however did not have 'clauses' or 'chapters'.

20 Ibid 81.

21 Ibid 421.

22 Ibid.

23 Ibid.

24 Jones, above n 15, 102.

25 Crennan, above n 13, 9.

principal grounds of the fundamental laws of England'.[26] The Bill of Rights was not just loosely modelled on Magna Carta; it sprang out of an age that had close parallels with the 13th century.[27]

British constitutional history holds Magna Carta in an important place. Magna Carta, while inchoate as a standalone document, outlines fundamental political principles and seeded the idea of the liberty of the subject. The *United States Constitution* also relies heavily on Magna Carta.[28] Magna Carta is relevant then, as Australia's *Constitution* draws heavily on both the British constitutional tradition of responsible government, as well as the doctrine of the separation of powers derived from the *United States Constitution*.[29]

III THE HUMAN RIGHTS MOVEMENT ADOPTS MAGNA CARTA AS ITS TOUCHSTONE

A fierce debate abounds in contemporary Australia regarding the establishment of human rights and civil liberties.[30] Magna Carta, or at least the perception of Magna Carta, is used to promulgate and elicit sympathy for various causes.[31] This takes Magna Carta out of context. As a result, there are a number of problems with attributing Magna Carta

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26 Crennan, above n, quoting Edward Coke, *The Second Part of the Institutes of the Laws of England* (W Clarke and Sons, 1817) Proeme.

27 Ibid.

28 See especially James Madison's list of constitutional amendments that effectively limit state power over individuals; the Fifth and Sixth Amendments state that no person should be 'deprived of life, liberty, or property …' and a 'right to a speedy and public trial'.

29 Crennan, above n 13, 10.

30 An example of the establishment is the push for Australia to adopt a Bill of Rights. An example of erosion of civil rights is the mandatory detention practices.

31 Australian Broadcasting Corporation, 'Big Ideas: Democracy and Human Rights', *Radio National*, 15 July 2015 (Dr Tania Colwell); Jennifer Button, 'Celebrating the Origins of the Rule of Law: 800 years of Magna Carta', 73 Advocate Vancouver 341 2015.

as the defining human rights document. The first is that Magna Carta was not solely focused on 'rights'.[32] In particular, the reissues of Magna Carta were more easily attributable to early liberalism and the development of the rule of law. Thus the human rights movement overstates Magna Carta's significance to their numerous causes.[33] Magna Carta ought to be primarily remembered as an attempt to limit the power of the monarch and an important time in the development of liberalistic thought. It ought not to be considered as *the* 'touchstone' for human rights.

A *Magna Carta's Development*

The 13th century charters lacked a political theory to support the concepts in them. For this reason, attributing Magna Carta as the sole foundation of the modern concept of 'human rights', is inaccurate and an overstatement. It was not until the 17th and 18th centuries that rapid changes in political institutions reformulated and restated Magna Carta.[34] John Locke's political writings in the 1680s and 1690s expanded and justified Magna Carta's notions of limited government and liberalism. From this time onwards the political doctrine of liberalism, with its key tenets of limited sovereign incursion and guarantee of individual rights was confirmed in economic, social and political life.[35]

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32 Lord Irvine of Lairg 'The Spirit of Magna Carta Continues to Resonate in Modern Law', (Speech delivered at the Great Hall of Parliament House, Canberra, 14 October 2002).

33 Examples of human rights veiled behind other causes in Australia are same-sex marriages under the veil of marriage equality, and euthanasia (physician-assisted death) and abortion under the veil of individual choice.

34 Scruton, above n 5, 269.

35 Ibid.

Importantly, Locke was able to align constitutional government with individual's 'rights'.[36] He put forth that natural rights – to life, limb, freedom of action and private property – are 'inalienable' and implanted by God in all reasoning beings.[37] On Locke's theory, it is then a matter of reason to perceive these rights independent of social order.

The Magna Carta is said to be a clear statement imparting human rights.[38] Relying solely on Magna Carta, however, overstates the text's significance. Attributing the Magna Carta as being the basis of, or starting point of human rights, ignores important human rights theory. In the rhetoric of human rights, the concept of 'natural rights' (as described above by John Locke) has largely been forgotten or overlooked. The human rights movement fails to distinguish natural law from positive law, such as that laid down by a particular body like a monarch. As Magna Carta was a human creation, and essentially a contract between monarch and barons, it is in essence positive law.

The result is that Magna Carta should only be viewed as part of the contribution to the constitutional history of Australia. Anything else is the imperialism of the present attributing something to Magna Carta that it was never intended to achieve.

B *Magna Carta and Religion*

From colonial law through to the Australian *Constitution's* protection of government involvement in religion, organised religion has played a significant role in Australia. However contemporary Australia is

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36 Scruton, above n 5, 275.

37 Ibid.

38 Interview with Gillian Triggs (Constitution Day 2015 Speakers' Forum: Magna Carta – is it relevant to 21st Century Australian democracy? 9 July 2015).

undergoing a decline in the influence of organised religion,[39] and for some people, human rights now supplants religion.[40] Despite its decline in influence, religion is still important for contemporary Australia. Religion was also important when the *Constitution* was created, with the central importance of God and the Christian faith acknowledged in Magna Carta reflected in the *Constitution*.[41]

A look at the debates surrounding the inception of the Australian *Constitution* show that religion was a key point of the discussion.[42] The result was s 116 that limits the power of the Federal Government in respect to religion. The remainder of the *Australian Constitution* is free of Bill of Rights-style guarantees, however s 116 is one main exception:

> 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 required as a qualification for any office or public trust under the Commonwealth.

The significance of religion in Magna Carta for England and Australia is an important point. As Wayne Martin CJ points out, the impact of Christianity on the Magna Carta is neglected in the rush to acknowledge the more commonly discussed (and perhaps more glamorous) aspects of the great text, that is, the chapters with recognisable legal or human rights

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39 Shimon Cowan 'God, Religious Tradition and the Australian Constitution' (2015) 514 *Quadrant Magazine*, 63.

40 Andrew Heard, *Human Rights: Chimeras in Sheep's Clothing* (1997) Simon Fraser University <http://www.sfu.ca/~aheard/417/util.html>.

41 The *Constitution's* Preamble references an 'Almighty God'.

42 Augusto Zimmermann, 'Constituting a 'Christian Commonwealth': Christian Foundations of Australia's Constitutionalism' (2014) 5 *The Western Australian Jurist* 123, 130.

implications.[43] It may be that the clauses in Magna Carta were directed to the protection of the church's property and money;[44] however, one of Magna Carta's major legacies is the notion that the government cannot discriminate by establishing a religion or imposing religious observance.[45] The reference to keeping the church free in the Magna Carta is therefore relevant to Australia.

The impact for Australia is that the *Constitution* specifically recognizes that the church should be free from governmental influence (s 116). This means that the *Constitution* conveys freedom on Australians to practice any religion free from government interference. It does not limit the church or religion. This is relevant because Magna Carta was in response to an abuse of power, and the recognition of religious freedom in the *Constitution* is a similar restriction on the abuse of power. In a multicultural society such as Australia, this recognition serves two purposes. Firstly, it acknowledges that freedom of religion is a fundamental right and is not subject to Parliament's sovereign power. Secondly, it acknowledges that Australia was, and is, multicultural and that diversity of religion and religious expression is something to be protected.

This is however subject to some qualification. In *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth*[46] it was held that s

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43 The Honourable Wayne Martin AC, Chief Justice of Western Australia, 'The Significance of Magna Carta' (Speech delivered at the St George's Cathedral Evensong, St George's Cathedral, Perth, Sunday 14 June 2015). <http://www.supremecourt.wa.gov.au/_files/Magna_Carta_St_Georges_Cathedral_Evensong_CJ_14_June_2015.pdf>. Examples of more famous sections of Magna Carta are chapters 39 and 40.

44 Carpenter, above n 17, 300.

45 Ratnapala, above n 2, 308.

46 [1943] HCA 12; (1943) 67 CLR 116 (14 June 1943).

116 does not operate where the result would cause a breach of the protection of the community or in the interests of social order.[47]

IV CONCLUSION

Contemporary Australia recognises liberalism as a political theory, with its ideals of limited government, the supreme value of freedom, toleration of religion and the protection of the individual against incursions by government. These are themes that are also found in Magna Carta. Since Magna has been reshaped and reinterpreted in the 800 years since, it is not a clear statement imparting rights on the individual. Claims of a clear link between Magna Carta and the current human rights movement must be met with healthy scepticism and careful evaluation.

Magna Carta is a document with liberal ideals. Its lasting relevance is as a document that contributes to the constitutional history of Australia. It is easy to dismiss Magna Carta as anachronistic, but this would be akin to dismissal of the rich history that contributes to contemporary Australia's *Constitution*. Magna Carta would however have been inchoate had it not been for the developments by Locke and Coke that took the Magna Carta's ideas and developed them into what we now recognise today.

47 Ratnapala, above n 2, 308.

THE MAGNA CARTA AND ITS RELEVANCE TO CONTEMPORARY AUSTRALIA

AMELIA DEVLYN*

I INTRODUCTION

It is a fallacy to say that the *Magna Carta* is of no relevance to contemporary Australia. Some scholars have questioned its relevance and significance, claiming that 'the actual content of *Magna Carta* is now not conducive to awe and reverence. Most of it consists of a lengthy… recital of feudal relationships which… have no relevance to modern government… [and] do not appear to be matters of great constitutional importance.' [1] However, the *Magna Carta* has been praised by legal scholars as the 'cornerstone of the rule of law',[2] and the foundation of the liberties of the individual. [3] It has contributed to constitutional development by establishing an independent judiciary and the concept of a written constitution. The fact that legal scholars and historians are commemorating its 800th anniversary shows that the *Magna Carta* has stood the test of time rather than fading into history, and is still a relevant part of the modern law in Australia.

II HISTORY OF THE MAGNA CARTA

* Amelia Devlyn LLB Student

1 Harry Evans, 'Bad King John and the Australia Constitution: Commemorating the 700th Anniversary of the 1297 Issue of Magna Carta' (1998) 31 *Papers on Parliament* 43, 44-45.

2 Raja Balachandran, 'Magna Carta: Medieval Curiosity or Cornerstone of the Rule of Law?' (2011) 49 *Law Society Journal* 74, 78.

3 David Clark, 'The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law' (2000) 24 *Melbourne University Law Review* 866, 868.

A *Origins*

In order to understand the *Magna Carta's* relevance, it is important to first examine the history of the document and its reception in Australia. The *Magna Carta* came into existence in 1215, as a group of rebellious barons forced King John to sign a negotiated agreement. This agreement, which later became known as the *Magna Carta*, forced John to concede his supreme governmental power, which was instead to be exercised according to custom and law, and asserted the superiority of law and justice.[4] Although King John subsequently repudiated the agreement, versions were reissued by King Henry II and King Edward I, in 1225 and 1297 respectively. The Charter laid dormant for centuries before being resurrected in the 17th Century by Sir Edward Coke, in the revolution against King James I.[5] Cooke upheld the *Magna Carta* as a reflection of the liberties enjoyed by all which had to be respected by the King, and that the King is not an absolute monarch, but also was subject to the law.[6]

B *Reception in Australia*

The *Magna Carta* received into Australia upon settlement in 1788 was the 1297 Charter, as it provided for fundamental liberties which extended to the English colonisers. However, the *Magna Carta's* role as a statute in Australia differs between jurisdictions. For New South Wales, Victoria, Queensland and the Australian Capital Territory, local Imperial Acts legislation has determined which version and provisions of the *Magna Carta* apply.[7] In these jurisdictions, the 1297 version of the *Magna Carta* applies, and of that version, only Chapter 29 remains a part of their

4 Ibid, 229-230.
5 Balachandran, above n 2.
6 Ibid.
7 See s 6 *Imperial Acts Application Act 1969* (NSW); s 8 *Imperial Acts Application Act 1980* (Vic); s 5 *Imperial Acts Application Act 1984* (Qld).

statutory law.[8] In Western Australia, South Australia, Tasmania and the Northern Territory, the applicability of the *Magna Carta* depends upon the jurisdiction's reception of Imperial legislation on a certain date.[9] The result of such Acts is that if British Parliament repealed chapters of the *Magna Carta* prior to the reception date, then only the remaining chapters were received in the jurisdiction.[10] The effect of such legislation is that many of the chapters of the *Magna Carta* have been repealed in Australian jurisdictions, and the New South Wales Law Commission went so far as to say that any inclusion of the *Magna Carta* in New South Wales law was 'chiefly sentimental.'[11] However, much of the *Magna Carta*'s relevance is grounded in the famous Chapter 29 which has not been repealed, and is the document's 'enduring symbolic role.'[12]

III MAGNA CARTA AND THE RULE OF LAW

The rule of law has been broadly defined as:

> [A] principle of governance in which all persons… including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated… it requires… measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[13]

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8 Clark, above n 3, 869-870; Castles, above n 3; Balachandran, above n 2, 76.

9 Balachandran, above n 2, 77.

10 Clark, above n 3, 871.

11 New South Wales Law Reform Commission, *Application of Imperial Acts*, Report No 4 (1967), quoted in Alex Castles 'Now and Then: Australian Meditations on Magna Carta' (1989) 63 *Australian Law Journal* 122, 124.

12 Clark, above n 3, 891.

13 Secretary-General of the United Nations, Kofi Annan in 2004, quoted by Nicholas Cowdery QC, 'Magna Carta: 800 Years Young' (2015) 40 *Australian Bar Review* 101, 103.

Further, the rule of law is said 'to ensure that people are not at the mercy of the momentary will of a ruler or a ruling group, but enjoy stability of life, liberty and property.'[14] The rule of law is proclaimed to have originated in the famous Chapter 29 of the *Magna Carta*, which states:

> No free man shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or in any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.[15]

One basic principle of the rule of law that has come from Chapter 29 as noted by Isaacs J in *Ex parte Walsh and Johnson; Re Yates* is that 'every free man has an inherent individual right to his life, liberty, property and citizenship.'[16] The *Magna Carta* rejected the use of arbitrary power, placed limits on the power of the State, and proclaimed that no one is deemed to be above the law. This forms the basis of the understanding of the rule of law, in line with the definition above. The *Magna Carta* established the understanding of the supremacy of the law and that all are to adhere to the law. This understanding of the *Magna Carta* and the rule of law is of great relevance to Australia today, as it ensured that Australians today are not at the hands of arbitrary power, and that there is equality before the law.

IV MAGNA CARTA AS A CHARTER OF RIGHTS

Many fundamental human rights and liberties, entitled to by all people, have their origins in the *Magna Carta*. Murphy J in *Victoria v*

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14 Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2002) [7].

15 *Magna Carta 1297* (Eng) 25 Edward 1.

16 (1925) 37 CLR 36, 79-80.

Australian Building Construction Employees' and Builders Labourers' Federation cited the *Magna Carta* as one of the 'great principles of human rights.'[17] Further, Heydon J in *Momcilovic v The Queen* listed a number of fundamental rights and freedoms which he purported can be traced back to the *Magna Carta*; such as procedural fairness, the right of access to the courts, the right to a fair trial, open justice, freedom of speech, the liberty of the individual and freedom from arbitrary arrest.[18] Such liberties are not gifts of the King or the State, but freedoms people hold prior to the State and which cannot be taken away, and have been acknowledged as 'a collection of principles [and] a source of overriding constitutional standards.' [19] Kirby J in *Newcrest Mining (WA) v Commonwealth* further acknowledged the *Magna Carta*'s contribution to human rights on an international scale.[20] He described the roots of Article 17.2 of the Universal Declaration, which prohibits the arbitrary deprivation of property, as tracing back to the *Magna Carta*.[21] The basic rights acknowledged by the *Magna Carta* continue to be enjoyed by Australians today, and reflect the Charter's continuing presence in Australian law and society.

V MAGNA CARTA AND PROCEDURAL FAIRNESS

The *Magna Carta*'s relevance to contemporary Australia is also grounded in its contribution to procedural fairness and access to justice.[22] The

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17 (1982) 152 CLR 25, 109.

18 (2011) 245 CLR 1, 177 cited in Darryl Browne, 'Celebrating 800 Years of Fundamental Rights and Freedoms' (2011) 49 *Law Society Journal* 76, 76-77.

19 Castles, above n 11, 122.

20 (1977) 190 CLR 513.

21 *Newcrest Mining (WA) v Commonwealth* (1997) 190 CLR 513, 658-659, cited in Robert McClelland, 'The Magna Carta' (Speech delivered at the Constitutional Law Conference, Sydney Parliament House, 20 February 2009).

22 See, eg, Lord Irvine, 'The Spirit of the Magna Carta Continues to Resonate in Modern Law' (2003) 119 *Law Quarterly Review* 227, 236.

majority in *Ebner v Official Trustee in Bankruptcy* held that '[f]undamental to the common law system of adversarial trial is that it is conducted by an… impartial tribunal… this…can be traced to *Magna Carta*.'[23] This understanding of being judged before fair and impartial tribunal further stems to the ideas of due process and equal protection before the law; which are deemed to be objectives of court administration,[24] and also credited as having their foundations in the *Magna Carta*.[25] The *Magna Carta*'s proclamation of a right of access to justice has also been the subject of a number of Australian cases; most notably, *Jago v District Court (NSW)*.[26] It was argued that there is a fundamental right to a speedy trial, which comes from the *Magna Carta*. However, the High Court held that such a right does not come from the *Magna Carta* as there is no textual support, but Australians do have a right to a fair trial.[27]

VI MAGNA CARTA, THE JUDICIARY AND THE LEGAL PROFESSION

23 (2011) 205 CLR 337, 343.

24 Michael Gething, 'A Pathway to Excellence for a Court – Part II: Defining Excellence' (2008) 18 *Journal of Judicial Administration* 22, 24; Clark, above n 3, 885. Clark defined due process as the 'entitlement to the due process of the time and place at which the hearing is to be held.'

25 *R v Mackellar* (1977) 137 CLR 461, 483.

26 (1989) 168 CLR 23.

27 *Jago v District Court (NSW)* (1989) 168 CLR 23, 78.

The *Magna Carta* has also been celebrated as the birth of the legal profession and judicial power,[28] and has contributed to the constitutional development of the separation of powers. Chapter 45 of the 1215 *Magna Carta* states that '[w]e will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.' The *Magna Carta* established the judiciary as a separate arm of government, as it ensured that 'the judicial power of the [S]tate should be entrusted exclusively to those with an expert understanding of the law.' [29] The concept of an independent judiciary is an important doctrine of constitutional governments like Australia, as it ensures political liberty and prevents the abuse of power.[30] According to Baron de Montesquieu:

> [T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control… Were it joined to the executive power, the judge might behave with violence and oppression.[31]

The chapter for an independent judiciary in the *Magna Carta* ensured that King John and future monarchs were answerable to the common law of the people. Likewise, in Australia today, Parliament must act in a way that is consistent with the law; as per the rule of law. The legal profession developed from the *Magna Carta* as a profession where the administration of justice was conducted by people who know the law, and

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28 Justice Patrick Keane, 'Magna Carta and Beyond: The Rule of Law 800 Years On' (2015) 35(5) *Proctor* 22, 23.

29 Ibid.

30 Thomas Cooley, *The General Principles of Constitutional Law* (Little Brown and Co, 1898) [22]; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11.

31 Baron de Montesquieu, *The Spirit of the Laws* (1748) Book XI, Chapter VI [152].

who ensured everyone abided by it.[32] The responsibility of applying the law today rests in the hands of those trained in the law, as a result of the *Magna Carta*. In Australia, the federal judiciary was established under s 71 of the *Constitution*, which vested Commonwealth judicial power in the High Court of Australia. Today, Australia's independent federal judiciary serves as a reminder of the *Magna Carta*'s relevance in establishing the legal profession and separate power of the judiciary.

VII MAGNA CARTA AND THE WRITTEN CONSTITUTION

The *Magna Carta*'s continuing relevance to Australia is reflected in the Australian Constitution, which has its roots in the principles of the *Magna Carta*.[33] Isaacs J in *Ex parte Walsh and Johnson; Re Yates* praised the *Magna Carta* as the 'great confirmatory instrument… which is the groundwork of all constitutions.'[34] Its relevance and significance has been noted to be not simply its contents but in 'its contribution to the history of constitutionalism, and… to the development of the concept of a constitution.'[35] The *Magna Carta*, as a written charter, contributed to the development of the concept of the written constitution. A written constitution is enacted as a single body of fundamental and supreme law of a country, and is difficult to change.[36] The *Magna Carta* was forged in a time when most laws were proclaimed orally. As an early example of written law, the *Magna Carta* became 'the great precedent for putting legislation into writing,'[37] and forms the 'first comprehensive statement

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32 Keane, above n 28, 24.

33 See Irvine, above n 22, 236; *Ex parte Reid; Re Lynch; Ex parte Burgess; Re Lynch* (1943) 43 SR (NSW) 207, 223.

34 (1925) 37 CLR 36, 79.

35 Evans, above n 1, 47.

36 Ibid.

37 M. T. Clanchy, *From Memory to Written Record: England 1066-1307* (Harvard University Press, 1979) 211-212, quoted in Irvine, above n 27, 230.

in written form…of the requirements of good governance and of the limits upon the exercise of political power.'[38] Australia's *Constitution*, a written constitution, is arguably descended from the *Magna Carta*. Thus the *Magna Carta* has a significant role in the tradition of writing down a country's fundamental laws and has shaped Australia's constitutional inheritance.

VIII CONCLUSION

The *Magna Carta*'s continuing importance to Australia goes beyond the chapters alone to what the document as a whole represents. It remains today a symbol of the rights of the individual, liberty and the rule of law. It is the origins of the judiciary and has played a role in the development of the constitutional tradition. The human rights, legal system, and Constitution that many Australians take for granted today have their roots in the *Magna Carta*. 800 years on, the *Magna Carta* has persisted and remained relevant to contemporary Australia, and its significance should indeed be commemorated.

[38] James Spigelman, 'Magna Carta in its Medieval Context' (2015) 89 *Australian Law Journal* 383, 388.

DENYING HUMAN RIGHTS, UPHOLDING THE RULE OF LAW: A CRITIQUE OF JOSEPH RAZ'S APPROACH TO THE RULE OF LAW

MICHAEL MCILWAINE*

I INTRODUCTION

This essay provides a critical analysis of Joseph Raz's formal conception of the rule of law and his provocative statement that:

> [a] non-democratic legal system, based on the denial of human rights, or extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.[1]

It first develops a framework for this analysis centred on differing definitions of 'the rule of law'. Further, it demonstrates that these definitions are borne out of the polarised natural and positive law theories that describe what 'law' is. Building on this framework this essay highlights contradictions in Raz's statement, and his approach in general, which leave it vulnerable for criticism. It further argues that Raz's approach to the rule of law is meaningless, as it does not protect

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1 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 211.

fundamental unalienable individual rights. This essay is somewhat sympathetic to Raz's approach as it argues that it limits judicial activism. Beyond this point, this essay argues strongly in favour of the substantive conception. It concludes by suggesting an approach to the rule of law that can protect fundamental individual rights across varied cultures.

II DEFINITION DEBATE

A *Polarising Statement*

Joseph Raz's well-known, perhaps infamous, statement polarises legal theorists and naturally sparks a debate about the definition of the rule of law. This debate concerns the very core meaning of the concept and not just differing opinions on the margins.[2] On one side, the formalist conception is deeply entrenched in legal positivism and is ultimately concerned with the *law as it is*. Conversely, the substantive conception, linked with natural law theory is concerned with law *as it should be*.[3] Therefore, this debate is primarily driven by a person's perspective of the concept of 'law'.[4]

This essay critically analyses the validity of Raz's statement through the contrasting lenses of the formal and substantive conceptions. Before doing this however, it provides a brief description of each approach.

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2 Jeremy Waldron 'Is the Rule of Law and Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137, 148.

3 Mark Bennett, '"The Rule of Law" Means Literally What it Says: The Rule of Law' (2007) 32 *Australian Journal of Legal Philosophy* 90, 91.

4 Paul Craig, 'Formal and Substantive Conceptions of the rule of law: an Analytical framework' (1997) (Autumn) *Public Law* 467, 487.

B *Basic Concepts of the Rule of Law*

There is no universally accepted definition of the rule of law. This is quite peculiar as it is arguably 'the preeminent legitimating political ideal in the world today, without agreement upon precisely what it means.' [5] However, there is a 'general agreement' that the rule of law includes protecting citizens from unpredictable and arbitrary interference with their vital interests' by other citizens and the government.[6]

C *Formal Conception and Positive Law*

Raz's formal conception of the rule of law is borne out of legal positivism.[7] As such, it focuses on the rules and procedures that are 'inseparable' from the rule of law and pays no attention to the substance of the law.[8] According to Raz, the rule of law is not the 'rule of good law'.[9] Therefore, concepts such as justice, equality and even democracy should be divorced from the rule of law. If this was not the case, Raz argues, the rule of law would lose its function and independence and would no longer be 'law' but a meaningless social philosophy.[10] Therefore, under this approach, the rule of law is viewed as one element of legal system and not the overall picture by which it should be judged.[11]

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5 Brian Tamanaha, On the Rule of Law: History, Politics, Theory (2004) 4 cited in Mark Bennett, '"The Rule of Law" Means Literally What it Says: The Rule of Law' (2007) 32 *Australian Journal of Legal Philosophy* 90, 92.

6 Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 83.

7 Mark Bennett, '"The Rule of Law" Means Literally What it Says: The Rule of Law' (2007) 32 *Australian Journal of Legal Philosophy* 90, 91.

8 Raz, above n 1, 210.

9 Ibid 211.

10 Ibid 211.

11 Ibid 211.

Divorcing the rule of law from moral conceptions highlights that the formal approach is purely instrumental.[12] For example, Raz likened the rule of law to a knife, which of course had no moral value, but could be used effectively for both good and bad purposes.[13] Hence Raz's provocative statement that 'gross violations of human rights' are compatible with the rule of law.[14]

According to Raz, the basic premise of the rule of law is that law should be capable of guiding behaviour.[15] For this to occur, laws must be prospective, open, clear and relatively stable.[16] Other necessary requirements include: an independent judiciary, natural justice, easily accessible courts and a restriction on crime-preventing agencies from perverting the law.[17]

This essay argues, below, that Raz's conception is meaningless as it fails to protect citizens from oppressive and tyrannical regimes. It is merely an empty vessel into which any law, harsh as it may be, can be poured. Further Raz's statement contains inherent contradictions that leave it open to criticism.

D *Substantive Approach and Natural Law*

The substantive conception of the rule of law is linked with natural law theory. This approach, while acknowledging the importance of the rules and formalities in any legal system, seeks to extend the formal conception

12 Robert P George, 'Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition' (2001) 46 *The American Journal of Jurisprudence* 249, 251.
13 Raz, above n 1, 225.
14 Ibid 221.
15 Ibid 213.
16 Ibid 214.
17 Ibid 216–218.

so that it protects individual rights.[18] Simply put, the substantive approach is concerned with what law *ought to be*.[19]

According to this conception a society cannot rely on the validity of laws just because they have been enacted according to proper rules. This would:

> completely … misconceive the *meaning* of the rule of law. …The fact that somebody has full legal authority to act in the way he does gives no answer to the questions whether the law gives him power to act arbitrarily or whether the law prescribes unequivocally how he has to act.[20]

Therefore, this approach has been seen as an attempt to loosen the positivist's grip on legal theory.[21] It recognises that laws must be measured according to a higher, unchangeable and eternal standard. One perspective of natural law theory is that this standard is derived from God and can be found in eternal 'fundamental law[s] of nature'.[22] A further argument concerning this higher standard is that mankind, as creations of God, have an understanding of this standard through their God-given conscience.

As Paul stated,

> For when the Gentiles, which have not the law, do by *nature* the things contained in the law, these, having not the law, are a law unto themselves: Which shew the work of the law *written in their hearts*, their *conscience also*

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18 Craig, above n 4, 1.

19 Friedrick A Hayek, *The Constitution of Liberty* (Chicago University Press, 1960) 206 cited in Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 87.

20 Ibid 87 (emphasis added).

21 Arthur Ripstein (ed) *Ronald Dworkin* (Cambridge University Press, 2007) 57.

22 John Locke, *Second Treatise of Government* (c 1681) Ch 11, s 135 cited in Zimmerman, above n 5, 31.

> *bearing witness*, and their thoughts the mean while accusing or else excusing one another[.][23]

As will be shown, below, this conception is not without opposition. A key criticism is that the concept of 'good law' is subjective and requires someone to draw up criteria for what is right or good law.[24] This will be addressed in the following section.

III CRITICAL ANALYSIS

Using the formal and substantive approaches, the following section critically analyses the validity of Raz's statement.

A *Inherent Contradictions*

It has been shown, above, that Raz's provocative statement is only valid when viewed from the formal perspective. However, even when viewed through the formal lens, aspects of Raz's approach appear inherently contradictory. For example, Raz states that a key virtue of the rule of law is to protect individual freedom.[25] However, he appears to be at pains to stress that this 'freedom' is limited. It only includes an individual's ability to predict their future environment based on their knowledge of prospective, clear, open and relatively stable laws.[26] It does not offer any protection against a government implementing oppressive laws, even slavery.[27] Indeed, this system is 'compatible with gross violations of human rights.'[28]

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23 *Holy Bible* (King James Version) Romans 2:14–15 (emphasis added).
24 Lord Bingham, 'The Rule of Law' (2007) 66 (1) *The Cambridge Law Journal* 67, 76–77.
25 Raz, above n 1, 220.
26 Ibid.
27 Ibid 221.
28 Ibid 220–221.

Raz goes further to state that a legal system that does not afford its citizens this predictability offends human dignity as it breeds the evils of uncertainty and frustrated expectations.[29] It seems perplexing and contradictory that a legal system would speak of 'human dignity' while simultaneously acknowledging that gross violations of human rights are permitted. Further, it seems absurd, for example, that a country with institutionalised child slavery would be held to respect human dignity as long as the servitude laws where prospective, clear, open and relatively stable while a country that protects human rights but has rather complicated[30] taxation laws would not.

Another contradiction in Raz's conception is that it addresses concepts such as human dignity, autonomy and individual freedom while claiming to be completely divorced from moral elements. Based on this point Trevor Allan argues that Raz's approach is actually 'based upon substantive foundations.'[31] This contradiction strikes at the heart of Raz's approach.

Adding to the contradictions above, Raz's provocative statement describes a totalitarian regime that would be compatible with the rule of law. As mentioned above, a key element of this approach is an independent judiciary, structurally free from political influence and that operates according to law.[32] However, experience shows that judicial independence 'does not fit with the classic understanding of authoritarianism.'[33] For example, in Nazi Germany, judicial

29 Ibid 222.

30 For a discussion on complicated law in a democratic society see Bingham, above n 24, 70.

31 Craig, above n 4, 9.

32 Raz, above n 7, 219.

33 Peter H Solomon Jr, 'Courts and Judges in Authoritarian Regimes' (2007) 60 *World Politics* 122, 123.

independence was totally absent. Laws were introduced to expel 'non-Aryan' judges and those who opposed National Socialism.[34] The remaining judges became mere indoctrinated conduits of the oppressive regime. This was highlighted in the sentencing of 80 000 citizens to death, without an avenue of appeal, for minor political crimes.[35]

Arguably, short of invalidating the statement, this inconsistency leaves Raz's statement and rule of law conception vulnerable to criticism. This is because it is highly unlikely that an authoritarian regime, that legalises gross violations of human rights, would allow a judiciary to act independently.

B *The rule of law must protect human rights*

Perhaps the biggest flaw in Raz's approach is that it provides no protection of fundamental human rights in an oppressive regime.[36] The substantive approach on the hand, while accepting the formal approach is a good place to start,[37] seeks to extend the conception of rule of law so that it upholds fundamental rights that are 'based on, or derived from the rule of law.'[38]

Adding to the above point, Arthur Chaskalson, former Chief Justice of South Africa, pointed out that the oppressive and discriminatory laws

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34 Kenneth F Ledford, 'Judging German Judges in the Third Reich: Excusing and Confronting the Past' in Alan E Steinweis and Robert D Rachlin (eds), *Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice* (Berghahn Books, 2013) 167.

35 Ibid 169–170.

36 Mark Ellis, 'Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice' (2010) 72 *University of Pittsburg Law Review* 191, 194.

37 Bingham, above n 24, 84.

38 Craig, above n 4, 1.

enacted in the Apartheid era adhered to the formal conception of the rule of law. However, he further stated:

> What was missing was the substantive component of the rule of law. The process by which the laws were made was not fair … And the laws themselves were not fair. They institutionalised discrimination … and failed to protect fundamental rights. Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is "an empty vessel into which any law could be poured".[39]

Bingham echoes this point when referring to the formalist conception.

> A state which savagely repressed or persecutes sections of its people could not in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside were the subject of detailed laws duly enacted and scrupulously observed.[40]

As described in section one, the substantive conception of the rule of law is a manifestation of natural law theory.[41] And natural law generally states that all people are 'created equal' and 'are endowed by their Creator with certain *unalienable* Rights, that among these are Life, Liberty and the pursuit of Happiness.'[42] Therefore, according to this perspective, 'laws' that offend fundamental human rights are not laws at all!

Bingham further argues that the rise in international law and human rights treaties places a responsibility on all governments to acknowledge that

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39 Arthur Clarkson, Remarks at the World Justice Forum, 1 July 2008 cited in Ellis, above n 36, 194–195.

40 Bingham, above n 24, 76.

41 George, above n 12, 249.

42 *United States Declaration of Independence* (emphasis added).

protection of human rights is linked with the rule of law. [43] As an example, he quotes the Preamble to the Universal Declaration of Human Rights 1948 that states, 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.'[44]

Therefore, a rule of law conception that does not include a substantive element to protect human rights is meaningless [45] and contrary to natural law.

C *Limits on Judicial Activism*

Perhaps a positive aspect of Raz's formal conception is that it limits 'judicial activism'.[46] Raz argues that if the virtue of the rule of law is judged by the *substance* of the law then it becomes a meaningless social philosophy lacking any useful function. [47] As discussed above, this concept fits naturally [48] with positive law theory that states that the validity of a law is determined by the rules ('norms') that enacted them and not by their content.[49]

Closely linked to the above point is the positivist's view that the judiciary is in the 'shadow of legislation.' [50] Arguably, the formal approach constrains judges to adjudicate based on what *the law is* and not to import any foreign subjective elements, such as political theory, to determine

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43 Bingham, above n 24, 75.

44 *Universal Declaration of Human Rights* 1948 cited in Bingham, above n 24, 75–76.

45 Ellis, above n 36, 199.

46 See Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 *Quadrant* 9.

47 Raz, above n 1, 211.

48 Craig, above n 4, 7.

49 See Hans Kelson, 'The Pure Theory of Law – Part One' (19340 50 *Law Quarterly Review* 517.

50 Ripstein, above n 21, 62.

what *the law should be*. Sir Owen Dixon concurred with this point stating that judges should not depart from what *the law is* 'in the name of justice or of social necessity or of social convenience.'[51]

A recent example of such a departure can be found in the US Supreme Court's majority decision in *Obergefell v Hodges* ('*Obergefell*'),[52] which ruled that same-sex marriage was a fundamental right based on the fourteenth amendment of the US Constitution. Zimmermann points out that the majority's view in *Obergefell* 'subverts and invalidates laws due to matters of personal opinion.'[53]

The majority's approach in *Obergefell*, and judicial activism in general, is contrary to Raz's formal approach as it leaves people to be 'guided by their guesses as to what the courts are likely to do' and 'these guesses will not be based on the law …'.[54] This is contrary to Dworkin's 'rights conception', a substantive conception of the rule of law, which arguably encourages judicial activism[55] to ensure individual citizens maintain their moral rights.

IV FINAL REMARKS

The analysis above strongly criticised Raz's conception of the rule of law as it completely fails to acknowledge its role in protecting 'unalienable' human rights. In doing so, it advocated for a rule of law conception that recognises that the content of laws should protect fundamental human

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51 Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 *Quadrant* 9, 20.

52 556 US (2015).

53 Augusto Zimmermann, 'Judicial Activism and Arbitrary Control: A Critical Analysis of Obergefell v Hodges 556 US (2015) – The US Supreme Court Same-Sex Marriage Case' (2015) 17 *The University of Notre Dame Australia Law Review* 77, 79.

54 Raz, above n 1, 217.

55 Zimmermann, above n 6, 89.

rights. However, there is an inherent difficulty in this proposition as '[t]here is not … a standard of human rights universally agreed even among civilised nations.'[56] Bingham argues for a relative approach to this problem where the legal lines are drawn around individual rights that are viewed as 'fundamental' in each respective country.[57] This essay however, prefers the slightly different approach of Ellis who optimistically argues for a universal acceptance of 'non-derogable' rights to be protected by the rule of law.[58] Such rights would include: 'the right not to be subject to torture or other cruel, inhumane or degrading treatment or punishment',[59] 'the right to a fair trial',[60] 'the right to freedom of thought, conscience and religion',[61] 'the right to non-discrimination'[62] and 'the right not to be punished disproportionately'.[63]

Ellis' approach however, remains flexible, across cultures, by including 'derogable rights' that might need to be compromised 'in order to respect … cultural values enshrined in individual states.'[64] This flexible approach can be applied across contrasting cultures to ensure that fundamental human rights are protected while rights, on the 'outer-edge'[65], can be adapted, or ignored, according to individual cultural sensitivities.

V CONCLUSION

This essay has shown that Raz's statement is only valid through a formalist perspective borne out of positive law theory. Arguably, this

56 Bingham, above n 24, 76.
57 Ibid 76.
58 Ellis, above n 36, 201.
59 Ibid 202.
60 Ibid 203.
61 Ibid 204.
62 Ibid 205.
63 Ibid 206.
64 Ibid 207.
65 Bingham, above n 24, 77.

conception of the rule of law is meaningless and it does nothing to protect unalienable individual rights derived from the rule of law. This essay has also shown that Raz's provocative statement, and his approach in general, contain inherent contradictions that leave them vulnerable to criticism. Finally, it has shown that the substantive conception of the rule of law can be applied across varied cultures by distinguishing between 'non-derogable' rights that are universally accepted and 'derogable' rights, on the margins, that can be adapted to individual cultures.

SPEECH

MAGNA CARTA: LESS THAN IT SEEMS (CAMPION COLLEGE CENTRE FOR THE STUDY OF WESTERN TRADITION MENZIES HOTEL SYDNEY, 28 NOVEMBER 2015)

JULIAN BURNSIDE AO QC

Magna Carta is mostly a myth, but provides a great example of an enduring truth: that in political matters, mythology matters far more than truth.

Popular history tells us that Magna Carta was sealed on the meadow at Runnymede on 15 June, 1215. So this year, on 15 June - we commemorated 800 years since it was sealed.

First, the document that was sealed on 15 June 1215 was the Articles of the Barons. Magna Carta was based on it and was prepared and engrossed a few days later, some say on 19 June.

Winston Churchill wrote about the signing of Magna Carta in volume 1 of his great History of the English Speaking Peoples:

"On a Monday morning in June, between Staines and Windsor, the barons and Churchmen began to collect on the great meadow at Runnymede. An uneasy hush fell on them from time to time. Many had failed to keep their tryst; and the bold few who had come knew that the King would never forgive this humiliation. He would hunt them down when he could, and the laymen at least were staking their lives in the cause they served. They had arranged a little throne for the King and a tent. The handful of resolute men had drawn up, it seems, a short document on parchment. Their retainers and the groups and squadrons of horsemen in sullen steel kept at some distance and well in the background. For was not armed rebellion against the Crown the supreme feudal crime? Then events followed rapidly. A small cavalcade appeared from the direction of Windsor. Gradually men made out the faces of the King, the Papal Legate, the Archbishop of Canterbury, and several bishops. They dismounted without ceremony. Someone, probably the Archbishop, stated briefly the terms that were suggested. The King declared at once that he agreed. He said the details should be arranged immediately in his chancery. The original "Articles of the Barons" on which Magna Carta is based exist to-day in the British Museum. They were sealed in a quiet, short scene, which has become one of the most famous in our history, on June 15, 1215. Afterwards the King returned to Windsor. Four days later, probably, the Charter itself was engrossed. In future ages it was to be used as the foundation of principles and systems of government of which neither King John nor his nobles dreamed."

Second, in 1752, England switched from the Julian calendar to the Gregorian calendar, to bring the calendar back into synchronisation with the real world. Eleven days simply disappeared. So, while it is true that the Articles of the Barons, later called Magna Carta, was sealed on 15 June 1215, that day is 800 years ago minus 11 days. The date which is exactly 800 years after the signing of the Articles of the barons is actually 26 June this year; The date which is exactly 800 years after the signing of Magna Carta is probably 30 June this year.

But this does not matter: it is the symbolism of the thing that really counts, and I doubt that anyone will think about Magna Carta on 26 June this year. and on 30 June their minds will be focussed on taxes (as Magna Carta was) but they will probably not give Magna Carta a second's thought that day.

King John was the youngest of 5 sons of Henry II. His oldest brother, Richard, was king, but went off to fight the crusades, where he earned his nickname "Lionheart". John's elder brothers William, Henry and Geoffrey died young. Richard died in 1199, and John became king.

Richard and John both incurred huge expenses in war, especially in suppressing rebellion in their French domains in Normandy and Anjou. Both leaned on their nobles to support the expense. John, who had managed to make himself deeply unpopular, met resistance. John made increasing demands for taxes of various sorts, including scutage – money paid to avoid military service – and he sold wardships and heiresses for large sums. Henry II and Richard had done the same, but John's nobles resisted. By May 1215, the barons had occupied London and made a series of demands.

In June 1215, the barons met King John at Runnymede. The Archbishop of Canterbury, Stephen Langton, played an important role in mediating the dispute and eventually the Articles of the Barons were prepared and sealed.

Before it became known as Magna Carta, it was set aside. Two months after the Articles of the Barons were sealed King John, who was not a reliable person, prevailed on Pope Innocent III to declare the Deed invalid. The Pope said it was "not only shameful and base but illegal and unjust." He declared it null and void, and ordered King John not to observe it. This was in August 1215, just 10 weeks after the great symbolic meeting at Runnymede.

The barons were not happy.

John died in October 1216. His son Henry was only 9 years old. Henry's advisors saw that re-issuing the Charter in modified form would help keep the young king in power. So an amended version was issued in 1217, under the title Charter of Liberties. At the same time the Charter of the Forest was issued. The Charter of Liberties was the bigger of the two, and soon became known as the Great Charter: Magna Carta.

When he had come of age, Henry III swore his allegiance to a modified version of Magna Carta. This took place on 11 February 1225, so that is probably the most appropriate date to observe. The 1225 version of Magna Carta more closely resembles the document which has been so venerated for so long.

Perhaps people will celebrate the 800th anniversary of Magna Carta on 11 February 2025, or perhaps on 22 February 2025 to allow for the change in calendars. But probably not.

The 1215 version of Magna Carta includes many provisions which are concerned with taxes. For example:

> (2) If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a `relief', the heir shall have his inheritance on payment of the ancient scale of `relief'.
>
> (12) No `scutage' or `aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable `aid' may be levied. `Aids' from the city of London are to be treated similarly.
>
> (15) In future we will allow no one to levy an `aid' from his free men, except to ransom his person, to make his eldest son a knight, and (once) to marry his eldest daughter. For these purposes only a reasonable `aid' may be levied.
>
> (27) If a free man dies intestate, his movable goods are to be distributed by his next-of-kin and friends, under the supervision of the Church. The rights of his debtors are to be preserved.
>
> (28) No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.
>
> (30) No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent.

And there are plenty of surprises:

(4) The guardian of the land of an heir who is under age shall take from it only reasonable revenues, customary dues, and feudal services. ...

(5) For so long as a guardian has guardianship of such land, he shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land itself. When the heir comes of age, he shall restore the whole land to him, stocked with plough teams and such implements of husbandry as the season demands and the revenues from the land can reasonably bear.

(6) Heirs may be given in marriage, but not to someone of lower social standing. Before a marriage takes place, it shall be' made known to the heir's next-of-kin.

(10) If anyone who has borrowed a sum of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains under age, irrespective of whom he holds his lands. If such a debt falls into the hands of the Crown, it will take nothing except the principal sum specified in the bond.

(33) All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.

> (35) There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russett, and haberject, namely two ells[1] within the selvedges. Weights are to be standardised similarly.

The only part of Magna Carta which is widely remembered (if that is the right word) is found in Articles 39 and 40. :

> (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.
>
> (40) To no one will we sell, to no one deny or delay right or justice.

Together, these became Article 29 of the 1225 version:

> (29) No free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land. To none will we sell, to none will we deny, to none will we delay right or justice.

[1] An ancient unit of measure. The English ell = 45 in.; the Scotish ell = 37·2; the Flemish ell = 27 in.

Considering the mystic significance which is attached to Magna Carta these days (and especially this year) it is interesting to note that Shakespeare, in his play King John, does not mention it. He mentions Stephen Langton, the Archbishop of Canterbury who played a large part in compiling the document, just once, and in passing. He does not mention Runnymede.

So why do we honour it this year, or at all? The short answer is: Sir Edward Coke. And here we embark on a truly remarkable story of a new reality being formed as myth is piled on myth.

Sir Edward Coke entered the English parliament in 1589, during the reign of Queen Elizabeth I. In 1594, he became Attorney-General and still held that role when James VI of Scotland became James I of England in 1603.

Coke stood at the intersection of two great struggles which marked the 17th century in England: The Parliament against the King, and the Church of England against the Church of Rome.

Elizabeth's father, Henry VIII, had famously broken from the Church of Rome because he wanted a divorce. The formation of the Church of England led to increasing oppression of English Catholics. The oppression sharpened during the reign of Elizabeth. Elizabeth died without leaving an heir or any obvious successor. When James VI of Scotland was cautiously chosen as Elizabeth's successor, the oppressed Roman Catholics of England had hopes that James might treat them more leniently. After all, James was married to Anne of Denmark who, although a Protestant, converted to Catholicism.

But these hopes were dashed, and a group of well-educated, pious, Catholic nobles conceived a bold plan to resist the increasing oppression. The opening of James' first Parliament was delayed because the Plague had spread through London. For the opening of the Parliament, the Royal family, the Lords and the Commons would collect together in the great Hall at Westminster. Eventually the date for the opening of Parliament was set for 5 November 1605. But word of the conspiracy got out. The night before Parliament was due to open, the whole Parliament building was searched. In a room immediately below the great hall, a man called John Johnson was discovered. He had 36 barrels of gunpowder: enough to blow the whole place sky-high.

John Johnson was also known as Guy Fawkes.

King James personally authorised the torture of John Johnson, in an attempt to identify the other conspirators. Torture was unlawful then, as it is now. But King James considered that he ruled above the law. He adhered to the theory of the Divine Right of Kings. In this, we see the elemental force which was at play in the Constitutional struggles of the 17th Century. The key question was this: Does the King rule above the law, or is he subject to it?

The trial of the Gunpowder conspirators began on 26 January 1606. Sir Edward Coke, as Attorney-General, prosecuted the case. He won. He was a favourite of King James because, on many occasions, he had supported King James's view that the King ruled above the law. Later in 1606 he was rewarded for his loyalty and good service by being appointed Chief Justice of the Court of Common Pleas.

Coke was an interesting man and a brilliant legal mind. He was born in 1542 and die in 1634.

On the bench, Coke's view seems to have changed. This sometimes happens to judges, to the great irritation of governments. In a number of cases, Coke CJ insisted that the King ruled subject to law. It is a principle we take for granted these days, but in the early 17th century it was hotly contested. He rejected King James' interference with the operation of the Courts. In 1615, the King ordered his judges to take no action in a case "until the King's pleasure is known". Some judges bowed to this. Coke defied the King, saying he would do "what an honest and just judge should do".

The King dismissed him from office in 1616. He re-entered Parliament.

In 1627 (the second year of the reign of Charles I) the King ordered the arrest of Sir Thomas Darnel and four others who had refused to advance a compulsory "loan" to the King. They sought habeas corpus. The jailer answered the suit by saying the five were held "*per speciale mandatum Regis*" [by special order of the King].

Darnel's case in 1627 prompted Coke to draft for Parliament the Petition of Right (1628). The Petition raised, with exquisite politeness, various complaints about the King's conduct, including that:

- he had been ordering people, like Darnel, to be jailed for failing to lend him money;
- he had been billeting soldiers in private houses throughout the country against the wishes of the owners;
- he had circumvented the common law by appointing commissioners to enforce martial laws and those commissioners had been summarily trying and executing "such soldiers or

mariners or other desolate persons joining with them as should commit … (any) outrage or misdemeanour whatsoever …";

- he had been exempting some from the operation of the common law.

The Parliament prayed that the King "would be graciously pleased for the further comfort and safety of your people, to declare … that in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm …".

The Petition of Right reflected Coke's distilled thoughts about English law and politics. In his most famous work, The "Institutes of the Lawes of England", Coke elevated Magna Carta to previously unrecognised significance. He claimed of it that it was the source of all English law, and in particular he claimed that it required that the King rule subject to law, not beyond it. He said that Magna Carta "is such a fellow that he will have no sovereign."

The Petition of Right was Coke's way of creating (he would have said "recognising") the essential features of the English Constitutional framework.

The Petition of Right was adopted by the Parliament but Charles I would not agree to it. Charles I, like John centuries earlier, wanted to continue raising taxes without the inconvenience of Parliament. Like King John, he did it by exacting large sums from his nobles, as he had done in Darnel's case. Again, the nobles were unhappy. The Civil War started in 1642. Charles lost the war and, in 1649, lost his head. Then came Cromwell, Charles II and James II.

James II was a Catholic and was deeply unpopular. His son-in-law, William of Orange, was persuaded to usurp the throne of England. In what became known as the "Glorious Revolution", on 5 November 1688, William landed at Brixham. That year, 5 November turned out worse for James II than it had in 1605 for James I. James was deposed and William and Mary became joint sovereigns in James's place.

But there was a catch. William had agreed in advance to accept the Petition of Right. So the parliament of 1689 adopted the petition of Right and it became the English Bill of Rights. By this path, Sir Edward Coke's views on Magna Carta gained an unassailable place in the fabric of English law.

In form, the Bill of Rights declares itself to be "An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown".

It recites and responds to the vices of James II. Its Preamble starts this way:

> "Whereas the Lords Spiritual and Temporal and Commons assembled at Westminster, lawfully, fully and freely representing all the estates of the people of this realm, did upon the thirteenth day of February in the year of our Lord one thousand six hundred eighty-eight present unto their Majesties, then called and known by the names and style of William and Mary, Prince and Princess of Orange, being present in their proper persons, a certain declaration in writing made by the said Lords and Commons in the words following, viz.:

> Whereas the late King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom ...

And it then declares certain "ancient rights and liberties". The English Bill of Rights does, in some ways, reflect Magna Carta. So:

> Magna Carta (1215) Article 12: No `scutage' or `aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable `aid' may be levied. `Aids' from the city of London are to be treated similarly

> Bill of Rights, clause 4: That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;

And the ideas underlying Article 20 of Magna Carta and clause 10 of the Bill of Rights are similar:

> Magna Carta (1215) Article 20: For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.

> Bill of Rights, clause 10: That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

Beyond this, other parallels can be found but it takes the ingenuity of Sir Edward Coke to make them sound persuasive. For example, Article 61 of Magna Carta of 1215 (which was not repeated in the 1225 version adopted by Henry III) provides for a council of 25 barons to hold the KIng to his promises, and clause 13 of the Bill of Rights requires Parliaments to be held frequently.

But Coke had persuaded a generation of lawyers and historians that the liberties in the Petition of Right, and thus in the Bill of Rights, were recognised in Magna Carta. So the importance of Magna Carta was picked up and sustained by the Bill of Rights.

We do not think about the English Bill of Rights much these days. When we hear about "The Bill of Rights" these days, we automatically think of the United States of America. It is not an accident. The American colonies had been established by the English when they settled Jamestown in 1607. By 1773, things were not going well. The Boston Tea Party took place on 16 December 1773, in protest against having to pay taxes to a distant government in which they had no representative. In 1776 the colonists decided to sever their ties with Britain and on 4 July 1776 they sealed the Declaration of Independence.

In 1789 a Constitution was proposed for the newly independent United States of America. It was a bold, and unprecedented, venture. The idea of a federation of states with local as well as a central government was a novelty back then. The thirteen colonies, anxious about the possible tyranny of a Federal government, put forward 10 amendments to the Constitution. Those amendments are known, in America and across the English-speaking world, as the Bill of Rights. They closely reflected the English Bill of Rights of 1689.

Although it is sometimes thought the US Bill of Rights is a human rights document, it is no such thing. It is no less than a reflection of what is now called the Rule of Law.

The parallels between the English Bill of Rights and the US Bill of Rights are very clear:

English Bill of Rights (1689)	**US Bill of Rights (1791)**
Preamble: By raising and keeping a standing army within this kingdom in time of peace without consent of Parliament, and **quartering soldiers contrary to law**	3 - **No Soldier shall, in time of peace be quartered in any house**, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.
3 - That the commission for **erecting the late Court of Commissioners for Ecclesiastical Causes**, and all other commissions and courts of like nature, are illegal	1 - **No law respecting an establishment of religion, or prohibiting the free exercise thereof**; or abridging the freedom of speech, or of the press; or the

and pernicious;	right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
4 - That **levying money for or to the use of the Crown by pretence of prerogative**, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;	See US constitution Article 1, Section 9 "...**No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law**; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time...."
7 - That the subjects which are Protestants **may have arms for their defence** suitable to their conditions and as allowed by law;	2 - A well regulated Militia, being necessary to the security of a free State, **the right of the people to keep and bear Arms, shall not be infringed**.
10 - That **excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments** inflicted;	8 - **Excessive bail shall not be required**, **nor excessive fines imposed, nor cruel and unusual punishments inflicted**
5 - That **it is the right of the subjects to petition the king**, and	1 - No law respecting an establishment of religion, or

all commitments and prosecutions for such petitioning are illegal;	prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and **to petition the Government for a redress of grievances**.

Two important provisions of the US Bill of Rights reflect Articles 39 and 40 of the 1215 Magna Carta (Article 29 of the 1225 re-issue).

Articles 39 and 40 of the 1215 Magna Carta:

> "(39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land
>
> (40) To no one will we sell, to no one will we refuse or delay right or justice."

> (1225 version, Art (29): No free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land. To none will we sell, to none will we deny, to none will we delay right or justice."

US Bill of Rights

> "6 - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; ... and to have the Assistance of Counsel for his defence.
>
> 7 - ...the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court"

Articles 39 and 40 of Magna Carta are sufficient justification for the document's fame. They have since been taken to stand for the proposition that punishment can only be imposed by a court, that laws apply to all equally according to its terms, and that all people are entitled to have their legal rights judged and declared by a Court. This is more grandly expressed as the Principle of Legality or the Rule of Law.

In Australia, we did not adopt a Bill of Rights in our Federal Constitution, and our Constitutional fathers did not have the same reasons to be anxious about a Federal government as the American colonists had a century earlier. But the High Court of Australia has found in the structure of our Constitution a Principle of Legality which reflects the spirit of Magna Carta as interpreted by Coke.

The Australian Constitution is divided into chapters. The first three chapters create the Parliament, the Executive Government and the Courts respectively. The High Court very early on decided that this gives each arm of government exclusive rights within its own domain. So, for example, only the parliament can exercise legislative power, and only the courts can exercise the judicial power. For present purposes, that means that courts can impose punishment, but the Parliament and the Executive cannot. Parliament can pass a law which says "Doing x is illegal; penalty 5 years jail" but only a court can find that a person has done x, and impose the available punishment.

At least according to Coke, this echoes the provision in Article 39 of Magna Carta that "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals..."

It seems odd, and not a little ironic that, in the year of the 800th anniversary of Magna Carta, we are confronted with a government which is seriously challenging the Rule of Law.

A measure introduced in 2015 authorises detention centre guards to treat detainees, including children, with such force as they think is reasonably necessary. As a retired Victorian Court of Appeal judge said to a Parliamentary enquiry, this would, in theory, allow a guard to beat a detainee to death without the risk of any civil or criminal sanction.

The *Social Services Legislation Amendment Bill* removes financial support for patients with a mental illness if they are charged with an offence which could carry a sentence of 7 years or more. This automatically puts a defendant at a disadvantage when facing a serious charge, and they suffer that disadvantage regardless whether they are innocent or guilty. Punishment without trial.

In late 2015 the Australian Parliament passed legislation which provides that any Australian who goes to fight with the Islamic State should be automatically stripped of their citizenship. The Immigration Minister - a member of the Executive government – has the power to prevent the person's citizenship being forfeited. This inverted measure replaced an earlier proposal that the Minister would have the discretionary power to cancel a person's citizenship. But having a person's citizenship cancelled automatically, without a hearing, and subject to the Minister's unfettered discretion, looks almost the same.

Having your citizenship cancelled looks very much like a punishment: but the Abbott government wants to be able to do it without troubling a Court to see if the relevant facts are proved and the punishment is required by law. And, archaic as it seems, letting the Minister take away a person's citizenship looks very much like outlawing or exiling the person without the judgment of his equals. Punishment without trial.

This is not a political argument: it is an argument about the rule of law and is as serious and important as it was 800 years ago.

It is too late to deny that Magna Carta has developed a level of significance which its authors may not have noticed or intended. If we are true to the spirit which Sir Edward Coke found in it; if we are true to the same spirit which informed the petition of Right and the English Bill of Rights and the American Bill of Rights then we owe it to the past and to the future to resist any attempt by this or any government to punish or outlaw or exile any person, except by the judgment of his equals.

Book Reviews

BOOK REVIEW: IAN HANCOCK, *TOM HUGHES QC: A CAB ON THE RANK* (THE FEDERATION PRESS, 2016)

JOSHUA FORRESTER*

This book is a well-written, well-researched and engaging work about the life and times of a titan of the New South Wales Bar. I must admit, however, that I did not know about Tom Hughes QC before reading this book. I did know about Tom's youngest brother, the erudite art critic Robert Hughes, whose book, *Culture of Complaint*,[1] remains one of my favourites.

Tom Hughes QC appeared in cases that would be familiar to both lawyers and law students: the *Concrete Pipes Case*,[2] the *Hospital Products Case*,[3] and the *Seas and Submerged Lands Case*.[4] He also had a strong connection with Western Australia, most notably being friends with former Chief Justice of Western Australia, the late Sir Francis 'Red' Burt. He also acted on behalf of Robert Holmes a Court, Laurie Connell, and Gina Rinehart, representing the latter against Rose Porteous (against whom he came off second-best in the courtroom – a rarity in his astonishing legal career).

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1 Robert Hughes, *Culture of Complaint: The Fraying of America* (Harvill, first published 1993, 1994 ed).

2 *Strickland v Rocla Concrete Pipes Ltd* [1971] HCA 40; (1971) 124 CLR 468.

3 *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41.

4 *New South Wales v Commonwealth* [1975] HCA 58; (1975) 135 CLR 337.

Before going to the Bar, Tom Hughes was a veteran of the Second World War. The book does well in picturing his life in training camps and then stationed in Britain, where Hughes flew Sunderland flying boats for the Royal Australian Air Force. The book also recounts his early life, being the scion of a respected Catholic family in Sydney. The accounts of Hughes' early life and his military training, as well as those of the workings of the NSW Bar, makes for some of the best reading in this book. It is said that the past is another country, and the biographer, Ian Hancock, is to be commended in bringing it to life on the pages.

Tom Hughes, in addition to being a barrister, was also a politician. He was a member of the Commonwealth Parliament from 1963-72, and Attorney-General from 1969-71. He was a staunch anti-communist during a tumultuous period in Australia's history, namely its involvement in the Vietnam War. However, Hughes is perhaps best characterised overall as a Liberal 'wet' and, given this, it is perhaps unsurprising that he is Malcolm Turnbull's father-in-law.

The 'supporting cast' in this biography is formidable. In politics, it includes John Howard, Sir John Gorton, Sir William 'Billy' McMahon, Malcolm Fraser and Gough Whitlam. In law, it includes Sir Garfield Barwick QC, Sir Anthony Mason QC, Sir William Deane QC, Murray Gleeson QC, Michael McHugh QC, Michael Kirby, Mary Gaudron QC, Dyson Heydon QC, Ian Callinan QC, and Lionel Murphy QC.

The subject of the biography, who was an advocate well into his 80's, and who is still alive and spry at the age of 92, speaks of a profession that, alas, may be passing away. He is quoted as saying that the Attorney-General's Department 'was well stocked with officers possessing a high degree of individuality, not to say eccentricity. This was a situation

entirely to my liking. Lawyers, if they are any good at their task, must be expected to possess each of these qualities'.[5] True that. And when one looks at the 'sausage factory' approach of modern legal practice, which seems to disdain the qualities of which Hughes spoke – and appear all the worse for it without any insight into why it is worse – one can only contemplate despair.

This book is well worth a read.

[5] Ian Hancock, *Tom Hughes QC: A Cab on the Rank* (The Federation Press, 2016) 141-2.

BOOK REVIEW: JOSHUA FORRESTER, LORRAINE FINLAY AND AUGUSTO ZIMMERMANN, *NO OFFENCE INTENDED: WHY 18C IS WRONG* (CONNOR COURT, 2016)

HEATH HARLEY-BELLEMORE*

So often in the discussion of human rights we find ourselves talking about 'freedom from'. Be it freedom from torture, slavery, wrongful imprisonment or any other number of rights. However, it seems the 'freedom to' rarely gets the same focus as 'freedom from'.

This 'freedom from' has become something of the dominant discourse in the realm of human rights, and freedom from discrimination seems to be at the forefront of this debate. One must ask however, at what point do 'freedom from' and 'freedom to' collide, and can they operate together?

Freedom of speech has seemingly become a 'freedom to' which has transformed into a 'freedom from'. That is to say, while we may have had a 'free speech', new laws have now given us 'freedom from' the free speech of others. Whilst there has always been to some extent a limit on free speech (defamation and slander for example), in the 21st century we have seen new laws implemented, however well intended they may have been when drafted, which have stifled free speech in the name of 'freedom from' discrimination.

Of course, one must prefix any discussion about free speech in Australia by noting that 'free speech' as it is commonly understood is not constitutionally (or in any other law domestically) enshrined. However,

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the *Universal Declaration of Human Rights*, of which Australia was one of eight drafters, acknowledges '… human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people …'. One must question how 'free' Australia intended speech to be when examining cases such as *Lange v Australian Broadcasting Corporation*, and this is the book to do it.

In 1975 following ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination*, the Commonwealth Parliament passed the *Racial Discrimination Act 1975* (Cth). Within this Act lives s 18C which states that (otherwise than in private) it is unlawful for a person to do an act which is 'reasonably likely to offend, insult, humiliate or intimidate another person or group of people' and is done because of the 'race colour or national or ethnic origin of the other person or of some or all of the people in the group'.

'From its inception' write authors Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, '18C of the Racial Discrimination Act … has been controversial'.

18C gained mainstream prominence in 2011 when broadcaster and journalist Andrew Bolt was sued over his comments in the Herald Sun newspaper regarding 'fair-skinned Aboriginal people'. Prior to the 2013 federal election, the then opposition leader Tony Abbott promised to repeal the controversial section if elected. In 2014, the now Abbott government announced they would not be repealing the section. It is from here the book begins.

At its crux, 'No Offence Intended' argues that s 18C is unconstitutional and therefore invalid for its failure in areas such as how it relies on the

external affairs power and how the section infringes on Australia's freedom of political communication. However, this is not the entirety of what the book discusses.

Among the chapters the authors tackle four main problems with not only s 18C, but the very powers that allowed for its drafting. These are: the question of interpretation, the external affairs power, the implied freedom of political communication, and finally, a proposal for legislative reform.

The chapter of interpretation is of great assistance to the reader, and will give them a deeper understanding of the arguments and analysis later in the book. In this part the authors examine how the High Court of Australia would likely interpret the wording of s 18C. They do this in a number of ways, first by looking at the section itself, second by examining various examples of case law to show how the Courts have interpreted some words that are also found in 18C, and finally how these tie to the text and purpose of 18C.

The analysis of the external affairs power is one of the larger sections in the book; evidently it examines how the external affairs power was used (questionably) to bring these conventions into law. In addition to this the chapter also examines these conventions and the available commentary and interpretation of these documents.

'The Implied Freedom of Political Communication', the next chapter and largest portion of the book (albeit by a 2 page margin) deals with Australia's constitutionally implied right to freedom of 'political communication', and how a law such as 18C evidently (and perhaps unjustly) burdens this right, namely by stifling debate on any matters which 18C aims to outlaw.

Of course this does not mean the authors argue for a 'freedom to' discriminate. Rather, this is an argument that bad ideas cannot be defeated in healthy debate if one is prevented by law from speaking about them.

In addition to the legal arguments, the book also argues within the context of Australian liberal democracy, that laws such as 18C are philosophically wrong and go against what was intended for Australia when our constitution was first drafted.

Finally, perhaps one should note that while any argument or analysis of this nature has a tendency to be highly academic, this book, while admittedly being so, does occasionally break the barrier of academic exclusion by providing the odd fun insight. For example, when examining what is meant by 'dignity' and 'equality' and the difficulties in ascertaining what they are and how may impugn on freedom of expression, the immortal words of Inigo Montoya start the section; 'You keep using that word. I do not think it means what you think it means'.

Ultimately the authors make a compelling and well supported argument against 18C. This book should appeal to anyone, academic or not, with an interest in law, politics, or freedom generally, and should be a bible for anyone who wishes to challenge this ill-conceived provision in the High Court of Australia.

BOOK REVIEW: NICHOLAS ARONEY ET AL, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA: HISTORY, PRINCIPLE AND INTERPRETATION* (CAMBRIDGE UNIVERSITY PRESS, 2015)

BRUCE LINKERMANN*

I first came across Professor Aroney's writing a few years ago, at my constitutional law professor's behest. I was instructed to peruse Professor Aroney's article, 'Constitutional Choices in the Work Choices Case, or What Exactly Is Wrong with the Reserved Powers Doctrine?'. Therein I found an insightful analysis of a seminal case. The outcome of the *Work Choices Case*, as Professor Aroney argued, was in a sense entirely predictable: the recapitulation of 'a series of interpretive choices that have been made by the High Court over the course of its history'.[1]

In *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* Professor Aroney and three outstanding constitutional law academics – Peter Gerangelos, Sarah Murray and James Stellios – discuss the historical context in which Federation took place and the subsequent judicial decisions that have given meaning to the Australian Constitution. For, although the Constitution is written, so 'fixed' in a sense, it is a document designed to endure, designed to remain relevant in an ever-changing society. To meet this need to make the document

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1 Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly Is Wrong with the Reserved Powers Doctrine?' (2008) 32(1) *Melbourne University Law Review* 1.

endure, the High Court has responded by applying interpretative methods that have indelibly shaped the institutions of government.

In the first chapter the authors describe the fundamental federal character of the Australian Constitution: a compact to unify six self-governing colonies while simultaneously creating a federal government and state governments with exclusively defined powers. This federal character is created and maintained through five interconnected constitutional principles: 'the rule of law, parliamentary sovereignty, judicial review, the separation of powers, representative and responsible government, and federalism'.[2] Throughout this book, the High Court's interpretation of the applicability and scope of these principles as they live in the structure and text of the Constitution is shown to be the driving force behind the development of constitutional law and the institutions of government.

In the first five chapter the authors examine the composition of the federal parliament and they explore the nature and limits of federal legislative power. In their discussion they also discuss the judicial expansion of legislative power. This expansion – arguably the most influential shift in Australian constitutional law – has seen the High Court's interpretative methods move from one favouring the Constitution as giving efficacy to a federal compact to one favouring the Constitution as a statute of the British Imperial Parliament. The result has been that federal legislative powers are plenary and interpreted as widely as the words could literally mean.

In chapters six and seven the authors discuss the structure of the executive and the scope of executive power. The authors comment on the

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2 Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation*, (Cambridge University Press 2015) 32.

fusion of the executive and legislative branches, describing this constitutional feature as, on one hand, entirely compatible with the notion of 'responsible government' yet, on the other hand, at odds with the strict American separation of executive and legislative powers.

In chapters eight and nine the authors discuss the judiciary and the scope of judicial power. They comment on the separation of judicial power from the executive and legislative powers, noting that the High Court has held that it is essentially a power necessary to protect rights and to uphold the Constitution's federal character. It is a power granted to an impartial adjudicator to determine disagreements between the different branches of government, between federal and state governments, and disputes that affect the rights of individuals.

Lastly, in chapter ten the authors discuss the States, the historical role they played in Federation, and the nature of their Constitutions.

As an undergraduate law student, I unequivocally recommend this book to any student intending to learn Australian constitutional law. This dynamic and complex body of law is not easy to comprehend for students new to the subject. But this book explains the history of federation, the theoretical principles that inform the constitutional system, and the judicial decisions that have shaped those principles and shaped the meaning of the Constitution. Simply put, it was a pleasure to read and will undoubtedly be an invaluable addition to any scholar of the Australian Constitution.

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