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ERRATA

There was an error in an article title in Volume 8 of *The Western Australian Jurist*. Joanne Lee, 'Should Interest Rates be Regulated or Abolished? The Case for the Abolution of Usury' (2017) 8 *Western Australian Jurist* 227 should read: Joanne Lee, 'Should Interest Rates be Regulated or Abolished? The Case for the Abolition of Usury' (2017) 8 *Western Australian Jurist* 227.

There was an error in an article in Volume 7 of *The Western Australian Jurist*. In Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, 'An Opportunity Missed? A Constitutional analysis of proposed reforms to Tasmania's 'hate speech' laws' (2016) 7 *Western Australian Jurist* 275. At ibid 327-8 the sentence '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 better world' should read '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 a better world'.

ARTICLES

CHRISTIANITY AND THE LAW: TRIAL SEPARATION OR ACRIMONIOUS DIVORCE?

Michael Quinlan*

ABSTRACT

This article considers the relationship between Christianity and the law in Australia beginning with the arrival of the First Fleet and the declaration of the Swan River Colony. It examines in some detail the influence of the Western legal tradition and of Christianity on the jurisprudence relating to one elemental aspect of Western society: marriage. It considers the make-up of contemporary Australia, contemporary attitudes to religion and the relationship between law and religion in Australia. The article concludes that the once close relationship between law and religion may be better described today not as a trial separation but as an acrimonious divorce. The article argues that conflict between Christianity and the law is increasing to the extent that there is a need for law reform to provide greater protection of religious freedom.

At the time this article was written the legislative protection of religious freedom remained in a state of flux. Following the redefinition of marriage on 15 November 2018, a review into religious freedom, the Ruddock Review, has taken place but this review has not been publicly released. Instead, the initial leaks of its recommendations to the press have been selective, mischievous and manipulative. Despite the evidence presented in this article of a need for a more adequate legislative framework for the protection of religious freedom, the response to the recommendations of the Ruddock Review to date can only cause scepticism as to the likelihood that any such framework is likely to be introduced in this county in the near future.

> Blessed are you when people abuse you and persecute you and speak all kinds of calumny against you falsely on my account. Rejoice and be glad, for your reward will be great in heaven; this is how they persecuted the prophets before you.[1]

There is no doubting the Christian roots of Australia's common law and legal system. Despite that history, in contemporary Australia, an observation that a particular law is consistent with or that it has been derived from Christian morality is more likely to be raised as a source of complaint and derision by persons seeking to change the law than recognised as a grounds for maintaining a traditional position. This article considers the relationship between Christianity and the law in Australia. The article argues that the relationship between Christianity and the law in Australia is under severe strain such that the relationship may be better described as an acrimonious divorce rather than a trial separation. The article argues that conflict between Christianity and the law is increasing to the extent that there is a need for law reform to provide greater protection of religious freedom.

The colonies of Australia were established within a context of the Western legal tradition which was steeped in Christianity. Although the majority of the new arrivals to each colony were, from the beginning, from a Christian faith tradition each colony comprised residents from a range of faith and cultural traditions. This article considers the changing relationship between Christianity and the law in Australia and focuses particularly on New South Wales where the British established their first settlement and Western Australia. Like the other territories and states of Australia, the Western Australia of today continues to comprise many religious, customary and faith traditions with Christianity declining both by population[2] and by influence measures. The article recognises the early symmetry between Christianity and the law in Australia in many areas of morality and behaviour. This was a consequence of the historical dominance of the Christian faith among the population in the colonies and historically in England from which Australia inherited the Western legal tradition, the common law and the compendium of English legislation which they brought with them. The article argues that after a period of trial separation Christianity and the law are now facing an acrimonious divorce. It argues that as a consequence of this divorce and given the benefits

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[1] Matthew 5:11-12 New Jerusalem Bible ('NJB'). Unless otherwise specified all references to scripture in this paper will be to the NJB.

[2] The traditions, customs and beliefs of Australia's Aboriginal and Torres Strait Islander peoples warrant particular mention and consideration but that is beyond the scope of this paper.

which Australian society has and continues to derive from Christianity, greater legal protections are now needed for religious freedom.

Part I of this article examines the relationship between Christianity and the law at the time of the arrival of the First Fleet and the declaration of the Swan River Colony which was later to become Western Australia. Part II considers the influence of the Western legal tradition and of Christianity on the jurisprudence relating to an elemental aspect of Western society marriage. Part III considers the make-up of contemporary Australia and contemporary attitudes to religion, with a particular emphasis on the position in Western Australia. Part IV considers the relationship between law and religion in Australia – and in particular in Western Australia today. Part V of the article argues that, given the state of the relationship between law and religion today, there is now a need for greater protection of religious freedom in law.

I THE CHRISTIAN ROOTS OF THE COMMON LAW AND THE LEGAL SYSTEM

The European colonisation of Australia began in 1788 as the result of a decision by the English parliament to establish a new penal colony. New South Wales joined the British Empire and inherited the Western legal tradition as it had developed in a Britain. When New South Wales was first colonised the oath of office taken by Governor Phillip was sectarian. Whilst he swore allegiance to the King he also swore allegiance 'to the protestant succession, whilst repudiating Romish beliefs in the transubstantiation of the Eucharist.'[3] Subsequent early governors also took an oath of office which included these words. The new colony paid Church of England clergy and allocated substantial Crown land exclusively for Anglican churches and schools.[4] Although a significant number of Irish and Catholics were among the convicts transported to New South Wales, it was 28 years before the Colonial Office in Britain allowed official Catholic chaplains into the colony despite many years of polite entreaties. Up until 1820 Catholic convicts were often forced to attend Anglican services.[5] In theory, the common law and English laws in place at the time of colonisation were received by the colony, as far as they were applicable.[6] However the new colony was essentially 'an

[3] Roy Williams, *Post God Nation? How religion fell off the radar in Australia – and what might be done to get it back on* (ABC Books, 2015) 28.
[4] Rowan Strong, 'Church and State in Western Australia: Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857' (2010) 63(3) *Journal of Ecclesiastical History* 517, 520.
[5] Williams, *Post God Nation?*, above n 3, 29.
[6] Patrick Parkinson, *Tradition and Change in Australian Law* (Lawbook, 5th ed, 2013) 150 [5.110].

open prison'[7] and a prison under military rule.[8] In 1828, s 24 of the *Australian Courts Act 1828* (Imp) made it clear that all of the laws of England as at 28 July 1828 would apply in New South Wales and Van Diemen's Land in so far as they were applicable.[9] The next year, on the western side of Australia, Lieutenant-Governor James Stirling RN proclaimed the Swan River Colony. The Swan River Colony also inherited the Western legal tradition as it had developed in Britain and its common law. Specifically, the Swan River Colony inherited English laws in place as at 1 June 1829 so far as they were applicable.[10]

In the Western legal tradition, law is autonomous, exercises a central role, and enjoys moral authority.[11] Whilst the seeds of these traditions were planted in the Greco-Roman world the tradition inherited in Australia had grown in the soil of Christianity.[12] In the Western legal tradition law is separately identifiable from custom, morality, religion or politics. This is not to say that law cannot reflect or be influenced by these things but to recognise that, even where laws coincide with religious prescriptions or proscriptions, the law is enforced in its own right and according to its own rules and norms not as a matter of religious obligation but of civic duty.[13] In a society with an almost uniform understanding of morality – such as a morality founded on a Christian religious tradition or on Christian religious traditions – there may be very substantial overlap and uniformity between the civic law and religious morality. The two can nevertheless be separately understood and studied – one in law schools and the other in schools of theology, for example. They also impose separate obligations: one may impose temporal obligations and punishments and the other spiritual or eschatological. In the Western legal tradition and increasingly so law is the central means of governing life and society.[14] In this tradition, social control and social change are achieved by the law.[15] This is because of the third aspect of this tradition which is fidelity to the law because of its moral authority.[16] In the Western legal tradition, law commands a high level of respect because of its status as law. People tend to obey laws simply because they are laws and they do so

[7] Ibid 139 [5.70].
[8] Ibid 150 [5.110].
[9] Ibid.
[10] Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) *Adelaide Law Review* 1, 2-3.
[11] Parkinson, above n 6, 23 [2.20].
[12] Harold J Berman, *Law and Revolution The formation of the Western Legal Tradition* (Harvard University Press, 1983) 558, Harold J Berman, *Law and Revolution II The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press, 2003) 201-382, Augusto Zimmermann, *Christian Foundations of the Common Law, Volume I: England* (Connor Court, 2018).
[13] Parkinson, above n 6, 24 [2.30].
[14] Ibid.
[15] Ibid.
[16] Ibid 28 [2.60].

habitually and independently of their own feelings about the law rather than from regular and conscious fear of sanction.[17] This tradition arose in a Christian context as Parkinson explains:

> The close relationship between law and theology in the formation of the western legal tradition, the belief in law as ultimately given by God and the idea that there were natural laws which governed human relations meant that law was imbued with a certain aura of sacredness. The close relationship between law and faith meant that law was believed in; for law, in Caesar's kingdom, was an aspect of the will of God.[18]

Where there is a basic general agreement on moral questions and where the majority of a population follows faiths within the Christian traditions, the civil law is likely to largely reflect the moral principles of Christianity and so the Western legal traditions of centrality, moral authority and fidelity to the law make a degree of rational and logical sense. The colonists also brought the related 'rule of law' with them. This requires not just the citizens but the government to act according to the law and 'the principle of equality before the law.'[19] Like the Western legal tradition of which it really forms a part as Williams explains 'the rule of law is quintessentially a product of Judeo-Christianity.'[20]

The Empire of which the new colonies formed part had developed in a close relationship with the state Church of England for two hundred years.[21] The Christian influence on the common law and the laws of England pre-dated the Reformation and the foundation of the Church of England. The influence of Christianity on the Western legal tradition has been so deep that Parkinson has observed that 'Christianity was to the formation of the Western legal tradition as the womb is to human life.'[22] The relationship between Christianity and the laws of England was described In 1676 Lord Chief Justice Sir Matthew Hale in this way: 'Christianity is parcel of the laws of England.'[23] Williams observes that this understanding 'was repeated by many English and American jurists until the early twentieth century.'[24] In the second half of the eighteenth century Edmund Burke was part of a revival of an

[17] Ibid.
[18] Ibid 64 [2.90].
[19] Parkinson, above n 6, 120 [4.700].
[20] Williams, *Post God Nation?*, above n 3, 36.
[21] Strong, 'Church and State in Western Australia Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857', above n 4, 517, 519.
[22] Parkinson, above n 6, 29 [2.70]; see also Williams, *Post God Nation?*, above n 3, 38-39, 77-81, 87-91.
[23] *Rex v Taylor* (1676) 1 Vent 293 as quoted by Roy Williams, *God Actually* (ABC Books, 2008) 273.
[24] Williams, above n 23, 273.

understanding of the inseparability of the state and the Church of England. As he wrote in 1792:

> [I]n a Christian commonwealth the Church and the State are one and the same thing, being integral parts of the same whole … Religion is so far, in my opinion, from being out of the province or the duty of a Christian magistrate, that it is, and it ought to be not only his care, but the principal thing in his care: because it is one of the great bonds of human society, and its object the supreme good, the ultimate end and object of man himself. [25]

On a similar theme in 1815 John Bowles, a High Church of England apologist, observed that:

> The constitution of this country is composed of two distinct establishments, the one civil, the other ecclesiastical, which are so closely woven together, that the destruction of either must prove fatal to both.[26]

This connection between the state and religion can be seen in Stirling's instructions from the Colonial Office which included support of religion, that is the religion of the Church of England,[27] in the new Swan River Colony:[28]

> You will bear in mind, that, in all locations of Territory, a due proportion must be reserved for the Crown, as well as for them maintenance of the Clergy, support of Establishments for the purposes of Religion, and the Education of youth, concerning which objects more particulars will be transmitted to you hereafter.[29]

The *Australian Courts Act 1828* (Imp) was passed and the Swan River Colony established during a key era in the relationship between the State and the Church of England in Britain. The imperial hegemony of the Church of England started to unravel in the 1830s. With Catholic emancipation, the passing of the *Reform Bill* in 1832 and the abolition of the *Test and Corporations Act*, Protestant dissenters and Catholics could vote and enter parliament Britain moved toward a professed policy of State neutrality towards churches.[30] In 1836 New

[25] Edmund Burke as quoted in Rowan Strong, 'The Reverend John Wollaston and Colonial Christianity in Western Australia, 1840-1863' (2001) 25(3) *The Journal of Religious History* 261, 273.
[26] John Bowles as quoted in Strong: ibid 261, 273
[27] Strong, 'Church and State in Western Australia Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857', above n 4, 517, 521.
[28] Ibid 517, 521.
[29] Lieutenant-Governor James Stirling's instructions, 30 Dec 1828 as quoted in Strong, 'Church and State in Western Australia', above n 4 517, 521.
[30] Strong, 'Church and State in Western Australia Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857', above n 4, 517, 519, 522; Strong, 'The Reverend John Wollaston and Colonial Christianity in Western Australia, 1840-1863', above n 25, 261, 274.

South Wales passed a Church Act which provided government funding not only to Anglican but also to Presbyterian and Catholic clergy and churches.[31] In 1840 the Legislative Council of the Swan River Colony followed suit and passed similar legislation.[32]

Like the rest of Australia, Western Australia was from the time it was founded as a colony of the British Empire a predominantly Christian colony but it was nevertheless a multi-faith, multi-cultural and pluralist society.[33] Whether complaints about deliberate favouritism[34] were fair or not[35] until state aid to religion ended[36] the Church of England received the great majority of financial support from the governments of the colonies of New South Wales and the Swan River because the funding arrangements were tied to the number of adherents and Anglicans were the largest populations in both colonies' populations.[37] Whatever the government's position in the colony and in Britain, the residents of the new colonies brought centuries of religious and theological antagonisms[38] and sectarianism with them as part of their cultural inheritance along with their shared Western legal tradition, the common law as it had developed in England and its Empire and their shared Christianity. Whilst some had different understanding of certain passages of scripture the Christian colonists had a shared belief in such matters as: the existence of God,[39] God's creation of the universe and of man and woman in the image of God,[40] God's institution of monogamous, heterosexual marriage,[41] the Decalogue,[42] God entering the world in the form of a human person, Jesus

[31] Strong, 'Church and State in Western Australia: Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857', above n 4, 517, 520.
[32] 'An Act to promote the building of Churches & Chapels and to contribute towards the Maintenance of Ministers of Religion in Western Australia': see ibid, 517, 525.
[33] Salvado records that just 19 years after Lieutenant-Governor Stirling's arrival in the small non-indigenous population of the colony of 4,622 persons, 83.6 per cent of the population identified with a Christian denomination. The population consisted of 3,063 Anglicans (67 per cent), 337 Catholics (7.3 per cent), 276 Methodists (6 per cent) and 187 Independent Protestants (4 per cent) and 759 'Chinese and others unspecified' (16 per cent) Dom Rosendi Salvado, *The Salvado Memoirs* (E J Stormon SJ trans and ed, Benedictine Community of New Norcia, 2007) 7. It is likely that this category included people who considered themselves Christians but who were not affiliated with one of the traditions included in the poll given the results of the first national census in 1911.
[34] Strong, 'Church and State in Western Australia Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857', above n 4, 517, 526.
[35] There is debate among academics as to the extent to which the Church of England enjoyed favoured status in the fledgling Swan River Colony: see ibid 517, 522-523.
[36] Which it did in NSW in 1863: ibid 517, 520.
[37] Ibid 517, 520, 525.
[38] Rowan Strong, 'The Colonial Religion of the Anglican Clergy: Western Australia 1830 to c 1870' (2014) 38(1) *Journal of Religious History* 91, 109-110; Lesley J Borowitzka, 'The Reverend Dr Louis Giustiniani and Anglican Conflict in the Swan River Colony, Western Australia 1836-1838' (2011) 35(3) *Journal of Religious History* 352, 361.
[39] Gen 1.
[40] Gen 1.
[41] Gen 2:24, Matthew 19:1-12.

Christ,[43] the Golden Rule,[44] that there were moral standards of behaviour set by God including proscriptions of suicide[45] and elective abortion[46] and that eternal judgment was a reality.[47] Like the Western legal tradition the common law was saturated with the Judeo-Christian worldview. As Robert Pasley has observed:

> The fundamental conceptions of equality before the law, of the accountability of the ruler to God and the law, of civil rights and liberties, of the individual's responsibility for his own acts, of mens rea, of the sanctity of promises, in fact the whole structure and content of our constitutional, civil and criminal law are all received from the Judeo-Christian tradition and can only be fully understood by one who has studied and mastered that tradition.[48]

With that general background given the contemporary significance of the meaning of marriage in Australia, Part II of the article considers the influence of the Western legal tradition and Christianity in the laws relating to marriage at the foundation of the antipodean colonies and at the time of the reception of English laws.

II MARRIAGE IN THE WESTERN LEGAL TRADITION

Heterosexual, monogamous relationships have long been recognised as marriage in the Western legal tradition.[49] This form of marriage existed well before Christianity in Ancient Greece and Ancient Rome and other pre-Judeo- Christian civilisations and it has existed in societies which are not and never have been Christian.[50] In the Western legal tradition state interest in regulating, preferencing, and recognising as marriages only heterosexual,

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[42] Exodus 20 and see Matthew 19:16-19 'And now a man came to him and asked, "Master, what good deed must I do to possess eternal life?" Jesus said to him, "Why do you ask me about what is good? There is one alone who is good. But if you wish to enter into life, keep the commandments." He said, "Which ones?" Jesus replied, "These: You shall not kill. You shall not commit adultery. You shall not steal. You shall not give false witness. Honour your father and your mother. You shall love your neighbour as yourself."'

[43] John 1, Matthew 1, Luke 1, 2.

[44] Matthew 7:12; see also Luke 6:31.

[45] Williams, *Post God Nation?*, above n 3, 39.

[46] Barbara Brookes, *Abortion In England 1900-1967* (Routledge, 1988) 24.

[47] Williams, *Post God Nation?*, above n 3, 79.

[48] Robert S Pasley, 'The Position of the Law school in the University' (1966) 52 *Catholic University Law Review* 34, 50-51. For a more detailed discussion of the Christian roots of the common law see Berman, *Law and Revolution*, above n 12, 201-382, and Zimmermann, above n 12.

[49] See Stephanie Coontz, *Marriage, a History: How Love* and *Conquered Marriage* (Penguin, 2005) 78; Marilyn Yalom*, A History of the Wife* (Perennial, 2002) 25-44; Garfield Barwick, 'The Commonwealth Marriage Act 1961' (1961) 3 *Melbourne University Law Review* 277, 278; *Reference re: Section 293 of the Criminal Code of Canada* [2011] BCSC 1588 [150], [152] - [157], [158], [162]-[163], [187].

[50] See *Brinkley v Attorney-General* (1890) 15 PD 76, 79 ('*Brinkley v Attorney General*'); Coontz, above n 49, 78; Yalom*,* above n 49, 25-44. Ancient Greece and Ancient Rome and the Empire of Japan are three examples.

monogamous relationships has a lengthy pedigree.[51] For Aristotle, reason dictated that marriage and family were foundational to society and they required state protection. He examined the natural order and from this he identified the essential nature of creatures and their purpose or end. This led him to derive ethical norms which would facilitate the achievement of these purposes or ends. For Aristotle this approach was not limited to lesser species but it could and should also be applied to human beings. For him it was legitimate to reason from the observed nature of humanity to formulate moral precepts. These moral standards would facilitate humanity achieving its true nature and fulfilling its destiny as human beings. In this teleological conception of law humanity was created for a purpose and human beings existed to fulfil their essential nature. Aristotle saw that human beings were naturally inclined to live in a civic environment. He concluded from this that family and the state are both communities established by nature in order to provide for the needs of life and for human life to continue.[52] For Aristotle, then, reason dictated that laws must be developed to uphold the family unit and the creation and operation of the city state in order to sustain community and needs of humanity. As he said:

> In the first place, there must be a union of those who cannot exist without each other; namely of male and female, that the race may continue (and this is a union which is formed, not of choice but because, in common with other animals and with plants, mankind have a natural desire to leave behind an image of themselves).[53]

Similarly Ulpian writing in Rome in 3 AD recognised the foundational role of marriage in his definition of natural law as:

> that which all animals have been taught by nature … From it comes the union of man and woman called by us matrimony, and therewith the procreation and rearing of children.[54]

The Western legal tradition had natural law philosophical explanations for preferencing monogamous, heterosexual marriages. It was not simply those philosophical foundations but also the essential survival of the state which saw the development of state laws preferencing heterosexual, monogamous relationships as marriages by the state. The state needed citizens to defend itself and marriage provided a structure in which children could be effectively

[51] See Coontz, above n 49, 78; Yalom, above n 49, 25-44; Barwick, above n 49, 278; *Reference re: Section 293 of the Criminal Code of Canada* [2011] BCSC 1588 [150], [152] - [157], [158], [162]-[163], [187].
[52] See discussion in Parkinson, above n 6, 40 [2.150].
[53] Aristotle, *The Politics,* Book I as quoted in Parkinson, above n 6, 40 [2.150].
[54] *Justinian's Digest*, Book I §1 1 as quoted in Parkinson, above n 6, 39 [2.150].

raised by their parents. Yalom argues that it was Roman respect for heterosexual, monogamy and its approach particularly through succession law of favouring married couples and their legitimately borne offspring – in the interests of the state – rather than Judeo-Christian respect for marriage, in that form, which saw heterosexual, monogamous marriage permeate the Empire.[55]

When the British arrived in Sydney, marriage was governed in England by Lord Hardwicke's *Marriage Act* of 1753.[56] This Act unequivocally preferenced Anglicanism for it mandated that all English marriages must be celebrated by an Anglican Minister according to the rites of the Church of England in a church or public chapel before two witnesses following the publication of marriage banns.[57] Unless a special license was granted by the Archbishop of Canterbury any marriage solemnised in some other way, was not only void, it was a felony. Similarly without first obtaining a licence to dispense with the publication of marriage banns it was a felony to celebrate a marriage without their publication. Acting contrary to these requirements was no trivial matter because a conviction of one of these felonies attracted a penalty of transportation to America for 14 years.[58] The reality of the multi-faith and multi-racial population of the new colony in Sydney necessitated a more ecumenical approach and Lord Hardwicke's Act was never law in New South Wales. Instead the Governor and Council of New South Wales enacted the 1834 Ordinance which confirmed the recognition by the colony of the validity of marriages between one man and one woman if solemnised in accordance with the rites not only of the Church of England but also by priests of the Catholic Church or by ministers of the Church of Scotland.[59] The next year Lord Brougham delivered a judgment in the House of Lords, which confirmed that marriage under the common law meant Christian marriage, that is, marriage between one man and one woman to the exclusion of others. Christianity was so much a part of the law that the Lords did not ground their position, for example, on the natural law[60] or in the state's interest in children being born and reared by their biological parents. To do so would have resulted in unnecessary verbiage: the judges and their readers all knew perfectly well what Christian

[55] Yalom, above n 49, 44.
[56] (UK) 26 Geo 2, c 33; see discussion in Barwick, above n 49, 277, 279; *Attorney General (Vic) v The Commonwealth* (1962) 107 CLR 529, 578-580.
[57] Barwick, above n 49, 280.
[58] Barwick, above n 49, 279-280.
[59] Barwick, above n 49, 280.
[60] See eg John Finnis, 'Law, Morality and "Sexual orientation"' (1994) 69 *Notre Dame Law Review* 1049, 1066, 'Marriage: A Basic and Exigent Good' (2008) 91(3-4) *The Monist* 388, and *Natural Law and Natural Rights* 81-84 as quoted in Sam Blay, 'The Nature of International Law' in *Public International Law: An Australian Perspective* (Oxford University Press, 2nd ed, 2005) 14.

marriage was and why it existed. Lord Broughton stated that Christianity alone explained why marriage under the common law was between one man and one woman. In doing so with these observations he set the tone for future English cases on the meaning of marriage:

> If indeed there go two things under one and the same name in different countries – if that which is called marriage is of a different nature in each – there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that *we regard it as a wholly different thing, a wholly different status,* from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate. This cannot be put upon any rational ground except our holding that the infidel marriage to be something different from the Christian and our also holding Christian marriage to be the same everywhere.[61]

This simple characterisation of marriages between one man and one woman to the exclusion of others by reference to the expression 'Christian marriage' was replicated in many subsequent decisions. In 1866 the Judge Ordinary observed that some countries recognised polygamous marriages as 'marriages' and used terms such as wife and husband for those in such relationships but that the same words had different meanings when used in those contexts to their meaning when used in England.[62] As he observed:

> What then is the nature of this institution [of marriage] as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If [marriage] be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of others.[63]

Similarly in 1880 Lush LJ wrote that:

> [T[here is no analogy whatever between the union of a man and a woman in a country where polygamy is allowed, and the union of a man and a woman in a Christian country. Marriage in the contemplation of every Christian community is the union of a man and one woman to the

[61] *Warrender v Warrender* (1835) 2 Cl & F 488[531]-[532] (emphasis added).
[62] *Hyde v Hyde* (1866) LR 1 P & D 130, 133-134.
[63] *Hyde v Hyde* (1866) LR 1 P & D 130, 133.

> exclusion of all others. No such provision is made, no such relation is created, in a country where polygamy is allowed, and if one of the numerous wives of a Mohammedan was to come to this country and marry in this country, she could not be indicted for bigamy, because our laws do not recognise as marriage a marriage solemnised in that country, a union falsely called marriage, as a marriage to be recognised in our Christian country.[64]

Writing in 1888 Stirling J echoed those earlier judgments when he opined that:

> [A] union formed between a man and a woman in a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the laws of England unless it be formed on the same basis as marriages throughout Christendom, and be its essence "the voluntary union for life of one man and one woman to the exclusion of others."[65]

In 1890 the President of the Probate Division in England recognised that, in these earlier decisions, the phrase 'Christian marriage' had been used as a sort of shorthand but again did not find it necessary to include any rational or reasoned justification of marriage in England having that meaning. As he observed:

> The principle which has been laid down by those cases is that a marriage which is not that of one man and one woman to the exclusion of all others, though it may pass by the name of a marriage is not the status which the English law contemplates when dealing with the subject of marriage.[66]

> [T]hough throughout the judgments that have been given on this subject, the phrases "Christian marriage", "marriage in Christendom," or some equivalent phrase, has been used, that has only been for convenience to express the idea. But the idea which was to be expressed was this, that the only marriage recognised in Christian countries and in Christendom is the marriage of the exclusive kind that I have mentioned …[67]

Again it is important to recognise that writing in the context of England in the 19th century it was simply not necessary for the judges to reach back to Aristotle or Ulpian or to the Greco-Roman foundations of marriage or to explain – even in passing – the centrality of marriage to the state because all of that meaning was encapsulated in the phrases which were used. This was so whether the precise phrase was 'Christian marriage', 'marriage in Christendom', or

[64] *Harvey v Farnie* (1880) 6 PD 35, 53.
[65] *Bethell v Hildyard* (1888) 38 Ch D 220, 234.
[66] *Brinkley v Attorney General* (1890) XV PD 78, 79-80.
[67] Ibid 80.

something similar. As the various Australian colonies were established, each passed its own marriage laws providing for state recognition of marriages between one man and one woman and legislating permissible degrees of consanguinity and marriage ages.[68] Again these colonies were overwhelmingly populated by Christians and by Europeans from the Western legal tradition. No colonies recognised polygamous marriages, marriages between two persons of the same sex or customary marriages of Australia's Aboriginal peoples and bigamy has always been a criminal offence.[69] As the article will explain in Part IV the lack of jurisprudential development of an expressed reasoned and rational foundation for the 'idea' of marriage in these cases meant that, more than a hundred years later, when Christianity was no longer recognised, without question, as being 'parcel of the laws'[70] the definition of marriage contained in those decisions was ripe for criticism and rejection.

III THE RELIGIOUS MAKE-UP OF CONTEMPORARY AUSTRALIA AND CONTEMPORARY ATTITUDES TO RELIGION

When the Australian colonies federated in 1901 the people of the participating colonies encapsulated the Western legal tradition of the supremacy of the law in Clause 5 of the new *Australian Constitution*.[71] They also included a preamble which recognised that the colonies joined together in the new Commonwealth 'humbly relying on the blessing of Almighty God.'[72] At the same time, recognising that whilst almost the entire population was Christian they did not all subscribe to one Christian tradition, the *Australian Constitution* proscribed the creation of an establishment religion, eschewed religious tests for public servants and prohibited the imposition of religious observances. The *Australian Constitution* also precluded the Commonwealth government from making laws 'for prohibiting the free exercise of any religion.'[73]

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[68] Barwick, above n 49, 283-286.
[69] As to recognition of indigenous cultural marriages see *R v Neddy Monkey* (1861) 1 Wyatt & Webb 40, 41; *R v Cobby* (1883) 4 LR (NSW) 355, 356; and *R v Byrne* (1867) 6 LR (NSW) 302; see Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [237].
[70] *Rex v Taylor* (1676) 1 Vent 293 as quoted by Williams, *God Actually*, above n 22, 272.
[71] 'This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.'
[72] *Australian Constitution* Preamble. For a description of how those words came to be included see Williams, *Post God Nation?*, above n 3, 137-140.
[73] *Australian Constitution* s 116.

Since statistics have been collected the majority of Australians have identified as Christians.[74] There has however been a downward trend in the percentage of Australians who identify as Christian. When the first census was taken in 1911, 96 per cent of Australians self-identified as Christian. In the most recent census in 2016, this had fallen to 52.1 per cent.[75] In Western Australia in the last census less than half the population (49.8 per cent) identified as Christian which was more the 2 percentage points below the national average. There also appears to be a trend away from religious belief. The numbers of 'No Religion'[76] have been increasing[77] from 0.8 per cent of the Australian population in 1966 to 30.1 per cent in 2016.[78] Since 2011, when 32.5 per cent of Western Australians selected the 'No religion' category in the census, this category has been the most population selection for Western Australians[79] as it has been in 4 of Australia's other states and territories.[80] In the last census 33 per cent of Western Australians identified with 'No Religion' which is close to 3 percentage points above the average for the nation (30.1 per cent).[81] The fact that the growth in the 'No Religion' category has been strongest among the young, with 28 per cent of those aged 15-34 reporting no religious affiliation in 2011 rising to 39 per cent in 2016 suggests that this move away from religion is likely to continue.[82] There are a number of other indicators which support this view. Among teenagers and those in their twenties only 31 per cent report belief in God[83] and only 39.4 per cent of Australians in the 18 to 34 age bracket identify as Christian.[84] Regular church attendance has also been in decline[85] falling to 15 per cent in 2011 from 36 per cent in 1972. Whilst these demographic changes have been taking place Australia has witnessed an increasing ignorance and antagonism towards Christianity.

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[74] Australian Bureau of Statistics, *2071.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013* (21 June 2012) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>.

[75] Australian Bureau of Statistics, *2016 Census: religion* (27 June 2017) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85?OpenDocument>.

[76] It should be noted that 'No Religion' does not necessarily equate to having no religious beliefs or faith/ the phrase is equivalent to secular beliefs and other spiritual beliefs: Australian Bureau of Statistics, *2071.0 – Census of Population and Housing: reflecting Australia – Stories from the Census, 2016: Religion in Australia*. (28 June 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Article~80>.

[77] Australian Bureau of Statistics, *2016 Census: religion*, above n 75.

[78] Ibid.

[79] Australian Bureau of Statistics, *2016 Census QuickStats: Western Australia* <http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/5?opendocument>.

[80] McCrindle Research Pty Ltd, 'Faith, Belief & Churchgoing in Australia' *Social Analysis* (24 March 2016) <http://mccrindle.com.au/the-mccrindle-blog/faith-belief-and-churchgoing-in-australia>.

[81] Australian Bureau of Statistics, *2071.0 – Census of Population and Housing: reflecting Australia – Stories from the Census, 2016: Religion in Australia*, above n 74.

[82] Australian Bureau of Statistics, *2016 Census: religion*, above n 75.

[83] McCrindle Research Pty Ltd, 'Faith, Belief & Churchgoing in Australia', above n 80.

[84] Australian Bureau of Statistics, *2071.0 – Census of Population and Housing: reflecting Australia – Stories from the Census, 2016: Religion in Australia*, above n 74.

[85] McCrindle Research Pty Ltd, 'Faith, Belief & Churchgoing in Australia', above n 80.

A *Growing religious illiteracy and antagonism towards Christianity*

Religious illiteracy has been described as 'a dangerous reality'.[86] If so it is a dangerous reality in contemporary Australia where Christianity is both poorly understood and considered negatively by many Australians. A significant number of Australians[87] (8 per cent) do not know any Christians and almost 18 per cent know nothing about the Christian Church in Australia.[88] More than a quarter of Australians (26 per cent) have a negative view of Christianity.[89] Seven per cent of Australians are passionately opposed to Christianity and 6 per cent of Australians have strong reservations about it.[90] Many Australians associate Christians with negative stereotypes. Some non-Christian Australians consider Christians to be judgmental and greedy, that their beliefs are outdated and that they impose their beliefs on others[91] and a significant number of Australians, who do know Christians, associate them with negative characteristics.[92] These include being judgmental,[93] opinionated,[94] hypocritical,[95] intolerant,[96] insensitive,[97] and rude.[98] David Hempton puts the situation in this way:

> We live in a world, indeed in a nation [here speaking of the US] where religious ideas have been taken up by out-of-tune instruments, and many in the West, especially under the age of thirty, now believe the melody itself is detestable.[99]

Much of Australia's popular media is openly antagonistic to Christianity.[100] For example, media personality Andrew Denton has called on religious people to withdraw from debate about euthanasia referring to Catholic businessmen and politicians who oppose legalising

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[86] David N Hempton, 'Christianity and Human Flourishing: The Roles of law and Politics' (2017) 12 *Journal of Law & Religion* 1, 54.
[87] McCrindle Research Pty Ltd, *Faith And Belief in Australia* (McCrindle Research Pty Ltd, 2017) 35.
[88] Ibid 10.
[89] Ibid 9.
[90] Ibid 31.
[91] McCrindle Research Pty Ltd, *Faith And Belief in Australia*, above n 87, 30.
[92] Ibid 35.
[93] 20 per cent: ibid.
[94] 18 per cent: ibid.
[95] 17 per cent: ibid.
[96] 12 per cent: ibid.
[97] 5 per cent: ibid.
[98] 4 per cent: ibid.
[99] Hempton, above n 86, 58.
[100] For example the *Sydney Morning Herald* and *Sun Herald* feature weekly columns from the militant atheist Peter Fitzsimons who regularly includes anti-Christian and ant-Catholic diatribes in his columns. See for example Peter Fitzsimmons, 'Folau's thoughtless comments are an anathema to the greatest of rugby's values', *The Sydney Morning Herald*, 7-8 April 2018, 51.

euthanasia as a 'Subterranean Catholic force'.[101] It is also common in the popular media to seek to undermine rational arguments if they are presented by persons of faith. For example, in an episode of the ABC television program Q&A dealing with euthanasia[102] the moderator Tony Jones asked only the panellist from a Catholic university Professor Margaret Somerville if she was 'a religious person'.[103] Whilst in Australia, Christians are certainly free to worship at home and in their churches, without fear of attack or fear for their physical safety there is a misconception by many in the media and in education that this is all that religious freedom entails. This approach disregards entirely the moral duty of Christians not only to live morally but to evangelise and to act.[104]

B *Relativism, individualism, the rule of law, and equality*

The large majority[105] of Australians who voted for change in the 2017 postal poll which asked whether the law should change to permit same-sex marriage indicates that the majority of the Australian population now reject the traditional Christian and common law understanding of marriage. The support for change was particularly strong in Western Australia[106] where no federal electorate voted for the status quo.[107] As Pope Benedict XVI observed in 2011:

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[101] Michael Edwards, 'Andrew Denton lashes out at "subterranean Catholic force" blocking voluntary euthanasia laws', *ABC News* (online), 10 August 2016 <http://www.abc.net.au/news/2016-08-10/denton-blames-catholic-force-blocking-voluntary-euthanasia/7718152>; Staff writers, 'Andrew Denton trying to exclude Catholic voices from euthanasia debate' *The Catholic Weekly* (online), 17 August 2016 <https://www.catholicweekly.com.au/andrew-denton-trying-to-exclude-catholic-voices-from-euthanasia-debate/>.

[102] Which featured journalist Nikki Gemmell, ALP Federal parliamentarian Penny Wong, the Federal Minister for Communications, Mitch Fifield parliamentarian singer/songwriter Billy Bragg, bio-ethicist Professor Margaret Somerville from The University of Notre Dame Australia.

[103] ABC Q&A program, *Assad, Assisted Suicide and Satire: Transcript Extract* (10 April 2017) <https://dwdnsw.org.au/wp-content/uploads/2017/06/transcript-QandA-100417-section-on-voluntary-euthanasia.pdf> 10.

[104] Mark 16:15, Matthew 28:19-20, 1 Timothy 6:12, James 2:14-18 and in a specifically Catholic context *Catechism of the Catholic Church* [904]-[905] and see Pope Benedict XVI, *Porta Fidei: Apostolic Letter for the Induction of the Year of Faith* (11 October 2011) <http://www.vatican.va/holy_father/benedict_xvi/motu_proprio/documents 11 October 2011> [10]: 'A Christian may never think of belief as a private act. Faith is choosing to stand with the Lord so as to live with him. This "standing with him" points towards an understanding of the reasons for believing. Faith, precisely because it is a free act, also demands social responsibility for what one believes. The Church on the day of Pentecost demonstrates with utter clarity this public dimension of believing and proclaiming one's faith fearlessly to every person. It is the gift of the Holy Spirit that makes us fit for mission and strengthens our witness, making it frank and courageous.'

[105] 61.6 per cent: Australian Bureau of Statistics, *1800.0 Australian Marriage Law Postal Survey, 2017 Results for Western Australia* (15 November 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1800.0~2017~Main%20Features~Western%20Australia~13>.

[106] 63.7 per cent: ibid.

[107] Ibid.

> We live at a time that is broadly characterised by a subliminal relativism that penetrates every area of life … Sometimes this relativism becomes aggressive, when it opposes those who claim to know where the truth or meaning of life is to be found. And we observe that this relativism exerts more and more influence on human relationships and on society … Many no longer seem capable of any form of self-denial or of making a sacrifice for others. Even the altruistic commitment to the common good, in the social and cultural sphere or on behalf of the needy, is in decline. Others are now quite incapable of committing themselves unreservedly to a single partner. We see that in our affluent western world much is lacking. Many people lack experience of God's goodness.[108]

Speaking of the individualism of our time Somerville has observed:

> In the West, we live in an era of intense individualism. This prevailing attitude has been described as "individualism gone wild" because it often excludes any sense of community. Many arguments that favour the availability of, and especially unrestricted access to, reproductive technologies, genetic technology, and euthanasia are based on claims of respect for individual rights. Advocates believe that these claims are essentially matters of personal morality and they involve only, or at least primarily individuals …[109]

The 'rule of law' itself gives no firm foundation for moral positions or legislative reform because the extent to which it demands 'equality' is itself in contention. Conservatives tend to argue that the rule of law means that everyone is equal before the law. In other words, conservatives are likely to argue that the rule guarantees independent courts and the application of the law to politicians and citizens equally. This is not the same thing as using the term 'rule of law' to demand differential treatment of citizens with differing characteristics with the professed intention of achieving some other often unexpressed form of 'equality'. The term 'equality' depends for its meaning on usage in a context. As the Chief Justice of New South Wales, the Honourable Tom Bathurst SC observed in his Opening of Law Term speech of 2018:

> The difficulty with the rule of law as a criterion for intervention is that it is far from being an objective and uncontested concept. Indeed, its authority is invoked in support of both sides of the ideological divide. While conservatives tend to rely on thinner, procedural conceptions of

[108] Pope Benedict XVI in a meeting with council members of the Central Committee for German Catholics in a speech reported by the Vatican Information Service as *Seek New Paths of Evangelisation for Church and Society* (24 September 2011) <visnews_entxts@mlists.vatican.va>. In an Australian context see the discussion in Williams, *Post God Nation*? above n 3, 250-274.

[109] Margaret Somerville, *Death Talk* (McGill-Queen's University Press, 2001) 4.

> the rule of law, progressives argue that procedural compliance alone is insufficient and that a conception of the rule of law unaccompanied by values of substantive equality is better labelled 'rule by law'.[110]

As Lester has observed:

> One key principle of the idea of equality is that although human beings are different in innumerable respects, our common humanity requires that we are all treated equally on merit. That means that for every difference in treatment, there must be good and relevant reasons.[111]

In order to consider what amounts to good and relevant reasons for differential treatment it is necessary to understand the context and whether or not there are principles and human rights at play in addition to or in competition with claims for 'equality'. Some might argue that some things, such as men and woman, marriage between one man and one woman and marriage between two persons of the same sex, actually are different in objective reality and that treating different things as if they are the same is not achieving 'equality'. Some purport to rely upon the rule of law for demands for what is called 'substantive equality' – or real equality such as changes to promote the interests of special interest groups or to seek to remedy past injustices by providing affirmative action or other remedial action.[112] These may be very laudable objectives and they may well be worth arguing for but they are not necessary for compliance with 'the rule of law'.

IV THE RELATIONSHIP BETWEEN LAW AND RELIGION IN AUSTRALIA – AND IN PARTICULAR IN WESTERN AUSTRALIA – TODAY

Berman observed in the early 1980s that:

> The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. Thus the historical soil of the Western legal tradition is being washed away in the twentieth century and the tradition itself is threatened with collapse.[113]

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[110] Tom Bathurst, 'Opening of Law Term Dinner: The Place of Lawyers in Politics', 31 January 2018 <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20180131.pdf> [57]; see also Roger Trigg, *Equality, Freedom & Religion* (Oxford University Press, 2012) 3-4.
[111] Anthony Lester, *Five Ideas To Fight For* (OneWorld, 2016) 52.
[112] The NSW Bar Association, *In Brief* (online), 19 August 2017 <http://inbrief.nswbar.asn.au/posts/4df95d7a2fb43495d59665ad0621ee85/attachment/SSM_media_release.pdf>.
[113] Berman, *Law and Revolution*, above n 12, 39.

This Part of the article confirms the reality of Berman's observation in contemporary Australia and considers several examples of contemporary laws which compel Christians to act against their religious beliefs or which preclude them from so doing. These examples relate to marriage between persons of the same sex and abortion. Before doing so it is necessary to consider the adequacy of the free exercise of religion protections afforded by s 116 of the *Australian Constitution* mentioned in Part III. As interpreted by the High Court to date, s 116 has no application to state laws. Whilst there have been few s 116 cases which have considered the free exercise protection to date, in the cases which have occurred, the High Court has focused its attention on the stated purpose of the relevant law rather than considering its real effect or result on the religious liberty of the complainants. As a result, to date, the High Court has given the free exercise guarantee a very narrow scope of operation rather than interpreting s 116 to give substantive protection to individuals facing legislative impediments to fully living their faith.[114]

A *Marriage*

The High Court in 2013, the Australian people through a postal poll in 2017 and the Australian parliament through legislation passed in 2017 have effected changes to the meaning of marriage. The full impact of these changes on Australian society is a matter beyond the scope of this article, but one predictable impact will be the intersection of the new understandings of marriage with anti-discrimination law. As discussed in Part II, in the 19th century, Christianity was such an elemental and pervasion component of British society that the law generally reflected that reality. As a consequence, cases concerning marriage in that century simply used expressions such as 'Christian marriage' as a sufficient and complete

[114] It is necessary only to consider one example: *Krygger v Williams* (1912) 15 CLR 366. In this case the High Court rejected the argument of a Jehovah's Witness that s 116 ought be interpreted to exempt him from having to attend military training when his religious beliefs precluded him from so doing. The fact that the Commonwealth has remedied this failure by enacting conscientious objection provisions in ss 61A, 61CA-61CZE of the *Defence Act 1903* (Cth) did not alter the fact that s 116 proved inadequate to provide relief essential to preserve the religious liberty of Mr Krygger, see George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law and Theory* (Federation Press, 2018) [27.96]-[27.104]; George Williams, 'Australian laws fall short when it comes to protecting religious liberty', *Sydney Morning Herald* (online), 20 November 2017 <https://www.smh.com.au/opinion/australian-laws-fall-short-when-it-comes-to-protecting-religious-liberty-20171120-gzoqm3.html>; Neil Foster, 'Religious Freedom in Australia' (Paper presented at 2015 Asia Pacific JRCLS Conference, The University of Notre Dame Australia Sydney, 29-31 May 2015, 2-12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2887798>; Frank Brennan, M A Casey and Greg Craven, *Chalice of Liberty* (Kapunda Press, 2018) 78. Some argue that the High Court ought to interpret s 116 to more adequately protect religious freedom in Australia: see eg Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade & Business Law Review* 239. An analysis of those arguments is beyond the scope of this article.

description of that institution. Those cases must be read within their historical context. As discussed in Part II, the expression 'Christian marriage' encapsulated a foundational element of Western society. It was an institution with a deep, rich history and meaning which went unexpressed in those cases because it was simply assumed (and actually present) knowledge. In a society in which Christianity was not so ubiquitous the Courts would have, of necessity, provided reasoning for the state's understanding of marriage. When this question arose in the High Court in the 1970s in *Russell v Russell*,[115] Jacobs J provided more than the shorthand explanation adopted by the 19th century cases. In that case he explained why marriage and divorce were included in the *Australian Constitution* where they are found in ss 51(xxi) and (xxii) respectively. As Jacobs J observed:

> Paragraphs (xxi) and (xxii) of s 51 [of the *Australian Constitution*] are the only subject matters of Commonwealth power which are not related to what may be broadly described as public economic or financial subjects but which are related to what are commonly thought of as private or personal rights.[116]

The fact that the *Australian Constitution* included these two heads of power demonstrates that marriage was not considered by the nation's Founding Fathers as an exercise of personal autonomy which was a personal or private matter. Marriage and divorce were considered to be matters of such importance, to the new Federation, that the Founding Fathers provided for the Commonwealth to have power to pass laws governing them. Jacobs J explained why these powers were included in the *Australian Constitution* in *Russell v Russell* in this way:

> The reason for their inclusion to me appears to be twofold. First, although marriage and the dissolution thereof are in many ways a personal matter for the parties, *social history tells us that the state has always regarded them as matters of public concern*. Secondly, and perhaps more important, the need was recognised for a uniformity in legislation on these subject matters throughout the Commonwealth. In a single community throughout which intercourse was to be absolutely free provision was required whereby there could be uniformity in the laws governing the relationship of marriage and the consequences of the relationship as well as the dissolution thereof. Differences between the States in the laws governing the status and the relationship of married persons could be socially divisive to the harm of the new community which was being created.[117]

[115] (1976) 134 CLR 495.
[116] Ibid 546 (Jacobs J).
[117] Ibid 546 (Jacobs J) (emphasis added).

As Jacobs J explained, the new nation was interested in marriage for the same reason that states have always had and continued to have an interest in state regulation and recognition of monogamous, heterosexual relationships as marriages: the creation of families and the raising of children:

> [M]arriage as a social intuition which the law clothes with rights and duties attaching to the parties thereto is primarily an institution of the family. It is true that marriage can be regarded as a social relationship for the mutual society, help and comfort of the spouses but it cannot be simply so regarded. *The primary reason for its evolution as a social institution, at least in Western society, is in order that children begotten of the husband and born of the wife will be recognised by society as the family of that husband and wife*.[118]

A lot more could be said about the history and meaning of marriage in the Western legal tradition than is set out in *Russell v Russell*, but it does partially explain the substantive reasoning for the state's interest in 'Christian marriage' absent in those seminal 19th century cases. Justice Jacobs' explanation for the Commonwealth's interest in marriage was consistent with the natural law and the philosophical and historic underpinning of what the common law referred to as 'Christian marriage'.

Justice Jacobs' observations in *Russell v Russell* and the deep and rich historical and philosophical natural law underpinning for the state's interest in and preference for 'Christian marriage' were not referred to by the High Court when it came to consider the meaning of marriage in the *Australian Constitution* in 2013. Instead, the High Court considered the 19th century cases references to 'Christian marriage' not as a shorthand reference to thousands of years of Western tradition but instead as an absence of any reasoning at all. By 2013, when Christianity was no longer universally understood, the real meaning of 'Christian marriage' was lost on the High Court. It reimagined the meaning of marriage as used in the *Australian Constitution* in the case striking down the *Marriage Equality (Same Sex) Act 2013* (ACT) as inconsistent with the *Marriage Act 1961* (Cth). In 2013 the High Court stated that:

> [T]he nineteenth century use of terms of approval, like "marriages throughout Christendom" or marriages according to the law of "Christian states", or terms of disapproval, like "marriages among infidel nations" served only to obscure circularity of reasoning. Each was a term which

[118] Ibid 548 (Jacobs J) (emphasis added).

> sought to mask the adoption of a premise which begged the question of what "marriage" means.[119]

In describing the phrases used in the 19th century marriage cases as obscuring 'circularity of reasoning' the High Court missed the depth of philosophical and historical meaning conveyed by those shorthand expressions which were simply a 'convenient way of expressing the idea' to use the expression used in *Brinkley v Attorney General.* As a consequence, the High Court departed substantially from 'Christian marriage' in giving the term 'marriage' as used in the *Australian Constitution* this meaning:

> '[M]arriage' is to be understood in s 51(xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations …[120]

As Anne Twomey has observed, in doing so, the High Court included its own formulation of essential components of its redefinition of marriage: it must be consensual, it must be between natural persons albeit of indeterminate number, it must be 'intended to endure' and it must not be terminable at the will of the parties but only 'in accordance with law'.[121] The High Court provided no explanation as to why the particular features that it preserved in its definition of marriage ought to be mandatory for a relationship to be within the legislative powers of the Commonwealth in relation to 'marriage'. Nor did the High Court adequately explain why others, particularly those which had been hitherto an enduring feature of 'marriage' as it has always been understood within the Western legal tradition, were jettisoned. In reaching its conclusion the High Court departed from its own logic. At the same time as the High Court rejected the term 'marriage' as having a fixed meaning it created its own new fixed meaning of the term.

To support its view, that marriage had never had a fixed meaning but was a 'juristic concept', the High Court referred to divorce and to the reality of polygamous and same sex marriages in some overseas countries.[122] With respect to the Court, the reality of polygamy in other countries was not a new development by any means. It had been recognised and addressed

[119] *The Commonwealth v ACT* (2013) 250 CLR 441, 462 [36].
[120] Ibid 461 [33].
[121] Anne Twomey, 'Constitutional Law' (2014) 88 ALJ 613.
[122] *The Commonwealth v ACT* (2013) 250 CLR 441, 462 [35], [37].

specifically as a fact in many of the key English cases which had explained that the words marriage, wife and husband when used in different jurisdictions need not bear the same meaning as their meaning in the English common law. This had been expressly observed as early as 1835 by Lord Brougton in *Warrender v Warrende*r,[123] in a passage set out in Part II, where he referred to polygamous marriages as having a 'wholly different *status*' to marriages as understood by the common law …'[124] Here, Lord Broughton differentiated between marriage, as that term was used and understood in England, from what might be considered to constitute marriage elsewhere. Given this understanding of the reality that the same term was used in different places to mean different things, the recognition of the fact of international polygamy did not warrant the High Court's departure from the previously understood meaning marriage as requiring monogamy. Due to this departure the High Court also failed to recognise the logic of the reasoning of the historic cases on marriage as meaning different things in different places, as also applying to new forms of state recognised relationships such as same sex marriages in foreign nations. In Australia the term 'marriage' had always been limited to monogamous and opposite sex relationships formalised by particular forms of religious and State accredited ceremonies. It was equally false reasoning for the High Court to look to the approach taken in some countries overseas to consider the term 'marriage' as a term which could encompass same sex relationships and then to apply that meaning to the term as used in the *Australian Constitution* as it would have been for the 19th century courts to have interpreted the term 'marriage' in England to include polygamy. Similarly the High Court's use of divorce as a key foundation for its view that that marriage had never had a fixed meaning in Australia ignored the fact that divorce was sufficiently recognised as a reality in Australia at the time of Federation for it to have been included as a separate and specific head of power in the *Australian Constitution*.[125]

In reaching its own finding of an understanding of marriage not found in earlier jurisprudence or legislation, the High Court failed to recognise the reality of fixed attributes of marriage as understood within the Western legal tradition: long-standing natural law and Christian conceptions of marriage as between only one man and one woman. It is perhaps not surprising that the High Court failed to grasp these fundamental and consistently found attributes of marriage within the Western tradition because the principle 19th century cases

[123] (1835) 2 Cl & F 488.
[124] *Warrender v Warrender* (1835) 2 Cl & F 488 [531] and repeated in *Bethell v Hildyard* (1888) 38 Ch D 220, 234.
[125] *Australian Constitution* s 51(xxii).

which it referred to were all written within an mindset in which Christianity was considered to be 'parcel of the laws of England'[126] where reference to 'Christian marriage' in that context was a sufficient explanation in and of itself. Had the High Court adopted the same approach in 2013 it would, no doubt, have been condemned for so doing. In the result, by its redefinition of marriage the High Court found that the Commonwealth had Constitutional power to legislate to redefine the 'juristic concept' of marriage within the broad parameters that it developed should it choose so to do. By denuding the term, marriage of its historic meaning without re-examining and explaining what must be a new foundation for state interest in the concept, the High Court set the scene for the lack of consideration and debate of the state's interest in marriage which ensued once the nation headed to a postal poll. The power granted to the Commonwealth by the High Court's redefinition of marriage was used by the Commonwealth parliament to redefine marriage following the results of the 2017 postal poll.[127] As a matter of Australian law, marriage is no longer what the common law described as 'Christian marriage'. Instead the state now defines marriage in Australia to mean 'the union of 2 people to the exclusion of all others, voluntarily entered into for life'.[128] The state now requires civil celebrants at all Australian civil marriages to use the following words or words to the same effect 'Marriage, according to law in Australia, is the union of 2 people to the exclusion of all others, voluntarily entered into for life'[129] and it is to educate about this new state understanding of marriage that the Commonwealth may now offer grants.[130]

B *Redefining marriage and anti-discrimination law*

After marriage was redefined in jurisdictions such as the United States and the United Kingdom, issues arose as a consequence of pre-existing anti-discrimination laws being applied to religious believers seeking to continue to live their lives in accordance with their religious faith. Conflicts have arisen involving service providers, property owners and civil servants who assert that their Christian faith precludes their participation in a same sex marriage. Some Christians have asserted that their religious beliefs prevented them, for example, from renting their property,[131] providing floral arrangements,[132] designing and

[126] *Rex v Taylor* (1676) 1 Vent 293.
[127] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).
[128] *Marriage Act 1961* (Cth) s 5.
[129] Ibid s 46(1).
[130] Ibid Pt 1A.
[131] *New York State Division of Human Rights on the Complaint of Melisa McCarthy and Jennifer McCarthy (Complainant) v Liberty Ridge Farm LLC, Cynthia Gifford and Robert Gifford (Respondent)* (Case numbers 10157952 and 10157963).

producing wedding cakes,[133] using photographic and artistic skills[134] in connection with a same sex wedding ceremony or taking steps to authorise or record such a relationship as a civil servant.[135] These sorts or problems have arisen because as Lester has observed '[r]econciling equality and religious freedom is particularly difficult.'[136] The difficulty which arises is that '[r]eligious beliefs are often at odds with other concepts of equality.'[137] In Lester's view '[i]n a plural democratic society, cultural differences should be accorded equality of respect unless they are abusive or oppressive. What to one group is praiseworthy to another may seem anti-social.'[138] After identifying the fact that anti-discrimination laws in the United Kingdom do not make provision for religious believers in the sorts of circumstances mentioned above Lester observes that:

> Some traditional followers of the three Abrahamic religions – Judaism, Christianity and Islam – feel undervalued and even persecuted when their objections to gay marriage are rejected.[139]

In describing the consequences for religious believers as feeling 'undervalued and even persecuted' Lester diminishes the true impact that religious believers in these situation can face if they do not conform and compromise their beliefs. In addition to the fines, penalties and requirements to attend education programs anti-discrimination laws of this kind hurt more than 'feelings' when they preclude those religious believers impacted by them by acting consistently with a characteristic of their personhood which is integral to their flourishing as a person: their religious faith. As Laycock and Berg have observed:

> [C]ommitted religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with the demands of the Being that they believe made us all and holds the whole world together.[140]

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[132] *State of Washington v Arlene's Flowers Inc,* Supreme Court of the State of Washington 91615-2.
[133] *Charlie Craig and David Mullins v Masterpiece Cakeshop, Inc* Colorado Court of Appeals No. 14CA1351.
[134] *Elane Photography LLC v Vanessa Willock*, Supreme Court of the State of New Mexico, Docket No. 33,687.
[135] Lester, above n 111, 57.
[136] Ibid 56; see also Trigg, above n 110, 4-7.
[137] Lester, above n 111, 57.
[138] Ibid 56.
[139] Ibid 57.
[140] Douglas Laycock and Thomas Berg, 'Same-Sex Marriage and Religious Liberty' (2013) 99 *Virginia Law Review* 3.

> No religious believer can change his understanding of divine command by any act of will … Religious beliefs can change over time … But these things do not change because government says they must, or because the individual decides they should … [T]he religious believer cannot change God's mind.[141]

The conflict between religious freedom and the law which is posed by anti-discrimination law is more than a matter of 'feelings'. Examples of the reality of conflict between religious freedom and pre-existing anti-discrimination law overseas were known but not taken into account in any legislative changes by the Commonwealth parliament when it amended the definition of marriage in 2017. As a result, Commonwealth, State and Territory anti-discrimination laws which were all drafted before such a redefinition of marriage was contemplated let alone enacted into law, continue unchanged. The fact that the definition of marriage has changed however means that those who continue to subscribe to an understanding of marriage consistent with 'Christian marriage' as it had been understood in the common law – whether for religious or conscientious grounds – may find themselves in breach of anti-discrimination law. Even prior to the redefinition of marriage in Australia Christians with traditional views on sexual morality and marriage have found themselves in conflict with such laws. For example, three years prior to the redefinition of marriage in Australia, in 2014 the Victorian Court of Appeal found that a company owned by the Christian Brethren had engaged in unlawful discrimination. The unlawful conduct occurred when the company declined to accept a booking by a group providing education to young people which promoted views on sexual morality of same sex sexual activity in conflict with those held by the Christian Brethren faith tradition. The politeness of the conversation and the religious reasons provided for the declinature of the booking did not protect the company from a finding of unlawful conduct.[142] More specifically, in relation to religious teaching on marriage, in 2013 the Catholic Archbishop of Hobart, Archbishop Julian Porteous was referred to the Tasmanian Anti-Discrimination Commission. The alleged breach of Tasmanian law occurred when the Archbishop arranged for the distribution of a booklet explaining the Catholic Church's teaching on marriage in Catholic parishes and to the parents of students attending Catholic Schools. Whilst it might be argued that an essential role of an Archbishop is to teach the faithful on such matters the Commission found that the

[141] Ibid 4.
[142] *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2014] VSCA 75.

complainant had identified a potential breach of the *Anti-Discrimination Act 1998* (Tas).[143] As a consequence the Archbishop was obliged to engage in mediation of the claim with the complainant. Whilst when mediation failed to resolve the dispute the complainant dropped the case had that not occurred the Archbishop would have faced litigation. In these two examples the present limits on religious freedom in Australia are evident. The risk of exposure to complaint and to litigation is a current threat to religious freedom in Australia.

The redefinition of marriage introduces an understanding of marriage which was not the law when service providers, property owners and civil servants started their businesses, chose or commenced their careers. Religious believers would have entered their trades and occupations without any inkling or expectation that their choices may bring them into conflict with the state or with other citizens who do not share their religious or conscientious beliefs about marriage. The redefinition of marriage has created prospects of conflict between religious faith and the law which had not previously existed. In Australia, people who refuse to participate in a same sex marriage in the sorts of circumstances as those which have occurred overseas may be found to be acting in breach of Commonwealth, State or Territory anti-discrimination laws. Commonwealth anti-discrimination law proscribes discrimination on the ground which include sex, sexual orientation, gender identify, intersex status and marital or relationship status and extend to refusing to provide goods or services[144] or accommodation.[145] The exemptions for 'a body established for religious purposes' under Commonwealth law are unlikely to protect individual religious believers or businesses.[146] Similar laws exist in Western Australia.[147]

C *Abortion*

Whilst Western Australia protects the freedom of conscience and religion of health practitioners in relation to the provision of elective abortion,[148] such protections are not uniform across Australia. In the Northern Territory, Queensland and in Victoria health

[143] See Dennis Shanahan, 'Anti-discrimination test looms over church's marriage booklet' *The Australian* (online), 30 September 2015 < https://www.theaustralian.com.au/national-affairs/antidiscrimination-test-over-catholic-churchs-marriage-booklet/news-story/ea8aaee464a1a65c32db6552117fad5f>.
[144] *Sex Discrimination Act 1984* (Cth) s 22.
[145] Ibid s 23.
[146] Ibid s 37.
[147] *Equal Opportunity Act 1984* (WA) s 20.
[148] *Health Act 1911* (WA) s 334(2) ('No person, hospital, health institution, other institution or service is under a duty, whether by contract or by statutory or other legal requirement, to participate in the performance of any abortion').

professionals who have a conscientious objection to abortion, must refer patients seeking an abortion to another health professional who has no such objection.[149] These laws act to force health professionals who have a conscientious – often religious – objection to abortion to facilitate the termination of a pregnancy. This legislation applies very broadly and is not limited, for example, to gynaecologists or maternity specialists. One example of the impact of these laws is demonstrative. In Victoria a general practitioner, Dr Mark Hobart, endured disciplinary proceedings as a result of his failure to comply with the law by referring a couple seeking an abortion on sex-selection grounds.[150] In NSW whilst there is no legislative override of conscience the NSW Ministry of Health ('NSW Health') has largely replicated the legislative position in the Northern Territory, Queensland and Victoria in a policy.[151] As this Policy is only mandatory for NSW Health and a condition of subsidy for public health organisations it does not apply to every health professional in NSW.

An increasing number of Australian States and Territories – although not Western Australia as yet – have created specific criminal offences prohibiting protesting and a wide range of other activities in the vicinity of an abortion clinic.[152] Since the introduction of such legislation there have been successful prosecutions in Tasmania[153] and Victoria[154] and an unsuccessful prosecution under the ACT legislation.[155] In Tasmania, Graham Preston and Mr and Mrs Stallard were arrested and successfully prosecuted for breach of an exclusion zone. The religious motivations of Mr Preston and his co-accused were matters of evidence and judicial comment in the case because the *Tasmanian Constitution* contains protections for

[149] *Abortion Law Reform Act 2008* (Vic), *Pregnancy Law Reform Act 2017* (NT), *Termination of Pregnancy Act 2018* (Qld).
[150] Andrew Smith, *Doctors refused to refer couple for sex selection abortion faces possible loss of his licence* (7 October 2013) Catch The Fire Ministries <http://catchthefire.com.au/2013/11/doctor-refused-to-refer-couple-for-sex-selective-abortion-faces-possible-loss-of-his-license/>.
[151] NSW Health, *Policy Directive Pregnancy – Framework for Terminations in New South Wales Public Health Organisations* (2 July 2014) <http://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2014_022.pdf>.
[152] *Reproductive (Acceptance to Terminations) Act 2014* (Tas) s 9, *The Public Health and Wellbeing Act of Victoria 2008* (Vic) s 185A, *Health Act 1993* (ACT) ss 85-87, *Pregnancy Law Reform Act 2017* (NT), *Public Health Amendment (Safe Access To Reproductive Health Clinics) Act 2018* (NSW) and the *Termination of Pregnancy Act 2018* (Qld). Such legislation has been proposed but not, as yet, enacted in Western Australia – see The Greens, 'Safe Zone Call For Abortion Clinics', 15 February 2017 <https://greens.org.au/news/wa/safe-zone-call-abortion-clinics>.
[153] Edith Bevin 'Anti-abortion campaigner Graeme Preston arrested again for protesting outside clinic', *ABC News* (online), 15 April 2015 <http://www.abc.net.au/news/2015-04-14/anti-abortion-campaigner-graeme-preston-arrested/6392214>.
[154] *Alyce Edwards v Kathleen Clubb* [2017] MCV (23 December 2017).
[155] *Bluett v Popplewell* [2018] ACTMC 2.

religious freedom.[156] The Magistrate summed up the motivations of two of the accused in this way:

> [Mr Preston] has been a Christian since he was 14 and he believes that human life has been created in the image of God uniquely and that human life is of absolute importance as referred to in the Scriptures. That God knows us even when we are growing in our mother's womb and in particular he believes in the incarnation of Jesus as God coming into the world born in his mother's womb and that that validates human life at every stage. Mr Preston explained that the Bible teaches people to care for one another and in particular to help those who are most vulnerable or defenceless. He considers that a child in the womb would be probably the most vulnerable category of human beings and that they are completely defenceless. He believes that it is right and necessary that people come to the aid of those who are vulnerable and defenceless which includes unborn children.[157]

> Essentially as I understood Mrs Stallard's evidence she regards herself as a practicing Christian, and as part of her Christian beliefs she believes that every life is sacred, that an unborn life does not have a voice, and that as part of her Christian beliefs she needs to stand up for people without a voice which led her to protest with Mr Preston.[158]

Whilst the religious motivations of the defendants were evident, the evidence did not establish that they prevented anyone from accessing the relevant clinic, or that they threatened, intimidated, badgered, harangued or attacked anyone, they were convicted.[159] The defendants' arguments that the legislation offended the implied freedom of political communication were also rejected by the Magistrate.[160]

In Victoria, Mrs Kathy Clubb was arrested and successfully prosecuted under the Victorian legislation. Mrs Clubb had entered an 'exclusion zone' around an abortion clinic and provided a pamphlet to and spoken with a couple entering an abortion clinic. The arresting officer noted that the protesters 'were law abiding people' and that he 'didn't want them coming before the Courts.'[161] The Victorian legislation, among other things, precludes any

[156] *Constitution Act 1934* (Tas) s 46(1) 'Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.'
[157] *Police v Preston and Stallard* [2016] TASMC (27 July 2016) [58].
[158] Ibid [65].
[159] Ibid [58]-[59], [64]-[65].
[160] Ibid [54].
[161] *Alyce Edwards v Kathleen Clubb* (2017) MCV (23 December 2017) 2.

communication 'in relation to abortions' which is 'reasonably likely to cause distress or anxiety.'[162] The Magistrate adopted the definition of 'distress' contained in the *Australian Concise Oxford Dictionary* which is '[a]nguish, suffering, pain, agony, ache, affliction, torment, torture, discomfort, heartache.'[163] Whilst the couple made no complaint and did not give evidence at the trial as to what Mrs Clubb said to them, there was no evidence of the content of the pamphlet she gave them and 'no evidence of duress or violence of any kind',[164] the Magistrate found that Mrs Clubb's interaction with 'the couple entering the Clinic was reasonably likely to cause the couple, at the least, discomfort.'[165] The Court rejected a defence grounded on the implied freedom of political communication on the basis that abortion was a 'health' rather than a 'political' issue.[166] The High Court heard appeals from the Tasmanian and Victorian decisions on the implied freedom of political freedom issue in a joint hearing in October 2018. The judgment has been reserved and is likely to be handed down in the first half of 2019.

In the ACT case, the prosecution failed to establish a breach of the ACT legislation by three Christians silently praying within the relevant exclusion zone. Two of the men prayed silently whilst they walked outside the office building in which an abortion clinic operated. The Magistrate was most concerned by the Christian who sat down on a bench and silently prayed the rosary.[167] In this case a defence relying on the implied freedom of political communication was again unsuccessful.[168] The defendants succeeded in the case as the Court found that they were involved in a protest by silently praying in a manner which attracted no attention to them. After careful consideration the Magistrate made this finding despite one man having rosary beads with him.[169] The judgment leaves open the possibility that acts of private prayer if sufficiently visible to others might be considered to offend the legislation. The conclusions of the Court warrant attention as they demonstrate the Pythonesque nature of the inquiry a Court is required to undertake in applying this legislation to prayers:

> The defendants contend they were simply engaged in individual private prayer, which was not evident to others, and they therefore were not involved in a protest, by any means.

[162] *The Public Health and Wellbeing Act of Victoria 2008* (Vic) s185B(i)(b).
[163] *Alyce Edwards v Kathleen Clubb* (2017) MCV (23 December 2017) 3.
[164] Ibid.
[165] Ibid.
[166] Ibid 6-9.
[167] *Bluett v Popplewell* [2018] ACTMC 2 (9 March 2018) [85].
[168] Ibid [43].
[169] Ibid [85].

> In this matter I am assisted by video evidence depicting the conduct of each defendant on the day in question. Mr Popplewell and Mr Mellor are depicted walking among the pedestrian traffic on the footpath outside the building. They are not obviously carrying any symbols. No religious or political paraphernalia are seen in their possession. They appear to be moving innocuously among the light pedestrian traffic. In fact both men, at times, walk past uniform police, who are questioning Mr Clancy, and those police officers do not look up towards those two defendants. The evidence was that both men were walking silently.
>
> Mr Clancy is seen initially walking among the pedestrian traffic before sitting down on a bench adjacent to the building. He has something in his hands, consistent with rosary beads. Evidence was provided by Detective Sergeant Grant Bluett that Mr Clancy was seated with his head bowed and with rosary beads in his hands. While the video briefly depicts Mr Clancy with his head bowed, for the most part he is seated, with his head in a neutral position and looking to his front without engaging those who walk past. I find Mr Clancy sat with rosary beads in his hands, but not with his head continuously bowed.
>
> When I consider all the evidence, and in particular the video evidence that I have described, two features stand out to me in relation to the appearance and movements of these three defendants when outside the building on the day in question. There is the presence of the normal and the absence of the abnormal. They simply do not stand out as participating in any extraordinary activity. They do not even gather. I make these observations cognisant of their previous involvement in prayer vigils and their admitted views about abortion.
>
> I accept they were each engaged in silent prayer, and that such prayer involved no component of expression, communication or message to those around them. The only reservation I have in that regard, arises from the presence of the rosary beads in the hands of Mr Clancy. However, the presence of those rosary beads, without any other symbolic display or gesture, leaves me with a significant doubt about whether there was any expression, communication or message by Mr Clancy.
>
> Accordingly I find that each defendant was not engaged in protest, by any means.[170]

State and Territory exclusion zone legislation operates to restrict the ability of religious believers to act in accordance with their seriously held beliefs and so to exercise their religious freedom. Rather than respecting the rights of religious believers to live their faith such legislation prefers a person's ability to enter an abortion facility without seeing or

[170] Ibid [80]-[82], [84]-[86].

hearing a protest or engaging in any communication which might cause discomfort – potentially even if that be by way of observable silent prayer.

V THE NEED FOR GREATER PROTECTION OF RELIGIOUS FREEDOM IN LAW

This article has shown the close relationship between Christianity and the law – particularly in relation to marriage – at the time of the arrival of the First Fleet and the declaration of the Swan River Colony. The Western legal tradition did not emerge from a vacuum. It is infused with the Christianity of those involved in the centuries of its development. The history of the Western legal tradition as inherited by Australia cannot be understood in isolation from Christian influences. This article has also described the great changes which have occurred since the foundation of the Australian colonies and nation in the make-up of Australia's population and in contemporary attitudes to religion. Finally, this article provided some examples of conflicts which currently exist between law and religion in Australia. The demographic trends, contemporary attitudes to Christianity in Australia and the examples provided indicate that Australia is in the process of endeavouring, at a very accelerated pace, to disentangle the law from its Christian roots. As the basic general agreement on moral questions which once existed, given the preponderance of Christianity among the population, breaks down, the rationale and logic of such central features of the Western legal tradition as the centrality of the law, the moral authority of the law, and fidelity to the law become questionable in themselves. Whether the law can be divorced from its Christian roots without, over time, jettisoning the nation's entire moral and ethical frame and the Western legal tradition which is its inheritance is something which is difficult to predict. In the meantime, law and religion are rapidly moving from a period of trial separation towards an acrimonious divorce. The failure of existing law to provide adequate protection to freedom of religion in the examples given in this article suggests a need for greater protection.

REVOLT OF THE DISDAINED: AMERICA'S 2016 PRESIDENTIAL ELECTION

Steven Alan Samson*

ABSTRACT

The 2016 presidential election hinged on the return of overlooked or marginalised middle-class and working-class Democrats and independents – some of whom had earlier supported Richard Nixon and Ronald Reagan – to reinvigorate traditional patriotism and help form a new 'populist-conservative fusion in rural and industrial areas' within the Republican party. Donald Trump's political fortunes rest to a considerable degree on his ability to secure broad public support while maintaining the loyalty of his original coalition of the disdained.

Most Americans live in 'flyover country'. This is not a pejorative phrase – though usually meant ironically – but it expresses several things at once: the country's vast interior landscape, its unfamiliarity to many who reside on the coasts, its own residents' remoteness from the major centers of commerce and politics, and perhaps a sense of resignation at being overlooked, ignored, or taken for granted.

Places in the upper Midwest manufacturing belt, such as Detroit, Gary, and Youngstown, were once hives of industrial activity – automobile assembly, aircraft parts, steel production – that were pressed into additional service in the lead-up to and during the Second World War as essential parts of Franklin Roosevelt's 'arsenal of democracy'. Yet by the 1960s these cities and many other industrial towns were falling on hard times and by the early the 1980s the term 'Rust Belt' entered the vernacular as these places descended into precipitous demographic decline and industrial decay.

I THE GREAT DISRUPTION

In *The Great Disruption*, Francis Fukuyama summarised what had by then become an international problem:

> People associate the information age with the advent of the Internet in the 1990s, but the shift away from the Industrial era started more than a generation earlier with the deindustrialization of the Rust Belt in the United States and comparable moves away from manufacturing in other industrialized countries.[1]

This period 'from roughly the mid-1960s to the early 1990s' was marked by 'seriously deteriorating social conditions', which included rising crime and social disorder, 'the decline of kinship as a social institution', a drop in fertility, and soaring rates of divorce and out-of-wedlock childbearing.

> Finally, trust and confidence in institutions went into a deep, forty-year decline. A majority of people in the United States and Europe expressed confidence in their governments and fellow citizens during the late 1950s; only a small minority did so by the early 1990s. The nature of people's involvement with one another has changed. Although there is no evidence that people associated with each other less, their mutual ties tended to be less permanent, less engaged, and with smaller groups of people.[2]

These conditions continued to deteriorate in many places. Detroit's population, for example, was 1,849,568 in 1950 when it was the hub of the American automotive industry. By the year 2000 it had declined to 951,270 and then to 672,955 in 2016. Although a political culture of corruption contributed to these woes, the human costs of urban decay were not confined to the industrial heartland. Many other factors have also been at work, including the interdependent decisions made by industrialists and labor unions, a growing web of national entitlement programs, and shifting political priorities.

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[1] Francis Fukuyama, *The Great Disruption: Human Nature and the Reconstitution of Social Order* (Simon & Schuster, 1999) 4.

[2] Ibid 4-5. See also Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster, 2001).

In 2012 Charles Murray published a study, *Coming Apart*, that pictured the country splitting not so much along racial and ethnic lines but even more along lines of economic and social class:

> The American project … consists of the continuing effort, begun with the founding, to demonstrate that human beings can be left free as individuals and families to live their lives as they see fit, coming together voluntarily to solve their joint problems. The polity based on that idea led to a civic culture that was seen as exceptional by all the world. That culture was so widely shared among Americans that it amounted to a civil religion. To be an American was to be different from other nationalities, in ways that Americans treasured. That culture is unraveling.[3]

This 'unraveling' has become a widespread perception. Yet, somehow, conditions may have been ripe in 2016 to inspire greater resistance and perhaps a rededication to the American project through Donald Trump's appeal to 'Make America Great Again'.[4] Whatever may account for the results of the presidential election of 2016, it must be measured in terms of largely unforeseen political shifts which, along with strategic miscalculations, led to the greatest electoral upset in living memory.

II THE GREAT REVOLT

The unexpected outcome of the 2016 presidential election initially sent journalists, pollsters, and political strategists – many in shock – to fall back on stock answers rather than take a hard look at the data. 'The postmortems from the 2016 campaign painted a simple picture of the coalition that elected Donald Trump – it was economically distressed, uneducated, and angry.'[5] Yet this conclusion diminishes the range of Trump's appeal, shortchanges his ability to communicate with traditional Democratic audiences, and depreciates the media savvy of both the messenger and his audience. In his announcement speech,

> Trump homed in on themes that would animate his seventeen-month campaign: infrastructure spending, immigration reform and a wall on the southern border, protection of Medicare and Social Security benefits, a proactive and ruthless approach to the Islamic State terrorists, an unyielding

[3] Charles Murray, *Coming Apart: The State of White America, 1960-2010* (Crown Forum, 2012) 12.
[4] For a fascinating, sympathetic, but unsparing study of the life and career of Donald Trump, see Conrad Black, *Donald J. Trump: A President Like No Other* (Regnery, 2018). The foreword is by Victor David Hanson, a California farmer, military historian, and classics scholar.
[5] Salena Zito and Brad Todd, *The Great Revolt: Inside the Populist Coalition Reshaping American Politics* (Crown Forum, 2018) 19.

> support for the Second Amendment gun rights, and a pledge to use the White House's bully pulpit to shame American corporations into on-shoring future manufacturing jobs.[6]

Among those that chose to reexamine and challenge the prevailing electoral models, Salena Zito and Bradley Todd, who wrote *The Great Revolt*, took the further step of developing the Great Revolt Survey, which was then conducted by an opinion research firm 'among a group of 2,000 self-reporting 2016 Trump voters, with 400 each coming from Ohio, Pennsylvania, Michigan, Iowa, and Wisconsin.'[7] These five states, along with Florida, had cast their electoral votes for Obama in 2008 and 2012 but switched from Democrat to Republican in 2016. Only the first three states are regarded as part of the Rust Belt – the other two are part of the rural Midwestern farm belt – but all had been suffering economic stagnation and dwindling opportunity.

The Great Revolt Survey, which was conducted in August 2017, asked voters from ten counties in the five states that were surveyed to rank-order four campaign promises made by Donald Trump from the most to the least important. Their priorities were to bring back manufacturing jobs to America (34%), protect Medicare and Social Security (30%), put conservative justices on the US Supreme Court (28%), and build a wall on the border of Mexico (7%). Other findings are also noteworthy: 87% of all those surveyed were optimistic about the future, 85% expressed a preference that the United States make its own decisions on major issues rather than challenge other nations to follow its example, and 86% believed that Trump stands up for the working people against powerful corporate interests.[8]

In addition, the authors identified seven categories or 'archetypes' of voters that are part of the new Trump coalition and profiled three representatives of each through longer interviews. More than two-thirds of the text is devoted to these profiles.[9]

As a result, the book offers a richer, more complex picture than that conveyed through the media, reflecting more sorrow than anger over such changes as 'the twin forces of automation and importation,' but also resonating a sense of empowerment gained by supporting a bold political

[6] Ibid 11.
[7] Ibid 18.
[8] Ibid 239, 276-82.
[9] The seven archetypes are Red-Blooded and Blue-Collared, Perot-istas (infrequent voters and older first-time registrants), Rough Rebounders (those who had suffered major setbacks), Girl Gun Power (women who take a

maverick. As a Republican campaign operative put it: 'The guy has been around construction sites all his life, and he has respected the work those guys did … The blunt way he talks connected with them.'[10] Said a resident of a township north of Detroit:

> "We are tired of these disturbances marginalizing American workers that have scraped out of their hometowns and either scattered away from families or left trying to re-create something that is gone. No one has guided us through this ruthless transition. Trump identified what we already knew."[11]

If one grievance stands out among these voters in these working-class strongholds it is the loss of voice and a perceived lack of respect for their ways of life. It is an age-old complaint – one that has accompanied earlier outbreaks of populist fervor dating back to the late nineteenth century – but it may have been sufficient to turn the election.[12]

III COMING APART

A careful scrutiny of the last three general elections – 2008, 2012, and 2016 – supports Murray's observations about a growing social and economic class divide.[13] As Zito and Todd note: 'Murray's thesis from 2012, that the American economy and education system has become a great sorting engine that drives the cultural divide, virtually anticipated the 2016 election returns four years later.'[14] Yet the unexpected electoral outcome should put us on guard against

strong self-defense position), Rotary Reliables (civic leaders), King Cyrus Christians (evangelicals and conservative Catholics), and Silent Suburban Moms (quiet about their support for fear of disapproval).

[10] Ibid 210.

[11] Ibid 214. The candidate seemed to embody Marshall McLuhan's slogan: 'The medium is the message.' One gets a sense that he was drafted because of his willingness to publicly acknowledge and address the hard issues, despite a scattershot lack of precision: see Salena Zito, 'Taking Trump Seriously, Not Literally', *The Atlantic* (online), September 2016 <https://www.theatlantic.com/politics/archive/2016/09/trump-makes-his-case-in-pittsburgh/501335/>.

[12] The populist movement consisted of farmers alliances, Grangers, and Greenback supporters who expressed opposition to monopolies and trusts, a demand for free and fair elections, an eight-hour workday, and adoption of the initial and referendum system. The movement was patriotic, supportive of the Constitution, positive in tone, and exhibited much of the spirit of Christian revivalism. Later Progressives are said to have 'stolen their clothes': see Norman Pollock (ed), *The Populist Mind* (Bobbs Merrill, 1967).

[13] Detailed electoral maps for each of these elections, including county-level maps, are easily found on-line, eg: <https://brilliantmaps.com/2016-county-election-map/>.

[14] Zito and Todd, above n 5, 231.

unwarranted conclusions, especially since the most recent three elections were more personality-driven than is the norm.[15]

This idea of the economy and education as a sorting engine, whether a matter of national priorities or personal lifestyle choices, contributes to a growing sense of political polarisation.[16] The geographer Joel Kotkin underscores the power of this idea by describing the role of Silicon Valley in producing a new-style oligarchy that has not only reshaped California politics but is also doing so in the country at large. In *The New Class Conflict*, Kotkin describes a feudal symbiosis between an Oligarchy of high-tech billionaires and a New Clerisy based in the media, academia, and government which, together, are pursuing a fundamental transformation of America that has left no tradition or institution unscathed.[17] But is this impetus sustainable?

Setting to one side the growing influence of a radical social and cultural agenda, Kotkin singles out as the most critical factor an ideology of sustainable sources of energy that squeezes out economic growth. 'To "save the planet,"' Kotkin claims, 'the Clerisy and most of their tech Oligarch allies seek to limit consumption by eliminating cheaper energy sources in favor of expensive, highly subsidized renewables, or the chance to profit from various mitigation matters. This strategy works well for all partners of the new ruling synergy, although not for the majority,'[18] which includes what he calls the 'yeomanry' and the 'new serfs.'[19]

> The rise of Oligarchic politics in both major parties threatens the very viability of the democratic system. It allows specific interests – developers, Wall Street, Silicon Valley, renewable or fossil fuel producers – enormous range to make or break candidates. As the powerful battle, the middle classes increasingly become spectators.[20]

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[15] Thus dissatisfaction with political circumstances also tends to be personality-driven, as illustrated by growing disaffection with the Obama Administration. See Bryan Preston, 'Rasmussen: The Ground Under Obama's Feet Is Starting to Shift', *PJ Media* (online), 24 May 2013 <https://pjmedia.com/blog/rasmussen-the-ground-under-obama-is-starting-to-shift/>.

[16] See Joel Spring, *The Sorting Machine: National Educational Policy Since 1945* (David McKay, 1976) for an example of the first; and Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (Houghton Mifflin Harcourt, 2008) for the second.

[17] The idea of a new feudalism was also an early populist theme. See Pollock, above n 12, 17.

[18] Joel Kotkin, *The New Class Conflict* (Telos Press, 2014) 137-38.

[19] See Joel Kotkin, 'California's New Feudalism Benefits the Few at the Expense of the Multitude', *New Geography* (online), 5 October 2013 <http://www.newgeography.com/content/003973-california-s-new-feudalism-benefits-a-few-expense-multitude>.

[20] Kotkin, above n 18, 151.

In a section entitled 'The Culture War Worth Having', Kotkin contends: 'The real issue revolves around the future of the American family. The family has long been marked for extinction among political radicals, and its demise is also now widely celebrated by both progressive pundits and some business interests.'[21] Broken families are a leading cause of downward economic mobility. Church affiliation is also trending downward, especially among the working classes. Yet 'the current fashions in urbanism not only disdain religiosity but often give short shrift to issues involving families.'[22]

Zito and Todd make a similar observation about the change of tone between Bill Clinton's successful presidential campaign in 1992 and Hillary Clinton's failed campaign in 2016:

> Within a generation, the religiosity that was once honored by both parties became mocked by one as merely a basis of bigotry. Angst about financial insecurity was derided by coastal elites in both parties as the last wheezing of an outmoded appendage on the global economic animal. Even in the wake of their decisive role in the elections, Rust Belt voters watched on cable television as the Left and journalists pigeonholed their rebellion as an ugly bout of white nationalism, doubling down on all the elitist snobbery those voters sought to rebuke.[23]

It is very revealing to contrast the 'home style' the two spouses displayed on the campaign trail.[24] One had been elected governor of Arkansas several times. The other had won a Senate seat in New York in 2000 and was subsequently reelected. When Bill Clinton ran for president, he identified himself with the moderate wing of the Democratic Party and was able to attract so-called Reagan Democrats – whom George H W Bush had estranged – back to the fold. By

[21] Ibid 149. This thesis is boldly illustrated in Darel E Paul, 'Culture War as Class War', *First Things* (online), August/September 2018 <https://www.firstthings.com/article/2018/08/culture-war-as-class-war>.

[22] Kotkin, above n 18, 149. These observations comport very well with Murray's assessment, which focuses on the formation of a new upper class and a new lower class, represented by two fictional, ideal-type neighborhoods that are based on the upscale neighborhood of Belmont, a Boston suburb, and the working-class neighborhood of Fishtown in Philadelphia. The first preserves a fairly stable family structure compared to the other. Murray, above n 3, 144-45.

[23] Zito and Todd, above n 5, 230.

[24] Richard Fenno's book by that title is about the relationship between members of Congress and their home constituencies: Richard F Fenno Jr, *Home Style: House Members in Their Districts* (Longman Classics, 2002). It is a classic of the political science literature. Bill Clinton was widely regarded at the time as the most talented politician of his generation.

contrast, Hillary Clinton has identified herself with the Progressive wing of the party and, in effect, shoved aside its more conservative working-class constituency.[25]

In 1992 Bill Clinton's standard stump speech was premised on 'nationalism and a critique of the economic and political elites who had taken actions contrary to the best interests of middle-class America.'[26] He generally closed his speeches 'with a clarion call to a cause instead of a call to a candidacy.'[27] In 2016 Hillary Clinton's speeches were 'not a paean to the middle-class work ethic' but a checklist of 'social wedges and cultural grievances.' Indeed, her kickoff speech concluded with 'an extended riff about gender politics and her own potential to break the glass ceiling.'[28]

IV CROSSING THE GREAT DIVIDE

These differences testify to a deep cultural divide that, for decades, has kept the defenders of traditional values – national, cultural, moral – on the defensive. Kotkin describes the attitude of the leadership of both the Democratic and Republican parties toward family and religious issues in terms that are not very flattering to either:

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[25] The New Left pursued a Gramscian 'long march through the institutions. through a step-by-step takeover of the Democratic Party that began in 1968 and culminated in the McGovern reforms that were implemented during the 1972 Democratic National Convention. See Arthur L Herman, 'Chicago 1968: The Night the Democratic Party Died', *National Review* (online), 28 August 2018 <https://www.nationalreview.com/2018/08/1968-democratic-convention-riots-modern-party-established/>. The Soixante-Huitard uprising in May 1968 was one of many manifestations of a growing institutional crisis in the West. See Helmut Schelsky, 'The New Strategy of Revolution: The "Long March" through the Institutions' (1974) 18(4) *Modern Age* 345. (A PDF may be found at <https://home.isi.org/journal-issue/fall-1974>). A study guide is available at <https://digitalcommons.liberty.edu/gov_fac_pubs/439/>.

[26] Zito and Todd, above n 5, 228-29. These elites bear a strong resemblance to what Samuel P Huntington called the 'Davos Culture' a generation ago: 'Each year about a thousand businessmen, bankers, government officials, intellectuals, and journalists from scores of countries meet in the World Economic Forum in Davos, Switzerland. … Davos people control virtually all international institutions, many of the world's governments, and the bulk of the world's economic and military capabilities. … It is far from a universal culture, and the leaders who share in the Davos Culture do not necessarily have a secure grip on power in their own societies.' Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (Touchstone, 1997) 57-58.

[27] Zito and Todd, above n 5, 228-29. A revived emphasis on perceived national self-interest became a focal point of the Trump campaign and inspired renewed interest in the nation-state form. See Micah Meadowcroft, 'The Nations of the Earth', *Washington Free Beacon* (online), 8 September 2018 <https://freebeacon.com/culture/yoram-hazony-hudson-institute-the-virtue-of-nationalism/>. It is also important to distinguish patriotism and liberal nationalism (as opposed to an ideology of global governance) from a 'blood and soil', nativist form of nationalism or chauvinism with which it is often deliberately misidentified. While Yoram Hazony acknowledges that 'hatred may be endemic to political movements in general,' including nationalism, he emphasises 'that liberal-imperialist political ideals have become among the most powerful agents fomenting intolerance and hate in the Western world today.': Yoram Hazony, *The Virtue of Nationalism* (Basic Books, 2018) 11.

[28] Zito and Todd, above n 5, 229-30.

> Sadly, neither of the rising political tendencies – what might be seen as Clerical liberalism [Democratic Party] and its libertarian counterpoint [Republican Party] – addresses such fundamental social deficits. The Clerisy tends to supplant the family with the state and informal arrangements among individuals. Economically focused libertarianism, rapidly becoming the intellectual foundation of modern conservatism, is almost psychologically incapable of addressing such social issues. 'The libertarian priority is meeting market needs,' observed one commentator. Other issues are secondary or they are seen as curable simply through market mechanisms.[29]

In the 2016 election the most striking predictors of electoral support for the two major party candidates – Hillary Clinton and Donald Trump – were demographic: the population density and average education level within voters' home county. According to Zito and Todd: 'Counties with rates of educational-attainment density higher than the national average performed better for Hillary in defeat than they had for Obama in victory, and counties with rates of bachelor's degrees below the national average of 29.8 percent moved toward the Republicans.' The apparent diversity of the latter offers opportunities to cross the educational divide:

> The driver of this [educational-attainment] split is not the college education itself, but the social pressure that comes with living exclusively among other college graduates – and the political liberation that comes for college graduates who have a more educationally diverse orbit.[30]

The specter of such a rift would have troubled the Framers of the American Constitution.[31] The premise behind their provision for an electoral college was to filter and help cool the political passions of the moment by selecting distinguished citizens from local electoral districts, who

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[29] Kotkin, above n 18, 150. Libertarianism and Clerical liberalism roughly correspond to what Walter Russell Mead calls Liberalism 3.0, the Red Social Model, and Liberalism 4.0, the Blue Social Model. He contends that both are finished and cannot be salvaged. Walter Russell Mead, 'The Once and Future Liberalism', *American Interest* (online), 24 January 2012 <https://www.the-american-interest.com/2012/01/24/the-once-and-future-liberalism/>.

[30] Zito and Todd, above n 5, 232. While Seymour Martin Lipset noted in 1960 that so-called cross-cutting cleavages, including religion, region, gender, and the urban/rural divide, may moderate the traditional left-right political spectrum, he still supported Robert MacIver's contention that '[t]he right is always the party sector associated with the interests of the upper or dominant classes, the left the sector expressive of the lower economic or social classes, and the center that of the middle classes.' Seymour Martin Lipset, *Political Man: The Social Bases of Politics* (Doubleday and Company, 1960) 222. Clearly the alienation of much of the working class from the left-wing party is the very opposite of historical expectation. Something more powerful seems to be at work, something Hazony identifies as collective self-determination: 'a concern for the lives and property of members of the collective to which we are loyal … the need to maintain the internal cohesiveness of the family, tribe, or nation, and the need to strengthen its unique cultural inheritance and pass it on to the next generation.' Hazony, above n 27, 9.

[31] The Framers of the American Constitution sought to achieve a 'more perfect Union'. By contrast, Samuel P Huntington notes a sharp divide between Americans in two adjacent sections of *Who Are We?* Entitled 'Dead Souls:

were not simply delegates but were also free to vote their conscience, to meet in the state capital of each state to cast their votes for president and vice-president. Just as importantly, the system favored candidates who could win broad political support throughout the country, which is also the reason why the president and vice president may not be inhabitants of the same state.[32]

The comparative diversity of the two candidates' appeal in the 2016 election is readily illustrated by electoral maps which show the level of popular support on a county-by-county basis. In 2016 Donald Trump carried approximately 2600 counties compared with Hillary Clinton's 489.[33] Trump was elected with 304 electoral votes from 30 states compared with Clinton's 227 electoral votes from 20 states even though Clinton won approximately 48% of the popular vote and Trump won just under 46%. Libertarian Party candidate, Gary Johnson, won approximately 3.3% and the Green Party candidate, Jill Stein, won approximately 1.1%. There had not been such a large so-called third-party result since billionaire Ross Perot's two bids in 1992 (19% of the popular vote) and 1996 (8% of the popular vote). Each time he failed to win any electoral votes.

The bitterness of the divide within and between the two major parties is indicated by an unusually high number of seven electors pledged to the major party candidates – two for Trump and five for Clinton – who cast or attempted to cast protest votes instead. These results suggest a softening of traditional party support and may point toward an eventual party realignment.

V THE BIG SORT

In part, these results seem to corroborate an even earlier study, *The Big Sort*, which identifies newer demographic patterns – 'the clustering of like-minded individuals' – that fracture along ever-narrower lines of identity and lifestyle. Bill Bishop writes:

The Denationalization of Elites' and 'The Patriotic Public': Samuel P Huntington, *Who Are We? The Challenges to America's National Identity* (Simon & Schuster, 2004) 264-76.

[32] This is enforced by denying the electoral votes of that state to the second candidate. The original system awarded the presidency to the first-place candidate and the vice presidency to the second-place candidate. George Washington was elected president unanimously in 1788 and 1792. John Adams won the vice-presidency both times but with fewer votes since there were other candidates. The advent of political party slates in the 1796 election disrupted the system, leading to John Adams winning the presidency but Thomas Jefferson, his rival for president, winning the vice presidency. Then in 1800, Aaron Burr, the Republican vice-presidential candidate, tied with Thomas Jefferson, who ran at the head of the Republican ticket. This threw the election into the House of Representatives where, after dozens of ballots, Alexander Hamilton, a Federalist, used his influence to support Jefferson's election. The Twelfth Amendment to the Constitution modified the Electoral College to reflect the new custom of party-line voting.

[33] Zito and Todd, above n 5, 263. See, eg, <https://brilliantmaps.com/2016-county-election-map/>.

> The old systems of order – around land, family, class, tradition, and religious denomination – gave way. They were replaced over the next thirty years with a new order based on individual choice. Today we seek our own kind in like-minded churches, like-minded neighborhoods, and like-minded sources of news and entertainment. … [L]ike-minded, homogeneous groups squelch dissent, grow more extreme in their thinking, and ignore evidence that their positions are wrong. As a result, we now live in a giant feedback loop, hearing our own thoughts about what is right and wrong bounced back to us by the television shows that we watch, the newspapers and books we read, the blogs we visit online, the sermons we hear, and the neighborhoods we live in.[34]

During the past three decades, an information revolution has weakened the broadcasting oligopoly that once tended to homogenize national and international reporting. A greater diversity of information outlets today has led political campaigning to become both more expensive and tactically more sophisticated but also more brutal. Bill Bishop's remarkable observation of the 2008 Democratic Party primaries has considerable bearing on more recent events.

> An election doesn't have to be between a Republican and a Democrat to find the Big Sort at work. In the long 2008 Democratic primary season, Obama and senator Hillary Clinton split the vote. But in a dead even contest between two ideologically similar candidates, half the voters lived in counties where either Obama or Clinton won by landslides – a greater percentage than in the 2004 general election between Kerry and Bush.[35]

This sort of polarisation is a significant trend but at the time it seemed to defy conventional wisdom. Clinton took six of the seven most populous states in the country (except Illinois, where Clinton was born but where Obama served as a senator), along with the Rust Belt, the coal country of Appalachia, and the oil-rich Southwest. Yet Obama secured the nomination by winning more states and dominating the Deep South, the agricultural upper Midwest and High Plains, the northern tier of the Mountain West, and the Pacific Northwest.

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[34] Bishop, above n 16, 39.

[35] Ibid 307. Like Ronald Reagan in the 1976 Republican primary contests against Gerald Ford, Barack Obama in 2008 waged an insurgency campaign to overtake Hillary Clinton, who at the outset of the contest was the presumptive nominee. Reagan, who had solid support in the South and the West, barely fell short in the delegate count. But Ford was defeated in the general election by Jimmy Carter and Reagan was elected president four years later. For a detailed electoral map of the 2008 Democratic primary, see <https://www.reddit.com/r/MapPorn/comments/32ct8y/2008_democratic_presidential_primary_results_by>.

In retrospect, this outcome suggests that either a generational struggle within the Democratic Party had begun or a strong protest vote had erupted against Hillary Clinton. After all, at the outset, it was 'her race to lose', as the expression goes. Obama was best known as the keynote speaker at the 2004 Democratic National Convention and as a first-term senator from Illinois who had written a couple of bestselling books: *Dreams from My Father* and *The Audacity of Hope*.[36] During the nomination campaign, Obama certainly had done better in many areas, especially the South, which tended to vote Republican, but he also lost most of those states in the general election. Nevertheless, he was also able to expand the party's appeal, which might otherwise have been concentrated on the East and West Coasts and in the industrial heartland. Despite all his rhetoric about hope and change, however, the evidence for a realignment or renewal within the Democratic Party, whether regional or generational, is mixed.[37] By 2016 it was also hard to detect a generational change in the party leadership.

Trump's ability to appeal to the agricultural Midwest that had supported Obama and the Rustbelt states that had initially supported Clinton but voted for Obama in the general election indicates the possibility of an electoral dealignment that may eventually lead to a party realignment. This brings us to the heart of the matter: the ability of Trump and the Republican Party to blend an older suburban coalition with a newer rural-industrial fusion of the neglected and disdained. As Zito and Todd contend:

> The emerging schism between the intensity of support for Republican candidates who represent this populist-conservative fusion in rural and industrial areas, and the newly competitive nature of educated suburbs that previously tilted Republican, is the core axis of our new politics.[38]

Ronald Reagan made significant inroads into Democratic strongholds in 1980 and even more impressively in 1984 when he swept every state except Minnesota, his opponent's home state. In his 1972 re-election Richard Nixon had done much the same, losing only DC and Massachusetts. Elements of this critical bloc of swing voters – at various times called the 'Silent Majority',

[36] Barack Obama, *Dreams from My Father: A Story of Race and Inheritance* (Crown, 2012); Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (Crown, 2006).
[37] The Obama candidacy represented his supporters' hope to inject new blood into the languishing New Deal and Great Society coalition that had dominated the country's political agenda since 1933 and, again, 1964. For a philosophic treatment of American liberalism, see Charles R Kesler, *I Am the Change: Barack Obama and the Crisis of Liberalism* (Broadside Books, 2012).
[38] Zito and Todd, above n 5, 25.

Middle American Radicals, and Reagan Democrats – have played an essential part in most Republican Party electoral successes since 1968 but without great enthusiasm after the Reagan years.[39] Their support, once squandered, has been difficult for Republicans and Democrats alike to win back.

VI AFTER THE FALL

Richard Nixon's fall from political grace resulted from an investigation into political 'dirty tricks' that began before he was reelected in a landslide in 1972. The aftermath to the break-in at the Watergate offices of the Democratic Party unfolded in the manner of a Greek tragedy and has become the preeminent object lesson as well as window into the American psyche. Every subsequent 'scandal' has been branded with the suffix 'gate'.[40] Even more than the Kennedy and King assassinations, Watergate marks both a culmination of the Sixties' turmoil and a turning point that has shaped American controversies and political attitudes ever since. Conrad Black conveys the reasons vividly:

> The Watergate debacle, partly due to Nixon's mismanagement, caused the evaporation of executive authority and led to the immolation of one of the most successful presidencies in American history. The Democrats in the Congress seized the opportunity to cut off all assistance to South Vietnam and doomed Indochina to the murderous attention of the Viet Minh, Viet Cong, Khmer Rouge, and Pathet Lao, and millions perished. As Trump watched the assault on Nixon, the disorderly rout in Vietnam as the Democrats undid Nixon's 'peace with honor,' and the irresolution of the Carter administration, he believed he saw the failure of the self-proclaimed best and brightest, the Eastern Establishment, the Ivy League, and the career State Department. The national media, academia, and the Democratic party establishment celebrated the defeat in Vietnam and the Watergate putsch as triumphs of American integrity, but the thirtyish Donald Trump strongly suspected that this was self-serving claptrap thinly masking a series of largely self-induced national disasters.[41]

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[39] See Donald I Warren, *The Radical Center: Middle Americans and the Politics of Alienation* (University of Notre Dame Press, 1976).

[40] 'Chinagate' is an example. See Byron York, 'When a Foreign Adversary Meddled in a Presidential Election', *Washington Examiner* (online), 9 September 2018 <https://www.washingtonexaminer.com/opinion/columnists/byron-york-when-a-foreign-adversary-meddled-in-a-presidential-election>.

[41] Black, above n 4, 6-7. Black adds: 'Though under very different circumstances, Trump would become intensely familiar with the shameless guerrilla tactics of the same media, academic, and political elites who had bloodlessly assassinated Nixon. He was forewarned.' Victor Davis Hanson updates and summarizes the use of these guerrilla tactics during the election and the early Trump Administration. Victor Davis Hanson, 'Just How Far Will the Left

The case has been made that the war was 'as good as won'. This betrayal of wartime allies and the resulting 'Vietnam syndrome – described as 'doubt about America's goodness and power, and fear of casualties and foreign "quagmires"'[42] – is a matter of profound national shame that has never been fully exorcised.

After Nixon resigned in disgrace in August 1974, the congressional Democrats were swept into supermajorities in both Houses that November. Even before that happened, however, the party's new antiwar leadership had chosen to cut off further assistance to the South Vietnamese regime. Several countries fell into the Soviet orbit before the decade was out.

The election of Ronald Reagan in 1980 started to break the longtime Democratic grip on Congress but it also failed to secure a party realignment. Since the Reagan years and the end of the Cold War, however, neither party has managed to extend its control over one or both houses of Congress or the presidency for more than a few years at a time.

Despite presiding over the end of the Cold War, George H W Bush failed to hold onto the so-called Reagan Democrats when he ran for re-election in 1992. But nearly a generation later it appears many of the Reagan Democrats' latter-day counterparts were willing to endorse a tough-talking, relatively non-ideological businessman who spoke their language, just as Reagan, a former union president, had done earlier. Much of Trump's attraction for a marginalized part of the electorate seems to exhibit the 'not born yesterday' attitude of people who are tired of betrayals. Black recognizes this, as shown by this summary of his brief on Trump's behalf:

> On the subject of Donald Trump, righteousness can be overdone, and often is; he has, as has been recounted, his inelegant aspects. But Benjamin Franklin's role in persuading Britain to expel France from Canada and fifteen years later in persuading France to help expel Britain from America was the ultimate expression of the art of the deal. Some of Jefferson's most florid passages in the Declaration are among history's greatest expositions of truthful hyperbole. In international relations, Richard Nixon was a chess player and Ronald Reagan was a poker player, and both were very successful. Trump seems more of a pool shark, but it seems likely that he will

Go?', *American Greatness* (online), July 23, 2018 <https://amgreatness.com/2018/07/23/just-how-far-will-the-left-go/>.

[42] Bruce S Thornton, *The Wages of Appeasement: Ancient Athens, Munich, and Obama's America* (Encounter, 2011) 150, 151.

> do well too. Trump isn't very reminiscent of Franklin or Jefferson or FDR or Nixon or Reagan; but he is a man of his times, and his time has come.
>
> With President Trump, no setback is admitted or accepted; for him, rebuffs are really victories, disguised victories, moral victories, or the preludes to victories. Hyperbole, truthful or otherwise, is his common parlance. He speaks for the people, he has been a very successful man, and he has repeatedly outwitted his opponents, which is why he is attacked with such snobbery, envy, and spitefulness. But America is reversing its decline and wrenching itself loose from the habits of lassitude, elitist decay, appeasement of foreign enemies, and domestic inertia. His record is impressive; his foibles are not durably relevant.[43]

VIII WHO ARE WE?

The great question raised by the candidacy and election of Donald Trump is whether the growing schism between the new elites and the general population can be healed. As the rise of identity politics endlessly reshuffles the political deck, the question of national identity has become more urgent for Americans as well as Europeans and others. In *Who Are We?* the late political scientist Samuel P Huntington even referred to a 'global crisis of identity'. Huntington himself wished to show the wisdom of choosing a revitalized 'Anglo-Protestant culture, traditions, and values that for three and a half centuries have been embraced by Americans of all races, ethnicities, and religions and that have been the source of their unity, power, prosperity, and moral leadership as a force for good in the world.'[44] But the assimilationist 'melting pot' ideal of a century ago has been challenged in the name of multiculturalism.[45]

The American political class and the leadership of both major political parties increasingly spoke the language of globalism, quite noticeably so at the end of the Cold War with George H W Bush's vaunted 'New World Order' a decade before the terrorist attacks of 11 September 2001. The idea of 'global governance' became part of the new political language and the Supreme Court began citing international standards. The press itself is largely oblivious to public

[43] Black, above n 4, 213.
[44] Huntington, above n 31, xvii.
[45] A bold defense of the nation-state has been undertaken by Melanie Phillips, a London-based journalist: see Melanie Phillips, 'Israel Gets the Nation-State Right While the West Fumbles with Identity', 27 July 2018 <http://www.melaniephillips.com/israel-nation-state-west-identity/>.

sentiment outside the major metropolitan areas and consequently failed to detect a growing resentment over perceived disrespect, both to the people themselves and to the country.

> Leading national journalists missed the potential efficacy of Trump's grievance appeal because they exemplified, professionally and personally, the other end of the complaint. Trump's campaign went straight at the idea that cultural power was stacked against voters who live outside the elite zip codes.[46]

What galvanised the greatest opposition to Hillary Clinton may have been her ill-chosen remarks two months before the election when she told a group of donors: 'you could put half of Trump's supporters into what I call the "basket of deplorables." … The racist, sexist, homophobic, xenophobic, Islamophobic, you name it.'[47] It was a self-inflicted wound, added to all the political baggage she already carried due in part to other self-inflicted wounds. The elitist disdain and general lack of respect shown towards ordinary Americans by 'those with access to the megaphones of culture' moved many reluctant voters off the fence. As a resident of Wisconsin commented:

> "Our culture in Hollywood or in the media gives off the distinct air of disregard to people who live in the middle of the country. As if we have no value or do not contribute to the betterment of society. It's frustrating. It really wants to make you stand up and yell 'We count,' except of course we don't. At least not in their eyes."

And a store owner in Michigan complained: 'There is no respect for anyone who is just average and trying to do the right things.'[48]

By contrast with the suppositions of the bipartisan political establishment, '[t]he connective tissue of the Trump movement is nationalism,' as Zito and Todd remark. Even so, much of it is philosophically 'driven by a value that places localism over globalism.'

> The new populism is a movement against bigness. It distrusts big government, big corporations, big media conglomerates, and, perhaps more than anything else, big multinational agreements and organizations. Just as the Whole Foods shopper is leery of the pesticide practices of a Mexican

[46] Zito and Todd, above n 5, 234.
[47] Ibid 239.
[48] Ibid 236, 237.

> agribusiness, the Trumpian populist has no confidence that the Brussels bureaucrat will make economic decisions that consider the well-being of the American blue-collar worker.[49]

What some would label truculence is what, for many Americans, is simply a reassertion of the traditional fighting spirit. In a famous speech laced with profanities, General George Patton probably exaggerated when he raised it to the level of a principle: 'Americans love a winner and will not tolerate a loser. Americans play to win all the time. That's why Americans have never lost and will never lose a war. The very thought of losing is hateful to Americans. Battle is the most significant competition in which a man can indulge. It brings out all that is best and it removes all that is base.'[50]

Yet as Adam Smith remarked about British military reversals in America: 'There is a great deal of ruin in a nation.' National survival requires a resiliency that must also withstand repeated testing in the political and military arenas. Notwithstanding the tarnish of historical shortcomings, a young Illinois legislator in 1838 mustered his audience with a call to transmit America's 'political edifice of liberty and equal rights' to future generations as a 'task of gratitude to our fathers, justice to ourselves, duty to posterity, and love for our species in general.'

> At what point then is the approach of danger to be expected? I answer, if it ever reach us, it must spring up amongst us. It cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide.[51]

Adversity takes the measure of men and nations. Institutions must be periodically renewed or else they drift until the consequent decay becomes too entrenched to reverse. The late Samuel P Huntington understood the stakes: 'All societies face recurring threats to their existence, to which they eventually succumb. Yet some societies, even when so threatened, are also capable of

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[49] Ibid 247.

[50] General George Patton, Speech to the Third Army: <https://genius.com/Gen-george-patton-speech-to-the-3rd-army-annotated>.

[51] Abraham Lincoln, Lyceum Address, 27 January 1838 <http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm>. Just a few years earlier Nathaniel Hawthorne wrote a short story, 'The Gray Champion', to make a similar point about renewing the patrimony. It features the timely return of an ancestral ghost during the 'Glorious Revolution' to pronounce judgment upon Massachusetts' royal governor, Edmund Andros, and his officers.

postponing their demise by halting and reversing the process of decline and renewing their vitality and identity.'[52]

IX THE POLITICS PRESIDENTS MAKE

Too often, however, any revitalisation comes at the expense of institutional integrity. Another American political scientist, Stephen Skowronek, has explored this pattern. Although he acknowledges that the American constitutional system was designed to counteract 'the degenerative propensities of republican institutions,' he adds a proviso that should trouble Constitutional originalists:

> The dismal cycle of classical republican politics may have been controlled by this design, but it was not stopped. Presidential leadership has worked to pull the federal government ever more deeply into crises of legitimacy before suddenly swinging things around in one spectacular display of its regenerative potential. A few incumbents, thrust to the commanding heights of political authority, have found new ways to order the politics of the republic and release the powers of the government; but they have done so by building personal parties and shattering the politics of the past, actions the Constitution originally was supposed to guard against. Moreover, each of these great political leaders – Jefferson, Jackson, Lincoln, Franklin Roosevelt, and Reagan – passed on a newly circumscribed regime, so tenacious as to implicate their successors in another cycle of gradually accelerating political decay.[53]

The Reagan presidency failed to accomplish such a realignment. It focused instead on defeating the Soviet Union. The last major realignment followed the election of Franklin Delano Roosevelt in 1932 during the Great Depression. It resulted in a long period of intensive legislation and centralized administrative regulation known as the New Deal, which was rendered effectively permanent through the *Executive Reorganization Act of 1939* ('1939 Act') and was later extended through Lyndon Johnson's Great Society program (1964-1968) and subsequent administrations. As a result of the 1939 Act,

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[52] Huntington, above n 31, xvii.

[53] Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* (Belknap Press, 1993) 33. The cycles, beginning with reconstructive leadership and ending with a disjunctive epigone, may signal merely an advancing political sclerosis.

> the administrative presidency was conceived with the expectation that it would be an ally of programmatic liberalism. It is not surprising, therefore, that when this expectation was violated with the rise of a conservative administrative presidency beginning in the 1970s, serious conflict developed between the presidency and bureaucracy. Nor is it surprising that this conflict influenced still another reform of administrative law with the objective of more effectively insulating reform programs from presidential influence.[54]

The candidacy and elevation of Donald Trump to the presidency was, from the start, difficult to imagine except under the most extraordinary of circumstances. Even in a state of decline, the bipartisan New Deal settlement militates against any such challenge from the outside. Yet it is very likely that Donald Trump – who explicitly campaigned to protect Social Security and Medicare benefits – was the only Republican who had a clear shot at winning the general election. People threw their support to him because they took the measure of the man and concluded that he would fight to revitalise the American experiment. His own use of guerrilla tactics against the resistance of an entrenched bureaucracy is what many voters expected and, indeed, demanded.

> After an era in which a sizable share of the Republican base, not to mention its often-checked-out margins and its most recent converts, had been disillusioned by the efficacy of more ideologically conservative politicians, from George Bush to Paul Ryan, Trump's new coalition may have been the only path back to presidential parity for the GOP.[55]

The deck is clearly stacked in favor of the existing power elite. Even if President Trump succeeds in establishing an effective administration on his own terms and is able to keep his commitments, another question remains. What can the Republicans do for an encore? Charisma, like lightning, cannot be bottled, marketed, or genetically reproduced. As always, the great institutional challenge is to broaden the party's base of support while securing a line of succession. If one or both houses of Congress revert to control by the Democratic Party, will President Trump or his successor be able to push his agenda, given its unpopularity with the bipartisan political establishment?

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[54] Sidney M Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* (Oxford University Press, 1993) 146.
[55] Zito and Todd, above n 5, 245.

The high-energy, high-wire Trump presidency may be an impossible act to follow. Failure to pass the trapeze bar to a steady hand in a timely way risks a very different alignment of political fortunes. 'Whatever happens,' as Black concludes his book,

> Donald Trump will be one of the most vividly remembered presidents and characters of American history. Difficult though it may be to believe at times, the office of the presidency, in that astonishing, ineluctable, and fateful American way, may have sought the necessary man again.[56]

X AFTERWORD

The midterm elections of November 2018 have changed the electoral landscape sufficiently to indicate that both major parties face mounting challenges in the lead-up to the 2020 presidential and congressional elections.

Following a shift of approximately 40 seats in the House of Representatives that led to a Democratic Party takeover of the leadership positions, President Trump confronts a divided Congress. Strong resistance to his policies and investigations directed at his Administration may be expected across a broad front within the House. Sean Trende discounts talk of an electoral 'wave', however, and suggests that the Democrats' surge in the House may be due in part to 'the Democrats' enormous fundraising advantage.'[57] The Republican majority in the Senate was somewhat strengthened, which may better enable the president to appoint more conservative jurists.

As for the 2020 national elections, third party or independent challenges in the presidential and perhaps a few congressional contests may contribute to a greater fragmentation – if not a realignment – of the two-party system. The president's prospects for reelection and restoration of a Republican majority in the House will hinge considerably on enlarging his coalition while fending off rivals within the party, a strategic grasp of the opportunities to reshape the national conversation, and retaining the confidence of his original supporters.

As to the character of the Trump coalition, Frank Buckley differs from Zito and Todd in describing it as a 'Republican workers party' which coalesced in 2016 by offering the electorate

[56] Black, above n 4, 213.

a conservative reiteration of an earlier tradition of liberal nationalism.[58] Internationally, it has counteracted the longstanding bipartisan dominance of liberal internationalism by promoting a renewed emphasis on national sovereignty as opposed to global governance.[59] Yet it does not countenance anything less than a robust and 'mutually beneficial cooperation among different nations. … Trump is not a globalist who denies the value in nationalism, but an internationalist whose vision of global harmony is rooted in independent nations, each pursuing its own interests.'[60]

Domestically, this American nationalism – which Buckley compares with Benjamin Disraeli's and Randolph and Winston Churchill's – champions 'the common good against corrupt special interests' and seeks 'to promote the well-being of all fellow citizens, and not simply a favored few.'[61] It is embodied in the loyalties that bind fellow citizens within a larger community or civil society without tyrannising over their lives, liberty, property, or consciences.[62]

> Nationalism is more than a duty to look after fellow citizens. It's also one of the particularistic emotions that bind us to others, like love of family and friends, creating the sense of solidarity or community that is one of the most basic of human goods. Simone Weil called this "the need for roots,"[63] and it's especially needed in today's America. … In our loneliness, in the animosities that divide us, there has never been a greater need for fraternity.[64]

The public has reacted electorally to this loss of roots in often unanticipated ways as, for instance, when politicians seek to replace what politics has helped displace. Philosophically, Michael Oakeshott's remarkable analysis of 'Rationalism in Politics' attributed the uprooting of social and moral conventions to the intellectual arrogance of those who have "no sense of the cumulation of experience, only of the readiness of experience when it has been converted into a

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[57] Sean Trende, 'So, Was It a Wave?', *RealClear Politics* (online) <https://www.realclearpolitics.com/articles/2018/11/16/so_was_it_a_wave_138677.html#2>.
[58] F H Buckley, *The Republican Workers Party: How the Trump Victory Drove Everyone Crazy, and Why It Was Just What We Needed* (Encounter Books, 2018) 63-73. For a discussion of the influence of Biblical Christianity on the rise of the nation-state concept in the West, see Adrian Hastings, *The Construction of Nationhood: Ethnicity, Religion and Nationalism* (Cambridge University Press, 1997) 5, 185ff.
[59] The American Freedom Alliance held an international conference on Global Governance vs. National Sovereignty in June 2012, see <https://www.conservativedailynews.com/2012/06/global-governance-vs-national-sovereignty/>.
[60] Buckley, above n 58, 73.
[61] Buckley, above n 58, 64.
[62] See Ernest Gellner, *Conditions of Liberty: Civil Society and Its Rivals* (Penguin, 1996).
[63] Simone Weil, *The Need for Roots* (Harper Colophon, 1971).
[64] Buckley, above n 58, 72.

formula: the past is significant for [them] only as an encumbrance.'[65] What has come to pass for 'a higher morality', according to Oakeshott, 'is merely morality reduced to a technique, to be acquired by training in an ideology rather than an education in behavior.'[66]

> Moral ideals are a sediment: they have significance only so long as they are suspended in a religious or social tradition, so long as they belong to a religious or a social life. The predicament of our time is that the Rationalists have been at work so long on their project of drawing off the liquid in which our moral ideals were suspended (and pouring it away as worthless) that we are left only with the dry and gritty residue which chokes us as we try to take it down. First, we do our best to destroy parental authority (because of its alleged abuse), then we sentimentally deplore the scarcity of 'good homes', and we end by creating substitutes which complete the work of destruction.[67]

By contrast, Samuel P Huntington focused more on the specific role played by political elites while also acknowledging the bloodless abstraction of their goals and ideals.

> Significant elements of American elites are favorably disposed to America becoming a cosmopolitan society. Other elites wish it to assume an imperial role. The overwhelming bulk of the American people are committed to a national alternative and to preserving and strengthening the American identity that has existed for centuries.[68]

In the inaugural issue of *American Affairs* following the 2016 election, the political philosopher Joshua Mitchell observed: 'If there is to be American greatness, it will emerge around the two

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[65] Michael Oakeshott, *Rationalism in Politics and Other Essays* (LibertyPress, 1991) 6. Oakeshott's Rationalism most resembles the purpose-driven Telocracy (as opposed to 'the substantively neutral legal order' of Nomocracy) as described in Michael Oakeshott, *Lectures in the History of Political Thought* (imprint-academic.com, 2006) 469-97. In a similar vein, Richard Landes surveys utopian and millennial movements throughout history that embody despotic rationalism. Landes identifies four attributes that are characteristic of the leadership, what he calls 'prime dividers', of ancient and modern agrarian civilizations: 1) *Privilege Legalized*: 'Aristocrats have special status before the law they legislate, they judge, they execute'; 2) *Manual Labor Stigmatized*: 'Labor defines commoners'; 'the *liberal* arts are precisely for those who are 'liberated' (by slaves) from banausic concerns'; 3) *Technologies of Knowledge and Weaponry Monopolized*: 'Elites try to maintain as much control over information as possible'; eg, the clerisy in the Middle Ages; and 4) *Honor and the Elite*: '[R]ecourse to force [by elites] allows them to establish their dominion in a quotidian sense by their possession of honor': Richard Landes, *Heaven on Earth: The Varieties of the Millennial Experience* (Oxford University Press, 2011) 216-17.

[66] Oakeshott, above n 65, 40.

[67] Ibid 41. An illustration of the destruction may in found in Nancy Pearcey, 'Justice Kennedy's Hubris', American Thinker (online), 2 December 2018 <https://www.americanthinker.com/articles/2018/12/justice_kennedys_hubris.html>.

[68] Huntington, above n 31, 366.

sorts of sovereignty that hold her together: liberal sovereignty and sovereignty based on covenantal nationalism.'[69]

> Liberal greatness means that we look at others as *neighbors* and *fellow* citizens. That we need to have strong borders, that we need to slow down immigration so that 95 million workforce-age fellow citizens can find jobs, and that we only admit foreigners who aspire to become American citizens, is not inconsistent with liberal sovereignty.[70]

Mitchell's chief focus, however, is with three expressions of what he calls '[t]he national covenantal aspiration to greatness' which 'must take both inward and outward forms.' The first addresses the legacy of slavery, which has been further aggravated by a form of identity politics that for half a century or more has sought to bind minorities to the hegemony of the Left while undermining traditional institutions.[71]

> The inward form … involves healing the still-festering wound of slavery and its aftereffects, through our churches and synagogues and through our face-to-face dealings in everyday life. The state can supplement those efforts, but it cannot substitute for them. There is no path to the Promised Land except through the agony of the desert.[72]

Second, greatness in its outer form requires 'orienting domestic policy toward the middle-class' in order to recover 'the strength and wisdom of a middle-class commercial republic.'[73] A 'cosmopolitan mindset' has emerged through the de-linking of democratic man from traditional institutions that once helped bind him into communities and families.[74]

> Tocqueville's ideas about voluntary associations, about family, about religion, and about federalism, point to the need to bring the soul down to earth, to connect it to others. The *embodied* soul formed through these institutions is hardly irrational, as the cosmopolitan would insist; the

[69] Joshua Mitchell, 'A Renewed Republican Party' (2017) 1(1) *American Affairs* 7 <https://americanaffairsjournal.org/2017/02/a-renewed-republican-party/>.
[70] Ibid 27-28.
[71] Ibid 15. See also Shelby Steele, 'Why the Left Is Consumed with Hate', *Wall Street Journal* (online), 23 September 2018 <https://outline.com/TXW6L8>.
[72] Mitchell, above n 69, 28.
[73] Ibid 28.
[74] See, for contrast, James McPherson, 'Emmanuel Macron and the Barren Elite of a Changing Continent', *Washington Examiner* (online), 14 May 2017 <https://www.washingtonexaminer.com/emmanuel-macron-and-the-barren-elite-of-a-changing-continent>.

> embodied soul, on the contrary, is the *healthy* soul, whose interests are formed in and through relations with others.[75]

The institutional breakdown resulting from what Oakeshott calls 'Rationalism in Politics' has been characterised in recent years by increasingly vicious culture wars that have especially resulted from the promotion of globalism and identity politics.[76]

Third, beyond our borders, greatness will require the reconfiguration of our country among the world of nations. Like it or not, our national covenantal understanding is that we are 'a shining city on a hill, and a beacon in the darkness', to paraphrase John Winthrop's 1630 encomium to his fellow passengers aboard the *Arabella*. We cannot renounce that charge; we can only understand and apply it well or ill.[77] As Mitchell notes in conclusion:

> The three together suggest the need for a mix, increasingly lost in our conversations about what has gone wrong with America, involving individual responsibility, neighborly involvement in our local communities, and ennobling national projects that only presidential initiative can facilitate. No one can help but observe that the world is changing before our eyes. Donald Trump has played a larger-than-life part in this. Yet amidst all of the changes – and amidst the hopes that *he* can make our country "great again" – the burden nevertheless rests on citizens, who must either build a world together or withdraw into themselves and wish in vain that the state will carry the load.[78]

This is a worthy challenge for a country G K Chesterton once described as 'the only nation in the world founded on a creed.'[79]

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[75] Mitchell, above n 69, 8-9. The author calls the 2016 electoral outcome '*a revolt in the name of national sovereignty*, not populism.'
[76] Ibid 9-11.
[77] Ibid 28. Gov. Winthrop's sermon cited Matt. 5:14 from the Sermon on the Mount.
[78] Ibid 30.
[79] The American Chesterton Society, 'America Is a Nation with the Soul of a Church' <https://www.chesterton.org/america/>.

THE NEW POLITICS OF SEX

Stephen Baskerville*

ABSTRACT

Sexual politics has grown rapidly in recent years not only in importance but also in complexity. It has replaced socialism as the vanguard ideology of the left. Yet the larger unity of its many manifestations has never been critically scrutinized as a whole, nor the interconnections between its various features understood. Liberal scholars generally endorse and promote the entire agenda. Various conservatives (religious, secular, libertarian, men's rights) criticise some aspects but often approve others. Few have tried to understand the larger phenomenon in its entirety or the dynamic driving it. Sexual politics today is driven by a dialectic of freedom and authority. The libertarian side includes demands to remove legal restrictions and moral inhibitions on sexuality generally, particularly on abortion, homosexuality, same-sex marriage, divorce, and cohabitation, and to allow changeable 'gender identity' to replace fixed biological sex in legal documents. Against this, an authoritarian side seeks to replace the discarded prohibitions with new prohibitions of its own. The principal manifestation is criminal and quasi-criminal accusations (with unclear lines of demarcation separating these categories) of rape, sexual assault, 'sexual harassment', domestic violence, child abuse, nonpayment of child support, 'bullying', sexual 'misconduct', sexual 'abuse', sexual 'aggression', bigotry, 'misogyny', 'sexism', 'hate speech', 'hate crimes', and more. These alleged infractions often have no fixed definitions and include both acts and beliefs (ideological, political, or religious), leading to restrictions on freedom of expression and religion. Often these accusations are adjudicated by irregular and even non-judicial tribunals through innovative rules of procedure and evidence, wherein due process protections for the accused are ignored or bypassed. Other manifestations include massive growth in the welfare state, with attendant problems of crime, substance abuse, and truancy, sexualisation of the military and foreign policy in unexpected ways, new roles for international organisations, especially development policy, and connections with the Islamic world.

I INTRODUCTION

With astonishing speed, the public agenda of the Western world and beyond has come to be dominated by what *Newsweek* magazine calls 'the politics of sex'.[1] Demands to liberalise abortion or recognise same-sex marriage are only manifestations of this trend, which entails much more than the familiar sexualisation of culture. What we are seeing is the emergence of an expansive political agenda and a new political ideology that derives its power from claims to control and change the terms of sexuality.

Demands for new forms of sexual freedom – what Helen Alvare calls 'sexualityism' and what some are calling 'gender ideology' – increasingly dominate left-wing politics, though elite opinion has been remarkably slow to recognise this new form of ideology, both feminist and, to coin a term, homosexual-*ist*. 'There has been a massive expansion of "sexual liberty",' Alvare writes. 'The federal government is seeking to expand sexualityism.'

Much more is involved in the new sexual politics than simply sexual license. Ubiquitous demands for 'power' and 'empowerment' reveal that what has emerged is a true ideology, reminiscent of the older ideologies of Communism and Fascism (and even, more recently, Islamism). Unlike its predecessors, however, this ideology uses *sexual* leverage as its main political instrument and weapon. One sympathetic scholar terms it 'the ideology of the erotic.'[2] This ideology reformulates the older battle cry of 'social justice' into more ambitious demands for what is now being called 'erotic justice'.[3] The means of achieving this involve the criminal justice system.

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[1] See <http://www.rojaksite.com/newsweek-politics-of-sex/>.

[2] Richard G Parker, *Bodies, Pleasures, and Passions: Sexual Culture in Contemporary Brazil* (Vanderbilt University Press, 2009) 111.

[3] Sonia Corrêa, Rosalind Petchesky, and Richard Parker, *Sexuality, Health, and Human Rights* (Routledge, 2008) 4-5.

Both feminism and the newer homosexualist ideology that adopts its methods began with apparently modest claims: feminists to legal equality with men; homosexuals to be left alone in private. It is now apparent that these agendas encompass far more than meets the eye and that we have opened a Pandora's box of demands and urges that, like sex itself (and political power), are virtually insatiable.

'Sex is always political', the radicals proclaim, because some are said to be perpetrating 'sexual oppression' by denying others their 'sexual rights'. To procure these rights, the oppressed are organising 'movements of resistance' to claim their 'sexual citizenship' and 'sexual self-determination'. Sexual rights are said to be 'inextricable from economic, social, cultural, and political rights', and these are 'rights that are protected by the state'. Sexual oppressors use 'hierarchies of sexual value' such as religion and traditional sexual morality that 'function in much the same ways as do ideological systems of racism'. What is demanded now is 'a more radical sexual politics capable of calling into question inequality or oppression in sexual relations or in articulating a vision of sexual self-determination and freedom' and launching a full-scale 'cultural revolution'.[4]

We have heard this language before. With updated grievances, it expresses a hatred of restraint, and authority and thirst for unrestricted freedom and revenge reminiscent of the ideologies of the last century. Palpable in these manifestos is the emotion that feeds all violent political movements: resentment. The resentment is directed not at named individuals – who could be formally charged and tried for recognised crimes using established procedures and tangible evidence – but against groups of unnamed transgressors *en masse*, against whom new crimes and new justifications for punishment must be devised. For the resentment rationalises the desire to rebel against the existing order, 'to restructure society', to overthrow existing institutions and institute a new order with themselves in command, and to use their new power to punish people who they believe have harmed them, and who in this case – even more than in the past – are most often simply ordinary people minding their own business.

[4] Ibid 4-5, 24, 26, 27, 29-30, 93; Richard Parker, Rosalind Petchesky and Robert Sember (eds.) *Sex Politics: Reports from the Front Lines* (Sexuality Policy Watch) <http://www.sxpolitics.org/frontlines/book/pdf/sexpolitics.pdf> 9, 20. This publication and book cited in the previous note are funded by major foundations, including Ford, MacArthur, and the Open Society Institute.

This is no longer the rhetoric of marginal extremists. The agenda of sexual liberation (and sexual resentment) now pervades virtually all social and political institutions: the media, universities, schools, charities, medicine, corporations, foundations, judiciaries, churches, governments, international organisations – with hardly a word of challenge, all have become thoroughly saturated with the politics of sex. No other matrix of issues exercises remotely as influential an impact on our culture, politics, and daily lives, and yet none has been so astonishingly exempt from critical examination by journalists or scholars.

II SEXUAL LIBERATION AND POLITICAL IDEOLOGY

Both feminism and the newer homosexualist ideology that adopts its methods began with apparently modest and limited claims: feminists to legal equality with men; homosexuals to be left alone in private. These minimalist demands have gained widespread sympathy. The liberal assumptions we all share today lead us to understand the radicals' demands as a matter of means and ends: The goal, we are told, is sexual freedom, and political activism and agitation is simply a means to that end. Once the minimal demands for freedom are met, we will return to stability, peace and quiet.

Yet it is now apparent that these agendas encompass far more than meets the eye and that we have opened a Pandora's box of demands and urges that, like sex itself (and political power), are virtually insatiable. When one understands the dynamics of radical ideology, it becomes more difficult to separate the substance of the sexuality from methods of the politics. It also become difficulty to see where it will all end. Sexual freedom is inseparable from *radical* politics, because (as any parent of an adolescent knows) sexual freedom is itself a form of rebellion and one easily politicised. Breaking sexual restraints and 'taboos' is an end in itself because it defies convention and authority and therefore provides 'power'. 'Your abortion can be a rebellious and empowering act,' declares one feminist:

> It is an act through which you can assert yourself … My hope is that … you will use your abortion to connect with women everywhere. You will connect your very special personal with the very important political, and you will begin to know your own power.[5]

Not all self-identified homosexuals necessarily understand their sexuality in expressly political terms. Yet homosexuality too has itself become a political statement. Lesbianism is more obviously political and for many constitutes the personal dimension of feminist ideology: 'Feminism is the theory, lesbianism is the practice,' in words attributed to Ti-Grace Atkinson. 'For many of today's feminists, lesbianism is far more than a sexual orientation … It is … "an ideological, political, and philosophical means of liberation of all women from heterosexual tyranny."'[6]

The means and the ends are thus parts of an internally coherent whole, intertwining the sexual and political drives as mutually reinforcing forms of rebellion. The result is open-ended revolt for its own sake – or what revolutionaries like Trotsky and Mao called 'permanent revolution'.

E Michael Jones has shown how sexual radicalism has coincided historically with political radicalism, including the most violent upheavals such as the French and Russian revolutions. 'Sexual revolution is, if not synonymous with revolution in the modern sense of the word,' he observes, 'then certainly it is contemporaneous.'[7] Feminists have long had intimate associations with Bolshevism and before them with Jacobinism. Likewise, homosexualists have longstanding involvement in Fascism, including Nazism. 'Gay men have been at the heart of every major fascist movement … – including the gay-gassing, homicidal Third Reich,' writes Johann Hari. 'Mainstream elements of gay culture – body worship, the lauding of the strong, a fetish for authority figures and cruelty – provide a swamp in which the fascist virus can thrive.'[8]

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[5] Rebecca Walker, 'She's Come for an Abortion. What Do You Say?' *Harper's Magazine*, November 1992, 51, quoted in Charmaine Crouse Yoest, 'The New Feminist at 50: Women Alone' (2013) 27(1) *The Family in America*, 18.

[6] Rene Denfeld, *The New Victorians* (Simon and Schuster, 1995) 45, quoting Cheryl Clarke, 'Lesbianism, an Act of Resistance' in Cherrie Moraga and Gloria Anzaldua (eds), *This Bridge Called My Back: Writings by Radical Women of Color* (Women of Color Press, 1983) 129.

[7] E Michael Jones, *Libido Dominandi: Sexual Liberation and Political Control* (St. Augustine's Press, 2000) 20.

[8] Johann Hari, 'The Strange, Strange Story of the Gay Fascists', *Huffington Post* (online), 21 October 2008 <http://www.huffingtonpost.com/johann-hari/the-strange-strange-story_b_136697.html>. See also Scott Lively and Kevin Abrams, *The Pink Swastika: Homosexuality in the Nazi Party* (Founders Publishing Corp, 1995).

In short, sexual radicalism demands not simply static sexual freedom. It is an ideology that uses sexual release to encourage open-ended rebellion by adolescents and resentment by adults. As we saw in the ideologies of the last century, this is a prescription for authoritarian government and determined, systematic persecution of 'oppressors'. This is precisely what we are now seeing on both the religious and secular fronts.

Throughout the world, sex is now the polarity, more than any other, that defines our ideological alignments. 'Most of the reasons' for differences between the Christianity of the affluent countries and the poor 'involve disputes over gender and sexuality,' writes historian Philip Jenkins. 'These have proved the defining issues that separate progressives and conservatives, ecclesiastical left and right.'[9] Something similar could be said of the secular political left and right, though Jenkins' focus on religion provides a good place to start.

III RELIGIOUS FREEDOM

Increasingly we see the direct confrontation between sexual liberty against religious liberty. In the Western democracies, almost all major restrictions on religious freedom now come from the expanding sexual agenda:[10]

- street preachers arrested for expressing convictions about sexual morality;
- government clerks and registrars losing their positions for refusing to officiate same-sex marriages;
- business owners and professionals sued and put out of business for refusing business that violates their consciences;
- Catholic adoption agencies closed because of their religious principles;
- Christian firemen ordered to participate in political demonstrations that mock their religion and police to display political symbols in police stations;

[9] Philip Jenkins, *The New Christendom: The Coming of Global Christianity* (Oxford University Press, 2011) 246.
[10] Stephen Baskerville, 'The Sexual Agenda and Religious Freedom' (2011) 4(2) *International Journal for Religious Freedom* 91.

- homeschoolers have lost their children to school authorities implementing an increasingly sexualised curriculum;[11]

- directives from the European Union would allow private citizens to be punished financially for expressing their religious and political convictions about sexual issues.[12]

In the US, the 'Obamacare' program was much more about sex than it was about health – financing not only abortion and contraception, but also single motherhood, whose advocates were the foremost constituency and promoters of the program.[13]

Even the United Nations recognises the threat. 'Christianity is … under pressure from a form of secularism, particularly in Europe,' according to the United Nations Economic and Social Council. 'Prejudice against Christians or ideas based on religion, which exists both in Europe and in the United States, mainly concerns questions relating to sex, marriage, and the family, on which the Catholic, Muslim, and Orthodox churches have taken stands.'[14] If expressing moral convictions now constitutes 'discrimination' against sexual radicals, it is hardly an exaggeration to suggest that sexual freedom and religious freedom now stand in a direct, eyeball-to-eyeball confrontation in which no compromise appears possible.

Advocates of sexual liberation – some with official, taxpayer-funded positions – themselves openly describe Christian and other religious beliefs as direct impediments to their freedom. 'Cultural and religious values cannot be allowed to undermine the universality of women's rights,' declares a United Nations committee. Another UN body reports that no middle ground is possible and that religious freedom is simply incompatible with sexual liberation. 'In all countries, the most significant factors inhibiting women's ability to participate in public life have been the cultural framework of values and religious beliefs,' it states. 'True gender equality

[11] Mike Donnelly, 'Religious Freedom in Education' (2011) 4(2) *International Journal for Religious Freedom* 61.
[12] Paul Coleman and Roger Kiska, 'The Proposed EU 'Equal Treatment' Directive' (2012) 5(1) *International Journal for Religious Freedom* 113.
[13] *Unmarried Women on Health Care: Unmarried Women Driving Change on Leading Domestic Issue*, Greenberg Quinlan Rosner, 8 August 2007 <http://www.greenbergresearch.com/articles/2066/3853_wvwv%20_health%20care%20memo_%200807m9_FINAL.pdf>.
[14] Quoted in *Shadow Report, 2005-2010* (Vienna: Observatory on Intolerance and Discrimination Against Christians in Europe, 2010) <http://tinyurl.com/2wvteq5>.

[does] not allow for varying interpretations of obligations under international legal norms depending on internal religious rules, traditions, and customs.'[15]

Sexual radicals are not increasingly bold in their demands that sexual freedom must be permitted to replace religious freedom. As predicted by a lesbian attorney in 1997, 'the legal struggle for queer rights will one day be a showdown between freedom of religion versus sexual orientation.'[16] Today, as the two do come into direct confrontation, freedom of religion is almost always the one that must yield. 'I'm having a hard time coming up with any case in which *religious* liberty should win,' says homosexual activist Chai Feldblum, who, as federal Commissioner for the Equal Employment Opportunity Commission, is sworn to uphold the US Constitution's First Amendment. 'There can be a conflict between religious liberty and sexual liberty, but in almost all cases the sexual liberty should win.'[17]

The aggressive, ideological quality of the new sexual demands suggests a connection to another global ideology – also a major threat to religious freedom – which likewise places sexuality at its core: Islamism, or Islam as a radical political ideology. Islamist militancy is not usually seen as a sexual ideology, and its theoretical incompatibility with the rights of women and homosexuals is obvious and frequently commented upon. But less obviously, it too bases its aspirations to political power on its claims to control the terms of sexuality and the family.

'The centrality of gender relations in the political ideology of Islam' is widely acknowledged by scholars,[18] whatever difficulty they may have making sense of it. 'The issue of women is not marginal,' write Ian Buruma and Avishai Margalit; 'it lies at the heart of Islamic [radicalism].'[19] Whatever may be the various sources of grievance and resentment fueling Islamist ideology, the

[15] *United Nations Division for the Advancement of Women*, General Recommendations Made by the Committee on the Elimination of Discrimination Against Women. No. 19, 11th sess (1992), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>; *Report of the Committee on the Elimination of Discrimination Against Women*, 13th sess, A/49/38 (1994) 39.
[16] Quoted in Teresa Wagner and Leslie Carbone (eds) *Fifty Years After the Declaration: The United Nations' Record On Human Rights* (University Press of America, 2001) 121. I owe this reference to Benjamin Snodgrass.
[17] Quoted in Maggie Gallagher, 'The (Gay) Public Intellectual', *CBS News* (online), 8 May 2006 <http://www.cbsnews.com/news/banned-in-boston-part-two/>.
[18] Parvin Paidar, *Women and the Political Process in Twentieth Century Iran*, 232, quoted in Masoud Kazemzadeh, *Islamic Fundamentalism, Feminism, and Gender Inequality in Iran Under Khomeini* (University Press of America, 2002) 4.
[19] Ian Buruma and Avishai Margalit, *Occidentalism: The West in the Eyes of Its Enemies* (Penguin, 2004).

responses largely distill down into Islamic sexual regulation. Muslim radicals understand that controlling sex and claiming sexual purity translate into political power. 'The *hejab* has been identified by the [Iranian] regime as the very cornerstone of its revolution,' notes Haideh Moghissi. 'It is described as basic to Islamic ideology and prescribed by God himself as a "duty" for women.' And as these scholars attest, women often figure prominently in radical Islamist movements.[20]

Conservatives often express perplexity because feminists and homosexualists seldom criticise radical Islamism, but the reason is plain: Insofar as radical Islam threatens their rights, conservatives will carry the radicals' water for them.[21] Meanwhile Islamists and feminists/homosexualists pursuing political power at the expense of Western and Christian values can become formidable allies, furthering each other's agendas by playing their critics off against one another.

IV SECULAR FREEDOM

But religious freedom is only the most recent and visible point of contention. The sexual agenda's implications for freedom extend well beyond religious expression – though here as elsewhere religious freedom comprehends other freedoms. Following its predecessors, the Sexual Revolution's promise of a new age of freedom is already manifesting itself in new forms of authoritarianism.

By far the most draconian punishments meted out by the new sexual gendarmes – and the most repressive government machinery ever created in the modern English-speaking democracies – is the unilateral and involuntary divorce *apparat*, government's purpose-built mechanism for dismembering families, seizing control over the private lives of innocent people and their children, summarily confiscating property, and criminalising the embodiments of the hated

[20] Haideh Moghissi (ed) *Women and Islam* (Routledge, 2004) 77-78. I have argued this at greater length in 'The Sexual Jihad: The Global Rise of Sexual and Religious Radicalism' (2008) 7(1) *New Male Studies* 1.
[21] Kay Hymowitz, 'Why Feminism is AWOL on Islam', *City Journal* (online), Winter 2003 <https://www.city-journal.org/html/why-feminism-awol-islam-12395.html>.

'patriarchy': fathers. This creation of the feminist bar associations[22] was enacted throughout the Western world, with little public debate, at the height of the Sexual Revolution. The oxymoron of 'no-fault' justice allows legally unimpeachable citizens – completely innocent of any legal infraction – to be summarily evicted from their homes, separated from their children, expropriated of all they possess, and if they fail or refuse to cooperate, they can be incarcerated without charge or trial.

Simply by filing for divorce, a discontented spouse acting without any legal grounds instantly places the lives of her entire family under government supervision: the father is summarily placed under the supervision of the penal apparatus; the children become effective wards of the courts and social service agencies; and the mother becomes a paid functionary-in-residence of the state (which can remove the children from her as well) – all without anyone having committed any legally actionable offense. There are no formal charges, no indictments, no juries, no trials, no acquittals, and most strikingly, no records of the incarcerations.[23]

It is impossible to overestimate the importance of the divorce system. It is in many ways the epicenter of the entire Sexual Revolution. Almost all of its most drastic innovations, including same-sex marriage, and the recent outbreak epidemic of quasi-criminal and semi-criminal accusations over various forms of sexual 'misconduct', 'harassment', and 'abuse' follow logically from the divorce dynamic and often adopt the *modus operandi* pioneered in the divorce courts.

V NEW GENDER CRIMES

The divorce machinery is only one example of how sexual radicalism dramatically expands police powers and criminalisation. Since the inception of their revolution – and well beneath the media radar screen – sexual militants have been creating a vast panoply of new crimes and expanded redefinitions of existing crimes – all of them involving sexual and family relations:

[22] National Association of Women Lawyers <http://www.abanet.org/nawl/about/history.html>. I am grateful to Judy Parejko for this reference.

[23] Stephen Baskerville, *Taken Into Custody: The War Against Fathers, Marriage, and the Family* (Cumberland House, 2007) ch 1. For only one striking example, see Rebecca May and Marguerite Roulet, 'A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices', Center for Family Policy and Practice, January 2005 <http://www.cpr-mn.org/Documents/noncompliance.pdf> 6, 9, 11, 41, 42, 43, 44.

'rape', 'sexual assault', 'sexual harassment', 'domestic violence', 'stalking', 'child abuse', 'bullying', 'sex trafficking', and more. These witch hunts bear almost no relation to what is suggested by the inflammatory language: 'rape' that clearly includes consensual sex and in most instances is no more than that;[24] domestic 'violence' that involves no violence or physical contact or threat of it;[25] 'child abuse' that is routine parental discipline or homeschooling or devised altogether to win advantages in divorce court;[26] 'bullying' that is so vague as to be meaningless or involves criticism of the homosexual political agenda or other differences of belief and opinion; 'stalking' that is involuntarily divorced fathers trying to see their own children; and much more.

In a rare scholarly investigation, Marie Gottschalk found that exploding prison populations in the United States resulted not from conservative law-and-order campaigns but from aggressive feminist campaigns in the name of rape and domestic violence. 'The women's movement became a vanguard of conservative law-and-order politics,' she writes. 'Women's organisations played a central role in the consolidation of this conservative victims' rights movement that emerged in the 1970s.'[27]

These new and loosely-defined crimes have politicised law enforcement and criminal justice, rendered both the civil and criminal law vague and subjective, by-passed and eroded due process protections for the accused, and criminalised and incarcerated vast numbers of men and some women who had no inkling that they were committing a crime. Until recently, few had ever heard of most of these crimes and even now no one can really understand what they mean because no fixed definitions exist.

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[24] Stephen Baskerville, 'Feminist Gulag: No Prosecution Necessary', *The New American* (online) 7 January 2010, <https://www.thenewamerican.com/culture/family/item/549-feminist-gulag-no-prosecution-necessary>, and Stephen Baskerville, 'Julian Assange's Political Honeytrap', *The American Conservative* (online) edition, 25 February 2011 <https://www.theamericanconservative.com/articles/julian-assanges-political-honeytrap-and-ours/>.

[25] Baskerville, *Taken Into Custody*, ch 4; David Heleniak, 'The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act' (2005) 57(3) *Rutgers Law Review* 1009.

[26] Baskerville, *Taken Into Custody*, ch 4.

[27] Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (Cambridge University Press, 2006) 115-116.

Seldom are these quasi-crimes adjudicated by trials or juries in standard courts.[28] Instead guilt (but seldom innocence) is summarily pronounced by specialised judges or, increasingly, various quasi-judges: 'judges surrogate,' lawyers, social workers, school administrators, campus tribunals, welfare officials, and other petty functionaries and political operatives with a vested interest in acquiring quasi-judicial power. Accusers are identified as 'victims' in official documents, and the accused are publicly labeled not only by media but even by law enforcement officials themselves with terms that presume guilt – 'perpetrators', 'abusers', 'batterers', 'bullies', 'harassers', 'deadbeats', 'traffickers', and more – even before they are tried (if they are tried at all). Distinctions between crime, tort, and everyday disagreement are blurred or eliminated by 'the glorification of feeling,'[29] with clear acts of criminal violence (for which existing criminal law has always provided) intermixed with open-ended terms like 'abuse' and 'exploitation' to suggest that anything that might fall under these vague but opprobrious terms is likewise a crime demanding that someone be arrested. The crime is often defined subjectively, according to 'feelings' rather than deeds, and guilt is determined not by the objective act of the accused but by the subjective state-of-mind of the accuser – not only whether she gave 'consent' but whether she felt 'fear'. Guilt can also be defined by the accuser feeling 'offended', making the accused guilty by definition.[30]

Convictions and high conviction rates are presented as goals to be pursued for their own sake, regardless of the merits or evidence in particular cases.[31] Proceedings are rigged with paid 'victim-advocates' (usually professional feminists) hired to testify against defendants they do not know and about whose alleged guilt they have no first-hand knowledge in order to secure conviction and maximum punishment.[32] Yet the accused are given no equivalent advocate-witnesses to testify for them and often no opportunity even to speak in their own defense. Throughout, the presumption of innocence has been inverted into a presumption of guilt, and

[28] 'We mean [by the rule of law], in the first place, that no man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner *before the ordinary courts of the land*.' A V Dicey, quoted in John Laughland, *A History of Political Trials* (Peter Lang, 2008) 7 (emphasis added).
[29] Paul Nathanson and Katherine K Young, *Legalizing Misandry: From Public Shame to Systemic Discrimination against Men* (McGill-Queen's University Press, 2006) 202-203.
[30] Coleman and Kiska, 'Proposed EU Directive'.
[31] Christina Patterson, 'It's Miliband, Not Clarke, Who Should Be Ashamed', *The Independent*, 19 May 2011.
[32] Stuart Taylor and K C Johnson, *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case* (Thomas Dunne, 2007) 377.

knowingly false accusations are unpunished and even encouraged.[33] Government campaigns claim to 'raise awareness' of unnamed nonviolent malefactors said to be guilty of nebulous new crimes which no one really understands. Government statistics purporting to quantify the existence of these crimes are based not on verifiable convictions but on 'reports' that are 'confirmed' not by convictions in jury trials but by the decree of judges and sometimes simply by civil servants such as social workers. The statistics and reports are also based on definitions so vague that it is not clear what if anything is being reported.[34] Accusers are officially 'certified' as 'victims' by civil servants, such as welfare agencies, with no judicial proceeding, implicitly entitling the officially certified victim to have her or his alleged (or quasi-certified) victimiser punished. For many incarcerations, government statistics and documentation, which in the United States and other free societies are required by law, are not published and do not exist. In many cases, there is not even a record of the incarcerations.[35] Accusers can profit financially by their accusations, by looting the accused with lawsuits, even without supplying any proof of a crime, as can third parties such as law firms and feminist or homosexualist 'nonprofit' groups.[36]

The innocent are easily railroaded into prison because the alleged crimes and the accusations arising from them encounter almost no challenge. Few are willing to place themselves in a position of appearing to defend 'sex crimes' or accused 'sex offenders'. One-sided 'awareness' campaigns vilify groups *en masse* – 'abusers', 'batterers', 'harassers', 'deadbeats', 'bullies', 'stalkers', (all reminiscent of Communist campaigns against 'counter-revolutionaries' and 'anti-social elements') – and intimidate anyone who dares question the government line and generate public hysteria that makes fair trials impossible for those actually accused of belonging to these categories. Accusations quickly become available as weapons to be used in personal and political vendettas. Patently false and petty accusations are processed because they rationalise budgets of

[33] Baskerville, *Taken Into Custody*, ch 4.
[34] Ibid ch 3.
[35] May and Roulet, 'Look at Arrests'.
[36] Coleman and Kiska, 'Proposed EU Directive'.

feminised and sexualised law-enforcement agencies by turning law-abiding citizens into safe, nonviolent criminals for the police to arrest.[37]

The result is a spiral of silence by journalists, scholars, and other presumed watchdogs. Far from questioning the accusations, conservative moralisers credulously hasten to tag along with the radical mob in condemning 'crimes' of which they have little understanding. One need only observe the zeal with which conservative political operatives abandon traditional stigmas against quaint, old-fashioned concepts like adultery or fornication and adopt sexualised agitprop jargon, whose full implications they cannot possibly understand, when they accuse President Bill Clinton of 'sexual harassment' or Muslims of 'homophobia'. The net result is that on the right as well as on the left, traditional morality is replaced with radical ideology.

VI THE POLITICAL HONEYTRAP

These new gender crimes have been created not despite the new sexual freedom but as the inseparable corollary to it. For what is striking about the new crimes is that they operate alongside and in concert with the new freedoms. What may be the most significant – and again, the least noticed – feature of gender crimes is how smoothly they combine expanded sexual freedom with diminished civic freedom: sexual liberation with political repression.

Many have observed the paradox of feminists promoting and offering easy sex coupled with simultaneously searching for new ways to punish men for sexual acts. Yet few understand the dynamic that connects the two. 'While women's studies professors bang pots and blow whistles at anti-rape rallies,' observes Heather MacDonald, 'in the dorm next door, freshman counselors and deans pass out tips for better orgasms and the use of sex toys.'[38] This anomaly is no accident: It is the sex that provides the weapon, and with it the political power.

The crime usually begins as some new sexual freedom demanded in strident terms as necessary to liberate women from some form of 'oppression' – though crucially, the new freedom is also

[37] 'Wrong Arm of the Law', *Daily Telegraph* (online), 31 July 2012 <http://www.telegraph.co.uk/comment/telegraph-view/9432252/Wrong-arm-of-the-law.html>; 'Christian Preacher Vows to Fight…', *Daily Mail* (online), 2 May 2010 <http://www.dailymail.co.uk/news/article-1270650/Christian-preacher-trial-public-order-offences-saying-homosexuality-sin.html#ixzz0n9nOnTGZ>.

[38] Heather MacDonald, 'The Campus Rape Myth', *City Journal* (online), Winter 2008 <http://www.city-journal.org/2008/18_1_campus_rape.html>.

enticing to men, especially young men with strong libidos and few responsibilities. This then degenerates into a corollary criminal accusation against (usually) the man who takes the bait by indulging in the newly permitted pleasure:

- Insisting that women can enjoy casual and recreational sex as they perceive men do, which then turns into accusations of 'rape' for sexual encounters to which a woman consented but later regretted. (This is now rampant in universities and the military.)[39]

- Demanding access to workplaces, universities, the military, and other previously male venues then invites accusations of sexual 'harassment' against the men when sexual relations inevitably develop (and often turn sour), regardless of who initiates them.

- Demanding cohabitation and 'no-fault' divorce to liberate women from 'patriarchal' marriage, but which quickly generates accusations of male abandonment (even when the woman severs the relationship), as well as domestic 'violence' and 'child abuse', in order to procure custody of children and the financial awards and assets that accompany them.

- Defiantly declaring that women do not need men for financial support but then demanding men who do not provide women with income in the form of alimony or child support be arrested and incarcerated without trial.

- Asserting that women do not need men for protection soon produces hysterical outcries for intrusive police powers, innovative punishments, and expanded penal institutions to punish ever-proliferating and loosely-defined forms of 'violence against women', even when no physical contact or threat of it has taken place.

[39] Campus tribunals are the only example that has received substantial attention, though they constitute a tiny part, and the 'nightmare' that the accused face there is very mild compared to what takes place in courts that can incarcerate. The term is from Judith Grossman, 'A Mother, a Feminist, Aghast', *Wall Street Journal* (online), 16 April 2013 <http://online.wsj.com/article/SB10001424127887324600704578405280211043510.html>. Likewise, 'The Rape "Epidemic" Doesn't Actually Exist', *US News* (online), 24 October 2013 <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/10/24/statistics-dont-back-up-claims-about-rape-culture?src=usn_tw>. For a scholarly treatment, Stephen Henrick, 'A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses' (2013 40(1) *Northern Kentucky Law Review* 49.

- Proclaiming the right to raise children outside wedlock and without fathers to protect and discipline them soon turns into demands to prosecute adolescents and even children for 'bullying' one another and eventually for real crime.

- Demanding the right to engage in homosexual acts and public sexual displays translates almost automatically into the power to arrest or otherwise stop the mouths of preachers, 'bullies', and anyone else who objects or ridicules or impinges on activists' 'feelings' or 'pride'.

- Legalising prostitution then feeds hysteria to find and prosecute unnamed 'sex traffickers'.

- Granting the right to breastfeed publicly without government restriction becomes the power to punish employers who try to impose limits in private workplaces and individuals who privately express discomfort.

- Demands for unisex bathing and toilet facilities in university residences lead to … – well, any young man lacking the intelligence to detect the trap awaiting him there may not belong in a university in the first place.

Here as elsewhere, progressive political doctrines have not eliminated a 'gender stereotype', as promised; whether by accident or design, they have merely politicised it – in this case that of the temptress, the seductress who lures men into a 'honeytrap' by offers of sexual pleasure before springing a trap that today can mean decades in prison.

Here too, we also see the familiar pattern of how radical political movements create the very problems they then re-package as grievances, and which then serve to rationalise increased 'empowerment' and repression against opponents.[40] 'Utopians are actually multiplying the social problems they claim to be solving,' notes Bryce Christensen. 'Gender-neutering utopians adroitly turn the social problems they cause into a justification for seizing yet more power.'[41] In each case, what is presented as an individual's right to exercise a new sexual freedom without

[40] The classic treatment is Milovan Djilas, *The New Class* (Praeger, 1958) 37.
[41] Bryce Christensen, 'The End of Gender Sanity in American Public Life' (2007) 49(4) *Modern Age* 412.

restriction by the state quickly translates, by a sleight-of-hand that few perceive or question, into a government power to punish – including arrest and incarceration – anyone who falls afoul of the new freedom. This is precisely the logic that transforms the Rights of Man into the Reign of Terror. The fanatical Antoine de St Just could have been speaking for the Sexual rather than the French Revolution when he declared, '*Pas de liberté pour les ennemis de la liberté.*' 'No freedom for the enemies of freedom.'

VII BRAVE NEW WELFARE STATE

This creeping criminalisation of the population – including much of the government machinery described above – originated in a larger increase in government scope and power, also created and administered in the name of both sexual liberation and family well-being: the ever-expanding welfare state – that vast and open-ended experiment in government growth whose existence is rationalised by the very problem it creates: the proliferation of single-parent homes. These fatherless communities are breeding grounds for crime, substance abuse, truancy, and virtually all of today's major social pathologies – including, most recently, terrorism.

But the welfare state also now administers its own specialised gendarmeries – a vast underworld of unaccountable quasi-police power that most people find too dreary to scrutinise until they discover it reaching into their own lives: social work, child protection, child and family counselling, child support enforcement, juvenile and family courts, forensic psychotherapy, plus public schools. These plainclothes quasi-police are largely ignored by conservative groups who describe themselves as defenders of the family. Yet they are assuming ever-more intrusive control over the private lives of people with children – starting with the poor and expanding to the middle class.[42] The welfare machinery directly encourages both criminality and criminalisation.

The social pathologies bred by welfare communities are also the very problems that account for most domestic government spending, including budgets for law-enforcement and incarceration, education, health, and other 'social services'. The welfare state is not only hugely expensive and unproductive in itself, in other words; it is also government's self-expanding engine for creating

[42] Stephen Baskerville, 'From Welfare State to Police State' (2008) 12(3) *The Independent Review* 401.

social ills for itself to solve. Gargantuan welfare expenditure in itself is relatively minor compared to the multiplier effect on spending it necessitates. For it spends money to turn children into criminals, addicts, drop-outs, shooters, and terrorists – precisely the problems that then rationalise more government programs, government spending, and government powers. This is why many have located the West's financial ills largely in the welfare state.[43] History's most affluent societies are voluntarily bankrupting themselves financially as well as morally by underwriting sexual indulgence.

Sexualisation is rapidly transforming the armed forces into its own enormous welfare state whose generous benefits, intended for traditional families, act as a magnet for single mothers and, now perhaps, homosexuals whose partners have sexually transmitted diseases.[44] Divorce courts see soldiers as sitting ducks for plunder, and military budgets are consumed by childcare and abortion.[45] As in universities, a feminised military makes military men a favorite target for accusations of 'sexual harassment' and 'sexual assault'.[46]

Sexualisation also transforms military power in unexpected ways. On the one hand, sexual radicals appear to be at the forefront of 'peace' and 'anti-war' movements and of efforts to diminish military power in favor of expanded domestic programs. Yet infiltrating the military is a high priority for feminists and homosexualists, who seek not only to assume combat roles but also propose aggressive military action as an instrument of women's liberation and of a foreign policy devoted to the demands of a homosexualist agenda.[47] Henry Kissinger's choice of words is significant: 'Military missions and foreign interventions are [now] defined as a form of social work.'[48]

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[43] Wall Street Journal, 'Europe's Entitlement Reckoning', *Wall Street Journal* (online), 10 November 2011 <http://online.wsj.com/article/SB10001424052970204190704577026194205495230.html>; Tom G. Palmer (ed), *After the Welfare State* (Atlas Network, 2012).
[44] Elaine Donnelly, 'Constructing the Co-Ed Military' (2007) 14 *Duke Journal of Gender Law and Policy* 815.
[45] Stephen Baskerville, 'The Fathers' War', *The American Conservative* (online), 24 October 2005 <https://www.theamericanconservative.com/articles/the-fathers-war/>.
[46] See Brian Mitchell, *Women in the Military: Flirting with Disaster* (Regnery, 1998); Martin Van Creveld, *Men, Women, and War* (Cassell & Co, 2001).
[47] William Lind, 'War for Women', *The American Conservative* (online), 3 January 2011 <http://www.theamericanconservative.com/articles/war-for-women/>.
[48] Henry A Kissinger, 'Power Shifts' (2010) 52(6) *Survival* 205, 206. See also Michael Mandelbaum, 'Foreign Policy as Social Work' (1996) 75(1) *Foreign Affairs* 16.

With Marxist-Leninist ideology largely discredited since the fall of European Communism in 1989, the left has also turned to feminism and homosexualism as the dominant ideological approach to problems of poverty and underdevelopment. Foreign aid programs are increasingly designed and administered according to feminist doctrine, resembling domestic welfare programs and breeding similar problems. These programs disrupt families, marginalise men, and turn women and children into dependents on Western aid officials. Increasingly too, foreign aid is used as leverage by wealthy countries to pressure traditional societies to compromise or curtail their religious principles and traditional values by implementing principles of women's and homosexual liberation.[49]

Also in the global South, the AIDS epidemic has been dominated and politicised – and also exacerbated – by sexual ideologues, who sabotage effective campaigns for abstinence and fidelity in favor of ideologically inspired but ineffective condom distributions, resulting in further spread of the disease and millions of needless deaths. 'This approach was the most egregious backfire in the history of public health,' writes Edward Green, of the Harvard School of Health, 'wasting billions of tax dollars and shouldering aside low-cost, low-tech, community-based, culturally grounded strategies … that had saved millions of lives.' Green calls it 'the greatest avoidable epidemic in history,' which he attributes to 'sexual ideology'.[50]

Organisations like the United Nation and the European Union operate very differently from what appears on the media radar screen. It is no exaggeration to say that the UN is now dominated by sexual programs and that the highest priority of many UN functionaries is promoting sexual ideology worldwide. The Obama administration likewise made sexuality the cornerstone of its foreign policy during its final years.

The politicisation of sexuality also involves the politicisation of its product – children – and the use of children as instruments and weapons for adults to acquire and distribute political power. This is often presented in the name of 'children's rights', with corollary abridgements of parental

[49] Kathryn Balmforth, 'Hijacking Human Rights', speech delivered at the World Congress of Families, 14-17 November 1999 <http://www.worldcongress.org/wcf2_spkrs/wcf2_balmforth.htm>; Sharon Slater, *Stand for the Family* (Inglestone, 2009) 3; Dale O'Leary, *The Gender Agenda* (Vital Issues Press, 1997) 48.
[50] Edward Green, *Broken Promises: How the AIDS Establishment Has Betrayed the Developing World* (PoliPoint Press, 2011) x, 199.

rights. Homeschoolers are one target, but the confiscation of children from legally innocent parents by government officials continues throughout the West, despite many exposes of the violations of parental rights.[51] If one wishes to enact measures to control the intimate private lives of adults, the way to neutralise opposition is to present them as being 'for the children'.

The blending of sexual liberation with political ideology is also seen in open-ended 'sexuality education' programs, which combine instruction in sexual technique with indoctrination in the politics of 'gender relations'.[52] This illustrates one of the most dynamic features of the new sexual ideology: combining the lust for sex with the lust for power, both of course being major drivers of adolescent rebellion. Political activism is not simply a means to the end of procuring greater sexual freedom, as liberalism superficially understands it; rather, the sexual and political drives are intertwined and mutually reinforcing.

VIII CONCLUSION

Throughout the world, virtually every item on the public agenda is now sexualised and feminised. Even issues that seemingly have no connection with sex and 'gender' and the family are now cast in terms of its impact on 'gender equality' and 'gender identity': health, taxation, immigration, development, war – all, we are told, involve some 'special hardship' for women, 'women and children', or alternative 'gender identities'. 'Women would suffer most from congressional budget cuts,' reports *The Hill*, where such headlines are routine.[53] (As satirised in *The Onion*: 'World Ends – Women, Minorities Hardest Hit.')

When every source of fear is designated a crime, when every claim of oppression is a claim to wield some new governmental or police power – the result is predictable: Everything oppresses, because every grievance is 'empowering'. Even problems that are consequences of sexual and

[51] Stephen M Krason, 'The Mondale Act and Its Aftermath: An Overview of Forty Years of American Law, Public Policy, and Governmental Response to Child Abuse and Neglect' in Stephen M Krason (ed), *Child Abuse, Family Rights, and the Child Protective System: A Critical Analysis from Law, Ethics, and Catholic Social Teaching* (Scarecrow Press, 2013).
[52] *International Guidelines on Sexuality Education* (UNESCO, 2009); Family Watch International, *Comprehensive Sexuality Education: Sexual Rights vs. Sexual Health* <http://familywatch.org/fwi/documents/fwipolicybrief CSE.pdf>.
[53] 29 July 2011.

leftist ideology itself oppress women and therefore empower them.[54] 'Is multiculturalism bad for women?' ask feminist scholars.[55]

All of this is so wildly successful because it exploits and politicises the natural concern of every society to protect and provide for women and children. The condition every civilized and stable society demands in return for this protection and provision is sexual restraint: the restriction of sex and childbearing to married families. But sexual restraint and its religious regimen are precisely what politicised western women, adolescents, and homosexuals are now in open revolt against.

What has changed is not that these groups are any less protected or provided for; on the contrary, they are the safest, least restrained, and most affluent people in history. Indeed, they have achieved levels of economic, political, and sexual freedom that allow them to demand 'empowerment', also without limit or restraint – enjoying the privileges specific to both sexes while claiming exemption from the responsibilities specific to either. This is true of both feminists and homosexualists, who demand the prerogative to alternate between male or female norms as it suits their advantage. Thus the paradox that the more free and powerful these groups become, the more constrained they feel and the more rationalisations we hear to incarcerate heterosexual men under whatever pretext is available.

But women, adolescents, and homosexuals do not need power in order to protect and provide for families. To the extent that they become heads of 'families' (for example through welfare or divorce) their authority is in collusion with the state, rather than a limitation upon its power, and the state becomes the substitute protector and provider – all in contrast to families headed by

[54] Feminists are shameless, for example, in posing as victims of the divorce revolution they themselves created and which is administered entirely by – or under pressure by – their operatives: 'It is in families,' writes Martha Nussbaum, ' … that the cruelest discrimination against women takes place.'

> [T]he patterns of family life limit their opportunities in many ways: by assigning them to unpaid work with low prestige; by denying them equal opportunities to outside jobs and education; by insisting they do most or all of the housework and child care even when they are also earning wages. Especially troubling are ways that women may suffer from the altruism of marriage itself ... [A] woman who accepts the traditional tasks of housekeeping and provides support for her husband's work is *not likely to be well prepared to look after herself and her family in the event (which is increasingly likely) of a divorce* or an accident that leaves her alone.

'Justice for Women', *New York Review of Books*, 8 October 1992, 43 (emphasis added).

[55] Susan Okin, in Joshua Cohen and Matthew Howard (eds), *Is Multiculturalism Bad for Women?* (Princeton University Press, 1999).

heterosexual men. These groups are therefore free to crave power, like they can crave sex, purely for pleasure – both of which cravings their political literature expresses very forthrightly. But the lust for power, like the lust for sex, can never be permanently satisfied. Both can only be limited and controlled. The radicals have already thrown off the controls on sex, and it is the argument of this paper that they are likewise now throwing off the controls on political power.[56]

The mechanisms – mostly religious – by which societies traditionally encourage and enforce sexual restraint vary significantly, and those variations also seem to make a huge difference in the economic prosperity and political freedom of the society. Historically, Jewish and Christian societies have been the most successful, though Confucian societies have recently imitated their success.

The other alternative today for organising both family life and sexual energy (and with them political power) is radical Islamism, which is itself as much a political ideology as a religious movement. It is therefore a rival to sexual radicalism and far more likely to increase state power further, where it can.[57] It is no accident that the other major alternative for ordering sexual and family relations, Christianity, is now under attack by, simultaneously, sexual militants in the West and Islamist militants in the South.

'Religion is central to sexual regulation in almost all societies,' writes Dennis Altman. 'Indeed, it may well be that the primary social function of religion is to control sexuality.'[58] This is simplistic: other important social functions of religion include controlling childhood rebellion and adult resentment – as well as political power generally. But it does point to one very concrete avenue by which the decline of faith in the West leads directly to the erosion of both social order and civic freedom. It is hardly surprising that increasing sexual militancy has resulted in today's

[56] See the foul-mouthed gloating of a Harvard law professor that radicals can now use courts to legislate policy as they please, because "the war's over, and we won." Mark Tushnet, 'Abandoning Defensive Crouch Liberal Constitutionalism' *Balkinization*, 6 May 2016 <http://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html>.
[57] Baskerville, 'Sexual Jihad'.
[58] Dennis Altman, *Global Sex* (University of Chicago Press, 2002) 6.

central political fault line emerging as a confrontation between sexual freedom and religious freedom – along with every other one.[59]

[59] The points in this article are documented further in Baskerville, *The New Politics of Sex: The Sexual Revolution, Civil Liberties, and the Growth of Governmental Power* (Angelico, 2018).

THE CONSTITUTIONALITY OF COMMUNICATION PROHIBITIONS AROUND ABORTION CLINICS

Greg Walsh*

ABSTRACT

Laws prohibiting a range of conduct in the vicinity of a hospital, clinic or other premise that performs abortions have been enacted in Tasmania, Victoria, the Australian Capital Territory and the Northern Territory. One of the prohibitions involves preventing certain types of communication around premises that perform abortion. It is unclear whether this prohibition is consistent with the implied freedom of political communication. A central consideration in determining whether the prohibition is compatible with the implied freedom is the extent of the burden imposed on political communication. The prohibition may be unconstitutional as it places a substantial burden on political communication.

I INTRODUCTION

Laws prohibiting a range of conduct in the vicinity of a hospital, clinic or other premise that performs abortions (an 'abortion premise') have been enacted in Tasmania, Victoria, the Australian Capital Territory and the Northern Territory.[1] One of the prohibitions involves criminalising communication about and against abortion in the vicinity of an abortion premise (the 'communication prohibition'). This prohibition has raised the possibility that the provisions that limit communication may be unconstitutional for violating the implied freedom of political communication in the *Australian Constitution* (the 'implied freedom').

The High Court has held that there is a three stage test for determining whether a law is inconsistent with the implied freedom. The first question asks whether the law 'effectively burdens the freedom in its terms, operation or effect?'[2] If it does not then the law is not invalid for breaching the implied freedom. If it does burden the freedom, then the second question asks:

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[1] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9; *Public Health and Wellbeing Act 2008* (Vic) ss 185A-185H; *Health Act 1993* (ACT) ss 85-87; *Termination of Pregnancy Law Reform Act 2017* (NT) ss 14-16.

[2] *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [104].

'is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?'[3] If it is not then the law is invalid for breaching the implied freedom. If it is then the third questions asks: 'is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?'[4]

Assistance in answering the third question may be provided to a court through the use of a three stage proportionality test.[5] This test enquires whether the law is

> *suitable* – as having a rational connection to the purpose of the provision; *necessary* – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and *adequate in its balance* – a criterion requiring 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'.[6]

The constitutionality of the Tasmanian and Victorian provisions is due to be assessed by the High Court, which has heard appeals from two individuals who have been convicted of violating the communication prohibition.

In *Police v Preston and Stallard*[7] ('*Preston*') Magistrate Rheinberger found that Mr John Preston, Mrs Penny Stallard and Mr Raymond Stallard violated the communication prohibition in the *Reproductive Health (Access to Terminations) Act 2013* (Tas) ('the Tasmanian Act'), which prohibits within a 150m zone of an abortion premise (an 'access zone') conduct that constitutes 'a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided'.[8] The convictions arose out of three separate incidents. On 5 September 2014, Mr John Preston was

[3] Ibid.
[4] Ibid.
[5] The use of the proportionality test to assist in answering the third question does not have the unanimous support of the High Court – see, eg, *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [157]-[166] (Gageler J); [415]-[438] (Gordon J).
[6] *McCloy v New South Wales* (2015) 257 CLR 178, 193-195 [2].
[7] *Police v Preston and Stallard* [2016] (27 July 2016) TASMC.
[8] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(1), (2).

standing about 4-5 metres from the entry door to an abortion premise based in Hobart.[9] He was seen by Ms Sarah Heald as she was walking past the premise.[10] On 8 September 2014, Ms Heald again saw Mr Preston outside the premise distributing leaflets and displaying a banner with a picture of an unborn child.[11] On this occasion Ms Heald approached Mr Preston and advised him that his conduct was illegal under the new legislation. On the 14 April, 2015, Mr Preston was again outside the premise and was accompanied this time by Mrs Penny Stallard and Mr Raymond Stallard. All three were holding signs critical of abortion. A police officer approached them and gave a direction requiring them to leave the area for 8 hours. When they refused they were taken to the police station and charged for failing to comply with the directions of a police officer and for committing an offence under s 9(2) of the Tasmanian Act. Magistrate Rheinberger held that the provisions did not breach the implied freedom and convicted the defendants for failing to comply with the directions of a police officer and for committing an offence under s 9(2) of the Tasmanian Act.[12] Preston was the only defendant who appealed against his conviction and $3,000.00 fine.

In *Edwards v Clubb*[13] ('*Clubb*') Magistrate Bazzani found that Mrs Kathleen Clubb violated the communication prohibition in the *Public Health and Wellbeing Act 2008* (Vic) that prohibited within a 150m zone of an abortion premise 'communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety'.[14] Mrs Clubb was a member of a group who had advised the Victorian Police that they were intending to test the validity of the legislation by engaging in conduct within an access zone that was potentially prohibited by the Act. At about 10.30am on 4 August 2016, Mrs Clubb was filmed by police about five metres from the entrance to the East Melbourne Fertility Control Clinic carrying two pamphlets with only one mentioning abortion. Mrs Clubb attempted to communicate with a couple who were entering the Clinic and offered them a pamphlet (the

[9] *Police v Preston and Stallard* [2016] TASMC (27 July 2016) [6].
[10] Ibid [3].
[11] Ibid [5].
[12] Ibid [54]-[55], [87]-[88].
[13] The criminal liability of Mrs Clubb was decided in *Edwards v Clubb* (Unreported, Magistrates' Court of Victoria, Magistrate Bazzani, 23 December 2017, Case Number G12298656) while the constitutional validity of the provisions was decided in a separate hearing: *Edwards v Clubb* (Unreported, Magistrates' Court of Victoria, Magistrate Bazzani, 6 Oct 2017, Case Number G12298656).
[14] *Public Health and Wellbeing Act 2008* (Vic) ss 185B, 185D.

Magistrate did not make a finding regarding which pamphlet was offered). The footage showed the male of the couple spoke to Mrs Clubb, declined the pamphlet and the couple then moved away from Mrs Clubb. The magistrate held that the engagement appeared polite and there was no evidence of duress or violence.[15] Magistrate Bazzani found that the provisions did not breach the implied freedom and convicted Mrs Clubb for violating the communication prohibition and imposed a $5,000.00 fine and a two year good behaviour bond.

A central consideration in determining whether the Tasmanian and Victorian Acts will be found to be constitutional is the extent of the burden that the laws place on the freedom of political communication. As the plurality stated in *Brown v Tasmania*: '[g]enerally speaking, the sufficiency of the justification required for such a burden should be thought to require some correspondence with the extent of that burden'.[16] Similarly, in *McCloy v New South Wales* the majority held that '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'.[17]

Considering the centrality of this issue to a consideration of the constitutionality of the Acts this article considers the extent to which the provisions burden political communication. Part II examines the broad range of communications prohibited outside abortion premises. Part III considers the extent to which communications not directed at abortion premises may be prohibited under the Acts. Part IV assesses the area that may be covered by access zones and considers any difficulties that may be involved in identifying access zones. Part V evaluates the gravity of the penalties for violating the provisions.

II THE BROAD RANGE OF COMMUNICATION PROHIBITED OUTSIDE ABORTION PREMISES

A *Conduct critical of abortion will be prohibited*

The prohibitions in the Tasmanian Act against 'protesting' and in the Victorian Act against 'communications reasonably likely to cause distress or anxiety' have the potential to prohibit an

[15] *Edwards v Clubb* (Unreported, Magistrates' Court of Victoria, Magistrate Bazzani, 23 December 2017, Case Number G12298656) 3.
[16] *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [118] (Kiefel CJ, Bell and Keane JJ) citing *Tajjour v New South Wales* (2014) 254 CLR 508, 580 [151] (Gageler J).
[17] *McCloy v New South Wales* (2015) 257 CLR 178, 219 [87] (French CJ, Kiefel, Bell and Keane JJ).

extensive range of non-violent conduct outside abortion premises. As indicated in *Preston* and *Clubb*, they can be expected to forbid any kind of communication that claims that terminations are unethical or that they may cause a woman to suffer physical or mental harm. The provisions will also likely prohibit individuals from advising women entering the premises that there are alternative options available with people who are willing to care for both women and their children. Perhaps most relevant to the High Court challenge, the provisions will also prohibit communications about legal and political matters relevant to the provisions. Under the provisions, for example, it would likely be illegal in the vicinity of abortion premises to criticise the provisions or the politicians who introduced the laws, recommend voting for a particular political party with a pro-life platform or ask those entering the premises to help campaign to reform the law.

Silent vigils outside abortion premises where the individual says and distributes nothing could also be prohibited if there is something that the person wears or does that could be understood as communicating disapproval of abortion. For example, praying in an obvious manner or wearing a symbol that is associated with anti-abortion views could be in violation of the provisions. That the provisions were designed to have this effect was made clear in the second reading speech for the Tasmanian Act in which the Minister, Michelle O'Byrne, stated that

> it will stop the silent protests outside termination clinics that purport to be a vigil of sorts or a peaceful protest but which, by their very location, are undoubtedly an expression of disapproval. As one submitter to the consultation framed it, there is nothing peaceful about shaming complete strangers about private decisions made about their bodies. I respect that each of us are entitled to our views. What I do not respect is the manner in which some people choose to express them, and standing on the street outside a medical facility with the express purpose of dissuading or delaying a woman from accessing a legitimate reproductive health service is, to my mind, quite unacceptable.[18]

If individuals engage in their silent activity in a way that cannot reasonably be understood to communicate a message of disapproval then there may not be a violation of the provisions. Such a result was found in *Bluett* v *Mellor*[19] ('*Bluett*') where three defendants were prosecuted under

[18] Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013 (Michelle O'Byrne).
[19] *Bluett* v *Mellor, Bluett* v *Popplewell and Bluett* v *Clancy* ACT Magistrates Court CC2017/2722).

the communication prohibition around ACT abortion premises.[20] Magistrate Theakston acquitted the three defendants on the basis that a protest requires some form of communication from a protester and that silent prayer and the mere display of rosary beads could not be considered to be a type of communication.[21] However, any type of non-verbal conduct that could be considered to communicate disapproval will likely violate the provisions. Even the act of walking through an access zone wearing symbols that may be associated with disapproval of abortion (e.g. a cross, rosary beads, religious clothing, clothing with pro-life slogans, etc) could result in criminal prosecution.

An additional feature of the provisions that substantially increases the extent of their operation is that they apply even if the person entering the premise consents to the communication or initiates the conversation with another person in the vicinity of the premises. Further, as all that is required under the provisions is that there is a 'protest' or communication that is 'reasonably likely to cause distress or anxiety' a person can be convicted if the person entering the premises did not want the matter to be prosecuted and did not suffer any distress or anxiety. The provisions even raise the possibility that those entering the premises may use the provisions maliciously by engaging in conversations in access zones with individuals who are anti-abortion and then making a complaint when a comment is made that may violate the provisions.

A conviction is also possible for communications that are not actually seen or heard by anyone entering the premise as the provisions prohibit conduct that is 'able to be seen or heard by a person accessing' the abortion premise. The intention for the provision to operate in this manner was made clear in the second reading speech in the Victorian Parliament which stated '[t]his offence does not require that an individual who is accessing or leaving such premises must actually see or hear the activity'.[22] Such an interpretation substantially increases the operation of the provision if there is no requirement that anyone needs to even be attempting to access the premise in order for an offence to be found.

[20] *Health Act 1993* (ACT) ss 85-87.
[21] *Bluett v Popplewell* [2018] ACTMC 2 [84]-[87].
[22] Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, 3976 (Jill Hennessy).

B *Conduct supportive of access to abortion may be prohibited*

Although these substantial restrictions are an expected result of the provisions, the ambiguous nature of the prohibitions will mean that the ambit of their operation will likely be much larger than this. The prohibitions could apply, at least under the Victorian legislation, to a person who is supportive of abortion rights but is concerned that some women are not making fully informed choices and who simply wants to talk to women entering abortion premises to make sure that they are making an informed choice. They could also prohibit someone who merely wants to obtain more information about what happens inside abortion premises and attempts to communicate with those entering or leaving the premises.

The provisions could also prevent members of the community from discussing important matters with those entering abortion premises. For example, there may be legitimate concerns about the safety of particular abortion premises but journalists or other individuals who want to discuss these concerns with employees may be unwilling to approach employees entering the premises due to concerns that this may violate the provisions. Similarly, if health professionals at the abortion premises are being investigated for malpractice or for performing illegal abortions the provisions might discourage individuals from advising women entering the premises about the allegations on the understanding that it could violate the provisions.[23] Although such conduct might be permitted on the basis that it is not a 'protest' or 'reasonably likely to cause distress or anxiety', the belief that there might be a conviction under the provisions may have the effect of prohibiting a wide range of communications that the parliamentarians supporting the provisions did not intend.

A particular problem with the Victorian provisions is that it may also operate to criminalise the conduct of patients, police officers or support persons. Section 185B(2) of the Act makes it clear that 'the definition of prohibited behaviour does not apply to an employee or other person who provides services at premises at which abortion services are provided'. However, there is no such protection provided to the pregnant woman, police officers or a family member or friend who is accompanying the pregnant woman as a support person to the premise. They could be prosecuted

[23] For a recent example of a case that held that the doctor had performed an illegal abortion see *R v Sood* [2006] NSWSC 1141.

if they say or do something that someone who is accessing the premises can see or hear and which is 'reasonably likely to cause distress or anxiety'.

The scope of the prohibition can be interpreted to not just cover statements to the woman by the support persons but also statements by the pregnant woman or the support persons to anyone in the environment. Such an outcome is possible as the provision simply prohibits conduct that is 'reasonably likely to cause distress or anxiety'. It does not restrict the operation of the provision to only prohibit conduct that is reasonably likely to cause distress or anxiety to a person entering the premises. For example, if individuals who do and say nothing except stand near the premises are not considered to be in violation of the Act and the woman or a support person says something offensive to them then this statement could be in violation of the Act. Support for such an interpretation can be found in the defence provided in s 185B(2) that only protects an employee or other person who provides services at the premises. It is arguable that if Parliament had wanted this defence to apply to others entering the premises then it could easily have expanded the defence.

A court could hold that a defence exists under s 185B(2) for the support person and police officer by interpreting the phrase 'other person who provides services' to include them, but it would be hard to argue that the phrase could extend to the pregnant woman who is the recipient of the services. Alternatively, a court might find that the phrase 'reasonably likely to cause distress or anxiety' is ambiguous and interpret it to apply only to a person accessing the premises. Under the legislation the purpose of the provision is stated as '(a) to provide for safe access zones around premises at which abortions are provided so as to protect the safety and wellbeing and respect the privacy and dignity of—(i) people accessing the services provided at those premises; and (ii) employees and other persons who need to access those premises in the course of their duties and responsibilities; and (b) to prohibit publication and distribution of certain recordings'.[24] Considering these purposes a narrow interpretation of the provisions may be adopted, which would remove the possibility of patients, support persons and police officers violating the provisions except in the rare situation that their conduct was 'reasonably likely to cause distress or anxiety' to persons entering the premises.

[24] *Public Health and Wellbeing Act 2008* (Vic) s 185A.

C *The importance of on-site protests*

The provisions will clearly have the effect of preventing individuals from engaging in protests and other forms of communication in the vicinity of the sites where the activity of concern takes place. Prohibitions against on-site protests and other activities are particularly limiting on political communication as it is at the sites where the controversial activity is occurring that individuals will often be able to most effectively promote their message to the people operating on that site and to the community. The importance of on-site action is widely recognised as demonstrated by the conduct of activists in other areas such as forestry operations, mining, churches, abattoirs and Greyhound racing. The importance of location to a protest in the context of forestry operation was emphasised in *Brown v Tasmania* by the plurality who noted that 'even though protests about forest operations may be communicated in other ways … other methods of communication are less likely to be as effective as the communication of images of protesters pointing to what they claim to be damage to the natural environment.'[25] A point affirmed by Gageler J in the same case:

> The communicative power of on-site protests, the special case emphasises and common experience confirms, lies in the generation of images capable of attracting the attention of the public and of politicians to the particular area of the environment which is claimed to be threatened and sought to be protected … The nature of the burden imposed on political communication by the impugned provisions is that the burden can be expected to fall in practice almost exclusively on on-site political protests of that description. Not only are the provisions targeted by the definition of protester to political communication, but they are targeted by the same definition to political communication occurring at particular geographical locations. Given those geographical locations, and given the history of on-site protests in Tasmania, it would be fanciful to think that the impugned provisions are not likely to impact on the chosen method of political communication of those whose advocacy is directed to bringing about legislative or regulatory change on environmental issues and would have little or no impact on political communication by those whose advocacy is directed to other political ends.[26]

Similarly, Nettle J noted that

[25] *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [117].
[26] Ibid [191], [193].

> there is a long history of environmental protests in Australia, especially in Tasmania, aimed at influencing public and governmental attitudes towards logging and the protection of forests. In the experience of the first plaintiff, on-site protests against forest operations and the broadcasting of images of parts of the forest environment at risk of destruction are the primary means of bringing such issues to the attention of the public and parliamentarians. Media coverage, including social media coverage, of on-site protests enables images of the threatened environment to be broadcast and disseminated widely, and the public is more likely to take an interest in an environmental issue when it can see the environment sought to be protected. On site protests have thus contributed to governments in Tasmania and throughout Australia granting legislative or regulatory environmental protection to areas not previously protected.[27]

III THE EXPANSIVE OPERATION OF THE PROVISIONS

A *Conduct not aimed at abortion premises will be prohibited*

As the Acts do not make it a requirement that the person's conduct is directed at abortion premises they would likely prohibit a wide range of behaviour within the 150m zones that could be seen or heard by those attempting to access the premises but which is not aimed at these individuals. This conduct could include an anti-abortion protest not aimed at abortion premises, individuals wearing anti-abortion clothing or symbols and a vehicle driving within a zone with an anti-abortion sign.

The provisions could even impact individuals in private residences or commercial premises whose conduct communicates an anti-abortion message that can be seen or heard by a person on their way to an abortion premise. A person discussing abortion or watching a documentary on abortion in their home, for example, could violate the provisions if a person walking to the abortion premises on the footpath could hear the statements made. Similarly, a bookstore will likely be prohibited under the provisions from displaying an abortion related book, poster or other object in its display window or some other internal or external location that may be observable by a person attempting to access an abortion premise. That the provisions could have this kind of impact was made clear by Ms Mikakos, Victorian Minister for Families and Children, who stated that an 'outward-facing sign about abortion in a window of a property that

[27] Ibid [240].

is in the safe access zone may be prohibited under the legislation if it is displayed in a manner that means it is able to be seen by a person accessing or leaving a premises [sic] that provides abortions and is reasonably likely to cause distress and anxiety'.[28]

B *Universities and other educational institutions*

A further problem with the provisions is that they may limit or prevent discussions at universities and other educational institutions. A premise at which abortions are performed that is close to an educational institutions will make it likely that at least part of the access zone will include the institution and so will make it a criminal offence to discuss abortion in a way that may violate the provisions. The Royal Women's Hospital in Melbourne, for example, performs abortions and is near The University of Melbourne. Depending upon how the perimeter of the Royal Women's Hospital is determined, the 150m access zone may result in a substantial area of the University being covered by an access zone. One of the campuses of The Australian Catholic University is similarly covered by an access zone as Dr Rachel Carling-Jenkins explains:

> One of the many Dr Marie Stopes abortion clinics is at 182–184 Victoria Parade, East Melbourne. The 150-metre radius — or the no-go zone — encompasses the Greek Orthodox church next door and all the grounds of the Australian Catholic University. Pro-life discussion, which may cause distress under this bill, will be prevented outside this church, on the grounds of the Australian Catholic University, on the grounds of the Catholic Education Office and on part of St Patrick's Cathedral property.[29]

The potential for the access zones to limit communications at universities and other educational institutions indicates the highly restrictive nature of the legislation as such institutions are, at least in theory, supposed to be places where open discussions of ethical and political issues is permitted and ideally encouraged for the benefit of society.

C *Houses of worship*

The provisions will also limit communication on the grounds of churches and other houses of worship. As indicated in the previous section, a single access zone in Melbourne will prohibit

[28] Victoria, *Parliamentary Debates*, Legislative Council, 24 November 2015, 4784 (Jenny Mikakos).
[29] Ibid 4755-6 (Rachel Carling-Jenkins).

communication about and against abortion on the entire grounds of a Greek Orthodox Church (the Holy Church of the Annunciation of Our Lady) and part of the grounds of a Catholic Cathedral (St Patrick's Cathedral). On the adverse impact that the prohibitions will have on the Greek Orthodox Church, Dr Rachel Carling-Jenkins advised the Victorian Parliament that the Very Reverend Father Kosmas Damianides from the affected Church 'has expressed grave concerns about this bill and what its implications may be for his parishioners, who may well discuss their pro-life views outside the church, which practically shares a wall with an abortion clinic'.[30]

The operation of the access zones in this respect provides a further example of how the provision may adversely affect political communication but its impact in relation to communications with a religious dimension may be considered to be particularly significant. The importance of freedom of communication to religious liberty is clearly recognised under international law. The *International Covenant on Civil and Political Rights*, for example, holds that '[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in *public or private*, to manifest his religion or belief in worship, observance, practice and *teaching*'.[31]

The High Court, however, may hold that the impact of the provisions on religious freedom is not a relevant additional consideration as the essence of the inquiry is on the burden on political communication and whether the provision has a particular adverse impact on political communication with a religious dimension is not relevant to this inquiry.

D *Politicians and political parties*

Political parties and individual politicians may also be adversely affected by the communication prohibitions. A standard practice, especially during election periods, is to affix political material in prominent areas and for supporters to distribute pamphlets in public places promoting the positions of the party or the politician. Those parties and politicians widely known to be critical

[30] Ibid 4756 (Rachel Carling-Jenkins).
[31] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 18(1) (emphasis added).

of abortion may violate the provisions if they promote these policies in an access zone. Even if there is no specific mention of abortion in the material used, the mere mention of the name of such a political party or politician in an access zone may be sufficient to meet the requirements of a communication that is reasonably likely to cause distress or anxiety. Considering the commitment of some anti-abortion activists they could even establish a political party with an explicitly anti-abortion name (e.g. the Australian Pro-Life Party) that would make it even more likely that the mere use of the party's name within an access zone would be a criminal offence. A political party or politician could even have an office within an access zone and under the provisions any display of material outlining their position on abortion or even merely identifying themselves could breach the provisions.

The possible impact of the provisions on the campaigns of politicians was considered by Ms Jenny Mikakos, Victorian Minister for Families and Children, who claimed that

> a billboard that would be advocating a vote for a certain political party due to its stance on abortion … would likely be a permissible act because such a billboard would not be targeting women accessing abortions and would therefore not be likely to be perceived as distressing. So if a member or political party were to be distributing material that related to their electioneering, as long as it was not perceived as distressing in terms of the definitions under the act, that would not be problematic. It is a different matter when people are handing out material that has very graphic photographs of foetuses or material of that nature, because that type of material may fall within the provisions of the act that relate to communicating in such a way that is likely to cause distress or anxiety to a person accessing an abortion clinic.[32]

The statement by Mikakos concedes that it would be possible for politicians and political parties to be prosecuted if they were distributing material that satisfied the requirement of being reasonably likely to cause distress or anxiety. Considering the adverse impact that the provisions will have on this central aspect of political communication the provisions should be recognised as placing a heavy burden on the implied freedom.

[32] Victoria, *Parliamentary Debates*, Legislative Council, 24 November 2015, 4790 (Jenny Mikakos).

E *A limited interpretation of 'attempting to access'*

The view that the phrase 'attempting to access' means that conduct occurring anywhere in the 150m zone might violate the provisions appears to have been rejected by Magistrate Rheinberger in *Preston* who instead preferred a narrower interpretation meaning that the person 'attempting to access' must be in close proximity to the premises.[33] The merit of this interpretation is questionable. A broad interpretation of the meaning of 'attempting to access' would provide better protection to women seeking terminations and would seem to be more in line with the purposes of the provisions aimed at protecting women from physical and emotional harm. Support for such an interpretation may be provided by Jill Hennessy, Minister for Health, who in relation to the prohibitions in Victoria made it clear in the Statement of Compatibility that a

> safe access zone of 150 metres has been determined to be appropriate because it provides a reasonable area to enable women and their support people to access premises at which abortions are provided without being subjected to such communication. As I have explained, the conduct has included following women and their support persons to and from their private vehicles and public transport. There have also been many instances of staff being followed to local shops and services, and subjected to verbal abuse. Such conduct has often occurred well beyond 150 metres. However, I consider that 150 metres is a reasonable area that is necessary to enable women and their support persons to access premises, safely and in a manner that respects their privacy and dignity. While such conduct has occurred beyond 150 metres of some abortion services, having a clear safe access zone of 150metres will enable abortion services to advise women of how they can best access the premises without the risk of such conduct, such as where they can park their vehicles or use public transport.[34]

Further support for a broad interpretation can be found in the terminology used to describe the protected area. The Tasmanian Act uses the phrase 'access zone' which supports the view that once a woman seeking a termination enters the 150m zone she is to be understood as having started the process of 'attempting to access' the premises. If this broader interpretation is preferred the High Court then the burden on the implied freedom by the Acts will be substantially increased in a range of ways such as those discussed above.

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[33] *Police v Preston and Stallard* [2016] (27 July 2016) TASMC 14 [27].
[34] Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, 3973-4 (Jill Hennessy).

IV THE SUBSTANTIAL AREA RESTRICTED BY ACCESS ZONES

A *The large number of access zones created*

A further criticism of the provisions is that they will create many access zones throughout Tasmania and Victoria making a substantial part of both States areas within which communications about and against abortions will be prohibited. In Tasmania, there would be access zones around the public hospitals (Royal Hobart Hospital, Launceston General Hospital, North West Regional Hospital and Mersey Community Hospital) at which abortions are performed. There may also be access zones around the five private hospitals in Tasmania (Hobart Private Hospital, St Helen's Private Hospital, North West Private Hospital, The Hobart Clinic and Steele Street Clinic Private Hospital) and the four Catholic hospitals (Lenah Valley Campus, St John's Campus, St Luke's Campus and St Vincent's Campus) if they offer surgical abortions and/or medical abortions such as RU486 or Plan B (or similar). In Victoria, according to the Australian Institute of Health and Welfare, there are 132 public and private hospitals in Melbourne with a similar number throughout rural Victoria.[35] Although some of these hospitals would not provide any reproductive health services, access zones would be established around those hospitals that provide surgical or medical abortions.

Catholic and other religiously affiliated hospitals may not offer surgical abortion or RU486 but they may offer (or may decide to offer in the near future) oral contraceptives and Plan B (or similar) for victims of sexual assault or for other patients who may benefit from the medication.[36] This type of medication can operate as a contraceptive but may also operate as an abortifacient by preventing implantation and on this basis if these hospitals do offer this medication then they could be considered to be abortion premises under the provisions.[37] Such an outcome is possible

[35] Australian Institute of Health and Welfare, 'My Hospitals' (2018) <https://www.myhospitals.gov.au/browse-hospitals/vic/melbourne/melbourne>.

[36] See, eg, Christa Pongratz-Lippitt 'German bishops give leeway on contraception in rape cases' (22 February 2013) <https://www.ncronline.org/news/world/german-bishops-give-leeway-contraception-rape-cases>.

[37] The dispute regarding whether Plan B and similar medication can have the effect of preventing implantation after fertilisation and whether such a result should be considered to constitute an abortion is an ongoing scientific and philosophical controversy. See, eg, Nicanor Pier Giorgio Austriaco, 'Is Plan B an Abortifacient? A Critical Look at the Scientific Evidence' (2007) 7(4) *The National Catholic Bioethics Quarterly* 703; Chris Kahlenborn, Rebecca Peck and Walter B Severs, 'Mechanism of action of levonorgestrel emergency contraception' (2015) 82 *The Linacre Quarterly* 18; R Alta Charo, 'Alternative Science and Human Reproduction' (2017) 377 *The New England Journal of Medicine* 309; Peter J Cataldo, 'Moral Certitude in the Use of Levonorgestrel for the Treatment of Sexual Assault Survivors' in Jason T Eberl (ed) *Contemporary Controversies in Catholic Bioethics* (Springer, 2017) 197.

as the Tasmanian provisions apply to premises at which 'terminations' are provided and the provisions define 'terminate' as meaning 'to discontinue a pregnancy so that it does not progress to birth by – (a) using an instrument or a combination of instruments; or (b) using a drug or a combination of drugs; or (c) any other means'.[38] Similarly, the Victorian provisions apply to premises at which 'abortions' are provided with the definition of 'abortion' taken from the *Abortion Law Reform Act 2008* (Vic) which defines 'abortion' as 'intentionally causing the termination of a woman's pregnancy by – (a) using an instrument; or (b) using a drug or a combination of drugs; or (c) any other means'.[39] A court could hold that a pregnancy only begins at implantation and so exclude medications like Plan B from the scope of the provisions.[40] However, if a broader interpretation of the provisions is adopted and the potential of medication like Plan B to 'discontinue' or 'terminate' a pregnancy is accepted then a court could hold that premises that provide this medication are abortion premises for the purpose of the Acts.

In addition to the premises that specifically provide abortions, doctor's clinics and medical centres that provide RU486 would also likely qualify as 'premises at which terminations are provided'. It is difficult to know the number of doctors who have been trained to administer RU486 as the government does not make this information easily accessible to the public due to its sensitive nature.[41] However, Ms Mikakos, the Minister for Families and Children in Victoria, estimated that in 2015 there were about 100 GPs trained in the administration of RU486 in Victoria.[42] An access zone could exist around any clinic in Victoria or Tasmania where a doctor administers RU486 and considering that these doctors may work at multiple clinics a significant number of access zones would be created by these doctors. Any clinic that administers Plan B (or similar) could also be covered by an access zone on the understanding that this medication has the potential to end a pregnancy. On the expansive scope of the provisions in Victoria, Dr Rachel Carling-Jenkins noted that there are '40,000 GPs in Victoria and an estimated 10,000 GP clinics.

[38] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 3.
[39] *Abortion Law Reform Act 2008* (Vic) s 3.
[40] R Alta Charo, 'Alternative Science and Human Reproduction' (2017) 377 *The New England Journal of Medicine* 309.
[41] Victoria, *Parliamentary Debates*, Legislative Council, 24 November 2015, 4786 (Jenny Mikakos).
[42] Ibid 4785 (Jenny Mikakos).

There are many with such clinics in the CBD. Should this extreme law pass, with a 150-metre radius around each clinic, almost the entire CBD will be a no-go zone for pro-life activism'.[43]

It is also possible that pharmacies in Tasmania will also be considered to be abortion premises for the purpose of the Act. Under the Victorian provisions it is explicitly stated that 'premises at which abortions are provided does not include a pharmacy'.[44] Similarly, the comparable provisions in the Northern Territory make it clear that 'premises for performing terminations … does not include a pharmacy'.[45] However, as there is no such exclusion of pharmacies in the Tasmanian provisions it is arguable that where RU486 and Plan B (or similar medications) are sold then these pharmacies may fall within the description of 'premises at which terminations are provided'. Although such a result is possible, the High Court may interpret the phrase 'premises at which terminations are provided' to only refer to premises that typically do more than simply provide a person with medication and general advice and so exclude pharmacies from the operation of the Tasmanian legislation on this basis. A similar approach could also be taken in relation to RU486 in which case the scope of the provisions would be further narrowed.

The area in which abortion related communications are currently prohibited may increase in the future if additional hospitals, doctor's clinics and medical centres decide to start providing surgical or medical terminations. The general nature of the provisions even creates the possibility of malicious abuse as an abortion provider could begin operating in a location where they know that public discussions regarding abortion are likely.

The reverse could also apply where particular premises stop providing surgical or medical terminations but decide against publicly announcing their decision. This would create the undesirable situation that community members would incorrectly believe that abortion related communications are illegal in certain public areas that are no longer covered by an access zone. It could also lead to police officers arresting individuals on the false belief that the person is in an access zone. This would be a very similar situation to *Brown v Tasmania* where the expansive

[43] Ibid 4755 (Rachel Carling-Jenkins).
[44] *Public Health and Wellbeing Act 2008* (Vic) s 185B(1).
[45] *Termination of Pregnancy Law Reform Act 2017* (NT) s 4.

nature of the provisions caused individuals opposed to the forestry operations to be arrested and charged under the legislation when they were not in a prohibited area.[46]

Considering the large number of hospitals, abortion premises, medical centres and general practice clinics the Tasmanian and Victorian provisions may have created hundreds, if not thousands, of access zones in which communications about and against abortions are prohibited. This represents a major limitation on the ability of individuals to discuss abortion in an extraordinarily large area of both States. On this basis the provisions should be regarded as imposing a major restriction on the implied freedom.

B *The difficulty in determining the area of access zones*

In addition to the extensive area covered by the provisions, a further problem, especially for activists and police officers, is working out the locations and boundaries of access zones. For some locations, such as abortion premises and public hospitals, it will be widely known that abortions are performed at the location and that access zones have now been established at those locations. However, for many other sites it will not be widely known that abortions are performed at the site often because the managers intentionally restrict this information due to the sensitive nature of abortion. Nevertheless, access zones will still be established around these sites as knowledge that abortions are performed on the premises is not required for an access site to be established.

A related problem is determining the precise boundaries of the 150m zones around abortion premises. It is unclear whether the zone should be from the particular locations where abortions are performed or from the entire perimeter of the premises. If it is held to be from the perimeter then for locations such as major hospitals a very large access zone will be created from which protesters are excluded compared to the access zones that will apply to smaller premises. Even for smaller premises the access zones will still be very large establishing zones that are at least 70,650 m^2 (150m radius x 150m radius x 3.14) in which abortion related communications may constitute a criminal offence.

[46] *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [150] (Kiefel CJ, Bell and Keane JJ).

This inability to reliably identify premises at which terminations are provided and the boundaries of access zones may result in individuals breaching the provisions even though they did not know that they were within an access zone. Such a possibility was recognised in *Bluett* where the magistrate held that a conviction could be secured without the person knowing they were in an access zone if they were reckless on the grounds that they were aware that there was a substantial risk that they were entering an access zone and they had no valid justification for entering the area.[47] This ambiguity surrounding the operation of the provisions is also likely to deter individuals from communicating about abortion in many areas throughout Tasmania and Victoria on the basis that an area might be protected by an access zone.

In *Brown v Tasmania*, the plurality in holding that the impugned provision was unconstitutional placed significant weight on how the design of the Act limited political communication it was not intended to limit. On the unintended operation of the provisions their Honours held

> [t]hat the Protesters Act may operate effectively to stifle political communication which it is not the purpose of the Act to stifle is not merely a function of the vagaries of the application of the concepts employed by the legislation to "facts on the ground"; it is a consequence of the design of the Act in its deployment of a possibly mistaken, albeit reasonable, belief of a police officer as the mechanism by which it operates. Protests may be effectively terminated in circumstances where it is not necessary that the protester has, in truth, contravened [the provisions], where it is not necessary to establish that any offence has been committed by the protester, and where judicial review of the mechanism whereby such a result is brought about is not practically possible before the protest is terminated.[48]

[47] *Criminal Code 2002* (ACT) s 20(2).
[48] *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [79] (Kiefel CJ, Bell and Keane JJ).

V THE GRAVITY OF THE PROHIBITION

A *Significant penalties apply for violating the prohibitions*

Under the Tasmanian Act a person who engages in prohibited behaviour within an access zone faces a penalty of a fine not exceeding 75 penalty units (75 x $159 = $11,925) or imprisonment for a term not exceeding 12 months, or both.[49] Under the Victorian Act a person who engages in prohibited behaviour within a safe access zone faces a penalty of 120 penalty units (120 x $158.57 = $19,028.40) or imprisonment for a term not exceeding 12 months.[50] These are significant penalties that permit a court to impose a substantial punishment including a lengthy prison sentence even for first time offenders. There are also no defences in the provisions that a defendant can rely upon to avoid conviction such as a 'reasonable excuse' defence that exists in the Victorian Act in relation to other types of 'prohibited behaviour' or that the person entering the clinic consented to or initiated the conversation.[51]

In *Brown v Tasmania*, the plurality considered the substantial penalties that applied to violating the prohibitions on protesting to be a further factor in finding that a significant burden was placed on the implied freedom. Their Honours held that

> [t]he possibility that a protester might be liable to a substantial penalty should not be overlooked, but it may not loom so largely as a deterrent. This may be because no charge under the Protesters Act has been successfully prosecuted. There has been no successful prosecution for the reason that mistakes have been made about whether the Protesters Act applied. However, from the point of view of protesters, there is nothing to suggest that mistakes will not continue to be made. That circumstance will operate as a significant deterrent. That will occur as a practical matter whether or not a prosecution for an offence is pursued to a successful conclusion and without any occasion for the determination by a court of whether or not the operation of provisions infringes the implied freedom in the circumstances of the case.[52]

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[49] Acting Minister for Justice (Tasmania), 'Penalty Units and Other Penalties' in Tasmania, *Tasmanian Government Gazette*, No 21, 24 May 2017, 429, 431 <http://www.gazette.tas.gov.au/editions/2017/may_2017/21703_-_Gazette_24_May_2017.pdf>.

[50] Treasurer, 'Notice Under Section 6, Fixing The Value Of A Fee Unit And A Penalty Unit' in Victoria, *Victoria Government Gazette*, No G 13, 30 March 2017, 485, 541 <http://www.gazette.vic.gov.au/gazette/Gazettes2017/GG2017G013.pdf#page=13>.

[51] *Public Health and Wellbeing Act 2008* (Vic) s 185B(1) def of 'prohibited behaviour' paras (c) and (d).

[52] *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [87] (Kiefel CJ, Bell and Keane JJ).

Unlike the legislation in *Brown v Tasmania*, there is no uncertainty regarding whether convictions will be secured against those who violate the Tasmanian and Victorian Acts considering that convictions have already been secured against those who were found to have violated the prohibitions. The substantial penalties and the likelihood of conviction is a significant restriction on the freedom as many individuals would be unwilling to engage in a protest if they considered that it could result in them being arrested and convicted of a crime requiring them to pay a substantial fine, serve a sentence of imprisonment up to 12 months and have a permanent criminal record.

B The prohibitions are permanent

The Tasmanian and Victorian Parliaments intend these laws to permanently ban communication about and against abortion in the vicinity of abortion premises. A permanent ban on political communication in an area is far more serious than the temporary bans for events such as the 2007 Asia-Pacific Economic Cooperation meeting held in Sydney. In *Brown v Tasmania*, the plurality considered the possible long duration of bans under the impugned Act was a significant burden on political communication as the Act could

> bring the protest of an entire group of persons to a halt and its effect will extend over time. Protesters will be deterred from returning to areas around forest operations for days and even months. During this time the operations about which they seek to protest will continue but their voices will not be heard.[53]

Unlike the temporary bans in the legislation in *Brown v Tasmania* the bans under the Tasmanian and Victorian provisions are permanent. The greater severity of the prohibitions contained in the provisions provides further support for a finding by the High Court that the provisions place a substantial burden on the implied freedom.

VI CONCLUSION

The burden that the provisions place on the implied freedom should be regarded as substantial considering that the prohibitions on 'protests' and communications that are 'reasonably likely to cause distress or anxiety' will likely prohibit a range of different types of communication around

[53] Ibid [86].

abortion premises. Further, the uncertainty regarding the location of access zones, the precise boundaries of the zones protected and the conduct that is prohibited in these locations may cause many individuals to decide not to protest, offer help or communicate about political matters anywhere near abortion premises through fear that they may violate the provisions even though they may not be within an access zone or otherwise breaching the provisions.

As discussed in the introduction, the assessment of whether a provision is unconstitutional for breaching the implied freedom involves the application of a detailed three part test. Although it is beyond the scope of this article to conduct a detailed assessment of the likely outcome of the appeal, it would not be unexpected for the provisions to be found to be compatible with the implied freedom especially if the High Court holds that the purposes of the provisions are to protect pregnant women from emotional harm and unsolicited offers of assistance and that these purposes are of such substantial importance that a significant burden on political communication can be justified.

Such an outcome, however, is not certain. An issue that will likely be central to the appeal is the requirement of 'necessity' explicitly identified in the proportionality test as requiring that there be 'no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom'. The High Court could find that there are alternative approaches to regulating the area that indicate that the Tasmanian and Victorian laws are not necessary. Some possible alternatives approaches could be laws that permit offering assistance to pregnant women while retaining prohibitions against statements critical of abortion, provide greater clarity regarding the location and boundaries of access zones,[54] suspend the operation of the provisions during election periods,[55] exempt sensitive areas within access zones such as houses of worship and universities, permit consensual conversations and/or impose less substantial penalties. The possibility that some of these approaches could be regarded as valid alternative means for achieving the purposes of the provisions may be an influential factor in convincing at least a majority of the High Court that the burden cannot be justified and the provisions are unconstitutional for breaching the implied freedom.

[54] For example, the approach adopted in the ACT involved creating a map of the access zone that clearly identified the location of the zone and its boundaries: *Health Act 1993* (ACT) ss 85-87; *Health (Protected Area) Declaration 2016 (No 2)* (ACT).

[55] Such an approach has been proposed in New South Wales: Public Health Amendment (Safe Access to Reproductive Health Clinics) Bill 2018 (NSW).

RESPECTING DIFFERENCE: AN ANALYSIS OF THE AUSTRALIAN SAFE SCHOOLS PROGRAM AND PARENTAL RIGHTS IN EDUCATION

Matthew J French

ABSTRACT

Following its nationwide implementation across hundreds of schools in Australia, the Safe Schools program has been the subject of much controversy. While concerns have been raised in relation to the program's teachings on topics such as gender and sexual diversity, a question that has featured little in the public discourse is how the program challenges the international prior right of parents to educate their children. In light of this issue, this article examines the development and scope of parental rights under the common law and international law, and the extent to which the Safe Schools program is consistent with such protection. An analysis of the international human rights instruments and case law reveals that, while the Safe Schools program seeks to address an important issue of bullying of LGBTIQ students, the program challenges the rights of parents to educate their children, by teaching material inconsistent with the desired instruction of parents, disallowing exemptions for conscientious parents, unnecessarily interfering with the family unit, and failing to afford transparency in education. In this way, this article highlights how the Safe Schools program contravenes parental rights under a number of international instruments to which Australia is signatory, and recommends the adoption of a number of reformative measures to ensure compliance. Amidst calls for a new anti-bullying scheme to replace the Safe Schools program, this research will be useful in guiding the content, structure and implementation of future school programs, consistent with the rights of parents under international law.

The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

- The Supreme Court of the United States, 1925[1]

I INTRODUCTION

The Safe Schools program has sparked much debate since its nationwide expansion to Australian schools in 2013. Some have argued that the program is necessary to combat bullying of LGBTIQ students by fostering understanding and tolerance of those that experience same-sex attraction and gender dysphoria. Others have argued that the program promotes an ideological agenda that is politically charged, hypersexualised and insufficiently grounded in reliable social science. Amongst the melee of opposing views, however, a worrying challenge has taken place, one that has gone largely unnoticed in the public sphere despite it affecting all families with children: the State challenge to the prior right of parents to educate their children.

The prior right of parents to educate their children is a right that has been protected for centuries under the common law and international law,[2] and is expressly recognised in the *Universal Declaration of Human Rights* ('UDHR').[3] The purpose of the right is to ensure that parents maintain the primary role of educating their children, whilst still being able to delegate that role to the state.[4] Nevertheless, a gradual challenge to parental rights has taken place in recent decades, with the Safe Schools program emerging as yet another symptom of

[1] *Pierce, Governor of Oregon, et al v Society of the Sisters of the Holy Names of Jesus and Mary* (1925) 268 US 510, 535; William G Ross, 'The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education' (2001) 34(1) *Akron Law Review* 177, 178.

[2] ICCPR art 18(4) provides that State Parties must 'have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'. The United Nations Human Rights Committee further elaborates on this right: 'The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18(1)… The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted': United Nations Human Rights Committee, CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4.

[3] *Universal Declaration of Human Rights* ('UDHR'), GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 26(3).

[4] Johannes Morsink, *Pennsylvania Studies in Human Rights: The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 2010) 263-269.

the larger scale interference of the state in the lives of families.[5] In light of this challenge, this article will explore how the rights of parents developed historically, and are currently enshrined under international law (Part II). It will also explore the context in which parental rights are relevant to the Safe Schools program (Part III). Following this background, an examination will then follow on the ways in which the program challenges parental rights under the common law and international law, in disrespecting the desired instruction of parents (Part IV), disallowing exemptions for conscientious parents (Part V), unnecessarily interfering with the family unit (Part VI) and failing to afford to parents transparency in education (Part VII).[6] Before undertaking this analysis, however, the historical development of parental rights in common law and jurisprudence must first be considered, so as to best understand the scope and rationale of parental rights in education.

II HISTORICAL DEVELOPMENT OF PARENTAL RIGHTS

A *Parental Rights in Common Law and Jurisprudence*

For centuries, there has been a strong presumption in favour of parents to direct and control the upbringing of their children.[7] This presumption was recognised by many of the great legal philosophers and jurists, including John Locke, John Stuart Mill, Hugo Grotius, Samuel von Pufendorf and William Blackstone.[8] As Locke observed, the care and education of children is

[5] For more information on the larger scale interference by the State in the lives of families, see: William D Gairdner, *The War Against the Family: A Parent Speaks Out on the Political, Economic, and Social Policies That Threaten Us All* (BPS Books, 2007).

[6] Although parental rights are generally discussed in the context of public school education, the international human rights instruments to which Australia is party do not make a distinction between parental rights in public and private schools. Questions arise as to whether the same protection ought to be afforded to parents whose children are enrolled in private schools, or whether, by subjecting themselves to the relevant private school's policies and curriculum, parents forfeit their rights regarding their children's education to the school. In the context of this discussion, the vast majority of Safe Schools members are public schools, and so this issue need not be addressed. For more information on parental rights and the public/private distinction, see: J Joy Cumming and Ralph D Mawdsley, 'The prevailing voice in choice in schooling: The balancing rights of parents, children and the courts' (2013) 18(1) *International Journal of Law & Education* 39.

[7] John C Hogan and Mortimer D Schwartz, 'In loco parentis in the United States 1765–1985' (1987) 8(3) *The Journal of Legal History* 260, 260; In *Wisconsin v Yoder* (1972) 406 US 205, for example, Amish parents were held not to have been in violation of Wisconsin compulsory attendance laws for refusing to send their child to school beyond the age of sixteen. The US Supreme Court acknowledged the 'strong tradition [of parental rights]… in the history and culture of Western civilisation', and affirmed the primary role of parents in the education of their children as 'established beyond debate': ibid 232.

[8] Hogan and Schwartz, above n 7, 260; In the words of Sir William Blackstone: 'The power of parents over their children is derived from the former consideration, their duty; this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it': William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) 452.

a duty so incumbent on parents, that nothing can absolve them from taking care of it.[9] This duty of parents to provide for their children is what gives rise to the authority that parents possess over them; an authority that comes before that asserted by anyone else.[10] In this way, parents have the prior right to direct and control the upbringing of their children, a right which must be respected by others, especially public authorities.[11] As declared by the US Supreme Court in *Pierce v Society of Sisters*:

> [The State must not] unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children… The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[12]

On this basis, although the State may conclude that it knows what is best for children, and seek to educate them accordingly, the right remains with the parents, as they are most likely to appreciate the best interests of their children.[13] As contemporary liberal theorist William Galston observes, although parents often fail to choose wisely, they are still in the best position to take care of their children and make decisions for their well-being.[14] Parents generally understand their children's individual traits better than public authorities, and 'they are not subject to the homogenizing imperatives of even the best bureaucracies in the modern

[9] John Locke, *The second treatise on civil government* (Prometheus Books, 6th ed, 1986) [67].
[10] Ibid. This is not to suggest that the state does not have authority to interfere with parental rights at all. Rather, the common law has long recognised that there may be circumstances in which a parent forfeits their rights of education over children, particularly in cases of child abuse and neglect. *In Re J (Child's Religious Upbringing and Circumcision)* [1999] 2 FLR 67, for example, the New Zealand Court of Appeal held that: 'We define the scope of the parental right under section 15 of the Bill of Rights Act to manifest their religion in practice so as to exclude doing or omitting anything likely to place at risk the life, health or welfare of their children'. Furthermore, common law has also supported the proposition that the state may intervene where the child would not otherwise receive a minimum standard of education: *Re The Seven P Children*, unreported, Family Court, Inglis J QC, 8 October 1991. For a more comprehensive discussion on the limits of parental authority, see: Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 205-207.
[11] Note, however, that there is only limited use seeking to resolve tensions between parents and the state by subordinating one party's right to the other. Perhaps a better approach would be to seek to reconcile the competing claims, such that state goals may be realised while at the same time, parents' educational decisions are observed. This is precisely the approach that the Supreme Court of Canada failed to adopt in the *Drummondville Parents' Case,* resulting in a trumping of state interests over that of parental rights: below n 128.
[12] *Pierce, Governor of Oregon, et al. v Society of the Sisters of the Holy Names of Jesus and Mary* (1925) 268 US 510, 535; Ross, above n 1.
[13] *B(R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315, 317-318.
[14] William A Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge University Press, 2002) 100.

state.'[15] In practice, the legal system must create a presumption in one direction or the other, and the case for a presumption in favour of parents is strong.[16]

However, this does not mean that the task of education cannot be undertaken by others. The common law has long understood that parents may choose to delegate some of their duties for their child's upbringing, while at the same time retaining authority.[17] This is known as the doctrine of *parental delegation.*[18] In regard to the doctrine, Pufendorf wrote that although the obligation to educate children belongs to parents, 'this does not prevent the direction… from being entrusted to another, if the advantage or need of the child require, with the understanding however that the parent reserves to himself the oversight of the person so delegated.'[19] Consequently, although parents may choose to delegate their authority to another person or institution, such as to the State for education, the right still remains with the parents as prior to all others. It follows that those entrusted to take care of the child must ensure that they perform such duties transparently, and without undermining the desired instruction of parents. This principle of course is not without exception. Because the state has a legitimate interest in enforcing this responsibility of parents,[20] state intervention in education may be justified in some circumstances,[21] such as where there is child abuse, neglect, or where the child would otherwise not receive a minimum standard of education.[22]

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[15] Ibid.

[16] Ibid. This sentiment was similarly expressed by the Supreme Court of Canada in *B(R) v Children's Aid Society:* The common law has long recognised that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being… because parents are more likely to appreciate the best interests of their children, and the state is ill-equipped to make such decisions itself: *B(R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315, 317-318; Similarly, L'Heureux-Dubé J in *Winnipeg Child and Family Services v KWL* [2000] 2 SCR 519, [72] observed: 'The mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child. Parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit.'

[17] Blackstone, above n 8, 441.

[18] Ibid.

[19] William Wagner, Nicole Wagner, and Jeremy Marks, 'Revisiting Divine, Natural, and Common Law Foundations Underlying Parental Liberty to Direct and Control the Upbringing of Children' (2014) 5 *The Western Australian Jurist* 1, 20; Samuel Pufendorf, 'On the Duty of Man and Citizen According to the Natural Law' (Cambridge University Press, 1991) 127.

[20] Galston, above n 14, 98.

[21] In the words of John Stuart Mill: '[It is] a self-evident axiom, that the State should require and compel the education, up to a certain standard, of every human being who is born its citizen… it is one of the most sacred duties of the parents… to give to [their child] an education fitting him to perform his part well in life towards others and towards himself…. and if the parent does not fulfil this obligation, the State ought to see it fulfilled': John Stuart Mill, *On Liberty* (Longman, Roberts and Green Co, 4th ed, 1869) 160. According to contemporary liberal theorist William Galston, the line at which the State may justifiably intervene to enforce parental authority, or assume the role, is where there are basic goods to defend, especially those needed for the normal physical, mental, and emotional development of the child: Galston, above n 14, 100.

[22] Ibid. In relation to the scope of parental rights, Locke held that the rights of parents do not 'extend to life and death… over their children', as such physical abuse of children would undermine the purpose of parental

Nonetheless, although the doctrine of parental delegation has enjoyed a long history of jurisprudential and common law recognition,[23] it was not until the twentieth century that the need for the parental right was fully realised.

B *Parental Rights in International Law*

During the twentieth century, collectivist educators became infatuated with the idea of remaking society through the schools.[24] They knew that infiltrating the schools was the best way to bring about social change by breaking down local patriotisms and family ties, and replacing them with a single allegiance to the State.[25] Thus in Nazi Germany, schools began indoctrinating children in collectivist thinking, and breaking down family allegiances through excessive claims on children and interventions into family life.[26] According to French psychologist, Alfred Brauner, German children under Nazism 'denounced, if required, their father who remained loyal to his old political party, and their mother, who preferred to believe the priest rather than the Fuhrer'.[27] Indeed, the indoctrination was so potent that when teenager Walter Hess heard his father call Hitler a 'blood-crazed maniac', he immediately reported him to the authorities, such that his father was then arrested and sent to Dachau.[28] Meanwhile, Walter was promoted to a higher rank in the Hitler Youth for his service.[29]

As to the collectivist education prevalent in Soviet Russia, in 1918, one Soviet schooling theorist declared:

> We must make the young into a generation of Communists. Children, like soft wax, are very malleable and they should be moulded into good Communists... We must rescue children from the harmful influence of the family... We must nationalize them. From the earliest days of their

authority: John Locke, *The second treatise on civil government* (Prometheus Books, 6th ed, 1986) [170]. Pufendorf similarly recognised that in cases of neglect, parents forfeited their rights over their children: 'If some parents… not only violating the law of nature but also overcoming common affection, are unwilling to nurture their offspring, and cast it forth, they cannot longer claim any right over it, nor can they demand from it longer any office due, as it were, to a parent': Wagner, Wagner and Marks, above n 19, 21; These principles have further been affirmed at common law: above n 10.

[23] Blackstone, above n 8, 441.

[24] Gairdner, above n 5, 209.

[25] Ibid 210.

[26] Tara Zahra, '"Children Betray their Mother and Father": Collective Education, Nationalism, and Democracy in the Bohemian Lands, 1900-1948' in Dirk Schumann (ed), *Raising Citizens in the "Century of the Child": The United States and German Central Europe in Comparative Perspective* (Berghahn Books, 2010) 199.

[27] Alfred Brauner, *Ces enfants ont vécu la guerre* (Editions sociales françaises, 1946) 179.

[28] Alfons Heck, *The Burden of Hitler's Legacy* (Renaissance House Publishers, 1988) 83.

[29] Ibid.

> little lives, they must find themselves under the beneficent influence of Communist schools... To oblige the mother to give her child to the Soviet state – that is our task.[30]

Instances such as these and many others testify to the danger of parents surrendering control over the education of their children; a threat explicitly recognised in the drafting of the international human rights documents.

Following the seizure of education, indoctrination of children, and establishment of the Hitler Youth service in Nazi Germany during World War II, in 1947 the United Nations Drafting Committee formulated article 26(3) of the UDHR. The article reads, 'Parents have a prior right to choose the kind of education that shall be given to their children.'[31] While the article may appear concise, one look at the debates that preceded its articulation reveals a depth of meaning and purpose behind its inclusion as a fundamental human right.[32] The reasons may be summarised: article 26(3) is essential to restrain state power as a profound threat to human freedom,[33] and so responsibility for education must be placed in the hands of parents as the 'natural persons' who can best defend the rights of children; rights that are 'sacred' as children cannot defend them themselves.[34] In reaching this conclusion, the Committee thus vested power in parents for the task of education, and so affirmed a long chain of common law and jurisprudential support for parental responsibility over children.

In subsequent decades, calls were made to clarify the rights expressed under the UDHR, and so later international documents elaborated further on the prior parental right. Article 18(4) of the ICCPR provides that State Parties must 'have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.[35] Similarly, article 5 of the *Declaration on the*

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[30] Orlando Figes, *The Whisperers: Private Life in Stalin's Russia*, (Metropolitan Books, 2007) 20.
[31] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948) art 26(3).
[32] Morsink, above n 4, 258-268.
[33] Ibid 265.
[34] Ibid 265-269. The idea that parents are in the best position to raise their children is further supported under *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 18(2), which states: 'State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern'; Adhar and Leigh, above n 10, 205-206.
[35] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(4); Articles 2 and 9 of the *European Convention on Human Rights* expresses the right is very similar words, and to the same effect.

Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief declares:

> Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents… and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.[36]

Parents are thus afforded a large degree of freedom from state interference, particularly for the care and education of children.[37] It follows that parents are free to teach their children in accordance with their own beliefs and convictions, without being subject to arbitrary interference from others, especially public authorities. However, this is not to suggest that parents are alone responsible for the task of education. Article 18(2) of the *Convention on the Rights of the Child* provides that 'States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children'.[38] In this way, a *negative obligation* is imposed on the State to refrain from unnecessary interference with the decisions of parents, alongside a *positive obligation* to assist parents in raising their children and affirming their educational decisions.[39]

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[36] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, art 5(2).

[37] In the United States, the courts have in recent decades failed to articulate a clear principle on what constitutes too much state intervention in education, as well as how much weight should be afforded to parental concerns. This has come at the great expense of parental rights. In *Fields v Palmdale School District* [2005] USCA9 640, a public school distributed a survey to primary school students, as young as age six, where parents were notified of the general nature, but not substance, of the questions to be asked of the children. The survey included questions such as 'having sex feelings in my body', 'touching my private parts too much' and 'thinking about touching other people's private parts'. Remarkably, in a decision that has attracted wide and vehement criticism, the court upheld the decision of the school board, finding that parents have no constitutional right to 'prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so'; Charles J Russo, 'Same-Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of their Children' (2007) 32(3) *University of Dayton Law Review* 361, 374; Elliott M Davis, 'Unjustly Usurping the Parental Right: Fields v Palmdale School District, 27 F 3d 1197 (9th Cir, 2005) (2006) 29 *Harvard Journal of Law & Public Policy* 1133, 1135.

[38] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 18(2).

[39] Patricia Wiater, *Intercultural Dialogue in the Framework of European Human Rights Protection* (Council of Europe, 2010) 62. In *Seven Individuals v Sweden, Application No 8811/79* (1982) 29 DR 104, 113, the European Commission of Human Rights ('ECHR') stated that 'the upbringing of children remains essentially a parental duty encapsulated within the concept of family life.' In this way, the ECHR illustrated that respect for parental rights also constitutes respect for the family.

Given that Australia is signatory to these international instruments, Australia is therefore subject to these obligations. Note however that, because Australia is a dualist country, such rights are not directly enforceable in Australian courts without their incorporation into domestic law, and because Australia has not yet taken steps to domesticate parental rights, the enforceability of such rights remains limited. A moral obligation does however exist. As noted by Brennan J in *Dietrich v The Queen*, treaties which have not been incorporated into domestic law may still be 'a legitimate influence on the development of our municipal law. Indeed, it is incongruous that Australia should adhere to the [ICCPR]… unless Australian courts recognise the entitlement and Australian governments provide the resources to carry that entitlement into effect'.[40] In light of this assertion, as well as the High Court majority opinion in *Minister of State v Teoh*, Australia is subject to a 'legitimate expectation' to adhere to its international legal obligations, including the need to respect parental rights.[41] Nevertheless, despite recognition of such rights across a number of international instruments, more recently jurisdictions all over the world have challenged the prior right of parents to educate their children,[42] as demonstrated under the Australian Safe Schools program.

III SAFE SCHOOLS PROGRAM AND PARENTAL RIGHTS

[40] *Dietrich v The Queen* (1992) 177 CLR 292; Ben Clarke and Jackson Maogoto, *International Law* (Thomson Reuters, 2nd ed, 2009) 70-75. In *Polites v Commonwealth* (1945) 70 CLR 60, the High Court held that legislation is not presumed to be conflicting with international law, and in the event of ambiguity, is to be read in conformity with the international law: ibid 68-69.

[41] In *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, the High Court majority noted that Australia was subject to a 'legitimate expectation' to adhere to the Convention on the Rights of the Child; specifically, that the 'best interests of the child' would be treated by administrative decision-makers as a 'primary consideration'.

[42] In more recent decades, the rights of parents to educate their children have become subject to serious challenge. Australia is signatory to a number of international instruments that protect parental rights, including the ICCPR, ICESCR and UNCRC, and yet parents in Australia have a very limited capacity to direct their children's schooling. While all of the state education acts recognise the responsibility of parents in education, and most allow for withdrawal of children from school classes on conscientious grounds, in practice the parental role is restricted to the choice of which school their child will attend. This limited role was recognised by the High Court in *Attorney-General (Vic); Ex Rel Black v Commonwealth ('DOGS case')* (1981) 146 CLR 559, 643*;* a decision that upheld the constitutionality of the *Schools Commission Act 1973* (Cth) (now defunct)*,* which expressed the prior right of parents as merely the right 'to choose whether children are educated at a government school or a non-government school.' Contrasted with the comprehensive protection of parental rights at common law and international law, parental rights in Australia can therefore barely be considered rights. In the words of education expert Joy Cumming, '[Australian] legislation, particularly in education, focuses more on the responsibilities of parents to meet government-imposed requirements, than rights': J Joy Cumming, Ralph Mawdsley, and Elda De Waal, 'The "Best Interests of the Child", Parents' Rights and Educational Decision-making for Children: A Comparative Analysis of Interpretation in the United States of America, South Africa and Australia' (2006) 11 *Australia & New Zealand Journal of Law and Education* 43, 53; As such, with the State enjoying extensive control over both public and private schooling in Australia, the effectiveness of the parental right 'to choose whether children are educated at a government school or a non-government school' must be called into question.

Emerging from Victoria in 2010, the Safe Schools Coalition Australia ('SSCA') is a national network of organisations which seek to 'create safer and more inclusive environments for same sex attracted, intersex and gender diverse students, staff and families.'[43] The Coalition places a particular emphasis on establishing safe and inclusive schools in Australia, with an overarching goal to promote tolerance and acceptance of LGBTIQ persons.[44] In light of research that suggests LGBTIQ persons suffer from high levels of depression, suicide and other negative social consequences,[45] bullying is a real issue that the Safe Schools program seeks to address. In response, the SSCA has produced a range of materials for schools to include in their curricula, including four official guides, three posters, and eight lesson plans contained in the resource *All of Us;* a teaching manual designed to be taught in school classrooms.[46] Because each state government in Australia is responsible for its own education policies, it is important to note that the Safe Schools program varies in practice and implementation from state to state.[47]

Following its nationwide implementation across many Australian schools in 2013, the Safe Schools program has been the subject of much controversy. Concerns have been raised in relation to the program's teachings on topics such as gender and sexual diversity, its sexual content, as well as the lack of parental engagement under the program.[48] Following an independent review of the SSCA program in March 2016,[49] Education Minister Simon Birmingham outlined the Federal Government's proposed changes to the program.[50] These changes included altering certain materials, limiting program access to secondary schools,

[43] Safe Schools Coalition Australia, *Who We Are* (2017) Safe Schools Coalition Australia <http://www.safeschoolscoalition.org.au/who-we-are>.
[44] Ibid.
[45] G Rosenstreich, *LGBTI People Mental Health and Suicide, Revised 2nd Edition* (2013) BeyondBlue <https://www.beyondblue.org.au/docs/default-source/default-document-library/bw0258-lgbti-mental-health-and-suicide-2013-2nd-edition.pdf?sfvrsn=2>.
[46] Christopher Bush et al, *All of Us* (2016) Safe Schools Coalition Australia <http://www.education.vic.gov.au/Documents/about/programs/health/AllOfUs_UnitGuide.pdf>.
[47] In December 2016, Safe Schools Coalition Australia severed its ties with the Safe Schools Coalition Victoria, with the Education Department taking over the management in Victoria; State Government of Victoria, *Safe Schools* (30 April 2017) Victoria Department of Education and Training <http://www.education.vic.gov.au/about/programs/health/Pages/safe-schools-coalition.aspx?Redirect=1>.
[48] David van Gend, *Stealing from a child: the injustice of 'marriage equality'* (Connor Court Publishing, 2016) 89-107.
[49] William Louden, *Review of Appropriateness and Efficacy of the Safe Schools Coalition Australia Program Resources* (11 March 2015) Australian Department of Education and Training <https://docs.education.gov.au/system/files/doc/other/review_of_appropriateness_and_efficacy_of_the_ssca_program_resources_0.pdf>.
[50] Simon Birmingham, *Statement of Safe Schools Coalition* (18 March 2016) Senator Birmingham <http://www.senatorbirmingham.com.au/Latest-News/ID/2997/Statement-on-Safe-Schools-Coalition>.

and requiring parental consent prior to students being taught SSCA content.[51] In September 2016, students in New South Wales, Tasmania, South Australia, Queensland and Western Australia were instructed not to participate in any lessons involving SSCA materials without the consent of their parents, although the extent to which this has been followed remains unclear.[52] Following the Federal Government's announcement to cease Safe Schools Coalition funding beyond 2017,[53] the state governments of New South Wales, Tasmania and South Australia have discontinued the program,[54] whereas the Victorian Government has strongly vowed to continue the program as funded by the state budget.[55] Nevertheless, amidst calls for a new anti-bullying program to replace the Safe Schools program in the states where it has been repealed,[56] it is worthwhile examining the program's experience across a number of Australian states, and its compliance with parental rights protected under the common law and international law.[57]

IV DISRESPECTING PARENTAL INSTRUCTION

The first way in which the Safe Schools program raises issues for parental rights in education is by teaching material inconsistent with the desired instruction of parents. In *Kjeldsen v Denmark,* three couples sought to exclude their children from compulsory sex education in the primary schools of Denmark on the basis that it offended their religious beliefs.[58] The parents' claims were dismissed; however, the European Court of Human Rights ('ECHR') declared:

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[51] Ibid.

[52] Stefanie Balogh, 'MP demands schools offer get-out option on gender bully scheme', *The Australian* (online), 15 September 2016, <http://www.theaustralian.com.au/national-affairs/education/mp-demands-schools-offer-getout-option-on-gender-bully-scheme/news-story/15d65f8a5becb6b004aacc00230215c6>.

[53] Gay Alcorn, 'What is Safe Schools, what is changing and what are states doing?', *The Guardian* (online), 14 December 2016 <https://www.theguardian.com/australia-news/2016/dec/14/what-is-safe-schools-what-is-changing-and-what-are-states-doing>.

[54] Georgie Burgess, 'Safe Schools ditching not due to pressure from Eric Abetz, Tasmanian Education Minister says', *ABC News* (online), 19 April 2017 <http://www.abc.net.au/news/2017-04-19/greens-slam-new-safe-schools-program-as-caving-in-to-right/8454646>.

[55] 'Victorian Premier guarantees future of Safe Schools program as Federal MPs call for scheme to be axed' *ABC News* (online), 16 March 2016 <http://www.abc.net.au/news/2016-03-16/victorian-premier-guarantees-safe-schools-if-federal-funding-cut/7252272>.

[56] Nour Haydar, 'Safe Schools program ditched in NSW, to be replaced by wider anti-bullying plan', *ABC News* (online), 16 April 2017 <http://www.abc.net.au/news/2017-04-16/safe-schools-program-ditched-in-nsw/8446680>.

[57] Although Australia is signatory to many of the international instruments that protect parental rights, Australia is a dualist country, and as such, parental rights under international law are therefore not directly enforceable in Australian courts: *Trendex Trading Corp v Bank of Nigeria* [1977] 1QB 529. However, Australia is nonetheless under a moral obligation to respect its international legal obligations. In *Polites v Commonwealth* (1945) 70 CLR 60, the High Court held that legislation is not presumed to be conflicting with international law, and in the event of ambiguity, is to be read in conformity with the international law.

[58] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711.

> The State… must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.[59]

Although the Courts' restrictive interpretation of parental rights as merely a prohibition on 'indoctrination' has been regarded as overly delimitative in more recent cases, the requirement of the curriculum being conveyed in an 'objective, critical and pluralistic' manner has since become the standard for assessing whether parental rights under international law have been violated.[60] The Safe Schools program falls well below this standard; firstly, in teaching material inconsistent with parents' beliefs and desired instruction; and secondly, in presenting material of an overly sexual nature.

A *Undermining the beliefs and instruction of parents*

The first way in which the program challenges parental rights is by undermining the beliefs and instruction that many parents wish to provide for their children. Under the program, students are taught a number of lessons on gender and sexuality, whereby lessons usually start with a testimonial video, followed by an activity or discussion on the topic that has been introduced. Generally, the aim of such lessons is to develop a greater understanding of the challenges faced by many LGBTIQ persons, and for the most part, they are appropriate for purpose. However, the program does overstep its boundaries in a number of ways, particularly in teaching controversial materials that conflict with the beliefs of many parents. Materials taught to students includes the idea that gender is a social construct that is best understood as what a person feels inside,[61] gender is not limited to male and female, and that a person's gender misalignment with their biological sex is normative.[62] One testimonial

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[59] Ibid [53].

[60] In *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 [31], for example, Warby J stated in relation to the standard for parental rights: 'The conclusion to be drawn is that the requirements of A2P1 will be infringed by the state if it fails in its duty to take care that the educational provision it makes is conveyed in an objective, critical and (importantly for the present case) pluralistic manner, even if it does not go so far as – in the ordinary sense of the phrase – to "pursue the aim of indoctrination". That conclusion is required, it seems to me, both by the way in which the Court's conclusion is expressed and in order to give real meaning to the duty of care delineated by the court in these cases.'

[61] Minus18, *OMG I'm Trans* (2015) Victoria Department of Education and Training, 6 <http://www.education.vic.gov.au/Documents/about/programs/health/OMG%20I%27m%20Trans.pdf>.

[62] For example, lesson 4 of the SSCA teaching resource 'All of Us' states: 'Up until this point, many students may believe that gender can only be either male or female, and that they have specifically related behaviours and characteristics. By completing this exercise, students will be able to explore the concept that gender exists outside this binary and that societal expectations of gender are shaped by the world in which they live': Christopher Bush et al, above n 46.

video features Nevo, a young person who identifies as male, telling students about 'growing up with the knowledge that the female sex assigned to him at birth did not match who he knew he was'.[63] Similarly, Margot explains to students 'what it's like to grow up being told you're a girl when you know you're a boy.'[64] The program does not discuss the evidence that points to gender being biologically determined, nor entertains the idea that feelings and identity cannot change these objective facts. As noted by David van Gend, at no point in the program is the idea entertained that this gender dysphoria may instead be a problem with the person's mind, and not their body.[65] Accordingly, students are taught such theories uncritically, with the effect being that students may more readily accept these ideas as fact. This has caused heavy backlash from many parents and groups, especially on the topic of gender fluidity, with the result being that 'gender theory' is now banned in NSW classrooms.[66] Furthermore, many theories promoted under the program are based on extremely contentious studies in psychology and social science, with the research underlying the program also being subject to strong criticism recently.[67] In this way, not only does the Safe Schools program teach material inconsistent with the beliefs and instruction of many parents, it further promotes ideas that are strongly contested in the scientific community. It is thus difficult to see how the program would satisfy the *Kjeldsen* requirement of 'objectivity'.

The second problem arising under the program's content is its failure to be conveyed in a 'pluralistic' manner. Australian children and young people grow up in a rich variety of religious and cultural milieu, with a large proportion of the population holding traditional beliefs very different to that of the creators of the Safe Schools program.[68] Despite this diversity, however, the program teaches a very limited view of sexuality and relationships, leaving parents who hold more traditional views largely out of consideration. In teaching students on matters such as transgenderism and sexual diversity, very little room for alternative viewpoints is granted, particularly those held by persons with more traditional beliefs. In New South Wales, over 17,000 signatures from the Australian-Chinese community were gathered in a petition for the state government to discontinue the program, on the basis

[63] Minus18, *Nevo's Story – All of Us* (22 November 2015) Minus18 <https://www.youtube.com/watch?v=e5tTKCqIwEk>.
[64] Christopher Bush et al, above n 46, 7.
[65] Gend, above n 48, 104.
[66] Rebecca Urban, 'Gender theory banned in NSW classrooms' *The Australian* (online), 9 February 2017 <http://www.theaustralian.com.au/national-affairs/education/gender-theory-banned-in-nsw-classrooms/news-story/eeb40f3264394798ebe67260fa2f5782>.
[67] Patrick Parkinson, 'The Controversy over the Safe Schools Program - Finding the Sensible Centre' (Sydney Law School Research Paper No.16/83, 14 September 2016).
[68] Ibid 29.

that it 'promotes a particular ideology, including gender fluidity, that is contrary to our cultural and belief system'.[69] The petition also notes that the program 'discriminates against children and parents from other cultures who have a view of sexual relationships involving male and female as normative'.[70] This is just one of a number of petitions brought against the program, due to its failure to represent traditional beliefs in the community.[71] Consequently, by failing to represent a greater diversity of views on a range of topics, the Safe Schools program disregards the beliefs and convictions of many parents, thereby falling short of the *Kjeldsen* requirement of 'pluralism'.

B *Exposure to Sexually Explicit Content*

Questions have been raised as to whether the material accessible under the Safe Schools program is appropriate for school age children, due to its sexual content. Although the ECtHR in *Kjeldsen* found that the Danish sex education program did not breach the rights of parents in that particular case, the Court did note that a different result may have followed had the program been involved in 'exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible'.[72] In light of this assertion, page 10 of the SSCA booklet 'OMG I'm Queer' provides students with the following advice by contributor Alice Chesworth:

> It may come as a surprise, but there is no strict definition for virginity, especially if you're queer. Penis-in-vagina sex is not the only sex, and certainly not the ultimate sex. If you ask me, virginity is whatever you think it is. I've had friends who count their first time giving oral as their virginity… I'm bisexual, so I ended up thinking of myself as having two virginities, my

[69] Danuta Kozaki, 'Safe Schools: Australian Chinese community petition against anti-bullying program lodged in NSW', *ABC News* (online), 24 August 2016 <http://www.abc.net.au/news/2016-08-23/safe-schools-mp-lodges-petition-against-program-signed-by-17000/7777030>; Parliament of New South Wales, *10,000+ signature petition on Safe Schools Coalition program* (23 August 2016) Parliament of New South Wales <https://www.parliament.nsw.gov.au/la/petitions/Pages/tabled-paper-details.aspx?pk=68765>.

[70] Parliament of New South Wales, above n 69.

[71] The Australian-Lebanese community also brought a petition against the program, arguing similar reasons for the cessation of the Safe Schools program in New South Wales: Parliament of New South Wales, *10,000+ signature petition on Safe Schools Coalition program* (5 April 2017) Parliament of New South Wales <https://www.parliament.nsw.gov.au/la/petitions/Pages/tabled-paper-details.aspx?pk=68765>; Another petition was also gathered in Queensland, with over 11,000 signatures calling for the list of schools signed up to the program to be released: Emma Partridge, 'Australian Christian Lobby slams Safe Schools anti-bullying program', *The Sydney Morning Herald* (online), 4 November 2015 <http://www.smh.com.au/nsw/australian-christian-lobby-slams-safe-schools-antibullying-program-20151103-gkq6gr.html>.

[72] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, [54].

> first time with a chick and my first time with a dude. How you think about it is really up to you![73]

Following the complaints of many parents and groups, the authors of the booklet removed this section entitled 'Doing It', and a smaller online version of the booklet appeared in 2015.[74] However, the 2014 version is still available in hard copy at schools, and on certain school websites.[75] Moreover, in February 2016, George Christensen MP gave an account of the sexual nature of the program in Parliament,[76] where it was observed that the SSCA website recommends to students websites that include pornographic web content, sex shops, adult online communities and sex clubs.[77] Therefore, with it infringing objectivity, pluralism and/or the accessibility of sexual content,[78] a strong case can thus be made that the SSCA program contravenes parental rights under article 18(4) of the ICCPR. It therefore stands to reason that parents ought to be able to exempt their children from materials taught under the Safe Schools program, so as to protect them from instruction contrary to their beliefs and convictions.[79]

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[73] Minus18, *OMG I'm Queer* (2014) Golden Grove High School, 10 <https://www.goldengrovehs.sa.edu.au/images/PDFS/OMG%20Im%20Queer.pdf>.
[74] Gend, above n 48, 96.
[75] Minus18, above n 73.
[76] Gend, above n 48, 99.
[77] As observed by Christensen, the SSCA resource 'All of Us' directs students to LGBT organisation Twenty10; an organisation which hosted a hands-on workshop for youth on sex toys and sadomasochistic practices in early 2016. 'All of Us' also directs students to the LGBT youth organisation Minus18, which produced most of the SSCA resources, and whose website provides advice on penis-tucking, chest-binding, sex toys and sex advice, amongst numerous other activities. In turn, many of these websites themselves have links to even more sexual websites, such as the pornographic sex shop 'The Tool Shed' which offers a range of sex toys and pornography, as well as teen sex advice site 'Scarleteen' which promotes activities such as group sex and sadomasochism. Since Christensen's speech, many of the links to these websites have been taken down, but one still cannot ignore their very presence in the first place: Commonwealth, *Parliamentary Debates,* Federation Chamber, 25 February 2016 (George Christensen MP); Gend, above n 48, 99-100.
[78] The Safe Schools program has been accused of sexualising children in other ways. Under the Victorian program's resource 'All of Us', a lesson is prescribed where children in years 7 and 8 are asked to imagine themselves as a person who is 16 years or older, and in a same-sex relationship. Questions are then asked of the children how they would respond to certain situations in that role: Christopher Bush et al, above n 46, 20.
[79] This is not to suggest that measures have not been undertaken to allow for greater parental involvement. Following the independent review of the SSCA program in March 2016, Senator Birmingham announced several changes to the Safe Schools program, including the requirement for 'parental consent for student participation in programme lessons or activities'. The changes also required 'agreement of relevant parent bodies for schools to participate in the SSCA programme, including the extent of participation and any associated changes to school policies'. Notably, these changes were consistent with the findings of the NSW Committee on the Sexualisation of Children and Young People, which identified several problems with the SSCA program in terms of its sexualised content and age appropriateness. Due to these perceived problems, the Committee recommended that 'the Department of Education require schools under the Controversial Issues in Schools policy to consult with parents prior to any implementation of the Safe Schools program, and require that parents choose whether to opt in to this program. At any time, parents may elect to have their child opt out of the program': Committee on Children and Young People, Parliament of New South Wales, *Sexualisation of Children and Young People* (2016) 58.

V DISALLOWING PARENTAL EXEMPTIONS

Another important feature of the SSCA program is the extent to which it allows exemptions for parents who seek to protect their children from the program. In *Kjeldsen v Denmark,* the ECHR found that, where compulsory education may be avoided by students exercising a right to opt-out, this factor will serve against the finding of a breach of parental rights.[80] By the same token, other cases have found that where a right to opt-out is not available or restricted by schools, the court will be more likely to find a breach.[81] In *Folgero v Norway,* for example, several parents successfully brought an action against a compulsory religious education program in Norwegian schools, due to the program not being delivered in a 'neutral and objective' way.[82] Although the program was regarded by the majority to have fallen short of indoctrination, its failure to offer sufficient exemptions for students was a strong contributory factor in finding a contravention of parental rights.[83] For these reasons, the Court held that the Norwegian religious education program failed the *Kjeldsen* test to be 'objective, critical and pluralistic', and so violated article 18(4) of the ICCPR.[84] More recent decisions have shed further light on the necessity for exemptions in compulsory education. In *Fox v Secretary of State*, it was declared:

> [A]n opt-out is not an adequate substitute for the provision of an educational programme which accords the parents their right to respect for their convictions. The need to withdraw a child would be a manifestation of the lack of pluralism in question.[85]

In this way, the Court found that a State's obligation to respect parental rights in education is not absolved merely by allowing parents to withdraw their children from the school classes. Rather, the need for parents to withdraw their children may instead indicate a failure of the

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[80] James Dingemans et al, *The Protections for Religious Rights: Law and Practice* (Oxford University Press, 2013) 437. In *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 [54], the Court observed that Denmark's education system 'preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools, which are bound by less strict obligations and moreover heavily subsidised by the State.'

[81] James Dingemans et al, above n 80, 435.

[82] *Folgero and Ors v Norway* (2008) 46 EHRR 44. Another case that is often cited alongside *Folgero* is that of *Zengin v Turkey* (2008) 46 EHRR 44, whereby the requirements of 'objectivity' and 'pluralism' are discussed in even greater detail.

[83] *Folgero and Ors v Norway* (2008) 46 EHRR 44, [100]. In reaching this conclusion, the Court held 'the system of partial exemption was capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life and that the potential for conflict was likely to deter them from making such requests': ibid; Heiner Bielefeldt, Nazila Ghanea, Michael Wiener, 'Freedom of Religion or Belief: An International Law Commentary' (Oxford University Press, 2016) 213.

[84] James Dingemans et al, above n 80, 435.

[85] *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 [79].

program to be sufficiently pluralistic in its conveyance, and thus require amendment. In light of these decisions, therefore, the Safe Schools program's facilitation of exemptions must be examined, so as to determine whether it affords sufficient respect for parental rights in education.[86]

In most state education acts in Australia, provision is made for parents to withdraw their children from classes on conscientious or religious grounds.[87] The reason behind this is that school instruction often conflicts with the desired instruction of parents, and thus facility must be made for parents to exempt their children from those teachings. Nevertheless, such an option seemingly does not extend to parents under the Safe Schools program. When one mother sought to exempt her son from the program due to her conflicting beliefs, the school and an SSCA coordinator told her that an exemption was simply not possible, such that the mother was forced to send her child to a private school.[88] The reason for the school's refusal was due to the program's wide implementation.[89] Under the program, schools are encouraged to implement SSCA materials across the whole school curriculum and in all subject areas. As point 5 of the SSCA resource 'Guide to Kick Starting Your Safe School' reads:

> Actively plan to include same sex attracted, intersex and gender diverse people, histories and events in your teaching area. Whatever the subject and your experience, there are always new ways you can better integrate diversity through case studies, texts, and other examples.

[86] This is not to suggest that parents must establish the *Kjedlsen* test of 'objective, critical and pluralistic' to qualify for a class exemption for their child. Rather, exemptions vary depending on the relevant state's education policy. In New South Wales, exemptions may be granted where a parent's 'objection is conscientiously held on religious grounds': *Education Act 1990* (NSW) s 26. This requirement reflects the standard applied in other jurisdictions. In the South African case of *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21, the relevant test for accommodation was whether the religious belief is sincerely held, and whether it could be reasonably accommodated. The Court held that, 'if a sincere religious belief is established, it seems correct that a court will not investigate the belief further … A religious belief is personal, and need not be rational, nor need it be shared by others. A court must simply be persuaded that it is a profound and sincerely held belief.' Although this case related to the accommodation of a child's religious convictions, and secondarily those held by the parents, the principle ought to apply consistently.

[87] *Education Act 1990* (NSW) s 77; *Education (General Provisions) Act 2006* (Qld) s 245; *School Education Act 1999* (WA) s 72; *Education Act 1972* (SA) s 102; Under the *Education and Training Reform Act 2006* (Vic), provision is not made for exemptions due to conscientious objection, but they may be sought from Special Religious Education. Nevertheless, an argument can be made that, even where religious exemptions are not granted under state legislation, anti-discrimination law in Australia would allow for parents to withdraw their children from certain classes on conscientious grounds.

[88] The Australian Family Association, Submission No 30 to the New South Wales Government, *Inquiry into the Sexualisation of Children and Young People,* 8 April 2016, 35-36.

[89] Ibid.

> Challenge gender stereotypes and heteronormativity in discussions inside or outside the classroom.[90]

Consequently, because SSCA materials may be applied across the whole curriculum, they may not be confined to specific classes from which parents can withdraw their children. Opt-out provisions under state legislation are thus effectively circumvented, leaving dissenting parents with the decision to either change schools or allow their children to be taught the material under the program. As a result, the presumption of control over children's education is thereby reversed in favour of schools, such that they then have a much greater liberty to teach students the program, regardless of the moral and philosophical convictions of parents. In considering the similarities that the Safe Schools program shares with *Folgero*, the program would arguably breach parental rights under Article 18(4) of the ICCPR, due to its failure to allow for a sufficient opt-out mechanism for parents who object to the program's content. Moreover, even if the program was to offer a greater facility for student exemptions, the State's positive obligation to respect parental convictions would still require further amendments to the program's material, in order to place the program in compliance with the *Kjeldsen* requirement to be conveyed in an 'objective, critical and pluralistic' manner.[91]

VI INTERFERING WITH THE FAMILY UNIT

The third way in which the Safe Schools program challenges the prior right of parents is by interfering with the family unit. Article 10 of the *International Covenant on Economic, Social and Cultural Rights* provides that 'the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.'[92] State Parties thus have an obligation to support family unity and stability, and are prohibited from engaging in any activity that might constitute 'unlawful and arbitrary interference' with the family.[93]

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[90] Roz Ward, Joel Radcliffe and Micah Scott, *Guide to kick starting your safe school* (2013) Safe Schools Coalition Australia <http://www.education.vic.gov.au/Documents/about/programs/health/GuideKickstartingSafeSchools.pdf>.

[91] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 [53].

[92] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 10.

[93] Article 17(1) of the ICCPR prohibits unlawful and arbitrary interference with the family unit. The Human Rights Committee has regarded the term 'unlawful' to mean that state interferences must have basis in law, and the term 'arbitrary' to mean that the interference must be 'reasonable in all the particular circumstances': Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1998) 79.

This prohibition does not merely involve a negative undertaking. Rather, in *X and Y v The Netherlands,* the European Court of Human Rights found that 'there may be positive obligations inherent in an effective respect for private or family life… even in the sphere of the relations of individuals between themselves'.[94] Only the 'most pressing grounds can be sufficient in a democratic society to justify the disruption of existing family ties', whether such interference emanates from state authorities or from natural or legal persons.[95] Nevertheless, despite the prohibition of family interference recognised under the common law and international law, the Safe Schools program interferes with the family unit by encouraging children to hide information from their parents, and advising schools to exclude parents from decisions affecting their children.

A *Encouraging Children to Hide Information from Parents*

As mentioned earlier, the SSCA resource 'All of Us' contains a number of lesson plans that usually start with a testimonial video from a young person, speaking about their experience being same-sex attracted, intersex or transgender. A common feature throughout these testimonies is that individuals often stress the importance of their family as a support network that helps them through the challenges they face growing up.[96] To this extent, the family is affirmed under the program. However, the program does in a number of ways undermine the family unit, such as by encouraging children to access restricted materials without parental consent. In 2014, the Safe Schools Coalition released several resources for schools and students, including the booklet 'Standout'.[97] On page 18 of the booklet, students are advised to seek access to websites at school that may be blocked at home. The booklet reads:

> Some students don't have access to the internet at home, or it is monitored by their family so having access at school is really important. Try accessing the website minus18.org.au, safeschoolscoalition.org.au or some of the groups listed at the back of this guide. Are any of them blocked? If so, for what reason? Speak to a teacher about the importance of allowing students to access them at school, and let them know why this matters.[98]

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[94] Ibid*; X and Y v the Netherlands, Application No. 8978/80* (1985) 8 EHRR 235 [23].
[95] *Application No. 8059/77* (1977) DR 15, 208; Van Bueren, above n 93, 79; 'ECHR' refers to the European Commission of Human Rights.
[96] See for example: Minus18, *Margot's Story – All of Us, Minus18* (online), 22 November 2015 <https://www.youtube.com/watch?v=CduZq6OHXH4>.
[97] Safe Schools Coalition Australia, *Resources* (2014) Safe Schools Coalition Australia <http://www.safeschoolscoalition.org.au/resources>.
[98] Roz Ward and Micah Scott, *Stand Out* (2014) Victoria Department of Education and Training <http://www.education.vic.gov.au/Documents/about/programs/health/StandOut.pdf>.

There are many reasons for parents having internet safeguards at home. Not only would such safeguards be in place to protect children from material that is inappropriate and harmful, it would also serve to restrict content that is contrary to the instruction of parents. The SSCA overrides this instruction, however, in advising children to seek access to certain Safe Schools materials at school, without parental knowledge.[99] In this way, children are encouraged to become activists for the Safe Schools cause, by asking teachers to unblock SSCA websites at school that may be against the wishes of their parents. The result of all this is that a disconnect is drawn between parents and children, interfering with family unity and stability, and undermining one of the most important ties between parent and child. Such practice would arguably constitute an arbitrary interference with the family, as prohibited under article 10 of the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').[100]

B *Schools Excluding Parents*

Another way in which the Safe Schools program fails to respect the family is through encouraging schools to exclude parents from decisions affecting their children. In the SSCA resource, 'Guide to Supporting a Student to Affirm or Transition Gender Identity at School', schools are advised on how to develop a plan to manage a student's gender transition.[101] In the document, no reference is made to the need for advice from a doctor, psychologist, or relevant expert, and there is no requirement to involve parents.[102] Instead, the resource suggests that there are circumstances in which the student's parents ought to be *excluded* from involvement in the gender transitioning process, subject to a determination made by the school. The document provides:

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[99] The Australian Family Association, Submission No 30A to the New South Wales Government, *Inquiry into the Sexualisation of Children and Young People,* 8 April 2016, 3.

[100] SSCA resources also direct children to websites such as Minus18; a site that encourages children to subvert parental safeguards when using the internet. In one Minus18 article, 'Cover your Tracks', students are provided with 'handy tips on keeping stealthy when browsing online', and instructed on how to delete their web-browsing history.[100] The consequences of this advice is evident. If parents are blocked from knowing what their children are accessing online, they are hindered in their ability to protect their children from accessing harmful materials and content contrary to their desired instruction. As a result, rather than assisting parents to fulfil their responsibilities, SSCA instead treats parents as people from whom things should be hidden, thereby alienating parents from their children: Evidence to Committee on Children and Young People, Parliament of New South Wales, Sydney, 7 April 2016, 21-24 (Theresa Mary Kelleher).

[101] Roz Ward, Joel Radcliffe and Micah Scott, *Guide to Supporting a Student to Affirm or Transition Gender Identity at School* (22 October 2015) Victoria Department of Education and Training <http://www.education.vic.gov.au/Documents/about/programs/health/GuideSupportingStudentAffirmTransition.pdf>.

[102] Parkinson, above n 67, 22.

> Consideration should be given to the age and maturity of the student and whether it would be appropriate to involve the students' parent(s) or guardian(s) in each decision. Assess the support given by a student's family members or carers, and think through the needs of any siblings, especially those attending the same school. If a student does not have family or carer support for the process, a decision to proceed should be made based on the school's duty of care for the student's wellbeing and their level of maturity to make decisions about their needs. It may be possible to consider a student a mature minor and able to make decisions without parental consent.[103]

This advice has also been supported in practice. La Trobe University research quotes a case in which teachers facilitated a student to leave school for gender-transitioning advice without parental consent. In the words of the student, 'a number of staff members did all they could to assist me in a period when my parents refused to allow me to transition… My teachers broke multiple rules to allow me to leave school without my parents' permission for medical appointments.'[104]

Such instruction by the SSCA resources does not accord respect for the rights of parents.[105] Not only does it suggest that parents should only be consulted if they are *supportive* of their child's gender transitioning process, it assumes that schools are better than parents at assessing the best interests of children, and so justified in subverting their parental rights.[106] The problem with this contention, however, is that not only is it incongruous with the prior right of parents to direct the upbringing of their children, it also fails to consider the lack of

[103] Roz Ward, Joel Radcliffe and Micah Scott, above n 101, 1.

[104] Dr Elizabeth Smith et al, *Gender affirming schools: Towards safe schools for gender diverse and transgender young people in Australia* (13 November 2015) La Trobe University <http://docplayer.net/12107663-Latrobe-edu-au-cricos-provider-00115m.html>; The Australian Family Association, above n 99, 3.

[105] This is not to suggest that parental rights over children remain unstifled until the child reaches the age of maturity. In *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, the High Court of Australia held that parental rights diminish as the child becomes increasingly competent and mature. However, the Court also held that where there is a dispute between parents and child for a proposed medical treatment, the *court* will adjudicate the dispute, where a decision for medical treatment will be made in the 'best interests of the child'. Considering that the SSCA resource advises *schools* to make such a determination without parental consent, and also without consideration of whether gender reassignment surgery would fit suitably into the category of 'medical treatment', issues of parental rights undoubtedly arise.

[106] This is not the first time that schools have been encouraged to override the decisions of parents. In South Australia, a compulsory school policy has been introduced in November 2016 which allows students to select whatever uniforms, bathrooms and sleeping quarters they prefer according to their identified 'gender'. Consultation with parents is advised under the policy, however, parental consent is not required. As such, if a student's wishes clash with those of the parents, the school may 'assess the best interests of the child to ensure their physical and psychological safety and wellbeing', and proceed with a decision on that basis: Department for Education and Child Development, *Procedure: Transgender and intersex student support* (24 November 2016) Department for Education and Child Development <https://www.decd.sa.gov.au/sites/g/files/net691/f/transgender-and-intersex-support-procedure.pdf?v=1480468803>.

conclusive evidence in favour of gender re-assignment treatment as a successful means of reducing the psychological issues faced by many transgender-identifying individuals.[107] Coupled with evidence that points to high rates of gender-confused children identifying consistent with their biological sex in adulthood,[108] the potentially irreversible damage that may be caused through gender re-assignment surgery, and the overall inconclusiveness of research in this field of study, surely it is beyond the scope of a school's function and capacity to assess the best interests of the child; that is, to determine whether to support or discourage a student's feelings of gender non-conformation.

Moreover, the Guide suggests that schools may assess the maturity of a minor in making this decision, and yet fails to offer any guidance on how to determine whether a child has sufficient maturity to override parental consent, such as by certification of a developmental psychologist.[109] As observed by Patrick Parkinson, schools must have a duty of care 'to ensure that people wholly unqualified to manage gender dysphoria are not involved in assisting the child or young person to make immensely important decisions that have all kinds of consequences', including alienation from parents.[110] These consequences are clearly not anticipated by the SSCA resource,[111] or have otherwise been ignored in pursuit of affirming students' decisions to transition gender. As a result, parents are excluded from

[107] One of the most comprehensive long-term studies into the effectiveness of gender reassignment surgery was a Swedish study published in 2011, examining 324 sex-reassigned persons up against a randomly-selected control group matched for age and gender. The study examined the long-term effectiveness of sex reassignment surgery with patients from 1973-2003: C Dhejne et al, 'Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden' 6(2) *Public Library of Science: One* 16885. The study concludes: 'Persons with transsexualism, after sex reassignment, have considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population. Our findings suggest that sex reassignment, although alleviating gender dysphoria, may not suffice as treatment for transsexualism, and should inspire improved psychiatric and somatic care after sex reassignment for this patient group.'

[108] A De Vries, Cohen-Kettenis. 'Clinical management of Gender dysphoria in Children and Adolescents: the Dutch Approach' (2012) 59(3) *Journal of Homosexuality* 301-316.

[109] Parkinson, above n 67, 22.

[110] Ibid.

[111] Moreover, the Guide also recommends that schools may, without mention of parental consent, change their accounts to record a different gender identity for students: Ward, Radcliffe and Scott, above n 101, 1-3; Under New South Wales law, gender identity may only be legally changed once a person is 18 years of age or older, and only when a set of strict criteria has been met. This criteria includes the person having undergone gender reassignment surgery, as well as the procedure being supported by the statutory declaration of two medical practitioners: *Births, Deaths and Marriages Registration Act* 1995 (NSW) pt 5A; Parkinson, above n 67, 22; In any case, the SSCA Guide ignores the policy behind these laws, and instead promotes the idea that students may choose their name and gender identity to be entered into school records, without mention of parental consent. As a result, parents are excluded from decisions involving their children, encouraging a disconnect between parents and children, and further undermining the family unit as protected under domestic law. Moreover, such instruction to students would also likely be inconsistent with Article 10 of the ICESCR, in failing to afford 'the widest possible protection and assistance to the family… the natural and fundamental group unit of society'.

decisions involving their children; a clear breach of the State's positive obligation to affirm the family unit under article 10 of the ICESCR.

VII FAILING TO PROVIDE EDUCATIONAL TRANSPARENCY

The last way in which the Safe Schools program undermines the rights of parents is through its lack of transparency. Although this requirement has not been explicitly recognised under international human rights instruments, article 18(4) of the ICCPR does impose an obligation on the State to ensure the religious and moral education of children is in conformity with parents' moral and religious convictions.[112] Transparency in education may therefore be implied under article 18(4) on the basis that, unless parents know what their children are being taught at school, an assessment of whether the State is complying with its obligations cannot be undertaken. Moreover, the *Melbourne Declaration on Education Goals for Young Australians* makes the following statement with respect to educational transparency:

> Information about the performance of individuals, schools and systems helps parents and families make informed choices and engage with their children's education and the school community. Parents and families should have access to… contextual information about the philosophy and educational approach of schools, their facilities, programs and extracurricular activities, [and] information about a school's enrolment profile.[113]

Communication with parents on the adoption of school policies and programs is thus an important objective under the policy framework for the Australian curriculum, so as to ensure that parents know what their children are being taught. Under the Safe Schools program, however, educational transparency has been ignored in a number of ways, including a lack of parental engagement in the program and failure of schools to notify parents when the program has been adopted.

A *Lack of Transparency and Parental Engagement*

[112] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(4); Articles 2 and 9 of the *European Convention on Human Rights* expresses the right is very similar words, and to the same effect.

[113] Ministerial Council on Education, Early Childhood Development and Youth Affairs, *Melbourne Declaration on Educational Goals for Young Australians* (December 2008) Australian Government Department of Education and Training <http://www.curriculum.edu.au/verve/_resources/National_Declaration_on_the_Educational_Goals_for_Young_Australians.pdf>.

Transparency in education has been neglected under the Safe Schools program by the lack of parental engagement in its adoption and implementation in schools. This has created concern among many parents. At one Melbourne school, parents of the Year 4 class were sent a letter by their school advising that Safe Schools was running a workshop for students 'to assist us with the gender choice of a student who is currently transitioning'.[114] Upon receiving this letter, several parents expressed concerns about the lack of notice and detailed information on what pupils would be taught in the workshop. As one parent of a Year 4 student explained, 'We just have lots of questions and we're not really getting answers… I'd like to know what my child will actually be taught in this workshop. This is a big deal and affects the whole school community.'[115] Other instances on non-transparency have been observed elsewhere. A case study of the Safe Schools program at Wollongong High School of Performing Arts revealed that the school's SSCA membership was not outlined anywhere in the school's anti-bullying policy, such that parents could only find out about the program by searching through the archives of school newsletters.[116] These examples, alongside many others,[117] illustrate the lack of transparency experienced by many parents under the program, especially with respect to the lack of information provided by SSCA member schools. As a result, if parents are unable to find out what their children are being taught under the program, an assessment of whether the State is complying with its obligation to respect parental rights therefore cannot be undertaken. The program thus reverses the presumption of control over children in favour of schools, challenging the requirement of transparency, and further circumventing the effectiveness of parental rights under article 18(4) of the ICCPR.

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[114] Rebecca Urban and Tessa Akerman, 'Year 4 pupil 'gender transitions' at Melbourne school', *The Australian* (online), 9 September 2016 <http://www.theaustralian.com.au/national-affairs/education/year-4-pupil-gender-transitions-at-melbourne-school/news-story/86ee2b26ec8e2f691baa3d7e8f795aa0>.

[115] Ibid.

[116] The Australian Family Association, above n 88, 30.

[117] One Victorian mother, Cella White, detailed how her son came home from school one day, telling her how the school told him that he could wear a dress to school, and how boys that identified as girls could use the girl's bathrooms. The mother had not at any stage been notified of this instruction by the school: *Cella's Story,* Youtube, 21 June 2016 <https://www.youtube.com/watch?v=rOmCyw9vRi4>; Concerns have also been raised about the information available about who is behind the program. When the SSCA resource 'All of Us' was first released, two main authors of the program, Roz Ward and Joel Radcliffe, featured prominently in the resource. However, following negative publicity of Ms Ward for her endorsement of Marxism, and Mr Radcliffe suggesting that parents do not have the power to shut down the Safe Schools program, revised versions of the resource no longer make any mention of them, with their names disappearing from the resource: Christopher Bush et al, above n 46; This is not the first time secrecy has been used to prevent parents from what is being taught, either. After details emerged that the Crossroads educational resource 'Do Opposites Really Attract' taught students that gender varied like the weather, the NSW Department of Education simply removed the resource from its website: New South Wales Department of Education, *Do Opposites Really Attract* (2015) CloudFront <https://d3n8a8pro7vhmx.cloudfront.net/marriage/pages/474/attachments/original/1475615796/Final-Do-opposites-really-attract-z3zbe9_(1).pdf?1475615796)>.

B *Freedom of Information Road-Blocks*

Another way in which educational transparency has been disregarded is through the New South Wales and Queensland state governments' failure to notify parents of which schools have become members to the Safe Schools Coalition Australia. On all state government websites in Australia, information has been provided to the general public on which schools are signed up to the SSCA.[118] This information is very important for many parents, who use it in their decisions of whether to enrol or unenroll their child from a particular school. On the 8th July 2016, however, the lists of New South Wales and Queensland schools signed up to the Safe Schools program were removed from the websites, such that parents could no longer see which schools were SSCA members.[119] The decision to delete the list from the websites came in the wake of strong public criticism of the program, schools withdrawing their membership, and parents removing their children from schools due to their SSCA affiliation.[120] According to the NSW Education Department, of the 31 public schools previously revealed as Safe Schools members, more than half had claimed they had been negatively targeted as a result.[121] However, rather than taking this public criticism and repudiation of the program as an indication of the need to look at how the program reflects the views of the community, the New South Wales and Queensland governments instead decided to remove the list of participating schools, such that parents could no longer see the list.

The decision of the two state governments has not been without public scrutiny. In New South Wales and Queensland, numerous formal requests for information were lodged in each state, however all requests have been refused.[122] The NSW State Department of Education justified its decision by arguing that 'releasing the names of participating schools could lead to the identification of individual students, thereby subjecting them to the potential for serious

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[118] See for example: Victoria Department of Education and Training, *List of Victorian Safe Schools* (16 March 2017) Victoria Department of Education and Training <http://www.education.vic.gov.au/Documents/about/programs/health/Safe%20Schools%20list%20-%2016%20March%202017.pdf>.

[119] Committee on Children and Young People, Parliament of New South Wales, *Sexualisation of Children and Young People* (2016) 58.

[120] Rebecca Urban, 'Secrecy over Safe Schools in NSW criticised', *The Australian* (online), 14 February 2017 <http://www.theaustralian.com.au/national-affairs/education/secrecy-over-safe-schools-in-nsw-criticised/news-story/7d58eeb7672fd26cdb97a2edf269b9bc>.

[121] Ibid.

[122] Queensland Department of Education and Training, *Disclosure Log – Right to Information* (2016) <http://deta.qld.gov.au/right-to-information/disclosure-logs/2016.html>; Elizabeth Tydd, *Review report under the Government Information (Public Access) Act 2009* (25 November 2016) Information and Privacy Commission New South Wales, 2.

harm, harassment or intimidation.'[123] This argument does not stand scrutiny, however. As observed by Information Commissioner Elizabeth Tydd, the harm test can only be satisfied where disclosure of information could 'reasonably be expected to expose a person to risk of harm' which requires more than a 'mere possibility, risk or chance… [and must] not be purely speculative, fanciful, imaginary or contrived'.[124] Under this standard, the NSW Department did not 'specify the person to which [sic] the possibility of harm applies, and substantiate the risk, and that the risk is serious', and failed to explain how publicly disclosing the name of a school alone could possibly subject an 'unspecified student' to harm.[125]

The consequences of this decision are evident. If parents can no longer go to the state government websites to establish if their school is, or is not, participating in the Safe Schools program, many parents will not know what materials their children are being taught. Parents will thus be unable to make informed decisions about their child's education, and will be denied the ability to ensure that their child's education is in accordance with their moral and philosophical convictions. In this way, parental rights as protected under article 18(4) are effectively circumvented and denied.[126]

VIII CONCLUSION

Prior to its enshrinement in the international human rights instruments, the prior right of parents to educate their children was for many centuries protected at both common law and in jurisprudence. Such protection recognised that, because parents are in the best position to care for their children, the State must not unreasonably interfere with parents' educational decisions, but rather must seek to affirm them in accordance with parents' desired instruction.[127] Despite the recognition that parental rights now enjoy under international law,

[123] Elizabeth Tydd, *Review report under the Government Information (Public Access) Act 2009* (25 November 2016) Information and Privacy Commission New South Wales, 7.
[124] Ibid 5.
[125] Ibid 6. Similar sentiments were also expressed by the state's privacy and information watchdog, who strongly rejected the claims of the NSW Department, recommending that a new decision should be considered. The Department has since reaffirmed its stance, however: Urban, above n 120.
[126] The lack of parental transparency under the program was brought particularly into the public limelight following comments made by SSCA coordinators regarding parental involvement in the program. In the words of a prominent author of the program's resources, Roz Ward, 'When people do complain then school leadership can very calmly and graciously say, 'You know what? We're doing it anyway, tough luck'. SSCA project manager Joel Radcliffe also stated in regard to the Safe Schools program: "Parents... seem to have a lot of power (in) schools… Parents don't have the power to shut this down.' Such statements have received significant backlash from parents and the wider community.
[127] Mill, above n 21.

more recently jurisdictions all over the world have challenged the rights of parents in education;[128] not least of all the Safe Schools program in Australia. Under the program, children are taught materials that fall short of the *Kjeldsen* requirements of 'objectivity', 'criticality' and 'pluralism', and allowed access to sexually inappropriate content, thereby undermining the desired instruction of many parents as protected under article 18(4) of the ICCPR. Contrary to article 10 of the ICESCR, the family unit is subject to arbitrary interference under the program, with children encouraged to access certain websites at school without the knowledge of their parents, and schools being advised to exclude parents from important decisions involving their children.[129] Because the program encourages schools to implement its materials across the curriculum, parents who conscientiously object to the program are effectively barred from exemptions from the SSCA materials, leaving them with the decision to either change schools or allow their children to be taught under the program. Lastly, following concerns raised by many parents and the wider community, the program's implementation in schools has been tarnished by a severe lack of transparency, particularly through the two state governments' refusals to publish the list of schools that are SSCA members. In this way, parental rights in education have been circumvented in many ways under the Safe Schools program, and reversed in favour of the State.

Therefore, in seeking to place the Safe Schools program in compliance with parental rights under the common law and international law, a number of reformative measures ought to be adopted. These measures include amending the program's materials to have a firmer basis in

[128] One example of a challenge to parental rights in education is that of the Canadian *Drummondville Parents' Case*. In the case, one couple on behalf of several thousand other parents sought to exempt their children from a provincial-wide mandatory course on ethics and religious culture. According to the parents, the course taught material that was inconsistent with their desired religious instruction, and so they did not want to expose their child to such contrary teachings. However, rather than recognise the prior rights of parents to direct the education of their children, the court instead placed the onus on the parents to prove the very harm that their application sought to avoid, effectively reversing the presumption of control over children in favour of the State. Contrary to the parents' assertions, furthermore, the court then took it upon itself to ascertain whether the course actually did undermine the couple's religious beliefs, and in finding to the negative, refused to grant exemption for the children. At no point did the Court adequately examine whether the goals of the State could be met by alternative means acceptable to the parents; a question surely relevant to reconciling the competing claims of the parties: *SL v Commission scolaire des Chênes* [2012] 1 SCR 235; Iain T. Benson,, 'An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion' (Unpublished PhD Thesis, University of the Witwatersrand, 2013) 94.

[129] Perhaps a useful analogue to 'the best interests of the child' test would be that of 'the best interests of the family'. Given the importance of family, group and community interests that arise in the context of parental rights, it would seem that the 'best interests of the child' test may have a focus that is too individualistic, and thereby neglect the rights of parents. For further discussion on the best interests of the child in the context of the family, see: Adhar and Leigh, above n 10, 205-207.

reliable research,[130] presenting issues with a greater diversity of views, and removing any links from the program's content to unsafe or otherwise inappropriate content.[131] The program must seek to affirm the family unit, by ceasing to encourage children to access materials without their parents' knowledge, and instead involving parents as much as possible in their child's education. In terms of the program's administration in schools, SSCA materials ought not to be implemented across the curriculum, but rather should be taught in separate classes such that parents may withdraw their child on conscientious grounds, whilst still allowing those who do want their child to participate in the program to reserve such an option.[132] Lastly, those that offer and endorse the program must display a significantly higher level of transparency; firstly, by the state governments publishing the list of SSCA member schools, and secondly, through increased communication by schools to parents on exactly what their children will be taught under the program.[133] Only through implementing these measures may the Safe Schools program accord with parental rights as protected at common law and international law, and only then may parents be afforded proper respect to direct and control the education of their children.[134]

[130] Strong criticisms of the Safe Schools program research were made by Patrick Parkinson: Parkinson, above n 67.

[131] Many of the links to inappropriate content have been taken down since being brought to public attention. However, some links still remain, such as the Minus18 article that instructs students to delete their web-browsing history: Micah Scott, *Cover Your Tracks* (31 December 2012) Minus18 <https://minus18.org.au/index.php/sex-love/item/144-cover-your-tracks>.

[132] Such an approach would be consistent with the reconciliation of competing claims between parents and the State, in that the state's goals may be achieved, whilst at the same time, respecting the rights of parents to direct and control the education of their children.

[133] A good measure to increase parental involvement may be for all states to adopt the Birmingham recommendations requiring parent body approval for the program to be adopted by schools, as well as parental consent via opt-ins for children to participate in the program: Simon Birmingham, *Statement of Safe Schools Coalition* (18 March 2016) Senator Birmingham <http://www.senatorbirmingham.com.au/Latest-News/ID/2997/Statement-on-Safe-Schools-Coalition>; Furthermore, an express onus could also be placed on schools to bring controversial materials to the attention of parents, so as to ensure that materials are consistent with parents' moral and philosophical convictions.

[134] It is not enough for changes to be only adopted by the Safe Schools program. To ensure that such educational programs cannot challenge parental rights to such an extent in future, Australia ought to consider enacting legislation consistent with the parental rights expressed under the ICCPR and CRC This legislation could mirror article 7.1 of the *South African Charter of Religious Rights and Freedoms 2010,* which provides that: 'The state, including any public school, has the duty to respect this right and to inform and consult with parents on these matters. Parents may withdraw their children from school activities or programs inconsistent with their religious or philosophical convictions.' Another option could be the adoption of a Charter of Educational Transparency or Charter of Family Rights.

BILL LEAK, ANDREW BOLT AND SECTION 18C: FREEDOM OF SPEECH AND THE LIMITS OF POLITICAL CRITICISM IN AUSTRALIA

John William Tate*

ABSTRACT

The Bill Leak affair, and prior to that the Andrew Bolt affair, have rendered freedom of speech a contentious political topic in Australia. It has also become an issue of significant parliamentary activity, with both the Abbott Government, and later the Turnbull Government, seeking to make amendments to s 18C of the Racial Discrimination Act 1975 (Cth), in part in response to each of these affairs. This article focuses on both the Leak and Bolt affairs, and their implications for freedom of speech in Australia. It also investigates why affairs such as these often give rise to such unresolved (and unresolvable) disagreement.

This article seeks to defend the importance of freedom of speech within Australian political culture, particularly in the context of political criticism. To this end it focuses on the question of the appropriate limits of political criticism. Such a purpose requires, among other matters discussed in this article, a close consideration of ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth) ('RDA'), and in particular a focus on the most recent high profile Australian free speech controversies wherein each of these legal provisions were invoked – the Bill Leak and Andrew Bolt affairs.

The article considers the legal, political and philosophical concerns that have arisen in relation to these free speech matters. It begins by focusing on the Leak and Bolt affairs, outlining their basic details, and then considers the Turnbull and Abbott governments' response to these affairs. These responses include an unsuccessful attempt, by each government, to amend s 18C, in order to widen the legal scope for freedom of speech in the public sphere. It also includes a successful effort by the Turnbull Government to reform certain aspects of the Australian Human Rights Commission ('Commission') in its handling of s 18C complaints.

The article then focuses on the terms of ss 18C and 18D themselves, their purpose within the RDA, and the various views concerning their propriety or need for reform. It then focuses on what is often an inextricable connection between 'criticism' and 'offense', in free speech matters, and considers the differing views of those who question whether, if we are to affirm one of these, in political debate within a polity, we must then tolerate the other. It also considers the difficulties this raises for conventional philosophical frameworks centred on resolving such disagreement, such as the liberal model of 'public reason'.

The article then seeks to highlight the reason why free speech controversies, such as the Bolt and Leak affairs, generate such heated, unresolved, and (often) unresolvable disagreement. It explains this in terms of the 'underdetermined' status of reason in such circumstances, which arises, in part, from the fact that key terms, employed in these debates, although at times a meaningful way to describe a set of circumstances, are nevertheless 'non-neutral', which means that their application to these circumstances is potentially subject to ongoing (and irresolvable) contestation.

The article then focuses on Federal Court judgments concerning s 18C, in particular the Bolt ruling, as evidence of the 'underdetermined' status of reason in such contexts. Indeed, it will be argued that the Federal Court's reasoning in the Bolt case produced a number of inconsistencies, and at times contradictions, in its understanding of the respective status of, and relationship between, ss 18C and 18D of the RDA, which deeply affected its judgment in this case.

The article then looks at the use of the term 'racism' in Australian public debate, and does so by focusing on the Bill Leak affair. Although it acknowledges that in many cases the use of this term is a meaningful way to describe a set of circumstances, it points out that, like other key evaluative terms discussed in this article, it is also 'non-neutral', with all the 'underdetermined' and (often) irresolvable contestation that arises from this. The article also points to the powerful consequences that, in some circumstances, the use of this term can have in limiting the scope of acceptable political criticism within the public sphere, not least in terms of the 'silence' it can impose on those aspects of public debate it successfully designates as 'illegitimate'.

I ANDREW BOLT AND SECTION 18C

In recent years, and for the first time in decades, freedom of speech is a high profile political topic in Australia. Its re-ascendancy began nine years ago with a series of events involving the journalist, Andrew Bolt. 'The Bolt Affair', as it came to be called, was initiated by two of Bolt's newspaper articles published in the *Herald Sun* on 15 April 2009 and 21 August 2009.[1] These articles publicly criticised light-skinned individuals who, in claiming Aboriginal heritage, applied for, and received, publicly funded awards reserved for indigenous applicants. Bolt argued that for such individuals to identify with one small element of their racial heritage and so qualify for such awards was unacceptable, and he referred to such individuals as 'white aboriginals' and 'political aboriginals'.[2]

These newspaper publications elicited a formal complaint to the Australian Human Rights Commission, alleging that, within them, Bolt had contravened s 18C of the RDA. The ultimate result was a Federal Court ruling against Bolt in 2011, declaring that his publications had indeed contravened s 18C.[3] The penalty was that a 'corrective notice' accompany the articles when they appeared on the *Herald Sun* website and that the articles not be republished.[4] However an additional Court order declared that the articles could remain available for 'historical and archival' purposes, which means they can still be accessed online.[5] Tony Abbott, as Opposition leader, was openly critical of the Federal Court judgment and this eventuated in the Abbott Government's unsuccessful attempt, in 2014, to amend s 18C.[6]

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[1] Andrew Bolt , 'It's so hip to be black', *Herald Sun* (online), 15 April 2009 <http://www.abc.net.au/mediawatch/transcripts/1109_heraldsun09.pdf>; Andrew Bolt, 'White fellas in the black', *Herald Sun* (online) 21 August, 2009 <http://www.heraldsun.com. au/news/opinion/white-fellas-in-the-black/story-e6frfifo-1225764532947>. For further discussion of the Bolt Affair, see John William Tate, 'Free Speech, Toleration and Equal Respect: The Bolt Affair in Context' (2016) 51 (1) *Australian Journal of Political Science* 34.

[2] Bolt, above n 1 (15 April 2009); Bolt, above n 1 (21 August 2009).

[3] *Eatock v Bolt* [2011] FCA 1103 (Summary) [17]; *Eatock v Bolt* [2011] FCA 1103 [8], [452]-[453].

[4] *Eatock v Bolt* [2011] FCA 1103 (Summary) [29].

[5] Adrienne Stone, 'The Ironic Aftermath of *Eatock v Bolt*' (2015) 38(3) *Melbourne University Law Review* 938.

[6] See Tony Abbott, 'Freedom Wars', *Institute of Public Affairs* (2012) <https://ipa.org.au/portal/uploads/Abbott_FreedomWars.pdf>; Tony Abbott, 'Joint Press Conference', Parliament House (2014), <http://www.pm.gov.au/media/2014-08-05/joint-press-conference-canberra-0>. See also n 32 below.

II BILL LEAK AND SECTION 18C

Yet matters did not rest there. The focus on free speech and s 18C has continued with the controversy surrounding the recently deceased cartoonist Bill Leak, and one of his cartoons, published in *The Australian* newspaper, on 4 August 2016, which was National Aboriginal and Torres Strait Islander Children's Day.[7] This cartoon was Leak's response to the *Four Corners* program, *Australia's Shame*, focusing on treatment of juvenile (particularly indigenous) inmates at the Don Dale Youth Detention Centre in the Northern Territory, which aired on ABC television on 25 July 2016.[8] The cartoon shows an indigenous policeman holding a poorly clothed indigenous youth by the scruff of the neck and telling the boy's poorly clothed and beer-swilling indigenous father: 'You'll have to sit down and talk to your son about personal responsibility'. To which the father replies: 'Yeah righto. What's his name then?'[9] Leak explained that the point he was seeking to make was that, in his view, the preponderance of young indigenous offenders within the Don Dale Youth Detention Centre was, at least in part, a consequence of a breakdown in parental responsibility among some indigenous parents in remote Aboriginal communities.[10]

Leak's cartoon provoked furore in a wide variety of quarters. New South Wales Aboriginal Land Council chairman, Roy Ah-See, declared the cartoon 'absolutely disgraceful', insisting that it 'stokes the fire of racism', and concluded that 'I can't believe *The Australian*, a national newspaper, would be so insulting to us as Aboriginal people'.[11] The leader of the Australian Greens, federal Senator Richard Di Natale, insisted: 'We think there is no place

[7] ABC, 'Bill Leak Cartoon in The Australian an Attack on Aboriginal People, Indigenous Leader Says', *ABC News* (online), 4 August 2016 <http://www.abc.net.au/news/2016-08-04/cartoon-an-attack-on-aboriginal-people,-indigenous-leader-says/7689248>.

[8] Bill Leak, 'Submission to the Parliamentary Joint Committee on Human Rights into Freedom of Speech in Australia', 8 December 2016 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Submissions>; Bill Leak, 'Interview: Bill Leak, Cartoonist for The Australian Newspaper', *ABC News*, 20 October 2016, <http://www.abc.net.au/news/2016-10-20/interview:-bill-leak,-cartoonist-for-the/7952634>; Bill Leak, 'Bill Leak Cartoon: What Are You Tweeting About?', *The Australian*, 5 August 2016, <http://www.theaustralian.com.au/opinion/another-twitter-feed-tantrum-about-my-cartoons/news-story/e4a2db48aa81424c6daf54a4497330e6>; Parliamentary Joint Committee on Human Rights, 'Freedom of Speech in Australia', *Official Committee Hansard*, 1 February 2017, 84, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommjnt%2Fbf6877ca-d923-4b09-b0bc-30d78d59f9db%2F0014;query=Id%3A%22committees%2Fcommjnt%2Fbf6877ca-d923-4b09-b0bc-30d78d59f9db%2F0000%22>.

[9] Paul Whittaker, 'The Australian Defends Bill Leak Indigenous Cartoon', *The Australian* (online), 4 August 2016 <http://www.theaustralian.com.au/business/media/the-australian-defends-bill-leak-indigenous-cartoon/news-story/ac8807a5040be29d3d890d3646cc9ef2>.

[10] Leak, 'Submission to the Parliamentary Joint Committee on Human Rights into Freedom of Speech in Australia', above n 8, 1-2; Leak, 'Interview: Bill Leak, Cartoonist for The Australian Newspaper', above n 8; Leak, 'Bill Leak Cartoon: What Are You Tweeting About?', above n 8; Parliamentary Joint Committee on Human Rights, 'Freedom of Speech in Australia', above n 8, 85.

[11] ABC, above n 7.

for that in modern Australia. This is a cartoon that takes us back to the worst days of white Australia', and declared that the editors of *The Australian* should 'apologise to the Aboriginal people who have been deeply offended by this publication'.[12] The Chief Executive of the Victorian Aboriginal Child Care Agency, Muriel Bamblett, saw the cartoon as part of a wider process of public vilification of Aboriginal people in the media:

> In the media, I think they have a public responsibility. That's obviously one of the opportunities to get good messaging about Aboriginal people. But if you're constantly stereotyping us as second class then it's about profiling us as second-class citizens in our own country.[13]

The most high-profile individual to advance the view that Leak's cartoon was 'racist' was federal Indigenous Affairs Minister, Nigel Scullion. In a media release, entitled 'No Place for Racist Cartoon', published on the same day as Leak's cartoon, he declared:

> Although Australian cartoonists have a rich tradition of irreverent satire, there is absolutely no place for depicting racist stereotypes. … I am heartened that various voices from across the political and social spectrum have come out and strongly condemned the cartoon. I would urge the *Australian* to be more aware of the impact cartoons like the one published today can have on Indigenous communities.[14]

Joining Scullion in his view that the cartoon was 'racist' were '173 media and communication professionals' who signed an open letter condemning the Leak cartoon in these terms:

> We are journalists, writers, photographers, artists, publishers and others who work in the media and communications industries. Signatories also include journalism, media and communications researchers and academics.
>
> We condemn The Australian's publication of Bill Leak's racist cartoon. Racism damages the health and wellbeing of those it targets.

[12] Ibid.
[13] Ibid.
[14] Nigel Scullion, 'No Place for Racist Cartoon', Press Release, 4 August 2016 <http://www.nigelscullion.com/media+hub/No+place+for+racist+cartoon>.

> We acknowledge that the media industry has a long history of perpetuating harmful and racist stereotypes of Aboriginal and Torres Strait Islander people, and that it is well past time that this stops.[15]

On the other hand, the editor-in-chief of *The Australian*, Paul Whittaker, on the day of the publication of Leak's cartoon, issued a statement in its defence, declaring:

> The Australian is proud of its long-standing and detailed contribution to our national debate over the crucial issues in Indigenous affairs. The current controversy over juvenile detention in the Northern Territory has lifted these matters to the forefront of national attention again … Bill Leak's confronting and insightful cartoons force people to examine the core issues in a way that sometimes reporting and analysis can fail to do.[16]

According to the timeline provided by the Commission, on 4 October 2016, it wrote to the lawyers for *Nationwide News Pty Ltd* ('Nationwide News'), the publishers of *The Australian*, advising them that it had received a complaint about Leak's cartoon, identifying those sections of the RDA that would 'appear to be relevant to the complaint' (including s 18C, which relates to public 'acts' which 'offend', 'insult', 'humiliate' or 'discriminate' on the basis of 'race, colour or national or ethnic origin', and also s 18D which exempts such 'acts' from being unlawful if they are engaged in 'reasonably and good faith' and fulfil some specified aspect of the 'public interest') and asking them to respond by 28 October 2016.[17] The lawyers for both Nationwide News and Bill Leak responded on 21 October 2016, asking that the Commission 'take no further part in any inquiry into, or any attempt to conciliate' the complaint on the grounds that a 'reasonable apprehension of bias' exists, and that until this issue was resolved, the lawyers and their clients had 'nothing further to say'.[18] The response also contained a schedule which stated that once the 'apprehended bias' issue was resolved, 'a public hearing in relation to the complaints' made by the complainant ought to be conducted.[19]

On 1 November 2016, the President of the Commission, Professor Gillian Triggs, wrote to the lawyers notifying them of the decision of the Commission to reject the 'allegations of

[15] New Matilda, 'Journalists, Writers, Academics Sign Open Letter Condemning Bill Leak Cartoon', *The Insider* (online), 9 August 2016 <https://newmatilda.com/2016/08/09/media-workers-sign-open-letter-condemning-racist-bill-leak-cartoon/>.
[16] Whittaker, above n 9.
[17] AHRC, 'Commission Reveals Details of 18C Complaints', *Australian Human Rights Commission*, 21 February 2017 <https://www.humanrights.gov.au/news/stories/commission-reveals-details-18c-complaints>.
[18] Ibid.
[19] Ibid.

apprehended bias'.[20] On the same day the Commission wrote to the lawyers confirming that it would continue the investigation into the complaint, and asking again that they provide a justification of Leak's cartoon under the terms of s 18D by 15 November 2016.[21] The Commission received a response from the lawyers on 8 November 2016 but it did not 'contain any submission in relation to section 18D'.[22]

On 11 November 2016, the complainant withdrew her complaint and the Commission sent a letter to the lawyers for Nationwide News and Leak advising them of this and 'closing' its file on the complaint.[23] According to *The Australian*, an additional complaint to the Commission concerning the cartoon was closed by the Commission on 13 December 2016, on the grounds that the Commission was satisfied that the complainant wished to withdraw their complaint.[24]

The Australian Human Rights Commission President, Gillian Triggs, appearing before a Senate estimates committee in February 2017, stated that, in her opinion, Leak's cartoon fell within the protection of s 18D of the RDA.[25] However, she also stated that, as President of the Commission, she was unable to initiate proceedings to determine if the complaint against the cartoon could be terminated on these grounds because Leak's lawyers had not responded to the request from the Commission to provide a statement defending the cartoon under the terms of s 18D.[26] Bill Leak died on 10 March 2017.

III THE TURNBULL GOVERNMENT AND SECTION 18C

The debate over freedom of speech intensified in the wake of the publication of Leak's cartoon and its investigation by the Commission, with conservative members within the Turnbull Coalition Government calling (as they did during the Abbott Government) for the amendment of s 18C. The catalyst for these demands was a belief, among these members, that the legal application of s 18C had resulted, in some cases, in excessive infringements on

[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Paige Taylor, 'HRC Drops Third Complaint About Bill Leak Cartoon', *The Australian* (online), 14 December 2016 <https://www.theaustralian.com.au/national-affairs/indigenous/hrc-drops-third-complaint-about-bill-leak-cartoon/news-story/103c00668bec8ecf5c47ced4054f2bfb>.
[25] Paul Karp, 'Bill Leak could have ended 18C complaint earlier, says Gillian Triggs', *The Guardian* (online), 28 February 2017 <https://www.theguardian.com/australia-news/2017/feb/28/bill-leak-could-have-ended-18c-complaint-earlier-says-gillian-triggs>.
[26] Ibid.

freedom of speech, with the result that s 18C, in the words of then Liberal MP, Cory Bernardi, had been 'misused'.[27] The Prime Minister, Malcolm Turnbull, specifically referred, as two examples of such 'misuse', to the subjection of Bill Leak's cartoon to investigation by the Commission, as well as the (ultimately unsuccessful) s 18C judicial hearing, in 2016, involving three Queensland University of Technology ('QUT') students, arising from a complaint made to the Commission concerning their Facebook comments critical of their ejection from an indigenous-only computer lab at their university.[28] The Prime Minister insisted that these were actions under s 18C that 'should not have happened' and declared that it was his government's intention to 'strike the right balance, defending freedom of speech so that cartoonists will not be hauled up and accused of racism, so that university students won't be dragged through the courts and have hundreds of thousands of dollars of legal costs imposed on them over spurious claims of racism'.[29]

Such were the Prime Minister's comments when, on 21 March 2017, he announced his government's intention to introduce into Parliament legislative reforms to s 18C. The prelude to this was a parliamentary inquiry into freedom of speech in Australia, initiated by the Turnbull Government in November 2016, and conducted by the Parliamentary Joint Committee on Human Rights ('Committee'). The Final Report of the Committee, entitled *Freedom of Speech in Australia*, was tabled in Parliament on 28 February 2017.

Most of the recommendations of the Committee concerned reform to the Commission and its handling of complaints under s 18C, including the need to 'prevent frivolous claims'.[30] However on reform to s 18C itself, the Committee was divided, with proposals ranging from no change to the current legislation, to the Turnbull government's preferred option of replacing the words 'offend', 'insult' and 'humiliate' in s 18C with the word 'harass'.[31]

The tabling of the Committee's report in Parliament was followed by the legislative action promised by Malcolm Turnbull above. On 30 March 2017, legislation was introduced into the federal Senate to remove the words 'offend', 'humiliate' and 'insult' from s 18C, substituting

[27] Jane Norman, 'Cori Bernardi Leads Coalition Backbench Senators in Push to Dilute Racial Discrimination Act', *ABC News* (online), 30 August 2016 <http://www.abc.net.au/news/2016-08-30/cory-bernadi-leads-coalition-push-to-change-18c-race-hate-laws/7796356>.
[28] Malcolm Turnbull, 'Press Conference with the Attorney-General', 21 March 2017 <https://www.pm.gov.au/media/2017-03-21/press-conference-attorney-general>.
[29] Ibid.
[30] Parliament of Australia, 'Report: Freedom of Speech in Australia', Parliamentary Joint Committee on Human Rights, 28 February 2017 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Report>, rec. 11. See also ibid rec 4-9, 12-19, 20-21.
[31] Ibid rec. 3.

them with the word 'harass', and retaining the word 'intimidate'.[32] The legislation was defeated the same evening by an alliance of Labor, Green and cross-bench Senators.[33]

IV AUSTRALIAN HUMAN RIGHTS COMMISSION REFORM

However although it failed to amend s 18C, the Turnbull Government did manage to legislatively implement some of the other recommendations of the Committee concerning reform of the Commission. To this end, the Government secured the passage of the *Human Rights Legislation Amendment Act 2017* (Cth) which amended some of the sections of the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') relating to the operations and procedures of the Commission. The amendments primarily related to Part IIB of the AHRC Act which deals with 'redress for unlawful discrimination'.

Section 46PH of the AHRC Act already had in place a series of provisions which allowed the President of the Commission, upon specific grounds, to terminate a complaint prior to a resolution between the parties. These included circumstances in which 'the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination' or 'the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance'.[34]

But as Prime Minister Turnbull's comments at note 29 above make clear, the Government clearly did not believe that these legislative powers, accorded within the AHRC Act to the President, were sufficient to avoid instances such as the Leak and QUT cases which, the Prime Minister insisted above, 'should not have happened'. After all, s 46PH left it to the discretion of the President to determine whether a complaint should be terminated upon any of the grounds listed in the Act.[35] The Turnbull Government therefore sought to remove some

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[32] James Massola, 'Coalition Party Room Agrees to Push 18C Changes, Despite Warnings from Barnaby Joyce', *Sydney Morning Herald* (online), 21 March 2017 <http://www.smh.com.au/federal-politics/political-news/coalition-party-room-agrees-to-push-18c-changes-despite-warnings-from-barnaby-joyce-20170320-gv2ofd.html>. By contrast, the Abbott Government sought, from April 2014, to retain 'intimidate' within s 18C but replace 'insult', 'offend' and 'humiliate' with 'vilify' (Attorney-General's Department, *Freedom of speech (Repeal of S. 18C) Bill 2014* (2014, <https://www.ag.gov.au/Consultations/Documents/Attachment%20A.pdf)>. They ultimately abandoned this attempt, prior to introducing legislation into Parliament, in August 2014 (see Abbott (2014) above n 6).

[33] Michael Koziol and Latika Bourke, 'Senate Kills Off Turnbull Government's Changes to 18C Race Discrimination Law', *Sydney Morning Herald* (online), 30 March 2017 <http://www.smh.com.au/federal-politics/political-news/senate-kills-off-turnbull-governments-changes-to-18c-race-discrimination-law-20170330-gvadad.html>.

[34] AHRC Act s 46PH 1(a), (c).

[35] Such discretion is evident in the fact that the Act states: 'The President *may* terminate a complaint on any of the following grounds' (ibid s 46PH(1) (emphasis added).

of this discretion from the President by ensuring that termination of a complaint by the President would, in some circumstances, be 'mandatory'. The result is that the amended s 46PH now distinguishes between 'discretionary termination of a complaint' and 'mandatory termination of a complaint'. The relevant section of s 46PH relating to the latter is as follows:

> *Mandatory termination of complaint*
>
> (1B) The President must terminate a complaint if the President is satisfied that:
>
> (a) the complaint is trivial, vexatious, misconceived or lacking in substance; or
>
> (b) there is no reasonable prospect of the matter being settled by conciliation.
>
> (1C) The President must terminate a complaint if the President is satisfied that there would be no reasonable prospect that the Federal Court or the Federal Circuit Court would be satisfied that the alleged acts, omissions or practices are unlawful discrimination.
>
> (1D) A complaint may be terminated under subsection (1B) or (1C) at any time, even if an inquiry into the complaint has begun.[36]

The Government also introduced other amendments to the Act. These included the requirement that '[t]he Commission must act *fairly* in the performance of the functions referred to in paragraph 11(1)(f).'[37] These functions authorise the Commission to:

> (i) inquire into any act or practice that may be inconsistent with or contrary to any human right; and
>
> (ii) if the Commission considers it appropriate to do so—endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry.[38]

The Government also amended s 46PF of the AHRC Act, incorporating provisions that require the President of the Commission to notify the respondent to a complaint 'as soon as the President has decided to inquire into the complaint', 'unless the President is satisfied that notification would be likely to prejudice the safety of a person'.[39] The amendments also provide for the more expeditious handling of cases by the Commission. They state:

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[36] Ibid s 46PH 1(B)-1(D).
[37] Ibid s 20(9) (emphasis added).
[38] Ibid s 11(1)(f).
[39] Ibid s 46PF (7)(a) and 8(a).

> The President:
>
> (a) must, having regard to:
>
> (i) the nature of the complaint; and
>
> (ii) the needs of the complainant or complainants; and
>
> (iii) the needs of the respondent;
>
> (iv) act expeditiously in dealing with the complaint in accordance with this section; and
>
> (b) must use the President's best endeavours to finish dealing with the complaint within 12 months after the complaint was referred to the President under section 46PD.[40]

Upon securing passage of these amendments, the Turnbull Government, in quite triumphalist tones, identified the impetus for these changes as the Leak and QUT cases, and argued that the amendments expanded the scope for freedom of speech in Australia and ensured that such cases as these would not arise again:

> The Government has today passed the most significant reforms to the Australian Human Rights Commission in almost 20 years.
>
> These reforms will improve the complaints handling processes of the Commission and ensure that the recent cases of the students at QUT, and the complaint against the late great cartoonist Bill Leak do not happen again.
>
> The Government acted swiftly to respond to community concern about the abuse and the misuse of the Commission's processes, highlighted in the recent Parliamentary Joint Committee on Human Rights (PJCHR) Inquiry into Freedom of Speech.
>
> It has been clear that the Commission's model for resolving complaints has not operated as effectively as it should.
>
> The Commission will now have the powers it needs to terminate unmeritorious complaints as soon as possible. It will also be required to act fairly and expeditiously in dealing with complaints, and to notify respondents about a complaint …
>
> While the Government is disappointed that the Senate voted against strengthening section 18C of the *Racial Discrimination Act 1975*, the procedural changes agreed to today will ensure that

[40] Ibid s 46PF(10).

> the Human Rights Commission will never again be able to be used to prosecute ordinary Australians who merely want to express their right to free speech.[41]

V SECTIONS 18C AND 18D

In both the Leak and the Bolt Affairs, what was at the centre of debate was the legitimate scope of freedom of speech and, in particular, political criticism, within Australia. Political criticism is a narrower concept than freedom of speech because its subject matter is more specific. The question of what constitutes 'legitimate' political criticism in Australia is inevitably informed by the terms of ss 18C and 18D of the RDA, as determined by their judicial application, since these are among the relevant statutory provisions which shape the lawful limits of freedom of speech in Australia. Section 18C(1) states:

> It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act 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.[42]

Some free speech advocates have argued that s 18C should not exist at all, and that the provisions within it that limit free speech are unjustified.[43] Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, for instance, argue that s 18C 'impermissibly infringes' the implied constitutional freedom of political communication, affirmed by the High Court of Australia in 1992, and also fails to adequately reflect the 'spirit and letter' of the United Nations' *Convention on the Elimination of All Forms of Racial Discrimination,* which the RDA was originally intended to implement.[44] Others, such as the members of the Abbott and

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[41] George Brandis, 'Government Passes Major Reform to the Australian Human Rights Commission', *Media Release*, 31 March 2017 <https://www.liberal.org.au/latest-news/2017/03/31/government-passes-major-reform-australian-human-rights-commission>.

[42] RDA s 18C.

[43] See Chris Berg, Simon Breheny, Morgan Begg, Andrew Bushnell and Sebastian Reinehr, 'The Case for the Repeal of s. 18C', *Institute of Public Affairs* (2016) <https://ipa.org.au/wp-content/uploads/2016/12/IPA_Submission_The_Case_for_the_Repeal_of_Section_18C_09122016.pdf>; Leak, 'Submission to the Parliamentary Joint Committee on Human Rights into Freedom of Speech in Australia', above n 8, 3; Parliamentary Joint Committee on Human Rights, above n 8, 85.

[44] Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended. Why 18C is Wrong* (Connor Court Publishing, 2016) 8, 213-14. The Australian High Court, in two landmark judicial rulings in 1992, declared that freedom of political communication (a narrower concept than freedom of speech) is an implied freedom within the Australian Constitution (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106). The reasoning of some of the

Turnbull Governments, have sought to retain the basic legislative framework of s 18C, but have sought to alter its content so as to raise the threshold before limits on speech apply, thereby expanding the legal scope for freedom of expression within the Australian public sphere.[45] Most involved in the debate have conceded that even when speech contravenes the limits identified by s 18C, there are some circumstances wherein such speech should still be considered lawful, such contravention notwithstanding.

Indeed, s 18D of the RDA seeks to ensure precisely this, qualifying the operation of s 18C by identifying circumstances in which public 'acts' ought to be permitted, irrespective of the 'offence', 'insult', 'humiliation' or 'intimidation' on the basis of 'race, colour or national or ethnic origin' to which they give rise. As Bromberg J put it in the Bolt case: 'Section 18D of the RDA provides that s 18C does not render unlawful anything said or done "reasonably and in good faith", if done in furtherance of one or other of the pursuits identified in paragraphs (a)-(c) of s 18D.'[46] These 'pursuits' include 'anything said or done reasonably and in good faith' in 'the performance, exhibition or distribution of an artistic work; or … in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or … in making or publishing … a fair and accurate report of any event or matter of public interest; or … a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment'.[47]

Justice Bromberg, delivering his judgment in the Bolt case, described s 18D as 'a provision which, broadly speaking, seeks to balance the objectives of s 18C with the need to protect justifiable freedom of expression'.[48] In this way, he said, s 18C and s 18D 'seek to find a balance between freedom of expression and freedom from racial prejudice and intolerance based on race'.[49] Precisely where such 'balance' should lie, in any particular instance is, we shall see, a matter of individual judgment, with the result that individuals can reasonably differ on whether s 18C or s 18D ought to have priority in any specific set of circumstances.

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justices, leading to this conclusion, was similar to James Madison's, at n 51 below, and concerned the necessity of freedom of political communication within a democracy to hold democratic representatives accountable. See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138-39 (Mason CJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72-74 (Deane and Toohey JJ).

[45] See the discussion of the Abbott and Turnbull governments' attempts to reform s 18C at above n 32.

[46] *Eatock v Bolt* [2011] FCA 1103 [340], [351].

[47] RDA s 18D (a)-(c).

[48] *Eatock v Bolt* [2011] FCA 1103 [6].

[49] *Eatock v Bolt* [2011] FCA 1103 (Summary) [14]. See also *Eatock v Bolt* [2011] FCA 1103 [210].

VI SPEECH AND OFFENCE

Such legislation as ss 18C and 18D, seeking to regulate public speech, arises precisely because such speech can have consequences. As John Stuart Mill tells us, it can give rise to violence.[50] As s 18C makes clear, it can also give rise to 'offence'. This is particularly the case with political criticism which, if it is particularly robust, might be offensive to some individuals. Indeed, there is a reciprocal relationship between critical speech and offence. All critical speech is potentially offensive, particularly to those at the sharp end of such criticism. Conversely, all offensive speech is likely to contain an element of criticism. The result is that, in many cases, criticism and offense are inextricably bound together, so much so that, in some instances, it is not possible to have one without the other.

James Madison identified the close, at times inextricable, connection between political criticism (particularly as it is manifest in a free press) and offence, insisting that our desire to ensure freedom for the former meant that we had to put up with the latter:

> Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression … ?[51]

This intimate connection between criticism and offence has also been recognised by those in Australia wishing to defend what they perceive to be free speech principles. Tony Abbott, when Opposition leader, advanced a position similar to Madison above, insisting that 'offence' is the 'price' we 'pay' for 'free speech'. He did so in 2012, as part of his wider criticism of the Federal Court's ruling against Andrew Bolt the year before:

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[50] John Stuart Mill, 'On Liberty', in J S Mill, *Utilitarianism, Liberty, Representative Government* (Everyman's Library, 1971) 114.

[51] James Madison, 'Report on the Virginia Resolutions (1800)', in *The Founders' Constitution: Amendment I (Speech and Press)* <http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html>.

> The price of free speech – which we must be prepared to pay – is that offence will be given, facts will be misrepresented and lies will be told … Speech that has to be inoffensive would be unerringly politically correct but it would not be free.[52]

Of course, many would question the inclusive 'we' to which Abbott resorts in the statement above. They might point out that often, in the public exercise of speech, those who 'pay' the 'price' for such speech, in terms of its 'offense', are not those engaging in it, and therefore enjoying the freedoms of it, but rather those who are the subject of such speech, or to whom such speech is directed, particularly when such individuals are in a position of unequal power relative to those advancing the speech, and the speech involves vilification, denigration, or other negative processes. Katharine Gelber has identified 'hate speech' in such terms, and explained the persuasive force which it, at times, is able to acquire within liberal democratic polities, very much in terms of these unequal circumstances:

> Racist hate-speech-acts constitute discursive acts of racial discrimination against a target group, acts which reproduce and reinforce inequality on the grounds of race, and which simultaneously appeal to norms and values which legitimate such inequality … [H]ate-speech-acts of hate speakers are capable of inhibiting the ability to speak of its victims. This occurs when an utterance is made which raises 'truth' claims of an objective world characterised by inequality, and where the hate speaker is in a position of power relative to the hearer.[53]

Consequently, as concerns regarding 'hate speech' make clear, the speech that is most likely to be subject to demands for legal proscription is the speech that is perceived to result in some sort of 'harm'. After all, we all agree with free speech for speech that we agree with. It is speech that is widely perceived as noxious, irresponsible, unequal, erroneous or offensive that is most likely to be subject to demands for proscription. As John Dunn put it:

> There is … only a need for freedom of expression where what is to be expressed is likely or certain to wound or outrage the feelings of fellow human beings.[54]

VII CRITICISM AND OFFENCE

Yet Dunn's statement, although true as a declaration of fact, falls short as a statement of principle. This is because although it is often the case that the speech that will most likely be

[52] Abbott (2012), above n 6.
[53] Katharine Gelber, *Speaking Back. The Free Speech versus Hate Speech Debate* (John Benjamins Publishing Company, 2002) 87, 117-118.
[54] John Dunn, 'What is Living and What is Dead in the Political Theory of John Locke', in John Dunn, *Interpreting Political Responsibility: Essays 1981-1989* (Polity Press, 1990) 20.

subject to proscription, and therefore possibly give rise to demands for protection, is speech that 'is likely or certain to wound or outrage the feelings of fellow human beings', this does not tell us which speech, that falls into this category, *ought* to be protected from proscription, the offence it causes notwithstanding, and which speech, having these same consequences, *ought* to be proscribed. After all, unless we wish to say that *all* speech that 'is likely or certain to wound or outrage the feelings of fellow human beings' *ought* to be protected, or *ought* to be proscribed, we need some basis for deciding, in any particular instance, which speech acts, involving what type or level of offence, *ought* to be subject to one of these outcomes rather than the other.

The key competing considerations, therefore, in determining the appropriate limits of political criticism, are these. If criticism and offence are at times inextricable, at what points, in acts of public speech, does the import of one outweigh the other, so that either:

1. The speech is deemed permissible because of the weight of its critical content, the offence it causes notwithstanding?
   Or:
2. The offence (and therefore harm) that the speech carries is of such gravity that, irrespective of its critical content, it can no longer be defended as a legitimate contribution to public debate, and so ought to be proscribed?

It is precisely these questions that arise in any evaluation of the respective claims of s 18C and s 18D, since each of these provisions embodies one of these competing considerations, and each can be enlisted to claim a priority over the other in the context of specific circumstances.

VIII PUBLIC REASON

A person who places immense importance on ensuring a society in which individuals are not subject to 'offence', 'insult', 'humiliation', or 'intimidation' will arrive at very different conclusions, concerning such competing considerations, than individuals like James Madison or Tony Abbott who, as we saw above, insist on the profound importance of freedom of speech in liberal democracies (particularly when manifested in a free press) and insist that the 'price' we 'pay' for such freedom is often 'noxious' outcomes. The result is that individuals within liberal democracies will often disagree on the respective weight that ought to be accorded to these competing considerations, often from the sincerest motives.

It might be argued that such disagreement can be resolved, within such polities, if we adopt a model of 'public reason'. The idea of 'public reason', within the liberal tradition, has been associated with the work of John Rawls and his idea of 'political liberalism'. Rawls' model of 'public reason' is specifically designed to enable citizens, within liberal democratic polities, to reach publicly agreed conclusions on issues upon which they might otherwise be divided.

Rawls' model of 'public reason' has a number of features. Rawls declared that individuals within a liberal democracy, when acting in their public capacity as citizens, have a 'duty of civility' towards each other.[55] One of the conditions of this 'duty of civility' is that when seeking to persuade each other on matters of public import, citizens should articulate their respective claims in ways that 'can be supported by the political values of public reason'.[56] This means that when seeking to justify the public propositions they wish to advance, they 'should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality'.[57] As such, they should not advance, as part of such justification, ideals such as the 'will of God', or some equally contestable concept, upon which disagreement is likely to be endemic and, in the absence of commonly agreed criteria, irresolvable.[58] According to Rawls, 'trying to meet this condition' of civility 'is one of the tasks that this ideal of democratic politics asks of us'.[59]

Rawls argued that such a model of 'public reason' must also satisfy what he calls the 'criterion of reciprocity'. The 'criterion of reciprocity' is satisfied when 'we sincerely believe that the reasons we would offer for our political actions … are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons'.[60] This model of 'public reason', involving a 'duty of civility' and a 'criterion of reciprocity', is therefore meant to exclude from public debate those reasons which others might not be capable of reasonably endorsing, thereby removing 'from the political agenda the most divisive issues, serious contention about which must undermine the bases of social cooperation'.[61]

[55] John Rawls, *Political Liberalism* (Columbia University Press, revised ed, 2005) 444.
[56] Ibid 217.
[57] Ibid 218.
[58] John Rawls, *A Theory of* Justice (Oxford University Press, 1972) 216, 217.
[59] Rawls, above n 55, 218.
[60] Ibid 446-47.
[61] Ibid 157.

Rawls was aware that rival public claims concerning specific 'truths' (such as the 'will of God' referred to above) were capable of falling short of the ideal of 'public reason', because unable to satisfy the 'duty of civility' and 'criterion of reciprocity'. He believed this was the case because individuals could reasonably have a contrary conception of such 'truths', with no impartial criterion to decide between such competing claims. In such circumstances, when individuals publicly insist on their own 'truth' in the face of the reasonable objection of others, 'civility' and 'reciprocity' (and therefore the regulative role of 'public reason') breaks down:

> Since many doctrines are seen to be reasonable, those who insist, when fundamental political questions are at stake, on what they take as true but others do not, seem to others simply to insist on their own beliefs when they have the political power to do so. Of course, those who do insist on their beliefs also insist that their beliefs alone are true: they impose their beliefs because, they say, their beliefs are true and not because they are their beliefs. But this is a claim that all equally could make; it is also a claim that cannot be made good by anyone to citizens generally. So, when we make such claims others, who are themselves reasonable, must count us unreasonable.[62]

IX NON-NEUTRAL PRINCIPLES

As Aristotle tells us, when it comes to matters of 'truth', 'what is white or straight is always the same'.[63] However, while our judgments are likely to concur regarding such 'facts', this is not always the case when questions of 'truth' are involved, with the result that disagreement may arise. This is because, as we saw in the case of 'public reason', individuals might adhere to different 'truths', or different 'principles', which they seek to apply to the same 'facts', or because (as in propositions concerning the 'will of God') they might adhere to the *same* 'principle' but disagree about its meaning and application to particular 'facts'. In the latter case, although individuals might agree about the 'truth' of a particular 'principle', they may disagree about the *extent* to which it applies to a particular set of 'facts', or the *way* in which it applies to such 'facts', and therefore disagree concerning the extent to which judgments, based on this 'principle', are relevant to those 'facts'. In those situations in which there is no neutral and impartial criterion capable of resolving such disagreement, incontrovertibly applying a general 'principle' to a particular set of 'facts', the 'principle' may be described as 'non-neutral'. As Gerald Dworkin puts it:

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[62] Ibid 61 (emphasis added). See also Rawls, above n 58, 216-17.
[63] Aristotle, *The Nicomachean Ethics* (Penguin, 2004) Book VI, vii, 153.

> It is important to realize that the controversy in question here is not one concerning the correctness or incorrectness, rightness or wrongness of the principle, but one concerning whether or not the controversial predicate in question applies to the particular case. Thus a principle that states that killing of redheaded people is justified is neutral in my sense, since one can tell which people are redheaded and which are not. On the other hand, one that states that killing in self-defense is legitimate is non-neutral, since parties will often differ as to when a case is one of self-defense.[64]

Needless to say, any principle which is 'non-neutral' may not qualify as a proposition that can be advanced, in the context of public debate, in ways consistent with the norms of 'public reason'. This is because, being 'non-neutral', individuals, although possibly agreeing on the broad meaning or 'truth' of the principle in question, may disagree as to whether it ought to be applied to a specific set of 'facts', or the extent or meaning of that application, and therefore on whether it is a relevant principle upon which judgment should be reached concerning such facts.

X UNDERDETERMINED REASON I

For the purposes of our discussion, the key terms identifying harm under s 18C ('offence', 'insult', 'humiliation' or 'intimidation') as well as the terms identifying a statement made in 'good faith' under s 18D, are 'principles' that must, in any particular appeal to these legislative clauses, be applied to a specific set of facts. The application of these 'principles' to these 'facts' might be one in which we are required to decide whether a particular public 'act' has caused 'offence' on the basis of 'race, colour or national or ethnic origin', and whether, having done so, it is nevertheless one that, being made in 'good faith', for one of the reasons outlined in s 18D, ought to be considered lawful.

Neither ss 18C or 18D provide any criteria concerning how the general 'principles' incorporated in each should be applied to particular 'facts', or the relative weight that each should be accorded in any 'balancing' process between them. In other words, all such 'application' and 'balancing' requires individual judgement which, as Charles Larmore tells us, is the 'faculty of insight into how general rules are to be applied to particular situations'.[65]

[64] Gerald Dworkin, 'Non-Neutral Principles' (1974) 71(14) *The Journal of Philosophy* 491, 493.
[65] Charles Larmore, *Patterns of Moral Complexity* (Cambridge University Press, 1987) ix.

What is significant for our purposes is that the 'principles' embodied in ss 18C and 18D are 'non-neutral'. This is because even when individuals are able to agree on their meaning in general, they may reasonably disagree as to whether they apply to a particular set of facts, or the extent to which they apply, or the relative weight (and therefore significance) that should be accorded to each when applied to these facts. For example, while they may agree on what 'intimidation' means in principle, they may disagree on whether 'intimidation' has occurred in the specific set of circumstances that has given rise to a s 18C complaint, or if it has, whether the public 'act' that produced such 'intimidation' should nevertheless be considered lawful given the considerations of s 18D. Further, they may disagree concerning the relevant criteria to be applied to resolve such uncertainties.

In such cases of 'non-neutrality', individuals (as Larmore tells us above) must rely on their individual judgment. Further, as Aristotle tells us, such judgment can differ.[66] In such a context, the use of reason is 'underdetermined', because it is unable to reach objective, veridical conclusions upon which all can agree, while there is no commonly agreed criteria to resolve any disagreement that persists. On the other hand, the disagreement that arises in such 'underdetermined' contexts can still be 'reasonable'. This is so if it is engaged in by sane persons (as defined by law) whose commitment to agreement is genuine and whose judgments, advanced in debate, arise from sincere motives. In the context of a liberal democratic polity, it is also possible to add to this conception of 'reasonableness' the Rawlsian criteria of 'reciprocity' and 'civility', discussed above, along with Rawls' additional criterion that the competing individual beliefs (or what Rawls calls 'doctrines') that inform public debate are 'reasonable' if they do not 'reject the essentials of a constitutional democratic polity'.[67]

[66] For Aristotle, such judgment required *phronêsis* - *phronêsis* being the intellectual virtue of deliberating and calculating, and therefore making informed judgments, 'with a view to some serious end' (Aristotle above n 63, Book VI, v, 150). Such reasoning may require an evaluation of available means, and a determination of which of these means is the most effective in achieving specifically chosen ends (or 'goods'). What we consider 'prudent' in these circumstances, Aristotle tells us, will 'vary' depending on what we think is 'good', and also what we consider, in specific circumstances, to be the best means to achieve this 'good', 'prudence' being concerned with such means (ibid, Book VI, v, vii, xii, 150, 153-154, 163). So whereas 'scientific knowledge consists in forming judgements about things that are universal and necessary', giving rise to 'demonstrable truths', 'prudence', like 'art', Aristotle tells us, is concerned solely with what is 'variable' (ibid, Book VI, vi, 151-52). 'Prudence', therefore, requires 'judgment' (*phronêsis*), not least concerning the applicability of principles to shifting empirical facts, and the relation of both to the end ('good') one wants to achieve. Similarly, *phronêsis* is required when seeking to apply non-neutral principles, like those we have identified in ss 18C and 18D, to the specific factual circumstances in which, it is believed, such legislative clauses apply, since such application (and the conclusions arising from this) is not self-evident, but subject to individual judgment, with the result that each individual's conclusions on these matters may differ.

[67] Rawls, above n 55, 488.

XII THE FEDERAL COURT AND SECTION 18C

'Non-neutrality', referred to above, along with the 'reasonable' disagreement that follows, is evident if we consider the case law on s 18C. For instance, in its reference to a public 'act' producing 'offence', 'insult', 'humiliation' or 'intimidation', s 18C(1)(a) refers to the 'reasonable likelihood' of these outcomes occurring, not the *actuality* of their doing so.[68] On these grounds, whether a person or group actually *was* 'offended', 'insulted', 'humiliated' or 'intimidated' as a result of a 'public act' is neither 'required' nor 'determinative' in any conclusion that such an act was 'unlawful' under s 18C. Justice Bromberg made this point as follows:

> Section 18C(1)(a) requires an assessment to be made of the reasonable likelihood of a person or group of people being offended, insulted, humiliated or intimidated … by the act of another person. That calls for an assessment of the reasonably likely reaction of the person or the people within the group concerned. It is thus the risk of a person or one or more people within a particular group of people being offended, rather than the actuality of offence, that is being assessed. Proof of actual offence for a particular person or group is neither required nor determinative, although evidence of subjective reaction is relevant to whether offence was reasonably likely …[69]

The Federal Court of Australia declared that an 'objective test' is necessary to determine if, as a result of a public 'act' subject to complaint under s 18C, 'offence', 'insult', 'humiliation' or 'intimidation' was a 'reasonable likelihood', with the result that s 18C(1)(a) has been contravened. As Justice Drummond put it in 2000:

> It is apparent from the wording of s 18C(1)(a) that whether an act contravenes the section is not governed by the impact the act is subjectively perceived to have by a complainant. An objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within the sub-section. The question so far as s 18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?[70]

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[68] See above n 42.
[69] *Eatock v Bolt* [2011] FCA 1103 [241].
[70] *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) FCA 1615 [15] (Drummond J).

The Federal Court is therefore of the view that, for the purposes of s 18C(1)(a), the question of 'reasonable likelihood' can be determined 'objectively'. Similarly, Bromberg J, in the Bolt case, declared that '[t]he assessment required by s 18C(1)(a) is obviously to be conducted objectively and not subjectively'.[71]

However such references to 'objectivity' notwithstanding, the question of 'reasonable likelihood', referred to in Bromberg J's passage at note 69 above, is inherently non-objective, because any judgment concerning such 'likelihood' will be informed by multiple variables, all of which (including their relative significances) will be subject to the choice and judgment of individuals. For instance, what individuals believe is 'likely to offend' a particular type of person or group of people, belonging to a specific racial, national or ethnic group, in any specific circumstance, will differ depending on each individual's judgment of the circumstances involved, the factors they decide to consider, the relative weight they place upon them, and that individual's own personal experiences and the capacities of empathy and understanding that these make possible.

Justice Bromberg sought to preclude such indeterminacy by citing case law that purported to determine when a consequence or outcome could be said to be 'reasonably likely'.[72] In particular, he quoted the view of Marks J in *Department of Agriculture and Rural Affairs v Binnie*, which declared:

> The expression 'reasonably likely' is substantially idiomatic, its meaning not necessarily unlocked by close dissection. In its ordinary use, it speaks of a chance of an event occurring or not occurring which is real – not fanciful or remote. It does not refer to a chance which is more likely than not to occur, that is, one which is 'odds on', or where between nil and certainty it should be placed. A chance which in common parlance is described as 'reasonable' is one that is 'fair', 'sufficient' or 'worth noting'.[73]

On this basis, Bromberg J concluded:

[71] *Eatock v Bolt* [2011] FCA 1103 [242]. For what the Court might mean by 'objective', in this context, see below n 75 and 126.
[72] See ibid [258]-[260].
[73] *Department of Agriculture and Rural Affairs v Binnie* (1989) VR 836, 842 (Marks J), quoted in *Eatock v Bolt* [2011] FCA 1103 [259].

> I can see no reason why the expression 'reasonably likely' as utilised in s 18C(1)(a) should not be given the meaning identified in *Binnie* as speaking 'of a chance of an event occurring or not occurring which is real – not fanciful or remote'.[74]

But far from providing us with the level of precision assumed by Bromberg J's declaration, at note 71 above, that '[t]he assessment required by s 18C(1)(a) is obviously to be conducted objectively and not subjectively', such a definition of 'reasonably likely' simply compounds the potential for disagreement and contestation. This is because, like so many idiomatic expressions, while individuals might be able to agree regarding its meaning in general, any application of this definition to a particular set of circumstances (to determine if such 'reasonable likelihood' arises in such circumstances) will be subject to the contingency of individual judgment, with all of the multifarious and idiosyncratic factors identified above, and the reasonable disagreement which is likely to follow.

In other words, the phrase 'reasonably likely' is a 'non-neutral' term. While some might argue that there is little room for reasonable disagreement concerning whether the Bolt newspaper articles, or the Leak cartoon, were 'reasonably likely' to cause 'offence' to indigenous Australians, the fact that the phrase is a 'non-neutral' term, whose application to specific circumstances is subject to reasonable disagreement, means any process of reasoning at which this term is at the centre cannot be described as 'objective'. Nor can any 'test' that the Court might formulate provide such 'objectivity'. Consequently, the reference, by members of the Federal Court, to 'objectivity', or 'objective tests', in such circumstances, to determine 'reasonable likelihood' of 'offence', 'insult', 'humiliation' or 'intimidation', is philosophically ill-informed.[75]

XIII 'REASONABLE HYPOTHETICAL MEMBER'

The Federal Courts might be said to have responded to this problem by declaring that the question of 'reasonable likelihood' is to be determined, within its 'objective test', by

[74] *Eatock v Bolt* [2011] FCA 1103 [260].

[75] Of course, it could be that when Bromberg J and others in the Federal Court use the term 'objective', in this context, they simply mean that the relevant judgments are not to be determined by the subjective impressions of the parties to the specific action in question. My point, however, is that irrespective of who has the authority to make the relevant judgements at issue, the judgments themselves will be just as 'individual', and so just as 'subjective', as those of the parties to the action, if 'non-neutral' terms are involved. Indeed, such terms inevitably *will* be involved because all judicial decisions, involving the application of general laws or legal concepts to particular facts, involve such non-neutral terms, and so involve inherently subjective judgment. While such realities are inescapable, the application of a term like 'objective', in such contexts, blurs this, providing a pretense to precision which is simply not available, and so the use of such a term is misleading and out of place.

appealing to the experience of 'a reasonable hypothetical member of a particular racial or ethnic group which is the target of the alleged conduct.'[76] As Bromberg J declared in his summary of the Bolt case: 'I have concluded that the assessment is to be made by reference to an ordinary and reasonable member of the group of people concerned and the values and circumstances of those people'.[77] In this context, Bromberg J insisted, only limited account is to be taken of '[g]eneral community standards'.[78]

Yet this criterion of appealing to 'a reasonable hypothetical member of a particular racial or ethnic group which is the target of the alleged conduct' to determine whether 'offence', 'insult', 'humiliation' or 'intimidation' is 'reasonably likely' to have occurred as a result of such conduct, with the result that s 18C(1)(a) is contravened, has been subject to contestation. Forrester, Finlay and Zimmermann, for instance, declare that the criterion is at odds with 'equality before the law'. As they put it: 'To have someone's legal liability depend on the race, colour, ethnicity or nationality of their audience or themselves is the antithesis of equality before the law … [This is because] someone may be legally liable in circumstances where another may not, and the *only* point of difference is the race, colour, ethnicity or nationality of the speaker or audience … '[79]

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[76] Parliament of Australia 2017, above n 30, sec 2.24. Of course, the appeal to such a 'reasonable hypothetical member' requires some criterion of what constitutes, on the part of such a member, a 'reasonable' response to a public 'act', to determine if 'offence' etc, is a 'reasonable likelihood'. Justice Bromberg affirms, on this point, Dowsett J in *National Exchange Pty Ltd v Australian Securities and Investments Commission*, who declared: 'Such a test does not necessarily postulate only one reasonable response in the particular circumstances. Frequently, different persons, acting reasonably, will respond in different ways to the same objective circumstances. The test of reasonableness involves the recognition of the boundaries within which reasonable responses will fall, not the identification of a finite number of acceptable reasonable responses.': *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90 [24] (Dowsett J) quoted in *Eatock v Bolt* [2011] FCA 1103 [251].

[77] *Eatock v Bolt* [2011] FCA 1103 (Summary) [15]. See also *Eatock v Bolt* [2011] FCA 1103 [250], [268]; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 [16]**.** Bromberg J points out that s 18C(1)(a) refers to public 'acts' directed to both a single 'person' and a 'group of people'. He declares that in those circumstances where the 'public act' is directed to a particular 'person', and 'a personal claim' of 'offence', 'insult', 'humiliation' or 'intimidation' has been made, there is no need to substitute a 'hypothetical' person for the 'person' affected by the 'act', in determining 'likelihood' of 'offence', but rather this 'likelihood' can be 'analysed from the point of view' of the 'identified person' themselves: *Eatock v Bolt* [2011] FCA 1103 [250]. Yet he insists if a 'public act', falling within the auspices of s 18C, is directed to a 'group of people', it is necessary to assess the 'likelihood' of 'offence' etc., by reference to a 'hypothetical representative' of the group: ibid.

[78] *Eatock v Bolt* [2011] FCA 1103 (Summary) [15]. Bromberg J also stated that '[w]hether the act in question is reasonably likely to have caused offence is to be assessed on the balance of probabilities … The onus of proof on that, and the other elements of s 18C, rests with the applicant': *Eatock v Bolt* [2011] FCA 1103 [261]. Needless to say, a reference to a 'balance of probabilities' does not make assessments of 'reasonable likelihood' any more 'objective' or the conclusions of the Federal Court's 'objective test' any less controvertible. This is because each individual, with full variability of judgment, will choose what factors they believe relevant to this 'balance', and what relative weight and comparative significance they will place upon each factor, thereby determining the outcome in their own particular way. Once more, therefore, outcomes will reasonably differ.

[79] Forrester, Finlay and Zimmermann, above n 44, 56 (emphasis added).

Some who have sought to amend s 18C to ensure a wider scope for political criticism have insisted that, contrary to Justice Bromberg and others above, the criterion of 'likelihood' ought *not* to be based on 'a reasonable hypothetical member of a particular racial or ethnic group which is the target of the alleged conduct.' For instance, the proposed Abbott Government reforms to s 18C, released by the Attorney-General, George Brandis, on 25 March 2014, included the proposal that whether an act was 'reasonably likely to have the effect' of 'intimidation' or 'vilification' was 'to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community'.[80] The Parliamentary Joint Committee's report on 'Freedom of Speech in Australia', referred to above, declared that this same proposal was among those that had the support of 'at least one member of the committee' but not majority support.[81]

What this shows is that, the Court's reference to an 'objective test' notwithstanding, there is nothing 'objective' about the criterion, used within this 'test', to determine the 'reasonable likelihood' of whether unlawful action has occurred under s 18C(1)(a). Despite Justice Bromberg's declaration that '[t]he emotions upon which s 18C(1)(a) turns are those of a victim and not of an aggressor',[82] reasonable justification is provided by others above why 'reasonable likelihood' might be determined not by reference to the group to which those subject to the public 'act' in question belong but rather by the broader criterion of 'an ordinary reasonable member of the Australian community' advocated by some of those seeking reform to s 18C.[83] The result is that, in regard to this question of criteria, reasonable

[80] Attorney-General's Department (2014) above n 32.
[81] Parliament of Australia 2017, above n 30, rec 3(e). Forrester, Finlay and Zimmermann have also advocated this reform: Forrester, Finlay and Zimmermann, above n 44, 224-25.
[82] *Eatock v Bolt* [2011] FCA 1103 [206].
[83] Bromberg J rejects this proposed reform. He insists that the wording of s 18C(1)(a) makes clear that the 'person' or 'group of people' referred to are those 'that the conduct in question was directed at' (ibid [246]). He declares that to substitute a 'reasonable person' test, reflecting general 'community standards', to determine the 'likelihood' of 'offence' etc, would therefore 'result in the perspective clearly required by the words of s 18C(1)(a) to be ignored': ibid [253]. As Bromberg J put it: 'It is the values, standards and other circumstances of the person or group of people to whom s 18C(1)(a) refers that will bear upon the likely reaction of those persons to the act in question. It is the reaction from their perspective which is to be assessed …': ibid. For the purposes of the Bolt case, however, Bromberg J. insists that irrespective of the 'test' used he would have arrived at the same conclusions: '[I]f, contrary to my view, the assessment of the reaction of the ordinary representative of the group should be made by reference to the imputations conveyed to the ordinary and reasonable reader … I would in any event have reached the same conclusions as those here expressed': ibid [299]. He adds further that 'to import general community standards into the test of the reasonable likelihood of offence', as would be the case if 'reasonable likelihood' was determined by the above-mentioned 'reasonable person' test (ie 'an ordinary reasonable member of the Australian community'), 'runs a risk of reinforcing the prevailing level of prejudice' which, he says, would be at odds with the wider purposes of Part IIA of the RDA: ibid [253]. He declares that these wider purposes include ensuring freedom from 'the harm caused by the dissemination of racial prejudice':

contestation arises, and any conclusions on the matter, far from being 'objective', are 'underdetermined'.

XIV 'PROFOUND AND SERIOUS EFFECTS'

The Federal Court of Australia has sought to provide some further clarity on this issue. They have sought to consider what magnitude of 'effect' or 'consequence' a public 'act' must produce in order to constitute 'offence', 'insult', 'humiliation' or 'intimidation' under the terms of s 18C(1)(a). To this end, Kiefel J pointed out that Part IIA of the RDA, in which s 18C appears, has a heading entitled 'Prohibition of Offensive Behaviour Based on Racial Hatred'.[84] Given this focus on 'racial hatred', she therefore concluded that 'only very serious and offensive behaviour was intended as the subject of s 18C'.[85] As she put it:

> Pursuant to the section the nature or quality of the act in question is tested by the effect which it is reasonably likely to have on another person of the racial or other group … To *"offend, insult, humiliate or intimidate"* are profound and serious effects, not to be likened to mere slights. Having said that, the court would of course be conscious of the need to consider the reaction from that person or group's perspective.[86]

Yet despite Kiefel J's declaration that it is the Part IIA heading of the RDA, referring to 'racial hatred', which informs her opinion that a public 'act' contravening s 18C must

ibid [210]. They also include the objectives of a 'multicultural society', which Bromberg J insists, are the 'promotion' of 'tolerance' and the 'protection' against 'intolerance', 'acceptance of racial and ethnic diversity', and 'the idea that people may identify with and express their racial or ethnic heritage free of pressure not to do so': ibid [334]. Given that the RDA is meant to incorporate these wider purposes, Bromberg J concludes that the 'purposes' underwriting s 18C are 'public' (as distinct from 'private'). He does so by pointing out that s 18C(1) excludes 'private' acts (see the reference to 'otherwise than in private' at n 42 above). He declares that such an exclusion 'suggests that the section is at least primarily directed to serve public and not private purposes … That suggests that the section is concerned with consequences it regards as more serious than mere personal hurt, harm or fear. It seems to me that s 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society': ibid [263]. He therefore concludes: 'In my view, "offend, insult, humiliate or intimidate" were not intended to extend to personal hurt unaccompanied by some public consequence of the kind Part IIA is directed to avoid.': ibid [267]). He concedes that such 'public consequence need not be significant. It may be slight': ibid. Nevertheless 'a consequence which threatens the protection of the public interest sought to be protected by Part IIA', rather than a mere 'personal hurt', is, he insists, 'a necessary element of the conduct s18C is directed against': ibid.

[84] See *Creek v Cairns Post Pty Ltd* (2001) FCA 1007 [14] (Kiefel J). Kiefel J points out that the same legislative intent, centred on prohibiting behaviour arising from 'racial hatred', was also apparent in the Second Reading Speech and Explanatory Memorandum to the *Racial Hatred Bill 1994*, which, as the *Racial Hatred Act 1995* (Cth), amended the *Racial Discrimination Act 1975* (Cth) by inserting into the Act sections 18B to 18F: ibid [14]. However see n 87 below on how 'racial hatred', as the proposed subject matter of s 18C, did not survive the legislative process.

[85] Ibid.

[86] Ibid [16] (emphasis in original). See n 83 above where Bromberg J argues that the 'effect' of the public 'act', falling within the jurisdiction of s 18C, must also be 'public', affecting the wider 'purposes' which Part IIA of the RDA is conceived to uphold, and not a mere 'private' effect based on 'personal hurt'.

constitute 'very serious and offensive behaviour', having 'profound and serious effects', she explicitly repudiates the conclusion that the public 'act' must arise from 'racial hatred' in order to contravene s 18C:

> Whilst one may accept that hatred of other races is an evil spoken of in the statute, I do not consider that the heading creates a separate test - one which requires the behaviour to be shown as having its basis in actual hatred of race. Sections 18B and 18C make it plain that the prohibition will be breached if the basis for the act was the race, colour, national or ethnic origin of the other person or group. Whilst the reason for the behaviour in question may be a matter for enquiry … the intensity of feeling of the person whose act it is, is not necessary to be considered, although in some cases it might shed light on what is otherwise inexplicable behaviour.[87]

With this statement, Kiefel J makes clear that the intention of the agent, engaging in a public 'act', is not relevant to determining if the 'act' has contravened s 18C(1)(a). Such intention, however, is relevant to determining if the 'act' has contravened s 18C(1)(b). This is because this provision requires that the 'act' be done 'because of the race, colour or national or ethnic origin' of a person or a group of people.[88] As Kiefel J explains in the passage above, it is not necessary that such intentions include 'racial hatred', but, for the purposes of s 18C(1)(b), it

[87] *Creek v Cairns Post Pty Ltd.* (2001) FCA 1007 [18] (Kiefel J). Justice Bromberg also advances the view that the public 'acts' falling under s 18C are not those confined to acts of 'racial hatred'. He points out that although the RDA was intended to give effect to the Commonwealth's obligations under the United Nation's *International Convention on the Elimination of all Forms of Racial Discrimination* ('Convention'), it does not give effect to article 4(a) of that Convention which seeks to create a criminal offence for 'all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof' *Eatock v Bolt* [2011] FCA 1103 [197]). Bromberg J points out that '[a] proposed criminal offence proscribing the promotion of racism in the manner condemned by Art 4(a) [of the Convention] formed part of the Racial Discrimination Bill introduced in 1974 but … was rejected by the Senate': ibid [198]. The *Racial Hatred Bill 1994* (Cth), which, in its eventual form as the *Racial Hatred Act 1995* (Cth), amended the *Racial Discrimination Act* by incorporating into it Part IIA (including ss 18C and 18D), originally had a provision proposing, as in 1974, to create a range of criminal offences relating to racial hatred, intended to give effect to Article 4(a) of the Convention, and amending the *Crimes Act 1914* (Cth) to this purpose: ibid [199]-[201]). However, as Carr J has pointed out, that amendment was once more rejected by the Senate (*Toben v Jones* [2003] FCAFC 137 [18] (Carr J). Consequently, although the heading of Part IIA of the RDA refers to 'Prohibition of Offensive Behaviour Based on Racial Hatred', the provisions of the *Racial Hatred Act 1995* (Cth), part of which became s 18C of the RDA, 'made no reference to the incitement of racial hatred and did not require an act to intentionally inflict harm as an element of breach. Instead, the civil provisions focused upon racially offensive behaviour and (by what became s 18D) included free speech protections which were not included in the proposed criminal offence of inciting racial hatred': *Eatock v Bolt* [2011] FCA 1103 [202]).

[88] See note 42 above. See also *Eatock v Bolt* [2011] FCA 1103 [306], [307], [309].

is necessary that they include a motivation for the public 'act' based on the 'race, colour or national or ethnic origin' of the target person or group.[89]

Kiefel J's ruling on the interpretation and application of s 18C(1)(a) ('very serious and offensive behaviour' having 'profound and serious effects') has become accepted legal precedent, being affirmed numerous times in case law.[90] However it does not remove the issue of 'non-neutrality' with which we began. This is because just what is to be considered, in any specific circumstance, 'very serious and offensive behaviour' having 'profound and serious effects' (and not, therefore, to be confused with 'mere slights') will, once again, be a matter for individual judgment, involving multiple variables, selected on the basis of numerous individual experiences, whose relative weight and significance will also be subject to this same judgment, and upon which, individuals may differ. While there will clearly be instances in which the impact of a public 'act' is so onerous and overt that few would disagree that the 'act' has had a 'profound and serious effect', sufficient to produce 'offence', 'insult', 'humiliation' or 'intimidation' under the terms of s 18C(1)(a), nevertheless in the case of lesser public 'acts', disagreement is likely to arise. In such circumstances, what one individual considers, in relation to a specific public 'act', a 'profound and serious effect', may not, due to the variability of individual judgment, be so perceived by another. The varying perspectives on the Leak, Bolt and QUT cases would be examples of this disagreement. 'Profound and serious effects' is therefore, when used in this context, a 'non-neutral' term, and the use of reason, by each individual, in their judgment concerning the

[89] Justice Bromberg, in the Bolt case, also makes clear this focus on 'intention' or 'motivation' in the application of s 18C(1)(b). He states that whereas s 18C(1)(a) 'concerns the likelihood of the impugned act causing offence', s 18C(1)(b) 'concerns the reason for the impugned act': ibid [193]. He states that '[s]ection 18C(1)(b) specifies the causal nexus between the act reasonably likely to offend and the racial or other characteristic or attribute of one or more of the persons reasonably likely to have been offended … That nexus or link is concerned with the reason that the act was done': ibid [303]. Bromberg J makes clear that the 'reason' for which the 'act' was done includes the 'motivation' of those engaging in the act: ibid [306]. He states that for the purposes of s 18C(1)(b), this 'motivation' must, at least in part, be determined by the 'race, colour or national or ethnic origin' of the target person or group: see ibid [307], [309]. As Bromberg J puts it: 'A publication, a speech or other communication may have many parts and different parts may be motivated by different reasons': ibid [304]. While it is 'not necessary', for the purposes of s 18(1)(b), that the 'race, colour or national or ethnic origin' of a person or group 'be the dominant reason or a substantial reason for the doing of the act … [n]evertheless, the reason will need to be an operative reason in the sense that it was involved in actuating the act': ibid [306]. Concerning the specific motivations of Andrew Bolt, in the publication of his newspaper articles, Bromberg J states: 'I have no doubt that one of the reasons which motivated Mr Bolt was his desire to convey a message about the Aboriginality and thus the race, ethnic origin and colour of the people dealt with by the imputations. I am satisfied that Mr Bolt wrote those parts of the Newspaper Articles which convey the imputations, including because of the race, ethnic [origin] … and colour of the people who are the subject of them … While I accept that Mr Bolt was motivated to write about what he perceived to be the identity choices made, I do not accept that race, colour and ethnic origin were not motivating reasons.': ibid [322], [326].

[90] See ibid [268]; Parliament of Australia above n 30, sec. 2.21; Forrester, Finlay and Zimmermann above n 44, 17-18. See also n 99 below.

application of this term to specific circumstances, will therefore be 'underdetermined'. Further, any 'balancing' of such s 18C considerations with s 18D, and the exemptions it purports to provide, will also be a matter of individual judgment, with the same 'underdetermined' consequences.

XV JUSTICE BROMBERG AND SECTIONS 18C AND 18D

Indeed, such 'non-neutral' terms are inevitable in legal decision-making because the contents of legislation have to be applied to particular circumstances, and because such circumstances cannot be anticipated within the legislation itself, individual judgment is required. Justice Bromberg acknowledged the inevitability of this individual judgment in the Bolt case. As part of his interpretation of Part IIA of the RDA, within which s 18C is located, he referred to 'two foundational values', with which, he says, the 'purpose and policy' of Part IIA is 'concerned'.[91] The first, he said, is freedom from 'the harm caused by the dissemination of racial prejudice'.[92] The second is the norm of 'freedom of expression', which he says, must 'be balanced against the objective of promoting racial tolerance and proscribing inappropriate racially based behaviour'.[93] He points out that '[w]hilst to some extent' these 'values are complementary of each other, Part IIA puts them in contest and then seeks to identify a point of balance at which harmony between them is to be found'.[94] He states that '[w]hilst the terms of Part IIA provide the boundaries within which that search for harmony is to be undertaken, the search inevitably involves *evaluative judgment*'.[95] He declares that it is 'evaluative judgments' of this kind that 'the Court is authorised and required by the legislature to make'.[96]

Yet we have seen that such judgments, and the 'evaluations' they involve, are inherently individual, in the sense that they are informed by the specific, and unique, experience of those making the judgments, and further, inevitably involve the application of non-neutral principles to specific facts. We have also seen that those making these judgments will, for these reasons, often differ in their conclusions, with no neutral or impartial criterion to decide between them. Upon these grounds, we have declared that such judgments are

[91] *Eatock v Bolt* [2011] FCA 1103 [195]. See also ibid [211].
[92] Ibid [210].
[93] Ibid [210]. See also ibid [211], [226].
[94] Ibid [211].
[95] Ibid [211] (emphasis added).
[96] Ibid [211].

'underdetermined', with the result that their conclusions are by no means incontrovertible, and so disagreement between individuals on such matters is 'reasonable'.

Once again, this inherent variability in individuals' 'evaluative judgment' can be perceived in Justice Bromberg's conclusions in the Bolt case. Bromberg J found that, for the following reasons, the Bolt articles constituted 'unlawful conduct' under the terms of s 18C:

> I have determined that some of the messages (what lawyers call "the imputations") which were conveyed by the two newspaper articles, were reasonably likely to offend, insult, humiliate or intimidate the people in question (or some of them), and that those articles were written or published by Mr Bolt and HWT including because of the race, colour or ethnic origin of those people.[97]

Bromberg J declares that '[w]hether the act in question is reasonably likely to have caused offence is to be assessed on the balance of probabilities'.[98] Further, for the purposes of determining whether 'offence', 'insult', 'humiliation' or 'intimidation' is 'reasonably likely' to have occurred, Bromberg J endorses Kiefel J's test referred to at n 86 above:

> I would respectfully agree with the conclusion reached by other judges of this Court, that the conduct caught by s 18C(1)(a) will be conduct which has "profound and serious effects, not to be likened to mere slights": *Creek* at [16] (Kiefel J); *Bropho* at [70] (French J); *Scully* at [102] (Hely J); or, as Branson J put it in *Jones* at [92] "real, offence".[99]

We saw that Bromberg J ruled that a determination on whether Bolt's newspaper articles were 'reasonably likely to offend' 'is to be made by reference to an ordinary and reasonable member of the group of people concerned and the values and circumstances of those people'.[100] On the basis of his assessment of the circumstances of the case, Bromberg J arrived at his conclusion that such a person *would* be 'reasonably likely' to be 'offended', 'insulted', 'humiliated' and 'intimidated' by Bolt's newspaper articles:

> I consider it reasonably likely that the ordinary person within this group would have been offended and insulted by her perception that the Newspaper Articles were challenging the legitimacy of her identity and that of others like her … She will have been conscious that, given her appearance and her identification as an Aboriginal person, others may perceive her to have

[97] Ibid [8]. See also ibid [298], [452].
[98] Ibid [261]. See also n 78 above.
[99] *Eatock v Bolt* [2011] FCA 1103 [268]. See also ibid [297].
[100] See n 77 above.

> falsely chosen to identify as an Aboriginal person and done so for opportunistic or political reasons, just like those people that Mr Bolt wrote about. That will be very offensive and insulting to her because it is not true. Her Aboriginal identity is important to her. It is who she is … It is also reasonably likely that she will be humiliated and intimidated by her perception of the capacity of the Newspaper Articles to generate negative or confronting attitudes to her from others … She may now think twice about asserting her Aboriginal identity in public generally or in particular public settings. That will be particularly the case, if she is young or otherwise vulnerable in relation to challenges to her Aboriginal identity.[101]

Bromberg J then explained why such outcomes pass the 'Kiefel test' concerning 'profound and serious effects':

> Acts which are reasonably likely to cause offence, insult, humiliation or intimidation of that kind have "profound and serious effects" and are caught by s 18C(1)(a). That kind of likely offence is not to be likened to "mere slights". It has a real potential to lower the pride and self-image of the person or group attacked and thereby inhibit the participatory equality in the affairs of the community which the group and its members are entitled to enjoy. Conduct with these consequences threatens the dignity assurance which all citizens are entitled to be accorded. The reactions which I have concluded were reasonably likely, are not reactions likely to be caused by the intolerance of the people affected.[102]

Bromberg J then advanced a series of reasons why the newspaper articles, having these 'profound and serious effects', were not protected under s 18D:

> I have not been satisfied that the conduct is exempted from unlawfulness by s 18D. The reasons for that conclusion have to do with the manner in which the articles were written, including that they contained erroneous facts, distortions of the truth and inflammatory and provocative language and that as a result, the conduct of Mr Bolt and HWT is not justified in the manner required by s 18D of the RDA.[103]

Bromberg J denied that, for the purposes of s 18D, the Bolt newspaper articles constituted 'fair comment' or were written 'reasonably' and in 'good faith'.[104] Indeed, he declared that '[e]ven if I had been satisfied that the s 18C conduct was capable of being fair comment, I

[101] *Eatock v Bolt* [2011] FCA 1103 [293]-[296]. See also ibid [415].
[102] Ibid [297].
[103] Ibid [8], [452]. See also ibid [414], [422], [427], [451]. Bromberg J also cited what he believes is authoritative precedent that the onus of proof 'rests on the respondents to show, on the balance of probabilities, that his or her action falls within one of the exemptions in s 18D': ibid [339].
[104] Ibid [384], [386], [398], [425], [427].

would not have been satisfied that it was said or done by Mr Bolt reasonably and in good faith'.[105]

We saw at note 95 above that Bromberg J. conceded that any attempt to 'balance' the competing imperatives embodied in ss 18C and 18D required 'evaluative judgment'. Concerning Bromberg J's *own* judgment in the passage above, reasonable individuals might (aside from the reference to 'erroneous facts') legitimately disagree as to whether the Bolt newspaper articles contained the shortcomings to which Bromberg J refers, or if they did, whether these shortcomings were of sufficient weight to disqualify the articles for protection under s 18D, or outweigh the negative effects on free speech which, as Bromberg J admitted, such disqualification would entail.[106] Once again, therefore, we see how the individual 'evaluative judgment', which Bromberg J acknowledged was necessary to arrive at such conclusions, is 'underdetermined'. The result is that no conclusion concerning the relative 'balance', accorded the priorities of ss 18C and 18D in the Bolt case, is incontrovertible, and reasonable disagreement may arise.

XVI SKEWED INTERPRETATIONS

One might think that individuals would be reasonably entitled to arrive at conclusions at odds with those of Bromberg J in the Bolt case on the grounds that s 18C and s 18D uphold two distinct values or imperatives that, as Bromberg J tells us above, require 'balancing' in relation to each other – thereby allowing an individual to acknowledge the 'profound and serious effects' of a public 'act' resulting in a contravention of s 18C(1)(a), but concluding that the public 'act' ought still be to be considered 'lawful' given the independent free speech imperative, centred on statements made for specific public purposes 'reasonably and in good faith', upheld by s 18D. Bromberg J seems to affirm this idea that ss 18C and 18D are informed by quite independent imperatives in his reference above to 'two foundational values' underwriting the 'purpose and policy' of Part IIA of the RDA – these being freedom from 'the harm caused by the dissemination of racial prejudice' and the norm of 'freedom of expression'.[107] Indeed, he even more explicitly suggests that ss 18C and 18D are informed by quite independent (and indeed competing) imperatives with his claim that 'Part IIA' places

[105] Ibid [424].
[106] Bromberg J makes this admission as follows: 'In the balancing process, I have also taken into account the silencing consequences upon freedom of expression involved in the Court making a finding of contravention' (*Eatock v Bolt* [2011] FCA 1103 (Summary) [25]. See also n 123 below.
[107] See above n 91-93.

these 'foundational values' in 'contest' and then 'seeks to identify a point of balance at which harmony between them is to be found'.[108] Neither the terms 'contest' or 'balance' would be meaningful to use in this context unless, underwriting such references, was the assumption that what was being referred to were quite independent and distinct values or imperatives which, being in competition, needed to be in some way accommodated in relation to each other.

But drawing on Federal Court precedent regarding the interpretation of ss 18C and 18D, Bromberg J contradicts all of these assumptions. He does so in his ruling that the statutory meaning of s 18D cannot be interpreted independently of the imperatives of s 18C, but rather, internal to our understanding of the key phrase that frames s 18D ('reasonably and in good faith') ought to be an assumption that a public 'act' is not engaged in 'reasonably and in good faith' unless there is a genuine effort, on the part of those engaged in the 'act', not to contravene s 18C. In other words, far from embodying 'two foundational values' which, in their rigorous independence, must be 'balanced' against each other, such an assumption supposes that internal to s 18D is a requirement to uphold the imperatives of s 18C.

Such a view was advanced by Lee J, in *Bropho v Human Rights and Equal Opportunity Commission*,[109] where he argued that the phrase 'in good faith', at the centre of s 18D, be interpreted not simply within its own semantic limits as meaning absence of 'dishonesty', 'fraud' or 'malice', but rather that our very understanding of the meaning of this term, for the purposes of s 18D, include a requirement to exercise 'due care' to 'avoid' or 'minimize' any contravention of s 18C:

> The words 'good faith' as used in s 18D involve more than the absence of bad faith, dishonesty, fraud or malice. Having regard to the context provided by the Act, the requirement to act in good faith imposes a duty on a person who does an act because of race, an act reasonably likely to inflict the harm referred to in s 18C, to show that before so acting that person considered the likelihood of the occurrence of that harm and the degree of harm reasonably likely to result. In short…[t]he 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.[110]

[108] See above n 94.
[109] [2004] FCAFC 16 ('*Bropho*').
[110] Ibid [144] (Lee J). See also *Eatock v Bolt* [2011] FCA 1103 [426]. Bromberg J endorses the above-cited opinion of Lee J in *Bropho* at ibid [345].

Bromberg J endorses this view of Lee J, and quotes French J in *Bropho* to the same effect, insisting that internal to our understanding of the meaning of 'in good faith', in s 18D, is a requirement to be 'faithful' to the norms upheld by s 18C:

> As Part IIA condemns racial vilification of the defined kind but protects freedom of speech and expression, the good faith exercise of that freedom 'will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s. 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict'.[111]

Bromberg J provides his own interpretation of what French J meant, in the passage above, by 'minimisation' of 'harm', and its relation to freedom of speech. Once more, this interpretation entailed an obligation to minimise any contravention of s 18C:

> In *Bropho* … French J recognised that freedom of speech is not limited to expression which is polite or inoffensive. However, the minimisation of harm which French J spoke of involves a restraint upon unnecessarily inflammatory and provocative language and gratuitous insults. The language utilised should have a legitimate purpose in the communication of a point of view and not simply be directed to disparaging those to whom offence has been caused …[112]

Bromberg J then concludes, in rigorously circular (and therefore question-begging) terms, that the reason why we can import into the meaning of s 18D's 'reasonably and in good faith' a requirement to uphold the imperatives of s 18C, is because any public 'act' which seeks to pursue the sort of 'academic', 'artistic', 'scientific' or journalistic imperatives referred to in s 18D, but does so in the absence of such 'good faith', could potentially lead to the violation of the imperatives of s 18C:

> The minimisation of harm by reference to the objectives of s 18C is, I think, imported into the words 'reasonably and in good faith' because non-compliance with that requirement (in the pursuit of an activity described by paragraphs (a), (b) or (c) of s 18D) is a basis for the impairment of the rights or freedoms protected by s 18C.[113]

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[111] *Bropho v Human Rights and Equal Opportunity Commission* (2004) FCAFC 16, [95], (French J), quoted in *Eatock v Bolt* [2011] FCA 1103 [343].

[112] *Eatock v Bolt* [2011] FCA 1103 [411]. Bromberg J declares elsewhere in his judgment that '[a] conscientious approach to freedom of expression is required by s 18D', but he defines such 'conscientiousness' as 'honouring the values asserted by the [RDA]': ibid [390]. Once again, therefore, the free speech clauses of s 18D are defined, in regard to their internal requirements, in terms of an obligation to uphold the imperatives endorsed elsewhere in the Act.

[113] Ibid [349]. See also ibid [427].

To insist that internal to the meaning of the key phrase framing s 18D ('reasonably and in good faith') is an obligation to act in ways that seek not to contravene s 18C, is to undermine any categorical independence between the respective imperatives underwriting ss 18C and 18D, and therefore any purported 'balance' between them. Far from ss 18C and 18D upholding (as Bromberg J claims above) 'two foundational values', in 'contest' with each other, in relation to which a 'balance' is required, arrived at on the basis of individual 'evaluative judgment', the meaning of one of these provisions has been made *conditional* upon the other. Far from a 'contest' arising between the two, with the possibility that s 18D might provide a genuine (because independent) exemption for public 'acts' considered 'unlawful' under s 18C, the interpretation of s 18D offered above by Justices Bromberg, Lee and French, skews the very import of s 18D in such a way that, internal to its meaning, is a norm of non-contravention regarding s 18C.

To conceive the extent to which such an outcome undermines any idea that s 18D 'balances' s 18C, or provides a genuine exemption from the injunctions of the latter, consider the following analogy concerning 'fair comment' and the law of defamation. Bromberg J points out that '[a]t common law, fair comment exists as a defence to a defamatory comment in order to facilitate freedom of expression on matters of public interest'.[114] 'Fair comment' therefore seeks to provide an 'exemption' from the 'unlawfulness' which might otherwise be ascribed to a statement that is found to be defamatory.

Bromberg J identifies some of the key prerequisites that the common law recognises for the effective exercise of the defence of 'fair comment' in relation to defamation. These include that 'the comment must be based on facts which are true or protected by privilege.'[115] They also include the condition that '[t]he fair comment defence only applies to a comment as distinct from a statement of fact', meaning that '[t]he comment must be recognisable as comment and the fact upon which the comment is based must be expressly stated, referred to or notorious'.[116] They also include the requirement that the 'report or comment' claiming to constitute 'fair comment' 'be on an event or matter of public interest'.[117] Finally, they include the requirement of 'honesty' – that the 'maker of the comment genuinely believe the

[114] Ibid [353]. Indeed, Bromberg J insists that this common law concept is internal to s 18D, declaring that 'by using the phrase 'fair comment' in s 18D(c)(ii), Parliament intended to invoke the requirements of the common law defamation defence of fair comment': ibid [358].
[115] Ibid [354].
[116] Ibid [355].
[117] Ibid [428].

comment made' – and 'beyond' the requirement of 'honesty', that both the 'maker' and 'the publisher of the defamatory statements demonstrate that reasonable measures were taken to adhere to the value of truth and the protection of reputation' by 'having taken reasonable steps to verify the accuracy of statements made and where practicable and necessary, seek responses from those whose reputations are at stake'.[118]

But imagine if one of the prerequisites of the common law defence of 'fair comment' was that the 'maker of the comment' earnestly sought, in the context of such 'comment', not to make any statement which diminishes the reputation of another, or arouses adverse public reaction to them? In such a circumstance, any independence of the defence of 'fair comment', relative to defamation, would be undermined, because internal to our very understanding of what constitutes 'fair comment' would be an obligation not to engage in the defamation for which 'fair comment' purports to provide an exemption.

It is precisely this phenomenon which occurs in the context of Justices Bromberg, Lee and French's interpretation of 'reasonably and in good faith' within the framework of s 18D. We saw that Bromberg J described s 18D as 'a provision which, broadly speaking, seeks to balance the objectives of s 18C with the need to protect justifiable freedom of expression'.[119] However no 'balance' between these competing 'objectives' occurs if the meaning of one is defined, in part, in terms of the non-contravention of the other. Far from embodying 'two foundational values', independent of each other, in which a priority placed on one provides a possible exemption from the 'unlawfulness' arising from the other, internal to the key phrase which defines s 18D ('reasonably and in good faith') is a requirement not to contravene the imperatives of the very provision (s 18C) to which s 18D purports to provide an exemption.

Bromberg J seems to fall short of perceiving these consequences arising from the interpretation of 'reasonably and in good faith', advanced by Lee J and French J, which he himself has endorsed. This is evident in his appeal to the 'test' of 'proportionality' to assist in the process of 'balancing' that he refers to in relation to ss 18D and 18C. Bromberg J tells us that such a 'test' is required when competing 'rights' are in 'conflict', such 'conflict' being apparent in those circumstances where the advancement of one right 'impairs' the other.[120]

[118] Ibid [357], [387], [388], [398]. On Bromberg J's declaration that such concern for the accuracy of 'facts' is also integral to the s 18D concept of 'reasonably and in good faith', see ibid [399].
[119] See n 48 above.
[120] *Eatock v Bolt* [2011] FCA 1103 [349]. See also ibid [427]. Bromberg J describes the 'test' of 'proportionality' as follows: 'Where rights and freedoms are in conflict, the impairment of one right by the

But such a 'test' only makes sense if the 'objectives' of ss 18C and 18D are genuinely independent of each other, in 'contest' with each other, and therefore capable of placing a potential limit upon each other, because only then can the relative 'impairment', for which the 'test' of 'proportionality' purports to provide a solution, apply.[121]

But we have seen that the interpretation of s 18D offered by Justices French, Lee and Bromberg ensures that it possesses no genuine independence from s 18C – an independence in which the advancement of one of these provisions might 'impair' the other. On the contrary, we have seen that public 'acts' that are held to be 'reasonable and in good faith', thereby falling within the jurisdiction of s 18D, are interpreted as being so, in part, because they have upheld an obligation to abide by the imperatives of s 18C.

We can see the same failure, on Bromberg J's part, to recognise the full implications of this interpretation of s 18D in his refutation of the Bolt and *Herald and Weekly Times*' rival interpretation of this provision, which he recounts in the passage below. In this passage, Bromberg J insists on perceiving ss 18C and 18D as upholding two 'competing' and 'conflicting' 'rights', between which a genuine 'balance' is required, with the result that '[e]ach must to some extent give way to the other'. He therefore rejects the respondents' claim that the interpretation of s 18D, advanced by Lee J and French J (and endorsed by himself), 'subjugates' the norms of s 18D to those of s 18C:

> Mr Bolt and HWT contended that the approach of French J in construing a requirement of proportionality, had the effect of prioritising the norms sought to be protected by s 18C over those protected by s 18D, so that s 18D was effectively subjugated to the norms of s 18C. Mr Bolt and HWT are right to say that Parliament intended a balancing of the competing rights and not the subjugation of one over the other. However, Mr Bolt is wrong to suggest that a balance is not achieved by the construction which French J (and Lee J) adopted. On that construction, neither of the competing rights is supreme or unbending. Each must to some extent give way to the other. The right to be free of offence gives way to the reasonable and good faith exercise of freedom of expression. The right to freedom of expression is limited to its reasonable and good faith exercise having regard to the right of others to be free of offence. The requirement of

exercise of another is often subjected to a test of proportionality. Proportionality, in the sense that the measures adopted are rationally connected to the objective of the competing right, and that the means used to impair the protected right is no more than is necessary to achieve the objective of the competing right': ibid [349].

[121] Ibid [349]. That Bromberg J conceives of ss 18C and 18D, in this context, as embodying two 'conflicting' and 'competing' 'rights', sufficiently independent that they are capable of 'impairing' each other, and therefore requiring a 'balancing' process, such as that assisted by the 'test' of 'proportionality', is evident in his conclusion that 'I can see no reason why a requirement of proportionality is not apt in the context of the balancing exercise involved in s 18D.': ibid [349].

> proportionality does not involve the subjugation of one right over the other and is consistent with achieving a balanced compromise between the two.[122]

But contrary to Bromberg J's claims in the passage above, we have seen (at notes 110-13 above) that it is precisely such a 'subjugation' of s 18D relative to s 18C that occurs because, under the terms of Lee J and French J's construction of s 18D, '[t]he right to freedom of expression is limited to its reasonable and good faith exercise', but an 'act' is only deemed 'reasonable' and exercised in 'good faith' if it has 'regard to the right of others', under the terms of s 18C, 'to be free of offence'. The result is that, contrary to Bromberg J's suggestion in the passage above, there is no genuinely equal and reciprocal 'balance' between ss 18C and 18D, where '[e]ach must to some extent give way to the other', because it is *only* s 18D which is interpreted in a manner such that it ought to 'give way' to s 18C. Section 18C, by contrast, is not interpreted as incorporating, as part of its internal meaning, a commitment to the non-contravention of s 18D. For this reason, Bromberg J's response to Bolt and Herald and Weekly Times, in the passage above, which presupposes a genuine independence between, and a genuine 'balancing' of, the respective imperatives of ss 18D and 18C, lacks plausibility and therefore credibility.

At one other point in his judgment, Bromberg J shifted position, once again contradicting much that had gone before. At this point, instead of claiming (as in the passage above) that ss 18C and 18D embody 'competing' and 'conflicting' 'rights' (thereby requiring a 'balance' between them) – a position which, we have seen, is contradicted at other points in his judgment - he subverts this idea and instead suggests that what is at stake in the Bolt case is two rival claims (under ss 18C and 18D respectively) to the *same* 'right' – this 'right' being the right to freedom of expression:

> I have taken into account the value of freedom of expression and the silencing consequences of a finding of contravention against Mr Bolt and [Herald & Weekly Times]. Given the seriousness of the conduct involved, the silencing consequence appears to me to be justified … Additionally, I take into account that the conduct was directed at an expression of identity. An expression of identity is itself an expression that freedom of expression serves to protect. That expression also deserves to be considered and valued. Identity has a strong connection to one of the pillars of freedom of expression – 'self-autonomy stems in large part from one's ability to

[122] Ibid [350].

> articulate and nurture an identity derived from membership in a cultural or religious group' …[123]

In other words, according to this interpretation, not only was Bolt seeking freedom of expression for his newspaper articles, but so were the applicants in seeking to express their indigenous identity. While Bolt might appeal to s 18D as protection of *his* right to freedom of expression, Bromberg J, in the passage above, is interpreting s 18C as a source of the *same* protection for the applicants.

XVII NON-NEUTRALITY REVISITED

Earlier we saw that 'non-neutrality' arose in those instances where individuals could agree on the meaning of a term or principle but disagreed concerning its application to specific circumstances. What we have seen above, in the context of the interpretation of s 18D offered by Lee J, French J and Bromberg J, is a situation where there may be disagreement over the very meaning of key terms or principles themselves (in the case of the contradictory statements offered by Bromberg J, by the *same* judge within the space of the *same* judgment).

There is nothing intrinsic to the phrase 'reasonably and in good faith', within s 18D, that makes it inevitable or incontrovertible that this phrase be understood in such a way that it incorporates a commitment to uphold the imperatives of s 18C. On the contrary, we found that other parts of Bromberg J's discourse centred on the relationship between ss 18C and 18D, not least the idea that each incorporated 'two foundational values' which, in their 'conflict', potentially 'impaired' each other, and therefore needed to be 'balanced' against each other, suggested a very different understanding, one that didn't subordinate the internal requirements of one of these clauses to the obligations of the other. Indeed, we saw that such a subordination vitiated the status of s 18D as an 'exemption' to s 18C, and we utilised the analogy of the defence of 'fair comment' in the common law tort of defamation to show this.

For this reason, it is highly plausible for a person to arrive at a definition of the phrase 'reasonable and in good faith', as it applies to s 18D, which does not subordinate its requirements to s 18C. They might, instead, interpret the meaning of the phrase in relation to imperatives entirely resident within s 18D, not least its reference to 'public interest' and 'fair comment'.[124] Bromberg J identifies 'public interest' with 'public benefit'.[125] However as

[123] Ibid [423].
[124] See n 47 above

'public interest' (or for that matter 'public benefit'), when applied to particular circumstances, is as 'non-neutral' as any other term we have discussed thus far, Bromberg J, in the following passage, is mistaken to assume an 'objective' determination is possible concerning whether a public 'act' is 'genuinely in the public interest':

> The 'genuine purpose' to which s 18D(b) refers does not appear to me to be a reference to the subjective purpose of the maker or publisher. What the provision calls for is the pursuance through a statement, publication, discussion or debate of a purpose which is genuinely in the public interest. That calls for an objective consideration of whether the purpose is genuinely in the public interest.[126]

It would be possible (and, given the purposes of s 18D, plausible) to interpret the legal meaning and requirement of 'reasonably and in good faith' in terms of whether the public 'act' falling within the auspices of s 18C is 'rationally related' to a matter of 'public interest'.[127] In this way, no reference is made, regarding the interpretation of 'reasonably and in good faith', to s 18C whatsoever. Bolt and his legal counsel advanced such a position but it was rejected by Bromberg J in the passage below. His reason for this rejection was once more the very demand that we have placed in question - that the meaning and application of s 18D be interpreted in terms of the obligations arising under s 18C, and (in this case) the wider objectives (identified at note 83 above) of the RDA:

> Mr Bolt and [Herald & Weekly Times] contended that the requirements of reasonableness and genuine purpose were satisfied because the Newspaper Articles were rationally related to the matter of public interest sought to be advanced by Mr Bolt…..The issue of rationality is not however the only consideration in assessing reasonableness and good faith, and I disagree with the contention of Mr Bolt and [Herald & Weekly Times] that it is. For the reasons already canvassed in relation to s 18D(c)(ii) the pursuance of an expressive activity reasonably and in good faith is also to be assessed by reference to the extent of harm done to the protective objectives of the [RDA] by the expressive conduct and whether a *conscientious* approach was

[125] As Bromberg J states: 'Section 18D(b) seems to be concerned to excuse conduct done reasonably and in good faith in the pursuit of a public benefit through the exercise of freedom of expression.': *Eatock v Bolt* [2011] FCA 1103 [434]).

[126] Ibid [435]. Once again, Bromberg J. may be using the term 'objective', in this context, merely to indicate a situation wherein a particular matter of fact (e.g. whether a 'purpose' is 'genuinely in the public interest') is not to be decided by the 'subjective' interpretations of a party to the action. But for the reasons explained at note 75 above, the 'non-neutrality' of a term like 'public interest' renders it equally subjective when applied to specific facts by any *other* party, and so the use of the term 'objective', in such contexts, is philosophically ill-informed.

[127] For some indication of what 'rationally related' might mean in this context: see ibid [438].

> taken which gave sufficient regard to those objectives including the minimising of the potential harm.[128]

We see, therefore, that Bromberg, French and Lee JJ.'s interpretation of the phrase 'reasonably and in good faith', within the auspices of s. 18D, has taken us beyond 'non-neutrality' to a contestation concerning the very meaning of this phrase itself, as it ought to be understood within its wider context in the Act. Such contestation arises because there is nothing intrinsic to this phrase that makes any definition of its meaning inevitable, and therefore incontrovertible, with the result that individual judgment is 'underdetermined' in this matter, with all the reasonable disagreement that is likely to follow.

XVIII UNDERDETERMINED REASON II

We saw above that reasonable disagreement can arise concerning whether Andrew Bolt's articles ought to have been found, by the Federal Court, unlawful under s 18C, given the 'underdetermined' status of any individual's judgment in reaching such conclusions. We can perceive the same contestation and disagreement, arising from the same 'underdetermined' status of individual judgment, in the context of the Leak cartoon. On the one hand, we have seen (quoted earlier) statements by leading Australian politicians and other public and professional figures insisting that this was a 'racist' cartoon and, as it lacked sufficient redeeming qualities, should not have been published at all. We shall see below the view of others, including Leak, that it was not 'racist'. We have seen the Commission President offer her personal opinion that even if it was 'racist', it deserved exemption under s 18D.[129] In this respect, we see persistent disagreement concerning the Leak cartoon. This is again apparent in the following exchange that occurred on the ABC's *Q&A* program on 21 November 2016. One panel member, journalist Greg Sheridan, declared:

> That was not a racist cartoon. Even if you think it was it certainly shouldn't have been illegal.[130]

Sheridan was then immediately cut short by another member of the panel, Nakkiah Lui, who declared:

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[128] Ibid [438]-[439] (emphasis added).
[129] See n 25 above.
[130] Australian Broadcasting Corporation, 'End of the Year, Dawn of an Era', *Q&A*, 21 November 2016 <http://www.abc.net.au/tv/qanda/txt/s4559268.htm>.

> As an Aboriginal person I'm interrupting you. Greg, I *do* think it was racist. So as an Aboriginal person, please do not make that general statement that it wasn't. As a white man, you think it wasn't, so good for you.[131]

This exchange shows that what Justice Bromberg called 'evaluative judgement' is an irreducible element in any consideration of the propriety of applying the term 'racism' to describe a specific set of 'facts' – in this case, Leak's cartoon. Such judgment may vary because, as we have seen, in the case of each individual, it is informed, among other things, by different personal experiences, and the diverse variables and considerations that arise from this. This is evident in Lui's statement above where she suggests that it is perhaps Sheridan's own racial identity, and the experiences associated with this, that has led him to a different conclusion on this matter to her.[132]

Further, whether 'racism' has occurred, in any specific set of circumstances, depends on both the intentions of those engaging in the behaviour in question and the effect of that behaviour on those towards whom it is directed.[133] It is possible for an act to be experienced as 'racist', by those subject to it, without its author intending it to be so, and vice versa. In some cases, there may be disagreement as to whether an individual's perception that they were subject to 'racist' behaviour is a 'reasonable' conclusion for they or others to derive from a specific set of 'facts'. It is precisely such disagreement which divided the respective parties in the Bolt and QUT cases, and divided opinion in the Leak affair. It is precisely these types of questions that the Federal Court's 'objective test' for determining the 'reasonable likelihood' of 'offence', 'insult', 'humiliation' or 'intimidation', under the terms of s 18C(1)(a), as well as

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[131] Ibid.

[132] Upon one other Leak cartoon, however, I think there is less room for reasonable disagreement concerning its alleged 'racism' or 'racist' effects. According to the ABC's *Media Watch*, the cartoon appeared in *The Australian* in May 2006 (ABC, 'Fear, Loathing and the Right to Offend', *Media Watch*, no <http://www.abc.net.au/mediawatch/episodes/fear-loathing-and-the-right-to-offend/9972908>). It depicted two poorly dressed indigenous men, sitting on stumps in the outback, one holding what is presumably a beer can, and both reading 'Brough's Ten Commandments' – a reference to Families and Community Services and Indigenous Affairs Minister, Mal Brough's, directives concerning appropriate behaviour in remote indigenous communities. The one without the beer can says to the other: 'Rape's out, bashing's out – this could set our culture back by 2000 years'. Paul Barry, the *Media Watch* host, declared that if such a cartoon doesn't 'brand all indigenous men as drunken thugs and rapists I don't know what would': ibid. But even more to the point, the cartoon, at the very least, identifies the two men's conception of indigenous 'culture' with the same.

[133] We have seen that both these elements, concerning 'intention' and 'effect', are embodied, respectively, in s 18C(1)(b) and s 18C(1)(a) of the *Racial Discrimination Act* (see the section 'Profound and Serious Effects' above). However we have also seen that, for the purposes of s 18C(1)(a), 'effects' are not determined, by the Courts, in terms of the subjective experience of the person or persons actually affected by the behaviour, but rather by the 'reasonable likelihood' that the behaviour would have such an 'effect' on a representative and reasonable member of the racial, ethnic or national group to whom that person or persons belong (see above n 69-71 and 77).

the consideration of 'intention' under s 18C(1)(b), is supposed to determine – though we have seen that not only the conclusions of such a 'test' but also the 'test' itself, and the criteria it employs, is open to reasonable contestation, thereby undermining its purported claims to 'objectivity'.[134] In each case, individual 'evaluative' judgment, involving multiple variables, is inescapable in the consideration of any of these issues, and is, in such circumstances, 'underdetermined', with all the reasonable contestation and disagreement to which this can give rise.

Does this mean that 'racism', like the terms of s 18C and s 18D identified above, is a 'non-neutral' term? It would appear that this is the case. This is because any judgment that 'racism' accurately describes a particular set of facts does not arise intrinsically, as an objective and inevitable conclusion from those facts themselves (like Aristotle's 'white' or 'straight' at note 63 above). Rather, it is a product of each individual's wide (and individually chosen) series of considerations, as applied to those facts, the understanding and evaluation of which is based on multiple and diverse personal experiences, resulting in judgments which, for the reasons explained above, will vary in their outcomes. As with other non-neutral terms, individuals may agree concerning what 'racism' is, but for the reasons above, reasonably disagree as to whether it accurately describes a particular set of facts. In other words, individual judgment, in such circumstances, does not lead to 'objective' and incontrovertible conclusions, but rather is once more 'underdetermined', so that reasonable disagreement between individuals is likely.

This does not mean that 'racism', any less than 'offence', 'humiliation', 'insult' or 'intimidation', does not exist, nor that in many instances it will not be a reasonable description of a particular set of facts. The *Oxford English Dictionary* defines 'racism' as:

> [a] belief that one's own racial or ethnic group is superior … (also) a belief that the members of different racial or ethnic groups possess specific characteristics, abilities, or qualities, which can be compared and evaluated. Hence: prejudice, discrimination, or antagonism directed against people of other racial or ethnic groups (or, more widely, of other nationalities), esp. based on such beliefs.[135]

[134] See the section 'The Federal Court and Section 18C' above. See also n 75 and n 126 above concerning what the Federal Court *might* have meant by 'objectivity' in these circumstances, and the implications of this.
[135] 'Racism', *Oxford English Dictionary*, <http://www.oed.com/view/Entry/157097?redirectedFrom=racism #eid>.

On the basis of this definition, there will certainly be circumstances wherein very few people will disagree that 'racism' has occurred. The Jim Crow era of the American South, Apartheid in South Africa, or the frontier wars and other forms of repeated violence perpetuated against indigenous Americans and Australians by elements of white settler society, would be instances in which clear and obvious acts of racism occurred on a frequent and, sometimes, systematic basis. Acts of racism also accompany not only these periods, but also our own. Refusing a person entry to a hotel, or access to real estate, or applying to them a more punitive process of policing, or even being averse to their company, if the motivation is their 'race', would be equally obvious instances of racism. In such circumstances, the room for 'reasonable' disagreement as to whether 'racism' is an appropriate description of a particular set of facts has been significantly reduced.

But we have seen that in regard to sets of 'facts' such as the Leak cartoon, this room for 'reasonable' disagreement is much wider. Individuals, we have seen, sincerely disagree on whether the cartoon is 'racist'. It is in the application of 'racism', as a descriptive term, to the specific 'facts' in this context – the content of Leak's cartoon and its publication in *The Australian* newspaper – that the 'non-neutral' status of 'racism' once again becomes apparent.

This is not to suggest that the use of 'racism', as a descriptive term, in any specific context, is unjustified. It is simply to point out that this application will, in many circumstances, be reasonably contestable, because the use of individual judgment, in these same circumstances, is 'underdetermined'.

Of course, it is possible that prejudice, partiality and absence of relevant personal experience will, in such cases, inform the individual judgment of some involved in such contestation, just as will well-intentioned error. This is particularly likely to be the case among those not subject to the type of racism in question and so lacking in the personal experience, and therefore existential understanding, of this reality. But even among better informed individuals, sincere and reasonable disagreement, for all the reasons above, is possible.

XIX 'RACISM' AND DELEGITIMATION

However it is not adequate to leave discussion of 'racism' simply at the claim that the term is 'non-neutral', the use of individual judgment, in relation to it, 'underdetermined', and therefore the validity of its application in any specific circumstance a matter of possible

contestation. This is because, as the examples above suggest, the term 'racist' is widely used in Australian public discourse as an epithet to describe specific individuals, or their speech acts, and in such circumstances, it is a very powerful signifier which, when successfully applied, is capable of denying legitimacy to the public statements of those to whom it is directed. For the purposes of our discussion, an epithet may be said to be 'successfully applied' when its 'truth', or its 'appropriateness', comes to be widely accepted within the polity. Accusations of 'racism', when successfully applied, are therefore acts of power (just as are acts of 'racism' themselves) precisely because they can give rise to these outcomes of delegitimation.

This does not necessarily render the accusation of 'racism' unjustified. Nor does it render it morally equivalent to an act of 'racism'. Both may be acts of power, but one is an overt attempt to discriminate while the other is an attempt to identify and combat discrimination. However for the reasons explained, accusations of racism are, in some circumstances, highly contestable. For this reason, although I would not contest whether the overtly discriminatory acts of neo-Nazi or white supremacist groups are 'racist', it is, I believe, necessary to consider more closely the extent to which the accusation of 'racism' can be appropriately applied to Bill Leak's cartoon.

As Leak explained, he sought to symbolically portray, in his cartoon, what he believed to be instances of parental neglect of children within remote indigenous communities, and which, he believed, accounted for the fact that a high proportion of the inmates at the Don Dale Youth Detention Centre were Aboriginal children.[136] When asked by Emma Alberici on the ABC's *Lateline* if he 'intended to be provocative with the cartoon?', Leak replied:

> Provocative, yes. I suppose so. I mean … it was in the context of the debate that was raging after Four Corners showed those terrible scenes from the Don Dale Detention Centre, and it was pretty distressing stuff. And I couldn't help thinking, well, 97 per cent of the children in the Don Dale Detention Centre are Aboriginal kids. That's a vast preponderance, isn't it? And I thought why so many? Of course I know the answer, I knew the answer, as do most people, and that is that … a lot of these kids are coming from the most desperate circumstances, you know, especially in outback remote Aboriginal communities, where there is incredibly high, you know, rates of drug-taking and alcoholism. Terrible. They are exposed to the most awful

[136] Leak, 'Submission to the Parliamentary Joint Committee on Human Rights into Freedom of Speech in Australia', above n 8, 1-2; Leak, 'Interview: Bill Leak, Cartoonist for The Australian Newspaper', above n 8; Leak, 'Bill Leak Cartoon: What Are You Tweeting About?', above n 8; Parliamentary Joint Committee on Human Rights, above n 8, 85.

> violence and abuse and neglect. And so it just, I thought to myself, well, it comes back ultimately to parents, you know? We all know that's true.[137]

In response to the cartoon, the Western Australian Police Commissioner, Karl O'Callaghan, confirmed Leak's depiction of this particular aspect of remote indigenous communities:

> Bill Leak's cartoon is representative of a situation that is more common in the indigenous population than the non-indigenous one. The fact that most children in detention in WA are indigenous is a reflection of that. It's an accurate representation. The situation where indigenous parents are reluctant to take responsibility is a more common one and is well-known to police. Any regional police officer, especially in the state's north, recognises the scenario presented by Bill Leak.[138]

Karl O'Callaghan, therefore, sought to defend Leak's cartoon in terms of its purported 'truth'. From the perspective of Leak's critics, however, the possibility that the cartoon truthfully reflected a wider social reality did not excuse it from a charge of 'racism'. After all, as many of Leak's critics argue earlier above, irrespective of its 'truth', the cartoon engages in a 'stereotyping' of indigenous Australians, and such stereotyping, being 'racist', is, they insist, impermissible.

XX CARTOONS AND STEREOTYPING

Justice Bromberg, in his judgment in the Bolt case, declared that the 'dissemination of racial prejudice usually involves attributing negative characteristics or traits to a specific group of people' and that '[t]he attribution of negative characteristics will often, although not invariably, involve the use of stereotyping'.[139] According to the *Oxford English Dictionary*, a 'stereotype' is '[a] person or thing that conforms to a widely held but oversimplified image of the class or type to which they belong'.[140] Concerning the role which 'stereotyping' plays in the dissemination of racism, Justice Bromberg quotes Milton Kleg, in his book *Hate Prejudice and Racism*:

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[137] Leak, 'Interview: Bill Leak, Cartoonist for The Australian Newspaper', above n 8.
[138] V. Laurie, 'Bill Leak 18C Cartoon Accurate, Says WA Police Commissioner', *The Australian* (online), 21 October 2016 <http://www.theaustralian.com.au/business/media/bill-leak-18c-cartoon-accurate-says-wa-police-commissioner/news-story/34fe96789280c8ed6ab77ee21c362ece>.
[139] *Eatock v Bolt* [2011] FCA 1103 [215].
[140] 'Stereotype', *Oxford English Dictionary*, above n 135.

> The effects of stereotyping lie at the base of prejudice. Stereotypic beliefs form the rationale for feelings of disdain and disparagement. When tied to prejudiced attitudes, stereotypes help create a number of behaviors ranging from avoidance to violence.[141]

Such an act of 'stereotyping', as occurs in Leak's cartoon, is, according to its critics, either 'racist' in and of itself or has 'racist' effects.[142] This is because in seeking to depict the indigenous father as negligent, alcohol-dependent, and irresponsible, Leak has (whether intentionally or unintentionally) reinforced such prejudiced images of indigenous Australians prevalent within white Australian society in the past and still held by some today.[143] The former chairperson of the Australian Government's Indigenous Advisory Council, Nyunggai Warren Mundine, although not holding this point of view himself, has described the conclusions such a perspective reaches as follows:

> In this world view, criticising one indigenous person is to criticise the group; insulting or offending one means insulting or offending the group. So: racist.[144]

It is true that Leak, in his cartoon, sought to depict what he saw as a wider social reality through a process of 'stereotyping'. This is evident in the fact that he drew an image of a beer-swilling, poorly clothed, bare-footed indigenous man, situated in a remote indigenous community, to represent the boy's father, and to embody what Leak perceived to be a wider reality of parental neglect among some parents in some of these communities.

But far from being gratuitous, such 'stereotyping' is an inescapable consequence of the discursive confines of the cartoon and the message Leak sought to convey. Within the confines of the cartoon, Leak could only draw a limited number of images, with the result that, if the cartoon was to serve its discursive purpose of conveying a message of parental neglect within a wider set of communities, this limited number of images had to represent what Leak perceived as a reality much wider, more complex and more variegated than these

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[141] Milton Klegg, *Hate Prejudice and Racism* (SUNY Press, 1993) 155, quoted in *Eatock v Bolt* [2011] FCA 1103 [215].

[142] See the criticisms of Leak advanced in the section 'Bill Leak and Section 18C' above.

[143] Bromberg J applied such reasoning in his Bolt judgment. He concluded that, given the public standing of Bolt, and the propensity of his readers to regard him 'as speaking with authority and knowledge', his column (the subject of the litigation) 'will likely have been read by some persons susceptible to racial stereotyping and the formation of racially prejudicial views. I have no doubt that some people will have read the Newspaper Articles and accepted the imputations conveyed to the ordinary reader as true and correct and that racially prejudiced views have been "reinforced, encouraged or emboldened".': Eatock v Bolt [2011] FCA 1103 [421].

[144] Nyunggai Warren Mundine**,** 'Bill Leak: A Policeman, A Father, His Son – and the Brutal Truth', *The Australian* (online), 17 March 2017 <http://www.theaustralian.com.au/opinion/bill-leak-a-policeman-a-father-his-son-and-the-brutal-truth/news-story/075eeb21b287c121c45f928f5cd7847c>.

images themselves. 'Stereotyping', in this context, was therefore inevitable, since if Leak was to make his message clear, he needed to draw 'a widely held but oversimplified image of the class or type to which [the individuals to which he was referring] belong'.[145] As Leak put it:

> This … is what a good cartoonist does. The cartoonist highlights topics of debate….through confronting, hard-hitting and pointed imagery.[146]

Given that the cartoon (like all cartoons seeking to represent what is alleged to be a wider social reality) could only contain a limited number of images to represent multiple individuals, in varied situations, the discursive limits of the cartoon itself made 'oversimplification' a necessity and 'stereotyping' its inevitable result. Such 'stereotyping', in and of itself, Leak would insist, is not an example of 'racism', but rather part of the inevitable process of creating this sort of cartoon, and seeking to fulfil the sort of discursive functions he assigned to it. As he put it:

> Far from seeking to malign indigenous people on the basis of their race, my cartoon aimed to expose the truth about the appalling levels of violence endured by Aboriginal women and children. It was nothing more, and nothing less than an entirely reasonable, and considered, expression of a view on a subject of intense public interest …[147]

This is not to deny the charge, levelled above, that the stereotyping within the cartoon might have had the wider consequence (whether Leak intended this or not) of reinforcing, among some readers, racially prejudicial attitudes towards indigenous Australians. But if such stereotyping, in the context of Leak's cartoon, was inevitable, the only way to have avoided such wider consequences would have been for Leak not to have drawn, or *The Australian* not to have published, the cartoon at all. In other words, only if the message Leak sought to convey, in the manner Leak sought to convey it, was not conveyed at all, would the charges of 'racism' have been avoided.

XXI 'TRUTH'

Of course, this is precisely the outcome that Leak's critics insist would have been the preferable one. Both the Indigenous Affairs Minister, Nigel Scullion, and federal Greens leader, Richard Di Natale, insist above that the cartoon should *not* have been published,

[145] See above n 140.
[146] Leak, 'Submission to the Parliamentary Joint Committee on Human Rights into Freedom of Speech in Australia', above n 8, 5.
[147] Ibid 3.

declaring that there is 'no place' for 'depicting racist stereotypes' in 'modern Australia'.[148] This amounts to a proposition that even if Leak believed, the Western Australian Police Commissioner confirmed, and government reports identify, that parental negligence is *one* cause of juvenile delinquency in remote indigenous communities, and *one* of the causes of high rates of indigenous juvenile incarceration, it is not a message that *ought* to be conveyed to the Australian public if it involves (as Leak's cartoon involved) symbolic pictorial representation of an indigenous parent actually engaging in such negligence.[149] Such a proposition is therefore a demand that such criticism, conveyed in such a manner, and irrespective of its 'truth', be proscribed altogether - silence, in such circumstances, being the preferable response to these parental realities.

Indeed, the same silence was demanded, by some, of the Western Australian Police Commissioner himself, in response to his confirmation, outlined above, that the Leak cartoon indeed represented a 'truth' that Western Australian police officers, involved with remote indigenous communities, would recognise.[150] Some of these demands for the Commissioner's silence arose on the (conceivably legitimate) consequentialist grounds that any confirmation of such 'truth' by police, at this time, would inflame existing racial tensions in towns like Kalgoorlie.[151]

Yet the demand of Scullion, De Natalie and others for Bill Leak's silence, a demand that arises from their insistence that Leak should never have drawn, and *The Australian* never have published his cartoon at all, is a much broader claim, declaring that 'silence', in circumstances involving such a cartoon, is preferable to Leak's attempt to expose what he believed to be (and what other sources, including government reports, have confirmed to be) a 'truth'. In other words, 'truth' is perceived in such circumstances as an expendable good, displaceable by more exigent imperatives, even when such 'truth' refers to a pressing social reality. Leak himself made this point in his appearance before the Parliamentary Joint Committee on Human Rights during its inquiry into 'Freedom of Speech in Australia':

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[148] Di Natale above n 12; Scullion above n 14.
[149] Concerning government reports, see Parliament of Australia. 'Doing Time – Time For Doing. Indigenous Youth in the Criminal Justice System', House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, June 2011, ch. 3 <https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf>. See also Mundine at below n 157.
[150] See above n 138. On criticisms of the Police Commissioner, see Eliza Borrello, 'WA police chief Karl O'Callaghan slammed for citing Bill Leak cartoon, "inflaming racial tensions"', *ABC News* (online), 21 October 2016 <http://www.abc.net.au/news/2016-10-21/wa-commissioner-karl-ocallaghan-racial-tensions-bill-leak/7956442>; Dennis Eggington, 'ALSWA CEO Dismayed at WA Police Commissioner', Press Release, 27 October 2016 <http://www.als.org.au/alswa-ceo-dismayed-at-wa-police-commissioner/>.
[151] Borrello, above n 150.

> I was concerned with the human rights of Aboriginal children. I am concerned about the human rights of Aboriginal women. They suffer from the most appalling levels of violence. They are 34 times more likely to finish up in hospital than white people in our community, but to mention that makes me a racist! For mentioning the shocking statistics that go along with sexual and physical abuse of children within Aboriginal communities, I get labelled a racist. It is absolutely absurd. It has nothing to do with racism at all. It is trying to stamp out truth.[152]

Indeed, Leak has made a similar point elsewhere concerning 'truth' and 'silence'. He did so again in relation to the topic of domestic violence and child abuse in remote indigenous communities, and pointed to the necessity of freedom of speech, as in the case of his cartoon, as one means to expose such violence and abuse:

> My cartoon only hinted at the truth about the appalling levels of violence endured by aboriginal women and children, but within minutes of clapping eyes on it, [Race Discrimination] Commissioner [Tim] Soutphommasane was all over social media urging people to lodge complaints against me with the Australian Human Rights Commission … You don't fix a problem by closing your eyes and imagining it has gone away. We'll never make progress unless we're able to talk openly about the scourge before us.[153]

Elected member of the Alice Springs Council, Jacinta Price, is an indigenous person who has affirmed Leak's concerns regarding 'truth' and 'silence', and the potential sacrifice of one to the other as a result of prioritizing harms such as 'offence' over the need to openly identify abuse:

> This notion that hurt feelings are more important than broken bones, broken faces, broken lives … It's appalling! It's absolutely appalling! People are far more interested in being 'virtue signallers' than they are [in] actually, you know, doing something for their fellow human beings. And again, you know, if you talk about these issues regarding Aboriginal people's lives, if you're not indigenous, you're a racist! You *cannot* talk about these particular issues.[154]

XXII 'SILENCE'

Of course, Leak himself was not 'silenced', in relation to his cartoon or its aftermath, and much public debate ensued concerning both the propriety of the cartoon and the decision of

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[152] Parliamentary Joint Committee on Human Rights above n 8, 85-86.
[153] Bill Leak, 'A Thousand Words', *The Spectator Australia* (online), 10 December 2016 <http://www.spectator.com.au/2016/12/a-thousand-words>.
[154] Nicola Wright, 'Interview with Jacinta Price', *Liberty Works*, 19 April 2017 <https://libertyworks.org.au/interview-jacinta-price/> (my emphasis).

The Australian to publish it. Indeed such public debate also contained discussion of the topic of the cartoon itself, not least the wider but related issues of parental neglect and domestic violence, and their links to indigenous juvenile delinquency and youth incarceration, in remote indigenous communities.

However while Leak himself was not 'silenced', nevertheless it is possible that the widespread public denigration to which Leak was subject as a result of the publication of his cartoon, not least involving accusations of 'racism', as well as his being subject to investigation by the Commission under the auspices of s 18C, could inhibit others who might wish to speak out on the same issues as Leak, with the opinion and in the tone in which he did. Leak himself acknowledged this in his appearance before the Parliamentary Joint Committee on Human Rights. The following exchange occurred between Leak and Senator James Paterson on 1 February 2017:

> Senator Paterson: How do you think people in your circumstance – say, a freelance cartoonist or a cartoonist who operates online or on social media who does not have the backing of a company like News Corp – would feel having watched the experience that you have been through?
>
> Mr Leak: You have raised what I think is one of the most important points about this. I think that that hypothetical person working for some magazine that might be online – goodness knows – or whatever but does not have the backing of an organisation like News Corp is going to look at what happened to me and say: 'That bloke really got into a lot of trouble for telling the truth. I better not tell it myself'. If that is not a dampener on freedom of expression and freedom of speech, I do not know what is. To me, I think it is extremely sinister. I think it is downright sinister what the AHRC did in my case because that is precisely the message that it sent out to everyone: do not tell the truth; do not take a risk; speech is not free in this country.
>
> Senator Paterson: Sometimes we call that the chilling effect –
>
> Mr Leak: Well, that is what it is.
>
> Senator Paterson: And we have been asking people about this this week, none of whom have been subject to a complaint like you have. They say they are unconvinced that a chilling effect exists or that if it does it is pretty small. Do you agree with that view?

> Mr Leak: No, I do not … [155]

XXIII 'TRUTH' AND 'SILENCE'

Certainly the causes of indigenous juvenile delinquency and youth incarceration in remote indigenous communities are much more complex than the situation conveyed in Leak's cartoon. As explained above, the cartoon is bound by discursive and pictorial limits which do not allow it to convey this complexity, with all its multiple and inter-related elements, in any comprehensive way. Indeed, any attempt to do so would blunt the cartoon's rhetorical force. Its discursive effect, in starkly identifying what its author perceived to be *a* 'truth' in many remote indigenous communities, and *a* cause of such outcomes, is dependent precisely on its 'oversimplification' of such complex issues, and the 'stereotyping' which is the inevitable result of this.[156]

But to deny legitimacy to the cartoon on this basis, irrespective of the 'truth' it seeks to convey, is to deny legitimacy to the sort of criticism it sought to advance when it is advanced in this manner. It is to demand that, when it comes to forms of communication such as Leak's cartoon, silence is the preferable response to the social reality it seeks to identify. Former chairperson of the federal government's Indigenous Advisory Council, Nyunggai Warren Mundine, has criticised those who have sought to advance such a position against Leak's cartoon, as well as those who have sought to justify such a position by describing the cartoon as 'racist'. He states:

> Report after report has found indigenous children in communities across Australia plagued by dysfunction, child abuse, family violence and addiction. Telling the truth can never be racist. So those who labelled the cartoon racist believe one of two things: they think the cartoon depicted a lie (in which case they're wrong; it depicts a real situation); or they think depicting an irresponsible Aboriginal person condemns all Aboriginal people. Bill didn't believe this and the cartoon said the opposite … Those who think it condemns all indigenous people should examine their own biases, not Bill's.[157]

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[155] Parliamentary Joint Committee on Human Rights, above n 8, 85.

[156] Leak also declared that, in his opinion, the rhetorical force and discursive effect of a cartoon is, at least in part, dependent on its capacity to cause 'offence'. As he told the Parliamentary Joint Committee on Human Rights: 'Frankly, if I did a cartoon and I could safely say with 100 per cent surety that no one would be offended by it, I would throw it away and start again because the point of a cartoon – the point of satire – is to point to something that is true … And, if a work of satire does not have a kernel of truth, the satirist is wasting his time.': ibid 86-87.

[157] Mundine, above n 144.

Similarly, Jacinta Price is critical of those individuals who accuse Leak's cartoon of 'racism' and who would have preferred the cartoon not to advance its message concerning family dysfunction in remote Aboriginal communities. She describes such individuals as those who 'absolutely disregard what Bill Leak was trying to get across and say, "Oh, racism, racist, Bill Leak's just a racist!" And completely ignore the point that there are children out there suffering these abuses.'[158] She then provides her own personal testimony regarding such abuse:

> We all know, in the Territory, children in these circumstances, they are running the streets at night. As a Councillor, you know, we have to pick up the slack from the parents, and the fathers, who are not taking responsibility for their children. You know, the rest of the community have to pick up that slack. And we wonder why these children wind up in youth detention? You know? When their home lives are absolutely dysfunctional. The adults in their families couldn't care less about the fact that they're running around late at night … Any given night you can drive around Alice Springs and you will see children as young as eight years old out there. And you know, it just … makes my blood curdle because I have children of my own and I could never imagine having let any of my children at that age walk the streets at night with the dangers that they can face.[159]

If it is 'racist' to criticise parental neglect in remote indigenous communities, holding indigenous parents at least partly responsible for specific familial outcomes that follow from this neglect, as Leak's cartoon sought to do, then such a use of the epithet of 'racism' denies legitimacy to such criticisms altogether, irrespective of their 'truth'. Such a use of the epithet therefore seeks to shut down public debate rather than broaden it. In this way it is a discursive act of power. The key question is whether, in the context of the Leak cartoon, it was a justifiable one. This article has argued that it was not.

I fully recognize that 'free speech', as a norm, is sometimes espoused by individuals with a very specific political agenda, to enable and legitimate attacks on those they perceive as their opponents. Such individuals, sometimes associated with what has, in recent years, colloquially come to be known as the 'Alt-Right', might support the free speech positions associated with Andrew Bolt and Bill Leak. But they do so for very different reasons to those which underwrite the defence of this position in this article. This article is premised on the assumption that a plural public sphere, in which multiple voices might be heard, is an

[158] Wright, above n 154.
[159] Ibid.

important precondition of a healthy liberal democracy. Those who espouse free speech merely as a "cloak" to attack and marginalize opponents are not seeking to pluralise the public sphere, but rather dominate it, ensuring that only 'voices' such as their own define the prevailing terms of debate.

XXIV CONCLUSION

Bill Leak showed immense courage in his professional and personal life. His response to the massacre of the journalists and cartoonists at *Charlie Hebdo*, on 7 January 2015, was to pen a cartoon depicting the Prophet Muhammad – the very free speech act for which the *Hebdo* staff had been murdered and for which he was then required to go into federal police hiding:

> My response to that was to draw a cartoon that did feature an image of the Prophet Muhammad. I thought this would be a kind of natural response from just about every cartoonist in the Western world.[160]

In the final months of his life Leak was embroiled in controversy concerning another of his cartoons. We have seen that individuals disagree as to whether Leak's cartoon, depicting an indigenous father and his son, is 'racist' or a legitimate contribution to public debate. We have seen that under the terms of s 18C and s 18D of the RDA, it is possible for it to be both.

But the underdetermined nature of all individual judgments in such matters means that individuals can reasonably disagree on such issues, without there being any objective means to decide between them. Consequently, those who resort to accusations of 'racism' should remember that the 'non-neutral' status of the term renders many such accusations contestable, rather than self-evident, and consider the extent to which the accusation, when successfully applied, is a powerful signifier, capable of shutting down public debate and denying legitimacy to specific individuals in their contribution to it.

A key question is whether the 'silence' that can result, on specific matters, from the successful use of such an epithet is, in all circumstances, justified, or whether it has the result of limiting what would otherwise be a legitimate realm of public inquiry, thereby reducing the plurality, and therefore quality, of Australian public debate. Although Leak himself was not 'silenced', and much public debate occurred concerning the propriety of his drawing or *The Australian's* publishing his cartoon, the widespread hostility that Leak encountered, and

[160] Leak, 'Interview: Bill Leak, Cartoonist for The Australian Newspaper', above n 8.

the widespread accusation that either he or the cartoon was 'racist', does have the potential of inhibiting others from raising similar issues to Leak in the manner or tone in which he did so, thereby having a 'chilling effect' upon those with similar views wishing to make a similar contribution concerning these pressing issues in remote indigenous communities.

CHRISTIANITY AND HUMAN RIGHTS

Andrew S Kulikovsky*

ABSTRACT

Modern day international relations are dominated by human rights talk and many political causes around the world today have been framed in terms of human rights. But how are human rights defined and where do they come from? Existing human rights instruments are merely declarative and offer no ontology or justification for their declarations. This paper demonstrates that one's conception of human rights will always be derived from their ontological notions about humans in general, whether they have rights, the nature of those rights, why they exist, how we can identify them, and how all this knowledge may be justified. Moreover, only Christianity offers the required 'high anthropology' and the moral and ethical framework to substantiate and enforce the kinds of rights specified in Articles 1-21 of the Universal Declaration on Human Rights.

I INTRODUCTION

Modern day international relations are dominated by human rights talk and many political causes around the world today have been framed in terms of human rights. Almost all governments and world leaders accept the notion of human rights, even if they only pay lip service to upholding and enforcing them.

But what are these human rights and where do they come from? Are they universal or cultural? Can each culture invent their own? Is there a religious aspect to them?

This paper examines all these questions and then focuses on the relationship between human rights and Christianity, and how human rights may be viewed from the perspective of Biblical Christianity.

II WHAT ARE HUMAN RIGHTS?

The common understanding of human rights is captured in the United Nations' ('UN') Universal Declaration on Human Rights ('UDHR'). This UN resolution, passed in 1948 at the end of the Second World War in response to the horrific abuses of prisoners, civilians, and minority groups—especially by the Axis powers—lays out a set of rights that all human

beings may claim, including against their own government. It was intended to usher in a new era of international peace and harmony.

The declaration was followed by a group of international covenants: the *Convention on the Elimination of all forms of Racial Discrimination* (1969), the *International Covenant on Civil and Political Rights* (1976), the *International Covenant on Economic, Social and Cultural Rights* (1976), the *Convention on the Elimination of all forms of Discrimination Against Women* (1981), and the *Convention on Rights of the Child* (1990).

But the UDHR and the other covenants are simply declarative statements—sets of assertions about what the UN functionaries and delegates believed were human rights at the given times. These declarations are not human rights as such, but simply declare what the UN believe them to be.

Many values and behaviours have been asserted to be universal human rights—or at least worthy of being protected by universal human rights law. These include women's rights, abortion, contraception, workers' rights, children's rights, indigenous peoples' rights, rights for homosexual people, and rights pertaining to religious freedom. The problem is that all these issues are highly controversial in all cultural traditions.

How, then, can we be sure of what human rights actually exist? On first reading, the UDHR articles seem fair and uncontroversial, but on closer inspection many of the asserted rights involve deeply moral and political issues on which many human beings disagree. Most traditional Hindus would not accept that all humans have equal rights (Articles 1-2). The right to life (Article 3) is deeply political with respect to abortion, euthanasia and capital punishment, and western national security authorities have emphasised the necessity of using torture to extract critical information from captured terrorist operatives (Article 5). Most practising Muslims would not accept the notion of equality of all before the law (Article 7). In times of war, arbitrary detention of residents (Article 9) from the opposing country may be necessary to prevent intelligence gathering and the possibility of sabotage. Communist and many socialist nations routinely deprive people of their property (Article 17(2)). Such nations also limit their citizens' rights to freedom of thought, freedom of religion and freedom of expression (Articles 18-19).

From Article 22 onwards, consensus becomes virtually impossible. Almost no countries accept that every person has a right to social security and the free development of his

personality (Article 22). No state could possibly ensure that a person has a right to work and protection from unemployment. And to guarantee citizens a free choice of employment is simply absurd (Article 23), as is any right to 'rest and leisure' or paid holidays (Article 24). And guaranteeing a particular standard of living with respect to food, clothing, housing, medical care, social services and education (Articles 25-26) is plain wishful thinking. This is why Stoljar argues that so many of the human rights that have been asserted do not actually exist:

> You cannot have a right unless it can be claimed or insisted upon, indeed claimed effectively or enforceably … Rights are thus performance-dependent, their operative reality being their claimability; a right one could not claim, demand, ask to enjoy or exercise would not merely be imperfect – it would be a vacuous attribute.[1]

Given the normal historical usage of the term, a 'right' is something that all people may claim simultaneously. Claiming a right places no obligation on any other person. As Pogge argues, 'human rights require that we not harm others in certain ways—not that we protect, rescue, feed, clothe, and house them …[C]ivil and political human rights require only restraint, while social and economic rights also demand positive efforts and costs.'[2] We all have (to some extent) a right to free speech but this right should impose no obligations on anyone else. A free speech right contains no additional right to force others to facilitate the propagation of your speech through television, radio, printing or internet publication. Similarly, a right to travel freely does not mean that others must pay the costs of that travel. Thus, the author contends that the exercise of a real human right cannot result in a breach of another person's human right. Any supposed human right that does so is not a true human right but a politically imposed one.

In any case, even seemingly uncontroversial human rights are not easy to define or describe. The right to life apparently does not include the right to be born in the first place. And on what basis can we even claim that the right to life is a basic human right?

Those who ran the recent 'Marriage Equality' campaign to legalise same-sex marriage in Australia framed the issue in terms of human rights ie homosexual couples are being denied a basic human right. Justice Michael Kirby had also argued some years ago that religious

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[1] Samuel Stoljar, *An Analysis of Rights* (St Martin's Press, 1984) 3-4.

[2] Thomas Pogge, *World Poverty and Human Rights* (Oxford University Press, 2002) 66, 70.

condemnation of homosexuals was a denial of their human rights, stating that '[f]or the sake of the planet and survival of the species we must embrace the universal principles of human rights.'[3] But what is the justification for these so-called rights that are supposedly being denied? Neither the UDHR nor any other UN covenant confers any inherent rights to homosexuals. On the contrary, both Article 16 of the UDHR and Article 23 of the ICCPR affirm the traditional family as 'the natural and fundamental group unit of society.' In addition, the UN Human Rights Committee considered the issue of same-sex marriage in the case of *Joslin v New Zealand*, finding that a State party has not violated the rights of homosexual couples by refusing to allow them to marry.[4] In *Hämäläinen v Finland*, the European Court of Human Rights concluded that comparable provisions in the European Convention on Human Rights do not require parties to provide access to same-sex marriage.[5]

Those who assert that certain human rights exist do so by supposing that their moral and legal claims are legitimate because of the existence of particular legal, moral, and social conventions. Therefore, their conception of human rights is directly dependant on how they believe they know about the existence of human rights, and how they would validate this knowledge. In other words, it is not possible to isolate our conception of human rights from ontological notions about humans in general, whether they have rights, the nature of those rights, why they exist, how they may be identified, and how all this knowledge may be justified.[6]

III THE ONTOLOGICAL BASIS FOR HUMAN RIGHTS

Human rights law, despite claims to the contrary, is not universally accepted. The positive nature of current human rights law means that the subject matter has become intensely political, because different groups of people are operating with different and opposing moral and cultural understandings of human beings and human nature.

Again, it is important to understand that the UDHR and other UN Covenants are mere declarations. They offer no justification for the rights they proclaim, nor any detailed exposition of their definition and limits. Moreover, these instruments implicitly claim to have

[3] Michael Kirby, 'Religious Condemnation of Homosexuals Denies Human Rights', *The Age* (Melbourne), 30 June 2008, 13.
[4] Human Rights Committee, *Communication No. 902/1999*, UN Doc CCPR/C/75/D/902/1999 (2002) [8.2]-[8.3] (*Joslin v New Zealand*).
[5] *Hämäläinen v Finland* (37359/09) [2014] ECHR 787.
[6] Anthony J Langlois, 'Conceiving Human Rights without Ontology' (2005) 6 *Human Rights Review* 5, 7.

a higher authority to stand above all other traditions, religions, cultures, and political ideologies in the world, but this higher authority is never identified. So who or what is this higher authority and what justification is there for this higher authority? Many have asserted that humans have human rights simply because they are human beings. But what makes human beings so special? Anthony Langlois has pointed out that '[t]he promotion of human rights depends upon belief in a high anthropology.'[7] So what is the basis for this 'high anthropology'?

A *Islam*

Like all followers of a particular religion, Muslims are not a monolithic group. They come from many different ethnic and cultural backgrounds, and some are more devout than others. Nevertheless, the teachings and practices of Islam in relation to the status of human beings shows a fairly consistent pattern of violation and abuse. From indiscriminate terrorism, ethnic cleansing, slavery, and the violation and subjugation of women, including genital mutilation and the taking of child brides, it should be clear that any notion of human rights as framed by the UDHR is apparently absent from Islam.

In spite of this terrible record—and perhaps to deflect criticisms away from it—the Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development) adopted the *Cairo Declaration on Human Rights in Islam* ('CDHRI') in Cairo in 1990. In many ways, it mirrors the UDHR but ends with Article 24 stating that "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah" and Article 25 stating that 'The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.' These two final Articles effectively nullify the previous twenty-three.

Once again, the CDHRI is a mere declarative statement that gains its claimed authority from the teachings of Islam and must be interpreted with respect to those teachings despite the fact that those teachings violate most of the common notions of what human rights entail.

B *Marxism*

In Marxism, human rights are mere by-products of social relations rather than universal, moral and ethical standards. In other words, talk about human rights is simply an expression

[7] Anthony J Langlois, 'The Elusive Ontology of Human Rights' (2004) 18 *Global Society* 243, 244.

for a set of conventions associated with a particular period of human history. For Marxists, individual rights are simply part of the moral, legal, and political framework that underpins the capitalist system:

> None of the supposed rights of man, therefore, go beyond the egoistic man … that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice …The only bond between men is natural necessity, need and private interest, the preservation of their private property and their egoistic persons.[8]

Therefore, as Steven Lukes concluded, 'the Marxist canon provides no reasons for protecting human rights.'[9] Although Marx may have advocated for certain specific rights for mankind during his life, and although many Marxists claim to believe in human rights, Lukes points out that human rights cannot be coherently justified or 'taken seriously' within the Marxist framework.[10] This is largely because Marxism is a de-humanising ideology. Social progress and the good of the community always trumps individual rights, resulting in the quashing of individual freedom and choice.

In addition, because the Marxist program denies freedom and choice, it must be implemented by force:

> The denial of human rights in socialist states can be seen as the natural outcome of Marist *praxis*: Marxist teaching about the nature of the class struggle and the conditions necessary for the emancipation of the proletariat from bourgeois values is not only theoretically alien to the concept of universal human rights, but its implementation by Marxist revolutionaries in the circumstances expected to prevail is likely to require the denial of such rights to ever-widening sections of the society if political power is to be secured and retained.[11]

Indeed, as R J Rummel has demonstrated, history is full of examples of Marxist states murdering their own citizens. Soviet Russia, Communist Eastern Europe, China, North Korea, Vietnam and Cambodia have together slaughtered over 100 million people during the 20th century.[12]

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[8] T B Bottomore (ed), *Karl Marx: Early Writings* (McGraw-Hill, 1964) 26.
[9] Steven Lukes, 'Can a Marxist believe in human rights?' (1982) 1 *Praxis International* 334, 344.
[10] Steven Lukes, *Marxism and Morality* (Clarendon Press, 1985) 70.
[11] L J Macfarlane, 'Marxist Theory and Human Rights' (1982) 17 *Government and Opposition* 414, 414.
[12] R J Rummel, *Death By Government* (Transaction Publishers, 1994) 2-11.

C *Christianity*

A high view of human beings is central to the Christian worldview, and the Western intellectual tradition owes much to the historical influence of Christianity, including the development of rights theories. These initial rights theories were based in 'natural law'—that is, the prescriptive law of God which is written in our hearts and minds (our conscience), so that we may follow God's commands (Romans 2:14-15).

Christianity teaches that man is a special creation of God and has been blessed with certain natural (or human) rights. Human beings have a certain dignity and were given dominion over the rest of creation (Genesis 1:26), because we are created in the image of God (Genesis 1:27). God made human beings in His own image, and as God's image-bearers, human beings are personal, moral, and spiritual beings. We have volition, freedom of choice, self-consciousness, self-transcendence, self-determination, and rationality.[13] Moreover, we have an innate capacity for relationships that characterise the image of the triune God. Thus, the image of God includes all facets of the human being; spiritual, psychological, moral, emotional, physical and relational. As the United States founding fathers expressed in their *Declaration of Independence* (1776): 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'

The Bible teaches that all human beings, because of their conscience, are capable of doing the right thing even though they are not practising Christians and despite having little or no knowledge of Christian morality and ethics (Romans 2:14-15).[14] Similarly, the Bible also teaches that all human beings have an inherent sense of what is morally wrong, but we often suppress this knowledge despite divine general revelation and natural law (Romans 1:18-23).[15] Thus, according to the Christian point of view, natural law imposes behaviour and

[13] Charles Lee Feinberg, 'The Image of God' (1972) 129 *Bibliotheca Sacra* 235, 246.

[14] 'Indeed, when Gentiles, who do not have the law, do by nature things required by the law, they are a law for themselves, even though they do not have the law, since they show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts now accusing, now even defending them.' (Romans 2:14-15, New International Version 1984).

[15] 'The wrath of God is being revealed from heaven against all the godlessness and wickedness of men who suppress the truth by their wickedness, since what may be known about God is plain to them, because God has made it plain to them. For since the creation of the world God's invisible qualities – his eternal power and divine nature – have been clearly seen, being understood from what has been made, so that men are without excuse. For although they knew God, they neither glorified him as God nor gave thanks to him, but their thinking became futile and their foolish hearts were darkened. Although they claimed to be wise, they became fools and exchanged the glory of the immortal God for images made to look like mortal man and birds and animals and reptiles.' (Romans 1:18-23, New International Version 1984).

character standards on all human beings in accordance with God's will as revealed in the teachings of the Bible. Indeed, John Locke recognised the priority of natural law in his Second Treatise of Government.[16]

Of course, few human rights theorists would accept the truth claims of Christianity, so they are obliged to find an alternative.

D *Secular Humanism and Liberalism*

Over a period of 400 years, the European intellectual and political elite slowly moved away from their roots in Christendom, through the Enlightenment or 'Age of Reason' and into secularism, existentialism and positivism.[17] The influence of Christianity and the Church was gradually replaced by a Hobbesian state of nature, and the elite moved from theism to deism and agnosticism, secularism and in many cases, atheism. The scientific revolution unlocked a new view of nature that questioned the special position and standing of human beings as well as God's role as Creator. Indeed, scepticism about the possibility of God's existence tended to undermine the very idea of natural law, since law requires a legislator and if the claimed legislator was non-existent then so were all his laws.[18]

Some humanists such as Jeremy Bentham (1748–1832) denied the existence of human rights altogether. In his book *Anarchical Fallacies,* he argued that rights were 'nonsense upon stilts' – unless they were the citizens' rights found in positive law, and as a utilitarian, he asserted that such rights must deliver the greatest good for the greatest number of people.[19]

French anthropologist and sociologist Georges Vacher de Lapouge asserted that each

> individual is dominated by his race and is nothing. The race, the nation is everything. Every man is related to all other men and all living beings. There is no such thing as human rights, no more than there are rights of the armadillo or the Gibbons syndactylus, of the horse which is harnessed or the ox which one eats. As soon as man loses the privilege of being a special being created in God's image, he possesses no more rights than any other mammal. The idea

[16] John Locke, *Second Treatise of Government* (Digreads.com Publishing, 2017) 7.
[17] Langlois, 'The Elusive Ontology of Human Rights' 249-250.
[18] Ibid 251-252.
[19] Ibid 253.

> of justice is an illusion. There exists nothing but force. Rights are only agreements—contracts between equal or unequal powers.[20]

Thomas Hobbes and Hugo Grotius advanced the view, which became known as 'subjective right theory', that human beings have human rights simply because we are human. According to Langlois, they did so in order to escape the Christian foundations of natural law:[21]

> Subjective right theory in principle bypasses God, the church, theology, tradition and the natural law to which these have given rise in its search for content. It goes straight to the idea of our being human, our 'common humanity'. This is the deontic reflex which gives rise to the deontic dogma of human rights ('we have human rights simply because we are human').[22]

Indeed, the principal claim of the Enlightenment was that because humanity was the highest tribunal, it is up to us to set the rules.[23]

But the basic problem with any subjective right approach is that simply being human does not give us the ability to automatically derive or identify our basic human rights. Indeed, what does it mean to be a human being and how does one discover these inherent human rights? We cannot just read off the UDHR by examining human nature. 'There is no direct and unmediated link between "we have human rights because we are human" and the content of those rights.'[24] Thus, we end up with the mere assertion that human beings have certain human rights.

Other secular humanists argue that rights language points to a common and universal moral knowledge that underlies all cultures, religions and philosophies. Those in the western tradition gain this common moral knowledge through liberalism; non-westerners can access it through Hinduism or Confucianism etc. The central claim is that there is a consensus about notions of human rights. The problem is that this claimed consensus simply does not exist. There is no agreement about a common and universal morality. Thus, Langlois concludes: '[T]he common moral knowledge argument is seen as an attempt to live with all the benefits

[20] As cited by Karlheinz Weissmann, 'The Epoch of National Socialism' (1996) 12 *Journal of Libertarian Studies* 257, 260.
[21] Langlois, 'The Elusive Ontology of Human Rights' 251-253.
[22] Anthony J Langlois, 'Human Rights and Modern Liberalism: A Critique' (2003) 51 *Political Studies* 509, 511.
[23] Peter Gray, *The Enlightenment: An Interpretation: The Science of Freedom* (Oxford University Press, 1989) 21-24.
[24] Langlois, 'Human Rights and Modern Liberalism' 511-512.

of God without actually having God, and runs into the same trouble as the attempt to have a moral or natural (prescriptive) law without a moral law giver.'[25]

The UDHR and other human rights instruments claim to present a timeless standard for human morality and ethics. These principles are intended to apply to all people, at all times, in all societies, but in the real world this is simply not the case. Human rights law is a manifestation of positive law and of relatively recent origin. Principles of human rights are not consistently applied to all people in the present, and they have clearly not been applied to all people in the past, as the history of the 20th century demonstrates.

It should be noted that many 'progressive' enlightenment ideas directly inspired the events that resulted in the carnage of the first half of the 20th century – events that ultimately led to establishment of the UN and the UDHR. One of those ideas was Darwinism. Philosopher James Rachels argues in his book, *Created from Animals: The Moral Implications of Darwinism*, that Darwinism undermines the Judeo-Christian belief in the sanctity of human life. He points to an observation made by Darwin in his 1838 notebooks: 'Man in his arrogance thinks himself a great work, worthy of the interposition of a deity. More humble and, I believe, true to consider him created from animals.'[26] Instead of being created in the image of God, human beings were just highly evolved animals. If human beings are merely highly evolved animals, then they are not a unique class of creature and thus there is no basis to assign them a unique set of rights. Since Darwinism provided a naturalistic explanation for the origin of ethics, Darwinists generally dismissed the notion of human rights as a chimera.[27]

Assuming the truth of Darwinism, Rachels uses it as a basis to justify euthanasia, infanticide (for disabled babies), abortion, and animal rights. Indeed, many scientists, social thinkers, and physicians in late 19th and early 20th century Germany used Darwinian arguments to undermine the value of human life. According to Weikart, in the second edition of *The Natural History of Creation*, Ernst Haeckel became the first German scholar to seriously suggest the euthanising of disabled infants. Eugenicists August Forel and Fritz Lenz taught that disabled people and non-Europeans were inferior to healthy Europeans. Darwinism implied human inequality because biological variation was required to drive evolution.[28]

[25] See Langlois, 'The Elusive Ontology of Human Rights' 256-257.
[26] Richard Weikart, 'Does Darwinism Devalue Human Life?' (2004) 30 *Human Life Review* 29, 29.
[27] Ibid 30.
[28] Ibid 29-30.

Ethnologist Friedrich Hellwald advocated a Darwinian view of social evolution in *The History of Culture*: 'The right of the stronger, is a natural law.'[29] He added:

> In nature only One Right rules, which is no right, the right of the stronger, or violence. But violence is also in fact the highest source of right, in that without it no legislation is thinkable. I will in the course of my portrayal easily prove that even in human history the right of the stronger has fundamentally retained its validity at all times.[30]

Darwinism's stress on the struggle for existence also contributed to the devaluing of human life. Darwin himself explained that mass human death was actually beneficial: 'Thus, from the war of nature, from famine and death, the most exalted object which we are capable of conceiving, namely, the production of the higher animals, directly follows.'[31] For Darwin, mass death was inevitable and necessary. Indeed, Adolf Hitler was greatly influenced by Darwin's ideas and the eugenics movement, and his writings and speeches clearly reflect it.[32]

It is interesting to note that James Rachels' views on issues of life and death are very similar to those of Australian bioethicist, Peter Singer, who has advocated for the legitimacy of infanticide for handicapped babies and voluntary euthanasia. Darwinism, too, plays a key role in Singer's philosophy with respect to life and death. Singer claims that Darwin 'undermined the foundations of the entire Western way of thinking on the place of our species in the universe' because it denied that humanity had any special status.[33]

In reality, for secular humanists, human rights are nothing more than social constructs. The international human rights instruments and institutions (treaties, conventions, courts etc) are mere creations of select groups of human beings. As a manifestation of positive law, human rights are merely the product of decisions made by states to co-operate in enforcing that law, therefore they lose the capacity to act as the basis for moral criticism against government power because they no longer stand above the asserted authority of governments.[34] Because human rights law comes into existence through human action, they can also go out of existence through human action (or inaction in relation to enforcement). In other words,

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[29] Friedrich Hellwald, *Culturgeschichte in ihrer natürlichen Entwicklung bis zur Gegenwart* (Augsburg Press, 1875) 27.
[30] Ibid 44-55.
[31] Charles Darwin, *On the Origin of Species* (Penguin, 1968) 459.
[32] See Richard Weikart, *From Darwin to Hitler: Evolutionary Ethics, Eugenics, and Racism in Germany* (Palgrave Macmillan, 2004); and Jerry Bergman, 'Darwinism and the Nazi Race Holocaust' (1999) 13(2) *Journal of Creation* 101, 101-111.
[33] Peter Singer, *Writings on an Ethical Life* (Harper Perennial, 2001) 77-78, 220-221.
[34] See Langlois, 'The Elusive Ontology of Human Rights' 256-257.

human rights instruments are often ignored, manipulated, and reinterpreted in accordance with what is politically expedient for governments and international agencies. This point has been brilliantly (if somewhat irreverently) made by Mark Steyn regarding the humanitarian crisis in Darfur (Sudan) in 2002-2004:

> If you think the case for intervention in Darfur depends on whether or not the Chinese guy raises his hand, sorry, you're not being serious. The good people of Darfur have been entrusted to the legitimacy of the UN for more than two years and it's killing them. In 2004, after months of expressing deep concern, grave concern, deep concern over the graves and deep grave concern over whether the graves were deep enough, Kofi Annan took decisive action and appointed a UN committee to look into what's going on. Eventually, they reported back that it's not genocide. Thank goodness for that. Because, as yet another Kofi-appointed UN committee boldly declared, "genocide anywhere is a threat to the security of all and should never be tolerated." So fortunately what's going on in the Sudan isn't genocide. Instead, it's just hundreds of thousands of corpses who happen to be from the same ethnic group, which means the UN can go on tolerating it until everyone's dead, at which point the so-called "decent left" can support a "multinational" force under the auspices of the Arab League going in to ensure the corpses don't pollute the water supply.[35]

It should be clear from the above that secular humanism cannot provide any ontological or epistemological basis from which one may logically derive any notions of human rights universally applicable to all human beings. In fact, its adoption of Darwinism means secular humanism cannot provide the high anthropology required. If there is nothing particularly unique or special about humanity, then why should we possess any special rights simply for being human?

IV CHRISTIANITY AND HUMAN RIGHTS

As noted above, the very notion of human rights depends on a high anthropology that establishes human beings as something special, worthy of special protections in the form of rights. Neither Islam nor any of the manifestations of secular humanism can provide such a high anthropology—only Christianity can.

So what does Christianity actually teach with respect to human rights? Following is a comparison between the UDHR and the teaching of Biblical Christianity:

[35] Mark Steyn, 'New Coalition of Willing Needed in Darfur', *The Australian* (Sydney), 8 May 2006, 14.

A *Article 1: Freedom, Equality, Dignity and Endowed with Reason and Conscience*

According to the Bible and Biblical Christian theology, unlike animals, all human beings—past, present and future—are special creations of God, made in His image (Genesis 1:26-27). Therefore, all human beings have innate worth and dignity, and are equally precious and valuable. It is on this basis that human beings are deserving of special protections in the form of human rights.

Christian ethics also brings freedom. The Ten Commandments (Exodus 20:1-17) capture the very essence of the Christian ethic. These commands are either prohibitions (e.g. "You shall not murder") or very specific commands (e.g. "Honour your father and mother"). The same can be said for all the other ethical and ceremonial laws in the Torah. Apart from these constraining laws, we are free to do as we please through the exercise of our reason and conscience.

B *Article 2: Non-discrimination*

The word 'discrimination' carries many negative connotations. However, according to the *Concise Oxford English Dictionary*, its primary meaning is "to recognise a distinction." In all areas of life, human beings discriminate on a daily basis. The issue with respect to human rights is whether the subject of discrimination is justified.

The Apostle Paul taught that there is "neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus" (Galatians 3:28). Elsewhere he stated: "Here there is no Greek or Jew, circumcised or uncircumcised, barbarian, Scythian, slave or free, but Christ is all, and is in all" (Colossians 3:11). In Christianity, when it comes to our human dignity and innate worth, there is no racial or ethnic discrimination, no social discrimination, and no sexual discrimination.

Genesis 1:27 indicates that the true expression of God's image is reflected in both the male and the female, together. Although Christian churches have not always upheld this Biblical teaching, the Church has always welcomed female converts and Christianity has recognised the contribution of women since the time of the early Church. In Romans 16, the Apostle Paul singled out a number of women including Phoebe, a deacon, his fellow worker Priscilla, the hard-working Mary, Tryphena, Tryphosa, and Persis, Junia, who was noted among the Apostles, the mother of Rufus who had acted as a mother to Paul, and Julia.

In addition, Christianity has provided the moral and ethical basis for the advancement of women's rights around the world. The Roman empire was no friend to women and routinely left infant daughters to die from exposure. Many women died or were maimed from forced surgical abortions. Surviving girls were often forced to marry at an age as young as twelve, and were then pressured into remarriage when widowed. But Christians opposed these practices and rescued abandoned infants. Moreover, the Christian view of women's value and dignity led to the ceasing in India of the Hindu practice of suttee (the burning alive of widows on the funeral pyre of their dead husbands). In China, Chinese Christian women, such as medical doctor Shi Meiyu, began agitating against the abusive practice of foot binding of girls and women and eventually had the practice banned. Christianity was also instrumental in providing educational opportunities for girls and women in countries such as India and Japan, that had traditionally denied such opportunities.[36] Christians were also instrumental in winning voting rights for women in England, Ireland, Australia and the United States of America.[37]

Biblical Christianity teaches that all humanity came from Adam and Eve, the first man and the first woman. Thus, racism should be seen as truly scandalous. All human beings are related to one another and all are image bearers of God regardless of their skin colour or physical characteristics.[38] In fact, the Bible never talks about 'races.' It refers to 'families,' 'clans,' 'tribes,' and 'nations' (cf. Genesis 12:2; Joshua 7:14). The variation in human characteristics and skin colour presently observed is merely a result of 'genetic drift' and/or loss of genetic information brought about by environmental pressure and/or genetic concentration as a result of population isolation.[39]

In addition, the Bible teaches that God does not show favouritism (Acts 10:34) and neither should we (James 2:1-4).

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[36] Jeff Myers, *Understanding the Culture: A Survey of Social Engagement* (Summit, 2017) 81-85.

[37] Carolyn C Nelson, The Uses of Religion in the Women's Militant Suffrage Campaign in England (2010) 51 *The Midwest Quarterly* 227, 227-242; Cliona Murphy, 'The Religious Context of the Women's Suffrage Campaign in Ireland' (1997) 6 *Women's History Review* 549, 549-565; The Women's Christian Temperance Union was instrumental in winning support for women's voting rights in both South Australia and the United States.

[38] Note that there is very little difference at all between the various people groups living on Earth. The colour of a person's skin is dependent on the amount of melanin produced by the body, which is a function of that person's genetics.

[39] Genetic drift is the concentration of a particular gene or set of genes in a particular population. Loss of genetic information involves the degeneration of a particular gene or set of genes resulting in functional information being lost from the entire population.

C *Article 3: Right to Life, Liberty and Security*

Christian teaching is emphatic: 'You shall not murder' (Exodus 20:13).[40] Murder is a most heinous crime because it violates the image of God in man: 'Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man' (Genesis 9:6). The severity of the punishment indicates the severity of the offense. The molestation of even one individual human life is a direct affront to the glory of God.[41]

One human right that is curiously missing from the UDHR is the 'right to be born'. This is arguably the most fundamental of all human rights since one cannot claim any other human right without being born in the first place. Unfortunately, humanists and feminists have acted as if the legal right to kill the unborn is an equally fundamental human right.

It should be noted that the Bible contains no prohibition against capital punishment. As noted above, Genesis 9:6 endorses it for the offence of murder.

The Bible also condemns rape and the seriousness of the crime is indicated by the mandated punishments: a man who rapes a betrothed woman faces capital punishment, and a man who rapes a woman who is not betrothed must marry her and never divorce her (Deuteronomy 22:25-29).

In addition, kidnapping and enslavement are also prohibited, with violators, again, facing capital punishment (Exodus 21:16).

[40] Some Bible translations (e.g. King James Version, American Standard Version) translate this verse as 'Do not kill' but 'kill' is an inaccurate rendering of the Hebrew Qal verb רָצַח (*rāṣēḥ*).

[41] One may be inclined to ask about instances of genocide of innocent people in the Bible (e.g. Deuteronomy 7:1-2). According to orthodox Christian theology, no one is innocent: 'there is none righteous, not even one' (Romans 3:10). Further, God announces that He was removing the Canaanites because of their wickedness (Deuteronomy 9:4–5), and it is worth noting that God granted them an additional 400 years of grace before doing so (Genesis 13:14). Justice demands that the punishment should fit the crime, but if the crime is misunderstood, the punishment will seem unjust. The Creator is not subject to His creation, and creation is His to do with as He wills and for His own purposes (Psalm 24:1, Romans 9:20–21). In any case, Israel was to drive out the inhabitants of Canaan (Exodus 23:28–33) as judgment for their wickedness (Deuteronomy 9:4–5). Only those who were unwilling to leave were to be killed (Deuteronomy 7:1–2). The inhabitants of the land knew what was coming and had fair warning (Joshua 2:9–11) before Israel began their campaign of conquest. Thus, none of the Canaanites had to die.

D *Article 4: Prohibition of Slavery*

Throughout history, every society has practiced or endorsed slavery. Whites enslaved blacks; blacks enslaved whites; blacks enslaved other blacks; and whites enslaved other whites.[42] The abolition of slavery is a relatively recent phenomenon.

But is slavery not ordained in the Old Testament? Yes, but not in the way slavery is often understood. It would be more accurately described as 'indentured servitude'. A person may voluntarily entered into servitude to repay debt (Deuteronomy 25:39-42), but that person may be freed at any time if he or she (or a relative) makes an appropriate payment to the owner (Leviticus 25:47-53).

The Israelites were not to treat captured women as slaves (Deuteronomy 21:14), and they were also commanded to offer refuge to slaves and treat them well (Deuteronomy 23:15). In addition, all indentured servants were to be released every fifty years (Leviticus 25:39-41).

In any case, Christians were chiefly responsible for abolishing slavery and the slave trade in Europe and the Americas.[43]

E *Article 5: Prohibition of Cruelty and Torture*

Although there is no explicit prohibition in the Bible against torture and cruel, dehumanising punishment, such prohibitions may be inferred from the high anthropology that Christianity advocates. Because all human beings are inherently sinful, yet still bearers of God's image, there is no basis for inflicting any kind of sadistic cruelty on our fellow human beings—for punishment or otherwise.

F *Articles 6-11: Law and Justice*

One of the key characteristics of the God of the Bible is that He is just (Isaiah 30:18; 2 Thessalonians 1:6; Revelation 16:7). Justice matters to God – with respect to both civil and criminal offences and to procedural fairness.

Again, Christianity's high anthropology means that all human beings have a right to recognition as a person before the law. It is important to note that this right is not consistently

[42] See Rodney Stark, *For the Glory of God: How Monotheism Led to Reformations, Science, Witch-Hunts, and the End of Slavery* (Princeton University Press, 2003) 291-327.
[43] Ibid 327-360.

granted in a secular humanist worldview, where unborn babies have no legal status as persons, and have no protection against being terminated in their mother's womb.

The Bible also contains many stipulations regarding procedural fairness. For the Israelites, disputes were to be settled by independent judges with varying responsibility appointed by Moses: 'He chose capable men from all Israel and made them leaders of the people, officials over thousands, hundreds, fifties and tens. They served as judges for the people at all times. The difficult cases they brought to Moses, but the simple ones they decided themselves' (Exodus 18:24-26).

Strict procedural rules were in place for making accusations of wrong-doing. There was no room for any arbitrary arrest, detention or exile, or the presumption of guilt, and the divine law only applicable from the time it was given by God. It was not retrospective.

The people were explicitly forbidden from giving false testimony against their fellow citizens (Exodus 20:16). Moreover, multiple witnesses were necessary and false and malicious witnesses were to be appropriately punished:

> [o]ne witness is not enough to convict a man accused of any crime or offense he may have committed. A matter must be established by the testimony of two or three witnesses. If a malicious witness takes the stand to accuse a man of a crime, the two men involved in the dispute must stand in the presence of the LORD before the priests and the judges who are in office at the time. The judges must make a thorough investigation, and if the witness proves to be a liar, giving false testimony against his brother, then do to him as he intended to do to his brother. You must purge the evil from among you (Deuteronomy 19:15-19).

The Bible also stipulates effective and proportionate remedies for various offences (Exodus 21-22; Leviticus 20).

G *Article 12: Privacy, Non-interference and Reputational Damage*

The Bible teaches that everything is laid bare before God and He sees everything. There is no hiding anything from God (Hebrews 4:13). However, the Bible does endorse privacy in our interpersonal relationships.

The Apostle Paul entreats the Thessalonians to make it their ambition to lead a quiet life, to mind their own business and to work with their hands so that they will not be dependent on anybody (1 Thessalonians 4:11). Gossipers and busybodies are roundly condemned (2

Thessalonians 3:11; 1 Timothy 5:13). Jesus stipulated that when giving alms, the people were not to announce it or do it in public but to give in secret (Matthew 6:2–4).

The Bible also condemns unjustified attacks on a person's honour and reputation by forbidding false testimony or slander (Exodus 20:16).

H *Articles 13-15: Freedom of Movement and National Identity*

There is inherent freedom in Christianity. The are some specific restrictions—commands to do something specific, or not to engage in certain behaviours – but they are relatively few in number. Apart from this, Christians are free – including to live and move where they choose in accordance with the laws of the land. The Bible is full of examples of God's people, His prophets, and His Apostles moving between states.

In addition, the Apostle Paul asserted his Roman citizenship in order to avoid being flogged (Acts 22:25-29).

God's people were commanded to treat immigrants well (Exodus 22:21; Leviticus 19:33-34), and to grant asylum and protection to escaped slaves (Deuteronomy 23:15-16).

I *Article 16: Marriage and Family*

The Bible is emphatic that the family is the basic unit of society and was instituted by God for the purposes of pro-creation and the raising and training of children:

> The LORD God said, "It is not good for the man to be alone. I will make a helper suitable for him" ... So the LORD God caused the man to fall into a deep sleep; and while he was sleeping, he took one of the man's ribs and closed up the place with flesh. Then the LORD God made a woman from the rib he had taken out of the man, and he brought her to the man. The man said, "This is now bone of my bones and flesh of my flesh; she shall be called 'woman,' for she was taken out of man." For this reason, a man will leave his father and mother and be united to his wife, and they will become one flesh. The man and his wife were both naked, and they felt no shame (Genesis 1:18, 21-25).

A husband is to love their wife (Ephesians 5:25-28), and the wife is to respect her husband (Ephesians 5:33). Adultery is forbidden (Exodus 20:14).

A father is to teach and train their children, not exasperate them (Ephesians 6:4). Children are to obey their parents (Ephesians 6:1) and honour them (Exodus 20:12).

The Bible also indicates that the decision to marry is a free choice and an agreement between both parties. (Genesis 24; 1 Corinthians 7:8-9, 36-38).

It should be noted that neither the Bible nor the UDHR endorses homosexual marriage. Indeed, given that both emphasise the purpose of marriage as being to "found a family," which is the "natural and fundamental group unit of society," homosexual marriage would violate these principles.

J *Article 17: Property Rights*

The Bible is clear that individual property rights exist. This most plainly set out by the eighth commandment: 'You shall not steal' (Exodus 20:15).

Specific remedies for theft and other property offences were also instituted (Exodus 22:1-15).

K *Article 18-20: Freedom of Thought, Opinion and Association*

As noted above, freedom is a core Christian principle. Becoming a disciple of Christ – or rejecting Christianity – is a free and individual choice. Unlike many other world religions, Christianity has no 'convert or die' methodology.

Every person in a Christian society has the freedom to choose a different religion and practise it (within the confines of the law of the land), to associate with whomever the wish, and to have and express whatever opinions they wish. However, Biblical Christianity teaches that each person must ultimately give an account for their actions (or lack thereof).

L *Article 21: Participation in Government*

The Bible teaches that governing authorities are ordained by God and are a practical necessity for the maintenance of justice and social order (Romans 13:1-4; 1 Peter 2:13-14), and the Apostle Paul commanded the Church to submit to these governing authorities. But note that the indefinite plural 'governing authorities' indicates this is a general principle, not a *carte blanche* endorsement of all governments and rulers.

However, the Bible offers no prescription for the actual form of government. Israel and Judah were Kingdoms and both had good kings as well as evil kings. This is because, according to Christian doctrine, human beings are not only God's image bearers but also fallen and sinful. All human beings are inclined to do wrong if left unrestrained by the powers of government, and this includes those in government. History and present-day experience repeatedly bear this out.

In Christianity human fallibility is readily acknowledged, as is the need to impose sophisticated checks and balances on human government since no individual or group with vested interests should ever be completely trusted with unchallenged power over others. As Lord Acton famously put it: 'Power corrupts. Absolute power corrupts absolutely.' Indeed, given their Christian beliefs and worldview, the authors of the Federalist Papers also recognised this truth: 'It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature?'[44] In other words, the tendency to do evil is inherent to human nature, and government with distributed powers is a means of trying to cope with this fact: 'Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint.'[45]

Although the Bible is silent on the form of government, the Christian doctrine of human fallibility strongly indicates the need for distributed, representative and limited government. The selection of representatives was practised by the early Church (Acts 6:2-3) so there is no reason to think that Christianity stands against participatory government. Moreover, governing officials were to dedicate themselves to their task in a full-time capacity and be supported by taxes (Romans 13:6).

M *Articles 22-30*

However, Christianity departs from the UDHR at Articles 22-30. This is not to say that Christianity is necessarily against these Articles. Rather, Biblical Christianity does not view them as fundamental human rights. The 'rights' asserted in these articles all place onerous

[44] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1961) 322.
[45] Ibid 110.

obligations on others in order for the claimed 'right' to be fulfilled. The result is that the rights of some people are violated in order to fulfil the 'rights' of others.[46]

For example, the 'right to social security' (Article 22) implies that it be funded by higher taxation, but this would begin to infringe the property rights of other citizens. The 'right to work' (and other associated rights) means that someone is obligated to employ the person claiming that right. While people should be free to pursue any career they wish, they do not have a right to force others to employ them or dictate the conditions of their employment, or unilaterally prescribe the level of their remuneration (Article 23).

Likewise, rights to leisure and holidays (Article 24), a certain 'standard of living' (Article 25), free education (Article 26) and cultural participation (Article 27) place onerous and unrealistic burdens on other citizens. These so-called rights are not protections against violations of human life and dignity but amount to mere demands for certain things—chiefly goods and services belonging to, or provided by, other people.

Again, this is not to say that Christianity is opposed to the provision of such benefits, or that a good, just, free and flourishing society should not provide them. But rather than being a human 'right', the basis for providing such things is Christian ethics: the exercise of Christian love, compassion, grace, mercy, generosity, and good will toward our fellow human beings who are all made in God's image.

Christianity teaches its followers to care for the less fortunate (Proverbs 14:31; Galatians 2:10, James 1:27, 2:5–6, 16), to help those in need (Proverbs 14:21; Matthew 5:42; Luke 10:30-37), to provide for the poor (Leviticus 19:10; Deuteronomy 15:7-8), to properly educate children (Ephesians 6:4; Proverbs), to be peacemakers (Romans 12:18-20; Matthew 5:9), to honour all people and do good to all mankind (1 Peter 2:17; Galatians 6:10), to give generously (Romans 12:8, 2 Corinthians 9:6–9), to look out for the wellbeing of others (Philippians 2:3–4), and to love all people (Galatians 5:14, James 2:8). Indeed, throughout history, Christians have routinely practised love and charity toward their fellow human beings. The majority of hospitals, hospices, orphanages and charities in the world today were founded by dedicated Christians. Christians also founded the world's great universities

[46] The so-called rights espoused in Article 22-30 were primarily pushed by the Marxist/Communist members of the United Nations.

including the first at Bologna, as well as Paris, Oxford, Cambridge, Uppsala, Lund, Heidelberg, Princeton, Harvard and dozens of others.[47]

V CONCLUSION

Langlois's detailed analysis has shown that one cannot make sense of human rights – with respect to their content, meaning or validity—apart from human intellectual traditions. He concludes:

> [T]he existence and universality of human rights do not derive from the capacity of human rights theorists to transcend their human particularity and comment on the nature of the human condition from some place external to that condition – be it a view from nowhere, an archimedean point or a god's eye point of view. Rather, human rights are established and regarded from within our philosophical, political and religious traditions.[48]

In other words, human rights 'are the outcome of a specific political and social theory, not its foundation.'[49] Moreover,

> human rights are not a given, because what it means to be human is not a given. Rather, our understanding of both of these is entirely dependent on the human traditions, the metaphysical narratives about the nature of humanity, out of which we do our political and philosophical theorising … [T]he concept of human rights implies a whole understanding of human beings which is historical and particular in origin and content, and is far from universally ascribed to by all humans – either in historical terms, or in the present day, empirically or normatively.[50]

Despite the lack of universal agreement – and thus universal acceptance – regarding the content and meaning of human rights, the UDHR still has broad support among many of the United Nations' member states, particularly western nations and many of their former colonies.

It should be clear from the above analysis that only Christianity provides a coherent basis for the fundamental human rights specified in the UDHR. Only Christianity can provide the high

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[47] For a good and detailed summary of the positive influence of Christianity throughout history, see Alvin J. Schmidt, *How Christianity Changed the World* (Zondervan, 2004).
[48] Anthony J Langlois, 'The Narrative Meta-Physics of Human Rights' 9 *The International Journal of Human Rights* 369, 387.
[49] Anthony J Langlois, 'Human Rights: The Globalisation and Fragmentation of Moral Discourse' (2002) 28 *Review of International Studies* 479, 490.
[50] Langlois, 'The Narrative Metaphysics of Human Rights' 380.

anthropology and the moral and ethical framework to substantiate and enforce these rights. And although Christian disciples have a far from perfect record in upholding human rights, history demonstrates that when Christian people act in accordance with what their Bible teaches and what their mentor Christ demonstrated, they have been an extraordinarily great force for good and for justice.

'IT'S NOT JUST COURTESY, IT'S THE LAW': (NOT) GIVING WAY TO ALIENATION

Alex Deagon*

ABSTRACT

In Queensland the law generally requires drivers to give way to buses in urban areas. This requirement is depicted on the back of many buses with a diagram including the phrase 'it's not just courtesy, it's the law'. This paper argues the contrast between 'courtesy' and 'law' assumes a positivist distinction between law and morality. More perniciously, 'law' in this context is framed as keeping peace through fear and coercion, or violently alienating members existing in a community. Instead, the paper proposes that law ought not to ground its authority in an ability to produce a spurious peace through violence. Rather, courteous conduct in a broader context of harmonious community can be achieved through the law of love.

I INTRODUCTION

In Queensland the law generally requires drivers to give way to buses in urban areas. As well as being found in transport regulations, this requirement is promulgated through various signs placed on the back of buses for drivers to see. These signs range from simple coloured diagrams with the instruction to 'give way' to coloured diagrams accompanied by the caption 'it's not just courtesy, it's the law'. This paper argues the more detailed caption assumes a positivist distinction between law and morality through contrasting 'courtesy' with 'law' and implying only law contains an enforcement mechanism designed to ensure obedience. More perniciously then, law is framed as a violent instrument which keeps peace and secures 'courtesy' through coercion and fear, which alienates members existing in a community. Therefore, in response, the paper proposes that law ought not to ground its authority in violence through fear and coercion, which produces only a spurious and superficial peace. Rather, law should find its authority in the natural law of Christian theology. Hence, this paper supports and draws from my developing body of work which constructs a theological natural law (the law of love in Christianity) to

critique and reform the secular state.[1] Christianity is suitable for the task because Christianity has an ontology of peace rather than violence, demonstrated through Christ's non-violent resistance to coercion and voluntary sacrifice of himself for the sake of others: the law of love, which produces a true peace of harmonious community. Consequently, the courteous conduct of 'giving way' can be achieved not through the ontologically violent coercion of positive law, but through instantiating the Christian virtues of love and humility after the model of Christ as part of the 'law of love'.

Part II of the paper summarises the legislation and details of the give way requirements, before Part III analyses the content and appearance of the sign in detail to indicate its positivist characteristics. Positivism is subsequently outlined in more detail and contrasted with natural law with particular emphasis on the theological elements of natural law. A theological approach to natural law provides the framework for a theological critique of the sign as producing antagonism and alienation in Part IV. Part V outlines the theological alternative of loving neighbour as self, or the law of love, as the framework for implementing the courteous approach of giving way without resorting to inevitable and ontological legal violence or mere duty. Finally, Part VI concludes by reiterating the argument that it is through the transcending function of the law of love that law is actually paradoxically fulfilled to produce a harmonious community

II GIVING WAY TO BUSES IN QUEENSLAND

The requirement to give way to buses in Queensland is contained in s 77 of the *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld), which states:

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[1] See eg Alex Deagon, 'Rendering to Caesar and God: St Paul, the Natural Law Tradition and the Authority of Law' (2014) 13(3) *Law, Culture and the Humanities* 481; Alex Deagon, 'Milbank's Milieu: Theorisations of Truth, Faith and Reason' (2014) 75(1) *International Journal of Philosophy and Theology* 86; Alex Deagon, 'On the Symbiosis of Law and Truth in Christian Theology: Reconciling Universal and Particular through the Pauline Law of Love' (2015) 23(4) *Griffith Law Review* 589; Alex Deagon, *From Violence to Peace: Theology, Law and Community* (Hart Publishing, 2017); Alex Deagon, 'Secularism as a Religion? Questioning the Future of the Secular State' (2017) 8 *Western Australian Jurist* 31; Alex Deagon, 'Liberal Secularism and Religious Freedom in the Public Space: Reforming Political Discourse' (2018) 41(3) *Harvard Journal of Law and Public Policy* 901; Alex Deagon, 'Reconciling John Milbank and Religious Freedom: "Liberalism" through Love' (2019) 34(2) *Journal of Law and Religion* (forthcoming).

(1) A driver driving on a length of road in a built-up area where the speed limit applying to the driver is not more than 70km/h, in the left lane or left line of traffic, or in a bicycle lane on the far left side of the road, must give way to a bus in front of the driver if—

(a) the bus has stopped, or is moving slowly, at the far left side of the road or in a bus-stop bay; and

(b) the bus displays a give way to buses sign and the right direction indicator lights of the bus are operating; and

(c) the bus is about to enter or proceed in the lane or line of traffic in which the driver is driving.

Maximum penalty—20 penalty units.

(2) In this section—

left lane, of a road, means—

(a) the marked lane nearest to the far left side of the road (the first lane) or, if the first lane is a bicycle lane, the marked lane next to the first lane; or

(b) if there is an obstruction in the first lane (for example, a parked car or roadworks) and the first lane is not a bicycle lane—the marked lane next to the first lane.

left line of traffic, for a road, means the line of traffic nearest to the far left side of the road.[2]

To summarise the provision, 'give way' means to slow down, and if necessary, stop in order to prevent a crash from happening. Subsection 1 provides situations or instances where a driver driving on a length of road in a built-up area is required to give way to a bus in front of them. According to paragraph (a), the driver is required to give way to a bus if the bus has stopped or is moving slowly at the far left side of the road or in a bus-stop bay. Paragraph (b) requires a driver to give way if the bus displays a give way to buses sign and the right direction indicator lights of the bus are operating. Paragraph (c) orders the driver to give way if the bus is about to enter or proceed in the lane or line of traffic in which the driver is driving. In cases of non-compliance, the maximum penalty is 20 penalty units. Importantly, subsection 1 applies only when the driver is driving in an area where the applicable speed limit is not more than 70 km/h and the driver is

[2] The author acknowledges Ms Shamreeza Riaz (PhD Candidate, QUT) for her invaluable research to gather and summarise the legal resources in this part.

driving in the left lane or left line of traffic or he/she is in a bicycle lane on the far left side of the road. Subsection 2 explains 'left lane' and 'left line of traffic'. 'Left lane' means the marked lane nearest to the far left side of the road. If first lane is a bicycle lane or if there is an obstruction in the first lane, then left lane means the second marked lane on the far left side of the road. 'Left line of traffic' means the line of traffic nearest to the far left side of the road.

The section then provides an example of the 'give way to buses sign' mentioned in subsection (1)(b):

Give way to buses sign

This standard sign, which is a simple coloured diagram with the instruction to 'give way', is not the impugned sign. In 2012 various local governments began rolling out a more substantive sign to reinforce the legislation. This sign is reproduced below:

(Image taken from: http://busaustralia.com/forum/viewtopic.php?f=5&t=68843)

The second sign is more substantive. In addition to containing the standard coloured sign with the instruction to 'give way', this sign contains the phrase 'it's not just courtesy, it's the law'. It is this phrase, as applied to the legally enforceable instruction to 'give way', which is the subject of critique in this paper.

III 'IT'S THE LAW': POSITIVISM AND NATURAL LAW IN THE GIVE WAY SIGN

A *Analysing the Sign: A Positivist Approach*

The phrase 'it's not just courtesy, it's the law' is expressed using contrasting colours and font size. 'It's not just courtesy' is in a smaller white font against a green background, while 'it's the law' has larger bolded white letters against a red background. The colour green is colloquially associated with freedom and permissibility, while the colour red is colloquially associated with warnings, rules and the prevention of particular conduct. For example, green means 'go' and red means 'stop' at traffic lights. The striking contrast of the larger 'it's the law' font gives the impression of 'it's the law' dominating or being more important than the smaller 'it's not just courtesy'. This juxtaposition of fonts and colours implies that if the instruction is not followed as a matter of courtesy, then it will be enforced as a matter of law. In other words, appealing to mere courtesy or 'just courtesy' to ensure people will give way to buses is deemed insufficient; it

must be backed by a threat. 'It's not just courtesy, it's the law' effectively means 'it's not just an optional nice or moral thing to do, it will be enforced by the state'.

The phrase therefore implies a stark distinction between courtesy and law. By contrasting 'just courtesy' with 'law', courtesy is distinguished from law. More significantly, courtesy is a type of civility or morality which, in this context, is distinguished from law. Furthermore, the phrase 'it's not just courtesy' as distinguished from 'it's the law' implies courtesy by itself is insufficient to facilitate obedience to the instruction. Something additional is required and that feature is 'the law'. This further requirement for law finally implies that 'law' is unique in its capacity to enforce obedience. Therefore, from this sign we can derive certain underlying assumptions about the nature of law. First, the requirement to 'give way' is an instruction, and also a law. Second, law is separate from morality. And third, law is unique in its capacity to enforce obedience in the event of noncompliance. These three assumed aspects of law match exactly with the classical positivist understanding of law, and consequently the sign exposes the fundamental theoretical contrast between positivism and natural law.

Classical positivism had its intellectual foundation in the Hobbesian promotion of a system of law as command, which was then expressly and systematically articulated by the eighteenth century legal positivist, John Austin.[3] Hobbes stated that 'it is manifest that law in general is not a type of counsel, but a type of command … it is a command of one to another who has been formerly obliged to obey him'.[4] In this sense, Hobbes defines law in terms of the command of the sovereign, the entity which obliges subjects to obey.[5]

Austin adopted this idea of law as command backed by an obligation to obey. For Austin, the 'province of jurisprudence' (i.e. the definition of law) is positive law or law that is 'posited by political superiors to political inferiors' (law by position).[6] In other words, it is a 'rule laid down by an intelligent being having power over him'.[7] The 'political superior' with power is termed

[3] See Alex Deagon, *From Violence to Peace: Theology, Law and Community* (Hart, 2017) 97-102 for the full account.
[4] Thomas Hobbes, *Leviathan* (Longman, 2008) 183.
[5] James Boyle, 'Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power and Essentialism' (1986) 135 *University of Pennsylvania Law Review* 383, 391.
[6] John Austin, *The Province of Jurisprudence Determined* (Ashgate, 1998) 8-9.
[7] Ibid.

the 'sovereign'.[8] So every law, 'properly so-called', is a 'species of command' issued by the sovereign, which is the entity owed habitual obedience by the majority of the society.[9] Command is 'distinguished from wish or desire' by the fact that the party issuing the command has the 'power to inflict evil' or pain in the event that the command is not obeyed, and this 'evil incurred through disobedience' is called 'sanction', or enforcement of/obligation to obedience.[10] Therefore, law strictly so-called according to Austin may be defined as a command from a sovereign enforced by sanction.

It is consequently straightforward to map this classical positivist understanding of law onto the assumptions undergirding the give way sign which have been explained earlier. The law to 'give way' is an instruction provided by the Queensland Parliament which passed the law. This is, in effect, a command by a sovereign as the Parliament (through law) is habitually obeyed by a majority of people. The assumption that law is unique in its capacity to enforce compliance corresponds to Austin's idea of sanction, which is the power of the sovereign to compel obedience through the threat of pain. Again, it is the Queensland Government as 'sovereign' which has this enforcement ability through its executive arm, and particularly the police. Finally, Austin says explicitly that morality, or the 'laws of God', are not 'within the province of jurisprudence' – which is Austin's definition of law.[11] This is reflected in the sign's contrast between courtesy and law which implies that courtesy, a moral virtue, is not law, and therefore law is separate from morality.

B *The Contrast with Natural Law*

Conversely, the jurisprudential discipline of natural law tends to address the question of authority and obedience by finding the source of the civil law in a higher, moral law.[12] Thomas Aquinas, a thirteenth century scholastic theologian and the classical proponent of natural law, defines law as 'a dictate of practical reason emanating from the ruler who governs a perfect community', and so there is an eternal law or *lex eterna*, which is God's law and which fulfils these criteria.[13] Since

[8] Ibid.
[9] Ibid 11-12.
[10] Ibid.
[11] Ibid 8-9.
[12] See Deagon, *From Violence to Peace*, above n 3, 85-90 for the full account.
[13] Thomas Aquinas, *Summa Theologica* (William Benton, 1952) vol 2, 208.

the eternal law of God is a subset of the content of the divine intellect and is therefore unchangeable truth, and to some extent people by grace know God and know truth, to this extent they know the eternal law.[14] The 'divine law' or *lex divina* allows people to participate 'more perfectly in the eternal law' through clarifying the eternal law against the limitations of pure human reason, and consists of the true revelation contained in Holy Scripture, the Old and New Testaments of the Bible.[15] Those who do not have this law of revelation nevertheless do by nature (illuminated by grace) those things which are of the law, and so know what is good and what is evil by conscience.[16] This is the 'natural law' or *lex natura*, which humans apprehend through their possessing a 'share of the Eternal Reason', and so they are able to 'participate in the eternal law through reason'; hence, the natural law is 'the rational creature's participation of the eternal law'.[17]

Through human reason (enlightened by grace as a subset of the divine reason or *logos*), the precepts of the natural law 'proceed to the more particular determinations', which are called positive or 'human laws'.[18] All human law or *lex humana*, as it accords with right reason, ultimately derives from the eternal law. Hence, if a law deviates from right reason (implying it does not accord with the eternal law of God or immutable truth), it is necessarily unjust, and therefore lacks the necessary quality of law.[19]

C *Natural Law as a Theology*

As I have argued elsewhere, following the tradition of Aquinas and sources he uses, there is good reason to think his conception of natural law is fundamentally based in the existence and nature of the God of Christian theology, revealed through the Incarnation of Christ to be the law of love.[20] Given Aquinas' particularly heavy reliance on Augustine, it is worthwhile considering

[14] Ibid 216-217.
[15] Ibid 210-211.
[16] Ibid 208-209.
[17] Ibid 209.
[18] Ibid 210.
[19] Ibid 216-218.
[20] See Deagon, *From Violence to Peace*, above n 3, 58-62, 85-90 in response to the possible objection that the natural law can be known through pure nature or natural reason. In short, even natural reason is enlightened by grace, and a full understanding of the natural law requires illumination through the Divine law (Scripture or God's revelation). The conclusion that natural law is a kind of theology is also supported by some contemporary interpretations. See e.g. Deagon, *From Violence to Peace*, above n 2, 85-90; Alex Deagon, 'Rendering to Caesar and God: St Paul, the Natural Law Tradition and the Authority of Law' (2014) 13(3) *Law, Culture and the Humanities*

Augustine's own framework for natural law in this context. To begin, Aquinas quotes Augustine as an authority for stating that 'there exists an eternal law', which is 'Supreme Reason' and 'Unchangeable'.[21] Similarly, Aquinas argues that Augustine 'distinguishes two kinds of law, the one eternal, the other temporal, which he calls human'.[22] Humans may access the eternal law through reason, which is sharing in the eternal reason, and this 'participation' is the natural law from which may stem human or positive law.[23] Hence, following Augustine the eternal law is 'imprinted' in our nature by the 'Divine light'.[24] Aquinas, further using Augustine, argues that the 'new law is instilled in our hearts', and not written down, but 'inscribed on the hearts of the faithful'.[25] This is the law of faith and of the Spirit. This new law is also the law of love, which contains the old law and fulfils it.[26] Ultimately then, according to Aquinas and following Augustine, the laws of the state have their justification and authority from the fact that they are part of the eternal and natural law of love given by God.[27]

Augustine contends that in order to live in peace, a person 'subordinates their primal tendencies to the rational soul'.[28] However, 'divine direction' is required to know what to do, and 'divine assistance' is required to obey.[29] A person requires grace, in order to apprehend obedience and consequent peace in the context of the everlasting law, and to be 'in subjection to this law for the good of the society'.[30] The basis for this is 'two precepts taught by God' – to love God, and to love one's neighbour as themselves. If one follows these, it will result in 'obedience to the law of society' and peace in that society.[31] For if the law of society is love of neighbour in the power and manner provided by Christ, this society will be characterised by selfless sacrifice, charity and generosity – a harmonious community.

481, 481-484; John Milbank, 'Paul Against Biopolitics' in J Milbank et al (eds), *Paul's New Moment: Continental Philosophy and the Future of Christian Theology* (Brazos Press, 2010) 24, 33-36.

[21] Aquinas, *Summa Theologica* vol 2, above n 13, 208.

[22] Ibid 210.

[23] Ibid 208-210.

[24] Ibid 209; C.f. M Crowe, *The Changing Profile of the Natural Law* (Martinus Nijhoff, 1977) 143.

[25] Aquinas, *Summa Theologica* vol 2, above n 13, 321.

[26] Ibid 326-329.

[27] C Anton-Hermann, 'The Fundamental Ideas in St Augustine's Philosophy of Law' (1973) 18 *American Journal of Jurisprudence* 57, 75.

[28] Augustine, *Concerning the City of God Against the Pagans* (Penguin, 2008) 873.

[29] Ibid.

[30] Ibid.

[31] Ibid.

Therefore, the primary content and principle of the natural law for Augustine, and later for Aquinas, is the law of love, which is to love your neighbour as yourself.[32] As such, this paper will argue that a fully theological natural law is the path to a legal community based in peace rather than violence, where the individual and the community are reconciled and interpersonal conflict is resolved through the notion of the law of love. In particular this is applied to the requirement to give way to buses in the sense that people should in fact give way to buses as a function of courtesy (a subset of the law of love) rather than due to fear or coercion (sanction) by law understood in a purely positivist sense. This argument is developed in detail in Part V. For now, the fact that natural law is (or at least can be) intrinsically connected with theology implies a more substantially theological critique of the positivist aspects of the sign is relevant. The paper now turns to this critique.

IV A THEOLOGICAL CRITIQUE OF THE SIGN: LAW AS COERCION AND ALIENATION

It has already been established above that the content and context of the phrase 'it's not just courtesy, it's the law' assumes the inadequacy of courtesy as an incentive to give way to buses, and relies on the threat of 'law' as an enforcement mechanism. These assumptions in turn expose more fundamental ontological assumptions amenable to critique using the theological framework I have developed previously.[33] First, the need for law and the inadequacy of courtesy assumes a framework of atomistic, self-interested individuals with no sense of harmonious being in a community. The primary reason, broadly speaking, that a person would not give way to a bus as a matter of courtesy is because they believe they are more important than the people on the bus and so they need to 'get ahead' rather than 'give way'. Rather than being together as members in a community, which requires patience and self-sacrifice, this framework alienates members as selfish individuals. Put in more explicitly theological language, the framework assumes a secular ontology of violence based on selfish desire rather than a Christian ontology of peace based on the self-sacrifice intrinsic in the law of love.

[32] See also Anton-Hermann, above n 27, 72; Crowe, above n 24, 54, 57-58 which situates these claims in the classical context.

[33] See Deagon, *From Violence to Peace*, above n 3, vi-vii, 1. See also Alex Deagon, 'On the Symbiosis of Law and Truth in Christian Theology: Reconciling Universal and Particular through the Pauline Law of Love' (2015) 23(4) *Griffith Law Review* 589, 591-594.

As I have argued extensively in *From Violence to Peace*, this ontology of violence is underscored by the positivist assumption that obedience to law requires law to be backed by sanction or threat. In this sense law is accorded the inherent characteristic of coercion, and is violently imposed on people to enforce obedience. Indeed, the very term 'positivism' itself connotes the violent positing of law, a use of force to establish, impose and preserve the law, as well as to compel obedience to it. Integral to Austin's very definition of law is this notion of sanction for disobedience, namely that obedience by which the legal subject is (en)forced through inflicted evil and pain.[34]

In his critique of Austin, twentieth century legal theorist HLA Hart (a positivist himself) agrees, arguing that Austin's law of the sovereign giving coercive orders (commands enforced by sanction) is nothing more than the law of the gunman: 'A orders B to hand over his money and threatens to shoot him if he does not comply'.[35] Not only does this seem to strengthen the contention that Austinian positivism is violent, but for Hart it also demonstrates the failure of Austin to give a proper account of the nature of the legal system as a series of rules producing obligations.[36] In particular, Hart states that two types of legal rules exist. The first or primary rules are those rules under which people are required to do or abstain from certain actions. The secondary rules introduce, extinguish and modify primary rules, and determine the nature of their operation. The most important of these is the secondary rule of recognition, which identifies and gives validity to the primary rules of obligation.[37] This obligation stems from what Hart terms the internal aspect of rules, where the citizen as part of the society (internal to it) is under some duty or obligation to obey the rule through something like habit or social pressure to conform, as opposed to the external point of view which merely views rules as predictors of human behaviour, with the external observer experiencing none of the obligation to comply.[38]

However, William MacNeil argues that Hart never really resolves the latent violence in the command theory of Austinian positivism – instead of replacing this violence with rules, Hart displaces the violence to the rule system itself, especially to the rule of recognition.[39] MacNeil

[34] See Deagon, *From Violence to Peace*, above n 3, 100-102.
[35] HLA Hart, *The Concept of Law* (Oxford, 1994) 82.
[36] Ibid 79-80.
[37] Ibid 80-81, 100.
[38] Ibid 86-89.
[39] William MacNeil, *Lex Populi* (Stanford, 2007) 44.

also notes Hart's apparent indifference to the violence of law, symptomatic of his anxiety (as a positivist) to avoid invoking moral concepts of the good.[40] Even Hart's rule of recognition imbibes violence due to its circular nature (the officials recognise the rule that recognises them as officials), for it proclaims certainty when there is only ambiguity, and papers over what Jacques Derrida termed the 'mystical foundation of law' – that on this view, there is no foundation – only coercion.[41] Indeed, it appears that Hart ultimately appeals to law being recognised as that which parliament enacts, which indicates no fundamental difference with Austin's theory.[42] Although, this is not quite so – MacNeil identifies that there is one problematic difference. Due to the internal aspect of Hart's rule system, the Austinian violence displaced there is no longer external, but internal. In other words, the gunman is now inside your head, so to speak; there is a mental 'shootout' between law and morality. Thus, MacNeil appeals for the return of Austinian positivism and the rejection of Hartian positivism, for at least Austin leaves room for inner thought and reflection, while Hart gives us a violence '(fascism) of the mind'.[43]

This framework of ontological violence is a secular ontology because Austin explicitly articulated the secularist basis of classical positivism, excluding God from law in that according to him, the 'laws of God' are not 'within the province of jurisprudence'.[44] But somewhat paradoxically, this violence is integrated with the use of theological language such as 'sovereign' and 'command', for sovereign is an attribute traditionally ascribed to God, as it is (particularly in the voluntarist tradition of Duns Scotus and its culmination in Hobbes) God who is a willing, superior being and has the power to enforce commands through the violent threat of punishments for disobedience.[45] Austin explicitly admits this much when he notes that God is the ultimate sovereign.[46] Hence, it seems Austin's theory of law is not only secularised and characterised by violence, but this violence is also linked to a kind of theology.[47]

[40] Ibid 49-50.
[41] Jacques Derrida, 'Force of Law: 'The Mystical Foundation of Authority' (Paper presented on *Deconstruction and the Possibility of Justice*, Cardozo Law School, 1989) 10.
[42] MacNeil, above n 39, 53-54.
[43] Ibid 58-60.
[44] Austin, above n 6, 8-9.
[45] Deagon, *From Violence to Peace*, above n 3, 99.
[46] Austin, above n 6, 18-19.
[47] Deagon, *From Violence to Peace*, above n 3, 10-11.

The paradox is explained by the fact that Austin's classical positivism has its roots in Hobbesian theological assumptions of primitive atomistic violence controlled by excessive sovereignty. In the Hobbesian framework the modern state attempts to sovereignly coerce peace as the mere absence of conflict between individuals. The ultimate power of the state and its monopoly on law to coerce obedience through violence caused Hobbes to characterise his version of the state as correlated to his theology: the state is the 'mortal god… under the immortal god'.[48] As I have noted elsewhere, the Hobbesian appeal to theology exposes the theo-mythical character of state sovereignty and the theological origin of the positivist, secular state: 'the vesting of absolute power in the state meant there was no longer any need to appeal to the authority of God, giving birth to the modern idea of the secular state and providing the conceptual framework for modern secular positivism'.[49]

Thus secular positivism is actually a violent theology. Similarly, the assumptions undergirding the sign have theological aspects such as an ontologically prior violence or Hobbesian 'war of all against all' where people need to get ahead rather than give way.[50] According to this view, the only way to prevent people from dominating each other to achieve this is the greater violence of positing or imposing coercive and alienating law. As Milbank observes, this process can never produce genuine obedience as part of harmonious community: 'only an "effective" peace is possible, a "secular" peace of temporarily suspended violence or regulated competition'.[51] Secular positivism really promotes a 'peace' of suspended violence where obedience to law is compelled by either physical or mental force, and tends to inhibit human flourishing by alienating the individual from the community. It establishes a spurious peace based on the suppression of an allegedly prior violence by even greater violence.

So using the schema I devised in *From Violence to Peace*, the sign promotes a secular ontology of violence in that it removes courtesy and higher moral or theological considerations from law (secularisation), draws boundaries between people as 'transgressors' (alienation) and imposes obedience (coercion) under the assumption of purely rational self-interest and atomistic

[48] Hobbes, above n 4, 116.
[49] Deagon, *From Violence to Peace*, above n 3, 99.
[50] Hobbes, above n 4, 86-87.
[51] John Milbank, *Theology and Social Theory: Beyond Secular Reason* (Blackwell, 1990) 336.

individuality (antagonism).[52] However, since the secular ontology of violence derives from contingent Hobbesian theological assumptions, it is subject to theological development and critique. Consequently the paper finally turns to articulating a theological alternative: a Christian ontology of peace through a theological natural law, and particularly the idea of courtesy facilitating obedience as part of the law of love. In this sense the instruction to 'give way' can be fulfilled without resorting to necessary ontological violence and coercion.

V A THEOLOGICAL NATURAL LAW ALTERNATIVE: 'COURTESY' AND THE LAW OF LOVE

The theological law of love exhorts members of the community to 'love your neighbour as yourself', which is specifically the law of love articulated by the Apostle Paul in the New Testament.[53] This fulfils the codified law since 'love does no wrong to a neighbour'.[54] As a first (and very crude) approximation, law can be understood as a principle or set of principles which govern individual relationships within a community. Love, as modelled by Christ, involves the voluntary sacrifice of oneself for another. So the law of love, to 'love your neighbour as yourself', is the voluntary giving of oneself for another as the principle which governs individual relationships within a community. It consequently encourages love for one's neighbour in terms of humility and sacrifice. Importantly, this is not forced or coerced (for this would necessitate violence), but rather freely volunteered as an imitation of Christ, and its end is to produce a legal community of peace.[55]

This theological notion of peace has its foundation in Augustine, and has been framed more recently by John Milbank. According to Augustine the heavenly peace is unique in that it

> …is so truly peaceful that it should be regarded as the only peace deserving the name, at least in respect of the rational creation; for this peace is the perfectly ordered and completely harmonious fellowship in the enjoyment of God, and each other in God. When we arrive at that state of peace, there will be no longer a life that ends in death, but a life that is life in sure and sober truth.[56]

[52] See Deagon, *From Violence to Peace*, above n 3, 3 where the schema is used.
[53] Romans 13:9.
[54] Romans 13:10.
[55] See Deagon, *From Violence to Peace*, above n 3, 7-8.
[56] Augustine, above n 28, 878.

The key here is 'perfectly ordered and completely harmonious fellowship' in the enjoyment of God and each other, which leads not to death or violence, but rather to peace and the good. This problem of whether there can be a harmonious human order is central – whether one can assign to their respective tasks and places many different activities, desires, and social formations.

As I have argued elsewhere, theological perspectives are important and appropriate to inform public policy and the framing of law for pursuing the common good in a liberal democracy.[57] In this sense, my paper here can be considered as offering a general reconsideration of the modern legal system from a theological perspective, framed through the specific issue of 'giving way' as a courtesy, which is in turn a function of the law of love. So at the general level, Augustine argues that the eternal city, or the Christian community, possesses the heavenly peace by faith, and 'lives a life of righteousness based on this faith, having the attainment of that peace in view in every good action it performs in relation to God, and in relation to a neighbour, since the life of a city is inevitably a social life'.[58] In other words, this ideal heavenly peace is attainable, at least in part, on earth and refers to an ordered harmony in the community of the city, where all citizens contribute and fulfil their role.[59] In such a community, the individual is not alienated and antagonised, but loved by the community comprised of individuals as a function of the law of love, and performs their designated role as an act of love towards all other individuals comprising the community.

For

> … just as the individual righteous man lives on the basis of faith which is active in love, so the association, or people, of righteous men lives on the same basis of faith, active in love, the love with which a man loves God as God ought to be loved, and loves his neighbour as himself. But where this justice does not exist… there is no commonwealth.[60]

Augustine in fact concludes that without the love based in faith (and consequently based on the revelation of God in Christ, the mutual bond of spirit), there is no commonwealth, or legal community. As such, for Augustine, not only is the theological law of love the most desirable

[57] See Alex Deagon, 'Liberal Secularism and Religious Freedom in the Public Space: Reforming Political Discourse' (2018) 41(3) *Harvard Journal of Law and Public Policy* 901-934.
[58] Augustine, above n 28, 878-879.
[59] Ibid 876.
[60] Ibid 890.

ontological basis for a legal community of peace, it is the only basis for such a community. Augustine's point also holds true for our modern system of law. That is, without a peaceful ontology – which involves loving your neighbour as yourself – it is not possible for the legal system to make peace, and it is rendered inherently violent in its attempt to keep violence at bay.

This exposes the radical contrast between Hobbesian assumptions of primitive atomistic violence controlled by excessive sovereignty, and the loving and peaceful Christian community. As mentioned previously the modern state attempts to sovereignly coerce peace as the mere absence of conflict between individuals, but the framework of the *ecclesia* as the city or legal community has authentic relations of love between God and neighbour by the Holy Spirit through the redemption effected by Christ.[61] Rather than the state establishing a spurious peace based on the suppression of an allegedly prior violence, the church as a community instantiates harmony through the law of love and peaceful persuasion.

More specifically in the context of courtesy as a framework for giving way to buses, the 'law of love' approach seeks to create a harmonious space where a person allows the bus to go ahead because they love their neighbour, rather than letting it go ahead because of external imposition or threat by law. Charity (love) or 'doing good' requires going beyond boundaries or precedents, something 'creative'.[62] As Milbank exhorts, 'to act charitably we must break through the existing representation of what is our duty towards our neighbour and towards God', and 'break through the bounds of duty which "technically" pre-defines its prescribed performance'.[63] In particular, we need to go beyond mere legal duty (for example, to just give way because we must for the purpose of avoiding legal punishment) and selfish interest (the aggressive pursuit of our own agenda without due consideration for others, or the prideful need to be seen as more important), desiring to truly act with humility, patience, love and sacrifice just like Christ did in humbling himself to death on a cross for our forgiveness:

> Do nothing from selfish ambition or conceit, but in humility count others more significant than yourselves. Let each of you look not only to his own interests, but also to the interests of others. Have this mind among yourselves, which is yours in Christ Jesus, who, though he was in

[61] James K A Smith, *Introducing Radical Orthodoxy: Mapping a Post-Secular Theology* (Baker, 2004) 236-237.
[62] John Milbank, *The Word Made Strange: Theology, Language, Culture* (Blackwell, 1997) 134.
[63] Ibid. See Deagon, *From Violence to Peace*, above n 3, 188-193.

> the form of God, did not count equality with God a thing to be grasped, but emptied himself, by taking the form of a servant, being born in the likeness of men. And being found in human form, he humbled himself by becoming obedient to the point of death, even death on a cross.[64]

In this practical sense courtesy as love of neighbour means displaying humility by considering the driver and passengers in the bus as more important and significant than yourself, displaying patience and kindness by correspondingly giving way to them, and engaging in self-sacrificial action by graciously accepting the inconvenience that will result from you giving way to them. In this sense love of neighbour eschews 'anger, wrath, [and] malice' and pursues 'kindness, humility, meekness and patience' with honesty, forbearance and compassion.[65] This approach after the model of Christ will produce a harmonious community where people graciously sacrifice themselves for others in accordance with the law of love.

Importantly, this harmonious community is implemented not through legal coercion but through persuasive persuasion, or faith-as-*pistis*. In this sense the Apostle Paul promotes a polity governed by faith or trust, persuasion by *aletheia* or the divine revelation of truth. He also stresses that this rule of trust constitutes a more fundamental mode of eternal law, situating this framework in the context of a theological natural law.[66] Such trust is a 'vertical' trust that God is just to an eminent and infinite extent that we cannot begin to fathom and a trust that this justice will eventually triumph so that a harmony of peace and order will embrace humanity.[67] It is also a 'horizontal' trust and mutual dependence between each member of the community, which provides a structure for harmonious existence and the embrace of self-sacrifice without assimilation or alienation. Milbank reasons:

> It may appear that trust is weak recourse compared to the guarantees provided by law, courts, political constitutions, checks and balances, and so forth. However, since all these processes are administered by human beings capable of treachery, a suspension of distrust, along with the positive working of tacit bonds of association, is the only real source of reliable solidarity for a community. Hence to trust, to depend on others, is in reality the only reliable way in which the

[64] See Philippians 2:3-8.
[65] See Colossians 3:8-9, 12-13.
[66] John Milbank, 'Paul Against Biopolitics' in J Milbank et al (eds), *Paul's New Moment: Continental Philosophy and the Future of Christian Theology* (Brazos Press, 2010) 49-50.
[67] Ibid 53.

> individual can extend his or her own power… the legitimate reach of one's own capacities, and also the only reliable way to attain a collective strength.[68]

The proposal for sacrifice, trust and humility to characterise giving way to buses, or social interactions in general, might be viewed as problematic due to the unscrupulous. What if people selfishly take advantage of the humility and sacrifice offered? Paradoxically obvious yet strange, the Christian answer is located in the crucifixion of Christ, who voluntarily allowed himself to be taken advantage of as part of his act of sacrifice.[69] As Milbank observes,

> Most forms of persuasion (and if we eschew violence, but still want to encourage virtue, only persuasion is left) are thoroughly coercive. We need in consequence to find a language of peace, and this is presumably why we point to *one* drama of sacrifice in particular. Truth and persuasion are circularly related. We should only be convinced by rhetoric where it persuades us of the truth, but on the other hand truth *is* what is persuasive, namely what attracts and does not compel. And Christians only see this *entire* attraction in the figure on the cross, a specific and compelling refusal to return evil for evil.[70]

So truth is most effectively revealed and people most ably persuaded by what attracts, namely Christ's refusal of violence which draws people to the peace of Christianity. Jesus himself said 'when I am lifted up from the earth, [I] will draw all people to myself', and he 'said this to show by what kind of death he was going to die'.[71] There is something irresistible (in the sense of peaceful persuasion) about the steadfast maintenance of humility, love, trust and sacrifice even in the midst of the most horrific mistreatment. Jesus cried out 'Father, forgive them! For they know not what they do'; he called upon the Father to forgive the ones who were at that moment crucifying him.[72] The answer to the question posed is, therefore, indicative of the radical and paradoxical nature of Christianity. The Christian response to people taking advantage of humility, sacrifice, trust and forgiveness is to continue offering that humility, sacrifice, trust and forgiveness as the concretely instantiated revelation of Christ, the truth. As people see this truth revealed, their minds are transformed and they are peacefully persuaded to do likewise. More

[68] Ibid.
[69] See Deagon, *From Violence to Peace*, above n 3, 127-132.
[70] Milbank, *Word Made Strange*, above n 62, 250.
[71] John 12:32-33.
[72] Luke 23:34.

particularly, as people see the communal solidarity which results from a law of love approach, they will be persuaded to give way themselves without the requirement for legal coercion.

Here resides the desirability of the Christian natural law approach: the law of love reveals the nature of Christ and peacefully persuades individuals in a community to act in accordance with it, hence in Christianity truth persuades to the good without coercion. The Church as persuading rather than coercing is important, for this allows the proclamation of a new political event: that of the cross, which replaces the sovereign power of the secular state with a different type of power or strategy of governance.[73] Paradoxically, the power of the cross is in its complete lack of sovereign power – Christ refuses to exert the power he possesses, instead resisting violent rule and establishing peace through service and the sacrifice of self; this in itself is far more powerful, and through Christ we can envisage the possibility of a similarly loving space where people sacrificially give way for others.[74]

It might be objected that this framing of Christian natural law fails to take proper account of Romans 13:1-7, which proceeds as follows:

> Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. [2] Therefore whoever resists the authorities resists what God has appointed, and those who resist will incur judgment. [3] For rulers are not a terror to good conduct, but to bad. Would you have no fear of the one who is in authority? Then do what is good, and you will receive his approval, [4] for he is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain. For he is the servant of God, an avenger who carries out God's wrath on the wrongdoer. [5] Therefore one must be in subjection, not only to avoid God's wrath but also for the sake of conscience. [6] For because of this you also pay taxes, for the authorities are ministers of God, attending to this very thing. [7] Pay to all what is owed to them: taxes to whom taxes are owed, revenue to whom revenue is owed, respect to whom respect is owed, honor to whom honor is owed.

It seems inescapable that, at the very least, Paul is invoking some kind of threat of physical violence ('judgment', 'bearing the sword') to justify obedience ('good conduct') to the civil authorities. In this context obedience to the good is effectively coerced by the state through

[73] Milbank, *Word Made Strange*, above n 62, 251.
[74] Deagon, *From Violence to Peace*, above n 3, 183.

violence, which is problematic in light of the preceding argument that a Christian approach persuades to the good without coercion and violence. A further and related problem is how my proposal in this paper works practically. Given we live in a fallen world, is it really possible to persuade people to the good without coercion? Bearing in mind Romans 13:1-7, is it not the case that sanction and threat of enforcement are necessary to secure the good sought through obedience to the law from a Christian perspective? I have engaged with these problems in previous work without clearly explaining how they might be resolved together and reconciled with the main argument articulated above.[75] This paper provides an opportunity to do that.

As I have noted in previous work, interpretation of Romans 13:1-7 must be contextualised by Romans 13:8-10:

> Owe no one anything, except to love each other, for the one who loves another has fulfilled the law. For the commandments, "You shall not commit adultery, You shall not murder, You shall not steal, You shall not covet," and any other commandment, are summed up in this word: "You shall love your neighbor as yourself." Love does no wrong to a neighbor; therefore love is the fulfilling of the law.

In *Rendering to Caesar and God*, I advanced three propositions in this respect.[76] First, 'Paul uses the law of love as the foundation for obeying the civil law in Romans 13.'[77] In verse 7 Paul states that all which is owed should be paid, including taxes, revenue, respect and honour. It does not seem a stretch to say this includes (or perhaps comprises) obedience. But then in verse 8 Paul paradoxically states to owe no one anything except love! He explains the paradox with the proposal that love fulfils (obeys) the law, and expands on this in verses 9 and 10. It follows that obedience to the law of the civil authorities 'has its basis in the law of love'.[78]

Second, in verses 1-2 'obedience of the civil law is premised on the fact that the civil law is ultimately instituted by God, so that disobeying the civil law is equivalent to disobeying God'.[79] As Jesus articulated in Luke 10:25-37 and John 14:15, full obedience to the law by the law of

[75] See Deagon, 'Rendering to Caesar and God', above n 20, 490-493, 499-502; Deagon, *From Violence to Peace*, above n 3, 141-142, 176-177, 180-181, 185-187.
[76] See also Deagon, *From Violence to Peace*, above n 3, 141-142.
[77] Deagon, 'Rendering to Caesar and God', above n 20, 490-491.
[78] Ibid.
[79] Ibid.

love necessarily includes love of God Himself in conjunction with love of neighbour, and love is a precondition of obedience. Therefore, if obedience to the civil law is equivalent to obeying God, and love is a precondition of obedience, it follows that the law of love produces obedience to God and the civil law. Finally, and it is worth quoting the third proposition in full:

> The law of love is the contextual precondition of obedience to the civil authorities in the passage immediately preceding Romans 13:1–10. In Romans 12:17–21, Paul states that one should not repay evil for evil, but overcome evil with good, doing good to one's enemies and loving them. This is the essence of the law of love, and its most extreme application – in the context of the law of love, Christ in Luke 10:25–37 explains in the Parable of the Good Samaritan that one's neighbor can be even their most bitter enemy. Thus, to avenge one's enemy is contrary to the law of love, and so Paul implies that instead of taking personal revenge, one should be subject to the civil authorities. Since the law of love is Paul's argument for not taking personal revenge, it follows that the law of love is the foundation for the fulfilling of the civil law in Romans 13.[80]

So the conclusion is that the law of love is the foundation for coerced obedience to the civil authorities in Romans 13. However, this still does not resolve the question of how persuasion to the good without violence can be reconciled with coercion to the good using violence, with the law of love as the foundation. The question can again be resolved through integrating some of my previous work. In *From Violence to Peace*, I consider contexts where some kind of violence may be appropriate yet compatible with ontological peace grounded by the law of love. Violence may be 'allowed' to 'facilitate educational redemption and ultimate peace'.[81] In a fallen world where there are some recalcitrant individuals, 'coercive action to prevent a person damaging themselves or others can be redeemed through their retrospective acceptance of the means taken to reach this final goal of peace'.[82] A resolute pacifism or refusal to (violently) intervene to stop violence may result in even greater violence. Just as Christ volunteered to allow violence for a redemptive purpose in his crucifixion, so the reality of evil in the world necessitates a 'redeeming violence' in the pursuit of final, perfect peace.[83] Yet this violence is not the 'unrestrained and evil' violence which presupposes conflict as an ontological and inevitable necessity and 'detracts from the good', but violence 'that is gift or strengthening' and which

[80] Ibid.
[81] Deagon, *From Violence to Peace*, above n 3, 176.
[82] Ibid 185.
[83] Ibid 185-186.

'communicates some substantive good'.[84] The existence of evil means our scenario is 'apocalyptic' rather than 'utopian', and 'we may require violence to bring the ultimate good of repentance, redemption and reconciliation'.[85]

Thus, the solution is to view the violence described in Romans 13:1-7 as a 'redeeming violence' necessary to bring about the substantive good of obedience to the law as a function of the law of love. The law of love is the foundation of obedience to the law in the context of pursuing ontological peace. Instantiating the law of love fulfils the law by persuasion to the good. However, in a fallen world where evil exists, redeeming violence may be necessary on the path to achieving the good and perfect peace, on the condition that this violence is recognised as redemptive and contingent. This approach also addresses the problem of practical application. The law of love persuades to the good without coercion, but where ultimate good and perfect peace is endangered 'persuasion' in the form of redeeming violence may be necessary. This is distinct from violent coercion through secular law which assumes the primacy of ontological violence, but instead can be viewed as another kind of loving persuasion with obedience and final redemption as the goal. For example, rather than 'it's not just courtesy, it's the law', a sign might ask whether failing to give way is loving. The fundamental appeal is to love rather than violence.

As such this Christian perspective produces a space for a harmonious community which is characterised by the 'fruit of the Spirit': 'love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control'; for 'against such things there is no law'.[86] These Christian virtues are beyond law and yet fulfil the law by their nature. Again, we see this through the Apostle Paul's exposition of the law of love in Romans 13:8-10. Paul demonstrates that the law of love provides the content which can ultimately inform a harmonious legal community. In Romans 13:10, he states that love does no wrong to a neighbour. In this way, all the commandments such as not to murder and steal and the like are contained by this principle, since if you love your neighbour according to Paul you will not murder them or steal from them. Therefore, the maxim to love your neighbour as yourself can plausibly provide the content of 'doing no wrong to a neighbour' from which a harmonious legal community can be created.

[84] Ibid 180-181.
[85] Ibid 181.
[86] Galatians 5:22-23.

Christianity therefore abides the desirability of peace without the violence of coercion.[87] Manifesting this alternative framework for giving way, governed by love beyond mere legal requirements, will persuade people there is another way to true peace and it is desirable.[88]

This 'new creation' of the law from its very spirit leads to a peace beyond violence, and a law beyond force, for instead the law of love, of selfless sacrifice and the pursuit of peace, will inhere in the interactions of individual persons, constituting a community of peace. It seems that the argument of the Apostle Paul in Romans 13:8-10 that the law of love fulfils the law since love does no wrong to a neighbour can plausibly be extended to all areas of law, such that a Christian theology of peace can be translated into a legal ontology of peace.

VI CONCLUSION: 'IT'S NOT JUST LAW, IT'S THE LAW OF LOVE'

This paper argued the phrase 'it's not just courtesy, it's the law' establishes a secular ontology of violence under the auspices of classical positivism in three ways. First, the stark distinction between courtesy and law implements the classic positivist separation of law and morality, and in particular the secular separation of law from theology. Second, the phrase assumes courtesy is insufficient to facilitate obedience to the 'give way' instruction, which assumes a primitive, violent existence of clashing atomistic individuals selfishly desiring to get ahead rather than give way. Third, and consequently, the phrase effectively gives law the function of enforcing obedience through violence and coercion. In fact there is at least one further related point which supports the argument. Merely requiring obedience to law in the form of secular rules or commands posited by a sovereign authority inevitably results in transgression, for then the law requires a standard that can never be attained by natural means. A law categorising people as selfish atomistic individuals requiring coercion to do what ought to be done as a matter of courtesy invites transgression by articulating itself in terms of formal boundaries which alienate; in other words, such a law is intrinsically violent. I have identified this in other work as the problem of juridification.[89]

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[87] Deagon, *From Violence to Peace*, above n 3, 194. See also John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People* (Blackwell, 2013) 228-236.
[88] Deagon, *From Violence to Peace*, above n 3, 194.
[89] See Deagon, From Violence to Peace, above n 3, 187; Deagon, On the Symbiosis of Law and Truth, above n 33, 608-609; Deagon, Rendering to Caesar and God, above n 20.

So 'just' or 'mere' law invites transgression and therefore violence. To (mis)quote Genesis 2:18, it is not good for law to be alone. This paper has argued that a better alternative is a Christian theological natural law, or a law informed by and imbued with theological richness: specifically, the 'law of love'. The law of love produces obedience not fundamentally through coercion, but through peaceful persuasion. Redeeming violence may be needed but it is not ultimate or inevitable. In particular the law of love paradoxically fulfils the law by transcending the law through the practice of Christian virtues such as humility, patience and self-sacrifice. This instantiates a Christian ontology of peace, or a more fundamentally harmonious mode of existence involving relational solidarity in community. Hence there is no need to give way to alienation, coercion and violence imposed by law. By courteously giving way to others as a function of the law of love, we can to some extent make the heavenly aspiration of perfect peace expressed by Augustine part of our earthly reality for the good of our community.

DOES PROPORTIONALITY ANALYSIS HAVE A ROLE IN STATUTORY INTERPRETATION UNDER THE VICTORIAN *CHARTER*?

Jim South*

ABSTRACT

The High Court's decision in Momcilovic v The Queen clarified that courts applying the interpretative obligation imposed by s 32(1) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) are not permitted to use the remedial approach to statutory interpretation adopted in the United Kingdom. However, that decision did not establish a binding precedent on whether courts interpreting statutes under s 32(1) are permitted, as part of the interpretation process, to apply the proportionality test prescribed by s 7(2) of the Charter. This article analyses constitutional aspects of this unresolved question and contends there is a significant likelihood that the relevant power to use proportionality analysis as part of the interpretation process cannot validly be conferred on any court vested with federal jurisdiction.

I INTRODUCTION

Section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') requires all Victorian statutory provisions to be interpreted, so far as it is possible to do so consistently with their purpose, in a way that is compatible with human rights. This interpretative obligation is of fundamental importance to the operation and purpose of the *Charter*. Indeed, the 'main purpose' of the *Charter* includes ensuring that all statutory provisions are interpreted 'so far as is possible in a way that is compatible with human rights'.[1]

Although s 32(1) is a key provision of the *Charter* and has been in operation since 1 January 2008, its meaning and operation remain clouded by uncertainty. The case law to date has, to some extent, reduced this uncertainty. Most notably, *Momcilovic v The Queen*[2] clarified that courts applying s 32(1) are not permitted to use the remedial approach to statutory

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[1] *Charter* s 1(2).

[2] (2011) 245 CLR 1 ('*Momcilovic*').

interpretation adopted in the United Kingdom by the House of Lords in *Ghaidan v Godin-Mendoza*.[3] However, *Momcilovic* did not establish a binding precedent on whether courts interpreting statutes under s 32(1) are permitted, as part of the interpretation process, to apply the proportionality test prescribed by s 7(2) of the *Charter*. This unresolved question is critical to the operation of the *Charter* and is likely to come before the High Court in due course.

The purpose of this article is to analyse potential constitutional impediments to the relevant use of proportionality analysis by Australian courts. It should be noted that it is beyond the scope of this article to analyse whether such use of proportionality analysis by the courts is desirable from a policy and philosophical perspective. Rather, this article focuses on the narrow legal question of whether Australian courts can validly be conferred with the relevant power to use proportionality analysis as part of the interpretation process.

II THE LEGISLATION

Section 32(1) of the *Charter* states:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

Section 7(2) of the *Charter* states:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and

[3] [2004] 2 AC 557 ('*Ghaidan*'). This remedial approach to statutory interpretation allows courts in the United Kingdom to depart from the legislative intention and to change the meaning of legislation by reading down or reading in words: see *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, [28] (Lord Bingham of Cornhill); *Ghaidan* [2004] 2 AC 557, [30], [32] (Lord Nicholls of Birkenhead), [40]–[51] (Lord Steyn).

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

III THE CASE LAW

As explained in the second reading speech for the Charter of Human Rights and Responsibilities Bill 2006 (Vic), s 7(2) of the *Charter* is a 'general limitations clause' which 'embodies what is known as the "proportionality test"'.[4] This test provides a process for assessing whether identified limits on rights are reasonable and demonstrably justified in a free and democratic society. The central question being considered in this article is whether the Victorian Supreme Court can validly be conferred with the power to apply the s 7(2) proportionality test as part of the interpretation process under s 32(1) of the *Charter*. There is case law, albeit inconclusive, on this question. The relevant case law is set out below, as well as in a number of academic articles published in the aftermath of the High Court's *Momcilovic* decision.[5]

A *The High Court's* Momcilovic *Decision*

In *Momcilovic*, a majority of the High Court held that in cases where a statute limits a right, the proportionality test prescribed by s 7(2) has a role in the interpretation process under s 32(1).[6] However, a differently constituted majority expressed dicta indicating or implying that it is or may be incompatible with ch III of the *Constitution* for the proportionality test to be part of the interpretation process.[7] Both those majorities included Heydon J, who held, in dissent, that the whole of the *Charter* is invalid.[8] Thus, there is no ratio in *Momcilovic* on

[4] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General).
[5] See, eg, Will Bateman and James Stellios, 'Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1, 11–17; Bruce Chen, 'Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006*' (2013) 74 *Australian Institute of Administrative Law Forum* 67; Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40 *Monash University Law Review* 340, 365–87; Adrienne Stone, 'Constitutional Orthodoxy in the United Kingdom and Australia: The Deepening Divide – *Constitutional Review under the UK Human Rights Act* by Aileen Kavanagh' (2014) 38 *Melbourne University Law Review* 836, 850–7; Justice Pamela Tate, 'Statutory Interpretive Techniques under the *Charter*: Three Stages of the *Charter* – Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal* 43, 63–8 <http://www.judicialcollege.vic.edu.au/sites/default/files/jcv_online_journal_vol02.pdf>.
[6] (2011) 245 CLR 1, 92 [168] (Gummow J), 123 [280] (Hayne J), 170 [427] (Heydon J), 249–50 [683]–[684] (Bell J).
[7] Ibid 44 [36] (French CJ), 174–5 [436]–[439] (Heydon J), 219–20 [574] (Crennan and Kiefel JJ).
[8] Ibid 175 [439].

whether courts interpreting statutes under s 32(1) are permitted, as part of the interpretation process, to apply the proportionality test prescribed by s 7(2). Below is a summary of the relevant reasons and dicta in *Momcilovic*.

French CJ accepted the Human Rights Law Centre's submissions 'that a proportionality assessment of the reasonableness of legislation is not an interpretive function' and that s 7(2) 'cannot … form part of the interpretive process because the proportionality assessment that it requires cannot be undertaken until a construction has been reached'.[9] His Honour also stated:

> In the event [of the making of a declaration of inconsistent interpretation under s 36(2) of the *Charter*], the justification of limitations on human rights is a matter for the Parliament. That accords with the constitutional relationship between the Parliament and the judiciary which, to the extent that it can validly be disturbed, is not to be so disturbed except by clear words. The *Charter* does not have that effect.[10]

Gummow J stated that s 32(1) 'is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Pt 2, including, where it has been engaged, s 7(2)'.[11] His Honour also stated that the following reasoning of the joint majority in *Project Blue Sky Inc v Australian Broadcasting Authority* 'applies *a fortiori* where there is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1)':[12]

> The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.[13]

[9] Ibid 43–4 [34].
[10] Ibid 44 [36].
[11] Ibid 92 [168].
[12] Ibid 92 [170].
[13] (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted) ('*Project Blue Sky*'). Note, however, that if the relevant use of proportionality analysis is constitutionally impermissible, that impediment cannot validly be circumvented by applying any of the principles of construction referred to in the quoted passage from *Project Blue Sky*. The common law rules of construction, like those prescribed by legislation, must conform with the *Constitution* (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)).

Based on this reasoning, Gummow J concluded that s 32(1) 'does not confer upon the courts a function of a law-making character'.[14]

Hayne J agreed with Gummow J's above reasons.[15]

Heydon J concluded 'that s 7(2) is central to the interpretation process to be carried out under s 32(1)'.[16] In support of this conclusion, his Honour stated that the expression 'human right' is defined in s 3(1) of the *Charter* 'as meaning not merely something listed in ss 8–27, but the civil and political rights set out in Pt 2, namely ss 7–27, including s 7(2)'.[17] His Honour therefore reasoned that '[t]he relevant rights are not those which correspond to the full statements in ss 8–27, but those which have limits justified in the light of s 7(2)'.[18]

Heydon J also contended that the concept of 'compatibility' is a central conception of the *Charter* and that absurd outcomes would result if all limits on rights were deemed to be incompatible with the affected rights.[19] This would mean that:

> a member of Parliament who introduced a Bill limiting human rights, but only in a way that was demonstrably justified in the light of s 7(2), would be required by s 28(3)(b) to state that the Bill was 'incompatible with human rights' … And if in s 38(1) 'incompatible with a human right' meant 'incompatible with a human right in its absolute form, even if reasonable limits were imposed on it pursuant to s 7(2)', then a public authority would act unlawfully if it acted incompatibly with the absolute human right notwithstanding that it acted compatibly with the right limited in the light of s 7(2).[20]

In addition, Heydon J contended that the extrinsic materials, including the below passage from the second reading speech, support the view that s 7(2) has a role in the interpretation process under s 32(1):[21]

> Part 2 reflects that rights should not generally be seen as absolute but must be balanced against each other and against other competing public interests. Clause 7 is a general limitations clause that lists the factors that need to be taken into account in the balancing process. It will assist courts and government in deciding when a limitation arising under the law is reasonable and

[14] *Momcilovic* (2011) 245 CLR 1, 92–3 [171].
[15] Ibid 123 [280].
[16] Ibid 170 [427].
[17] Ibid 165 [415].
[18] Ibid.
[19] Ibid 165–6 [416].
[20] Ibid 166 [416].
[21] Ibid 166–7 [418]–[419].

> demonstrably justified in a free and democratic society. Where a right is so limited, then action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right.[22]

Having decided that s 7(2) is central to the interpretation process under s 32(1), Heydon J went on to hold, in dissent, that both those sections and the whole of the *Charter* are invalid.[23] His Honour's reasons for concluding that s 7(2) is invalid include the following. First, s 7(2) gives a court a non-judicial power to 'determine what legal rights and obligations should be created'[24] by giving it the power to decide the legal extent of the limit to a human right.[25] Secondly, s 7(2) 'reveals that the Victorian legislature has failed to carry out for itself the tasks it describes'[26] and 'has delegated them to the judiciary'.[27] Thirdly, '[b]ecause the delegation is in language so vague that it is essentially untrammelled, it is invalid'.[28] Fourthly, s 7(2) 'contemplates the making of laws by the judiciary, not the legislature'.[29] Finally, in accordance with the principle established in *Kable v Director of Public Prosecutions (NSW)*,[30] s 7(2) is invalid as the conferred legislative function would 'be so intertwined with the judicial functions of the court as to alter the nature of those judicial functions and the character of the court as an institution'.[31]

Crennan and Kiefel JJ concluded that s 7(2) 'has no bearing upon the meaning and effect of a statutory provision, which are derived by a process of construction, not any enquiry as to justification'.[32] They contended that 'an understanding of the extent of the effects of the statutory provision is essential to the enquiry under s 7(2)'[33] and that the justification question

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[22] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General).
[23] *Momcilovic* (2011) 245 CLR 1, 175 [439].
[24] *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Precision Data*').
[25] *Momcilovic* (2011) 245 CLR 1, 170 [428].
[26] Ibid 172 [431].
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] (1996) 189 CLR 51, 96 (Toohey J), 103 (Gaudron J), 116–19 (McHugh J), 127–8 (Gummow J) ('*Kable*'). *Kable* established the principle that State legislation cannot validly confer upon a State court a function that substantially impairs the institutional integrity of the court as a recipient or potential recipient of federal jurisdiction.
[31] *Momcilovic* (2011) 245 CLR 1, 174 [436].
[32] Ibid 219 [572].
[33] Ibid 218 [568].

'is a distinct and separate question from one as to the meaning of a provision'.[34] Their Honours also stated:

> Despite the word 'compatible' appearing in s 32(1) (and 'incompatible' in s 32(3)) it cannot be concluded that the enquiry and conclusion reached in s 7(2) informs the process to be undertaken by the courts under s 32(1). If some link between s 7(2) and s 32(1) were thought to be created by the use of such terms in s 32, such a result has not been achieved: (a) because the process referred to in s 32(1) is clearly one of interpretation in the ordinary way; and (b) because s 7(2) contains no method appropriate to the ascertainment of the meaning and effect of a statutory provision.[35]

Bell J concluded 'that the question of justification in s 7(2) is part of, and inseparable from, the process of determining [pursuant to s 32(1)] whether a possible interpretation of a statutory provision is compatible with human rights'.[36] Her Honour contended this construction 'recognises the central place of s 7 in the statutory scheme and requires the court to give effect to the *Charter*'s recognition that rights are not absolute and may need to be balanced against one another'.[37] With respect to the criteria set out in s 7(2), her Honour stated 'these are criteria of a kind that are readily capable of judicial evaluation'.[38]

B *Case Law from the Victorian Court of Appeal*

At the time of writing, the Victorian Court of Appeal is yet to determine its response to the High Court's division of opinion in *Momcilovic* on whether s 7(2) has a role in the interpretation process under s 32(1). In the decision appealed against in *Momcilovic*, the Court of Appeal had decided that the question of justification under s 7(2) 'becomes relevant only after the meaning of the challenged provision has been established'.[39]

In each case since *Momcilovic* where two or more Justices of the Court of Appeal have considered the issue, the majority view has been that it was unnecessary in the circumstances

[34] Ibid.
[35] Ibid 219–20 [574].
[36] Ibid 249 [683].
[37] Ibid.
[38] Ibid 250 [684] (citations omitted).
[39] *R v Momcilovic* (2010) 25 VR 436, 465 [105] (Maxwell P, Ashley and Neave JJA).

of the case to determine whether the Court is bound to follow its previous decision on the relationship between ss 7(2) and 32(1).[40]

With respect to the principle that an intermediate appellate court should follow its earlier judgments unless satisfied that the earlier judgment is clearly wrong, the Court of Appeal has left open the question whether this principle applies where there is a majority (albeit non-binding) view in the High Court going against the earlier judgment, or where the earlier judgment has been overturned by the High Court on appeal.[41] The Court of Appeal has also left open the question whether, even if the above principle does apply, the fact that a majority of the High Court disagrees with the earlier judgment may be enough to satisfy the intermediate appellate court that the earlier judgment was clearly wrong.[42]

Even if the Court of Appeal does eventually decide whether s 7(2) has a role in the interpretation process under s 32(1), its decision would not necessarily end the uncertainty surrounding this question. The relationship between ss 7(2) and 32(1) is of fundamental importance to the operation of the *Charter* and is contentious because it raises highly contested questions about the appropriate role of the judiciary in a representative democracy. Any decision by the Court of Appeal on the relationship between ss 7(2) and 32(1) would therefore be likely to be scrutinised by the High Court in due course. This scrutiny might even be initiated by one or more Justices of the High Court, as occurred in *Momcilovic*.[43]

IV THE ACADEMIC LITERATURE

As indicated earlier, the High Court's *Momcilovic* decision has generated a number of academic articles.[44] Most of them focus on summarising the case law, which is detailed above. Some of them present arguments challenging the respective Justices' interpretations of ss 7(2) and 32(1) of the *Charter*.[45] However, apart from setting out the inconclusive case law,

[40] *Slaveski v Smith* (2012) 34 VR 206, 214–15 [21]–[22] (Warren CJ, Nettle and Redlich JJA); *Noone v Operation Smile (Australia) Inc* (2012) 38 VR 569, 575–7 [24]–[31] (Warren CJ and Cavanough AJA); *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 473 [122] (Warren CJ), 475 [133] (Hansen JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383–4 [87]–[88] (Redlich, Osborn and Priest JJA).
[41] *Noone v Operation Smile (Australia) Inc* (2012) 38 VR 569, 576–7 [30]–[31] (Warren CJ and Cavanough AJA).
[42] Ibid.
[43] During the special leave hearing, Crennan J observed that '[t]he case bristles with some constitutional issues which do not really surface in the submissions before us today' (Transcript of Proceedings, *Momcilovic v The Queen* [2010] HCATrans 227 (3 September 2010) 486–8).
[44] See above n 5.
[45] See, eg, Debeljak, above n 5; Tate, above n 5.

there is a paucity of further analysis of the *constitutional* (as distinct from *interpretative*) issues likely to arise in any future High Court challenge to the validity of a conferral of the relevant power for courts to conduct proportionality analysis.

Adrienne Stone delves beyond the case law to offer a possible explanation for why the High Court's approach to judicial review of rights differs from the approach adopted in the United Kingdom.[46] She contends that the explanation for the 'vast differences'[47] between those approaches 'may lie in fundamental conceptions about the role of the judiciary rather than contingent aspects of constitutional structures'.[48] In support of that view, she states:

> The Australian constitutional conception of judicial power is notably 'legalist'. That is, it reflects a preference of the Australian courts — and especially the High Court — for the view that judges deciding hard questions of constitutional law should do so, as far as they possibly can, by reference only to legal materials and without recourse to other matters such as considerations of political morality or policy preferences.[49]

In view of the constitutional and conceptual differences identified by Stone, the case law on the *Human Rights Act 1998* (UK) is not an appropriate source of guidance on whether the relevant power can validly be conferred on Australian courts. As stated by French CJ in *Momcilovic*, the decisions of the European Court of Human Rights and the United Kingdom courts are 'of little assistance in determining the function of s 7(2) in the *Charter*'.[50]

In a subsequent article, Stone presents arguments supporting the view that there is no constitutional impediment to the conferral on Australian courts of the relevant power to use proportionality analysis as part of the interpretation process:

> As I have argued elsewhere, the task of implementing the Australian *Constitution* inevitably requires the same kinds of judgments as are involved in proportionality analysis: judgments as to the meaning of the many morally contested ideas that the *Constitution* adopts. The need for this kind of reasoning is especially obvious where judges have developed unwritten structural principles that resemble constitutional rights. In Australian constitutional law these include a right of freedom of political communication and a 'rule of law' principle. Equally, it is required by s 92 of the *Constitution*, which guarantees freedom of trade among the states. …

[46] Stone, above n 5.
[47] Ibid 855.
[48] Ibid 856.
[49] Ibid.
[50] (2011) 245 CLR 1, 13 [22].

> But given the many ways in which the Australian courts already interpret vague and general language and choose between competing conceptions of contestable ideas, the claim that proportionality analysis is so entirely foreign to Australian courts that it is constitutionally impermissible does not sit well with reality of judging under the Australian *Constitution*.[51]

The analysis in Part V of this article acknowledges that the use of proportionality analysis by Australian courts is permissible in certain contexts, but identifies potential constitutional impediments that apply in the present context. As will be seen in Part V, that context is distinguishable from the others in a number of constitutionally significant ways.

In contrast to the arguments presented by Stone, Dan Meagher identifies several reasons why Australian courts may be disinclined to incorporate proportionality analysis into the interpretation process.[52] Those reasons include the following points: incorporating proportionality into the principle of legality framework would require judges to answer questions that are more political and philosophical than legal; courts will often lack the institutional resources and expertise to properly undertake this sort of polycentric decision-making; and the application of the proportionality test is very much in the eye of the judicial beholder.[53]

It is acknowledged that Meagher raises the above points as potential reasons why the common law principle of legality might not evolve in Australia to incorporate proportionality analysis. Nevertheless, those reasons entail separation of powers considerations that may also be relevant in any High Court examination of the validity of a legislative conferral on Australian courts of the relevant power to apply proportionality analysis as part of the interpretation process.

Like Stone, Claudia Geiringer offers a possible explanation for why the High Court's approach to judicial review of rights differs from the approach adopted in other jurisdictions.[54] Geiringer considers that the differences of opinion expressed in *Momcilovic* on the relationship between ss 7(2) and 32(1) of the *Charter* are manifestations of an

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[51] Adrienne Stone, 'Judicial Power – Past, Present and Future: A Comment on Professor Finnis' on *Judicial Power Project* (10 November 2015) <http://judicialpowerproject.org.uk/judicial-power-past-present-and-future-a-comment-on-professor-finnis/>.
[52] Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 469–70.
[53] Ibid.
[54] Claudia Geiringer, 'What's the Story? The Instability of the Australasian Bills of Rights' (2016) 14 *International Journal of Constitutional Law* 156, 164–6.

unresolved contest between two competing narratives.[55] Those narratives are the 'internationalist narrative', which favors the borrowing of human rights doctrines developed in other jurisdictions, and the 'Australian exceptionalism narrative', which draws on a long tradition of legalism in Australian public law.[56] With respect to the latter narrative, Geiringer states that it:

> tends to support the view that proportionality analysis is, at best, peripheral to the operation of the charters in the courts. That is because proportionality analysis is foreign to traditional common law method and invites the courts into a task not ordinarily exercised by judges outside of the context of the federal constitution—that of evaluating the adequacy or legitimacy of legislation. On this view, proportionality analysis is, at best, an alien interloper that involves a significant departure from the ordinary judicial role; at worst, a technique that involves the exercise of non-judicial power and thus brings the courts into conflict with constitutional doctrine.[57]

Geiringer also expresses the following warning:

> If local institutions misread the tea leaves strewn by the High Court in *Momcilovic*, they may find themselves promoting readings of their statutory bills of rights that increase the likelihood of provisions in the two instruments (or indeed the instruments as a whole) being held to be invalid.[58]

V POTENTIAL CONSTITUTIONAL IMPEDIMENTS TO SECTION 7(2) HAVING A ROLE IN THE INTERPRETATION PROCESS UNDER SECTION 32(1)

This part of this article identifies and analyses potential constitutional impediments to s 7(2) having a role in the interpretation process under s 32(1). The constitutional validity of s 7(2) having such a role depends on the answers to the following questions:

(A) Does the relevant use of proportionality analysis entail the exercise of a power that would not be able to be conferred on any court as federal jurisdiction?

[55] Ibid.
[56] Ibid 165.
[57] Ibid 166 (citations omitted).
[58] Ibid 172.

(B) If so, and given the absence of a constitutional separation of powers in Victoria,[59] would it be compatible with the requirements of ch III of the *Constitution* for the Victorian Supreme Court to exercise the relevant power when exercising state jurisdiction?

If the answers to those questions are 'yes' and 'no' respectively, it is not constitutionally permissible for s 7(2) to have a role in the interpretation process under s 32(1).

The following analysis offers opinions on the above questions. Of course, those opinions are necessarily speculative, as no-one can predict with certainty how the High Court would rule on these issues.

A *Does the Relevant Use of Proportionality Analysis Entail the Exercise of a Power that Would Not Be Able to Be Conferred on Any Court as Federal Jurisdiction?*

Courts exercising federal jurisdiction are not permitted to exercise any power that is not judicial power in terms of ch III of the *Constitution* or a power incidental thereto.[60] It follows that the Victorian Supreme Court is not permitted to exercise legislative or executive power when interpreting State laws in exercise of federal jurisdiction. Any provision of the *Charter* conferring such a power on the Victorian Supreme Court would be incapable of being 'picked up' by s 79(1) of the *Judiciary Act 1903* (Cth) and applied in federal jurisdiction as Commonwealth law.[61]

This constitutional limitation has potential implications for the validity of the role of the courts in applying ss 7(2) and 32(1). The High Court may conclude that it would be incompatible with ch III of the *Constitution* for the *Charter* to confer a power on the Victorian Supreme Court to interpret statutes in a way that is constitutionally prohibited when federal jurisdiction is being exercised. Therefore, in order to analyse the validity of the role of the courts in applying ss 7(2) and 32(1), it is necessary first to consider whether that role entails an exercise of power that would not be able to be conferred on any court as federal jurisdiction.

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[59] *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

[60] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kable* (1996) 189 CLR 51; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

[61] *Solomons v District Court (NSW)* (2002) 211 CLR 119, 134–5 [20]–[24] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ); *Rizeq v Western Australia* [2017] HCA 23 (21 June 2017) [81] (Bell, Gageler, Keane, Nettle and Gordon JJ).

The High Court has acknowledged that 'it has not been found possible to offer an exhaustive definition of judicial power'.[62] The reasons for the difficulty in formulating such a definition were referred to in *Brandy*:

> Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not.[63]

As indicated in the above passage, the High Court has accepted that some functions may, chameleon like, take their character from the body in which they are reposed.[64] As pointed out by Gaudron J in *Sue v Hill*, there are other functions which, inherently, are exclusively judicial or exclusively non-judicial.[65]

In the absence of any exhaustive definition of judicial power, the High Court has developed criteria to assist in identifying functions and powers that are, or may be, exclusively judicial or exclusively non-judicial. Only some of those criteria are relevant for present purposes. The criteria considered relevant are identified and analysed below.

1 *Does the Power Entail Determining What Legal Rights Should Be Created?*

In *Precision Data*, the High Court stated:

> if the object of the adjudication is not to resolve a dispute about the existing rights and obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power.[66]

In *Momcilovic*, Heydon J included this criterion as a reason for holding, in dissent, that s 7(2) is invalid. His Honour concluded that s 7(2) 'gives a court power to "determine what legal rights and obligations should be created" by giving it the power to decide the legal extent of

[62] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 257 (Mason CJ, Brennan and Toohey JJ) (citations omitted) ('*Brandy*').
[63] Ibid 267 (Deane, Dawson, Gaudron and McHugh JJ) (citations omitted).
[64] *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 18 (Aickin J); *Sue v Hill* (1999) 199 CLR 462, 516–17 [134]–[135] (Gaudron J, Gleeson CJ, Gummow and Hayne JJ agreeing); *Pasini v United Mexican States* (2002) 209 CLR 246, 253–4 [12] (Gleeson CJ, Gaudron, McHugh and Gummow JJ); *Thomas v Mowbray* (2007) 233 CLR 307, 326–7 [10]–[12] (Gleeson CJ).
[65] (1999) 199 CLR 462, 515–16 [132].
[66] (1991) 173 CLR 167, 189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

the limit to a human right'.[67] In *Precision Data*, however, the High Court went on to qualify its above statement:

> In some situations, the fact that the object of the determination is to bring into existence by that determination a new set of rights and obligations is not an answer to the claim that the function is one which entails the exercise of judicial power. The Parliament can, if it chooses, legislate with respect to rights and obligations by vesting jurisdiction in courts to make orders creating those rights or imposing those liabilities. … Leaving aside problems that might arise because of the subject-matter involved or because of some prescribed procedure not in keeping with the judicial process, where a discretionary authority is conferred upon a court and the discretionary authority is to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature, it will be possible to conclude that the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes an exercise of judicial power.[68]

This means that even if, as seems likely, it is the case that the relevant use of proportionality analysis entails a power to determine what legal rights should be created, it does not necessarily follow that this power is incapable of being characterised as judicial. The characterisation of the power also depends on other criteria, including whether the power is to be exercised 'by reference to an objective standard or test prescribed by the legislature'.[69]

2 *Is the Power to Be Exercised by Reference to an Objective Standard or Test Prescribed by the Legislature?*

Only four of the Justices in *Momcilovic* dealt with this criterion in their reasons. Heydon J undertook a detailed analysis[70] of the criteria prescribed by s 7(2) and concluded that they 'are so vague that s 7(2) is an impermissible delegation to the judiciary of power to make legislation'.[71] Crennan and Kiefel JJ concluded, without elaboration, that s 7(2) 'contains no method appropriate to the ascertainment of the meaning and effect of a statutory provision'.[72] In contrast, Bell J concluded that 'these are criteria of a kind that are readily capable of

[67] (2011) 245 CLR 1, 170 [428].
[68] (1991) 173 CLR 167, 190–1 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (citations omitted).
[69] Ibid 191.
[70] (2011) 245 CLR 1, 170–2 [428]–[432].
[71] Ibid 164 [409].
[72] Ibid 219–20 [574].

judicial evaluation'.[73] Apart from citing supporting case law,[74] her Honour did not elaborate on this point.

As stated by Gummow and Crennan JJ in *Thomas v Mowbray*, '[i]t should be said at once that the case law shows acceptance of broadly expressed standards' [governing the exercise of powers conferred on courts].[75] There are numerous examples of vague and broadly expressed criteria, such as 'reasonably necessary',[76] 'reasonably appropriate and adapted' (which, like s 7(2), entails proportionality analysis),[77] 'oppressive, unreasonable or unjust',[78] 'just and equitable'[79] and 'necessary to make to do justice',[80] that have been found by the High Court to be acceptable for application in federal jurisdiction. The High Court has also determined that the inclusion of policy or moral considerations in such criteria is not necessarily indicative of non-judicial power.[81]

In view of the case law outlined above, there is considerable uncertainty as to whether the criteria prescribed by s 7(2) constitute 'an objective standard or test'[82] capable of application in the exercise of judicial power. However, the validity of s 7(2) does not necessarily depend on the answer to that question. Even if the criteria prescribed by s 7(2) do constitute the required objective standard or test, it does not necessarily follow that there is no constitutional impediment to the relevant use of proportionality analysis in the interpretation process. Perhaps the greatest risk of such an impediment lies in an important qualification

[73] Ibid 250 [684] (citations omitted).
[74] *Thomas v Mowbray* (2007) 233 CLR 307, 331–4 [20]–[28] (Gleeson CJ), 344–8 [71]–[82], 350–1 [88]–[92] (Gummow and Crennan JJ), 507 [596] (Callinan J); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 553–4 [14] (Gummow J), 597 [168]–[169] (Crennan and Kiefel JJ).
[75] (2007) 233 CLR 307, 345 [72].
[76] Ibid 331–3 [20]–[27] (Gleeson CJ), 352–3 [99]–[103] (Gummow and Crennan JJ), 507–8 [596] (Callinan J), 526 [651] (Heydon J).
[77] Ibid.
[78] *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368, 383 (Kitto J) ('*Amalgamated Engineering Union Case*'); *Thomas v Mowbray* (2007) 233 CLR 307, 345–6 [73] (Gummow and Crennan JJ).
[79] *Cominos v Cominos* (1972) 127 CLR 588, 590–1 (McTiernan and Menzies JJ), 594–5 (Walsh J), 598–600 (Gibbs J), 600–6 (Stephen J), 608–9 (Mason J).
[80] Ibid.
[81] *Amalgamated Engineering Union Case* (1960) 103 CLR 368, 383 (Kitto J); *Thomas v Mowbray* (2007) 233 CLR 307, 345 [73], 348–51 [80]–[93] (Gummow and Crennan JJ); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 551 [5] (Gleeson CJ), 553 [14] (Gummow J), 560 [37] (Kirby J), 597 [168] (Crennan and Kiefel JJ).
[82] *Precision Data* (1991) 173 CLR 167, 191 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

contained in the passage quoted above from *Precision Data*.[83] That qualification forms the basis of the following criterion.

3 *Do the Nature and Treatment of the Subject-matter of the Power Result in that Power Being Characterised as Exclusively Non-judicial?*

In *Precision Data*, the High Court accepted that judicial power may include a legislatively conferred authority for a court to create new rights and obligations, provided that authority is exercised according to legal principle or by reference to an objective standard or test prescribed by legislation.[84] That acceptance, however, was prefaced and qualified by the following words: 'Leaving aside problems that might arise *because of the subject-matter involved* or because of some prescribed procedure not in keeping with the judicial process …'[85]

The above reference to 'problems that might arise because of the subject-matter involved' signifies that the nature and treatment of the subject-matter of a power conferred on a court constitute a criterion for determining whether that power is exclusively non-judicial. It is important to note that the application of this criterion does not necessarily depend on whether or not an objective standard or test has been prescribed by the legislature for exercise of the power. What matters for this criterion is the nature and treatment of the subject-matter involved, not necessarily the way in which the power would be exercised. Where this criterion applies, the relevant power is incapable of being characterised as judicial. As will be seen, this criterion has potentially significant implications for the constitutional validity of the relevant use of proportionality analysis as part of the process of interpreting legislation.

If the *Charter* does or is amended to empower the courts to apply s 7(2) when interpreting statutory provisions, the power of the courts to apply s 7(2) will involve and extend to the following subject-matters:

(1) statutory provisions interpreted under s 32(1);

(2) statutory provisions assessed under s 36(2) of the *Charter* to determine whether they cannot be interpreted consistently with human rights; and

[83] Ibid 190–1.
[84] Ibid 191.
[85] Ibid (emphasis added).

(3) acts and omissions of public authorities who are relevantly required to comply with the obligations imposed by s 38(1) of the *Charter*, which states:

> Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

For the first two items listed above, the subject-matter of the power is the statutory law itself, as distinct from something dealt with by statutory law. This distinction becomes evident when considering the previously mentioned examples of vague and broadly expressed criteria that have been found by the High Court to be acceptable for application in federal jurisdiction.

In *Thomas v Mowbray*, the criteria of 'reasonably necessary' and 'reasonably appropriate and adapted' involved the subject-matter of 'obligations, prohibitions and restrictions' to be imposed by the order of the issuing court under s 104.4 of the *Criminal Code* (Cth).[86] These criteria are not used for assessing any statutory provisions. Rather, they are used for assessing 'obligations, prohibitions and restrictions' to be imposed by the relevant court orders.

In *Amalgamated Engineering Union Case*, the criterion of 'oppressive, unreasonable or unjust' involved the subject-matter of 'conditions, obligations or restrictions' imposed by '[a] rule of an organization' upon 'applicants for membership, or members, of the organization'.[87] This criterion, which had been prescribed by s 140 of the *Conciliation and Arbitration Act 1904* (Cth), was used for assessing the relevant 'conditions, obligations or restrictions', not any statutory provisions.

In *Cominos v Cominos*, the criteria of 'just and equitable' and 'necessary to make to do justice' involved the subject-matters of property settlements and court orders under the *Matrimonial Causes Act 1959* (Cth).[88] As with the criteria in the preceding examples, these criteria were not used for assessing any statutory provisions.

In contrast, if a court were to apply the criteria prescribed by s 7(2) when interpreting a statutory provision under s 32(1) or assessing a statutory provision under s 36(2), the involved subject-matter would be the involved statutory provision. The *content* of the

[86] (2007) 233 CLR 307, 342–3 [64] (Gummow and Crennan JJ).
[87] (1960) 103 CLR 368, 379–80 (Kitto J).
[88] (1972) 127 CLR 588, 595–7 (Gibbs J).

statutory law would be assessed, as distinct from something governed by legislation or something done or proposed to be done under legislation. This is a critical distinction between the relevant application of the s 7(2) criteria and the application of the criteria in the examples detailed above.

The fact that a power conferred on the courts involves the subject-matter of statutory provisions will not necessarily result in that power being characterised as exclusively non-judicial. For example, s 35(a) of the *Interpretation of Legislation Act 1984* (Vic) requires that a construction that would promote the purpose or object underlying an Act shall be preferred to a construction that would not promote that purpose or object. The power of the courts to apply that section when interpreting statutes is clearly judicial. Statutory and common law rules of construction are commonly applied by the courts for the purpose of choosing between available interpretations of statutes. Applying these rules is an accepted part of the judicial power to interpret statutes.

This analysis leads to the conclusion that in order to determine whether the subject-matter of a power results in that power being characterised as exclusively non-judicial, it is necessary to consider not just the nature of the subject-matter but also what is being done or proposed to be done in relation to it. In other words, it is necessary to consider both the nature and the treatment of the subject-matter, which in this case is statutory provisions.

What is the relevant nature of the subject-matter of statutory provisions? A prominent and constitutionally significant part of the nature of statutory provisions is that making them is an inherently legislative function. This has implications for the characterisation of any power that extends to making or amending statutory provisions, otherwise than through the accepted processes of statutory interpretation. It is considered highly unlikely that the High Court would characterise such a power as judicial.

Assuming the *Charter* does or is amended to empower the courts to apply s 7(2) when interpreting statutory provisions, would the exercise of that power involve treating the subject-matter of statutory provisions in a way that extends to making or amending them, otherwise than through the accepted processes of statutory interpretation? For the following reasons, it is considered the answer to that question is ‘yes’.

Instead of merely regulating the way the courts choose between available interpretations of statutory provisions, the relevant power would require the courts to create the interpretations by applying the criteria prescribed by s 7(2). The criteria would be applied to determine what the law should be. In Australia, this type of legislative policy-making is an inherently non-judicial function. It could be countered that the judicial function of interpreting legislation involves lawmaking. However, the extent of that lawmaking within the judicial function has traditionally been limited to choosing between interpretations that are reasonably open having regard to the existing statutory text and context. As explained above, the relevant power would exceed that limit. The courts would undertake the delegated legislative task of balancing the prescribed rights against each other and against other conflicting interests. Through this balancing process, the courts would create the legal limits of the prescribed rights, which would be taken to be legislated limits prescribed by the *Charter*. In effect, the courts would legislate under the guise of interpretation.

As already explained, the judicial function includes various powers that involve creating rights in applying legislation. The critical distinction here is that the relevant power would require the courts to create the legislative limits of the prescribed rights. As distinct from merely applying legislation, the courts would create it.

In these circumstances, it is considered the characterisation of the power would be unaffected by the availability or otherwise of an objective standard or test prescribed by the legislature. As indicated by the previously quoted qualifying words of the High Court in *Precision Data*,[89] in some cases the nature and treatment of the subject-matter of a power may result in that power being characterised as exclusively non-judicial, notwithstanding the availability of an objective standard or test prescribed by the legislature. For the reasons outlined above, it is considered this is such a case. The relevant type of legislative policy-making is an inherently non-judicial function, regardless of whether or not the criteria prescribed by s 7(2) are capable of judicial application.

Moreover, because of the inherently legislative nature of the relevant power and the fact that it would extend beyond the judiciary's accepted lawmaking role of choosing between available interpretations, it is considered the power would not, chameleon like, take its

[89] (1991) 173 CLR 167, 191 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

character from the body in which it is reposed.[90] Any power of this nature to make statutory law involving 'a discretion or, at least, a choice as to what that law should be'[91] would be likely to be characterised as exclusively non-judicial.

4 *Does the Power Entail Reviewing Legislation on the Merits?*

Another potential reason why the relevant power may be characterised as exclusively non-judicial is that it arguably entails reviewing legislation on the merits. In Australia, judicial review does not extend to reviewing the merits of administrative and legislative decisions made by the political branches of government. Judicial review is confined to declaring and enforcing the law that determines the limits and governs the exercise of the repository's power.[92] The merits of a decision, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[93] Although these principles have been expressed in cases involving administrative decisions, the underlying separation of powers considerations indicate that the expressed principles apply equally to legislative decisions.

A court applying s 7(2) when interpreting a statutory provision would be required to review that provision to assess whether it satisfies the prescribed proportionality test. The outcome of the review would not affect the validity of the involved provision. This is evident from s 36(5) of the *Charter*, which states:

> A declaration of inconsistent interpretation does not—
>
> (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or
> (b) create in any person any legal right or give rise to any civil cause of action.

Moreover, in *Kerrison v Melbourne City Council*, the Full Court of the Federal Court held that s 38 of the *Charter*, which provides that it is unlawful for a public authority to act in a

[90] *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 18 (Aickin J); *Sue v Hill* (1999) 199 CLR 462, 516–17 [134]–[135] (Gaudron J, Gleeson CJ, Gummow and Hayne JJ agreeing); *Pasini v United Mexican States* (2002) 209 CLR 246, 253–4 [12] (Gleeson CJ, Gaudron, McHugh and Gummow JJ); *Thomas v Mowbray* (2007) 233 CLR 307, 326–7 [10]–[12] (Gleeson CJ).
[91] *Western Australia v Commonwealth* (1995) 183 CLR 373, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).
[92] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J), quoted with approval in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160 [25] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).
[93] Ibid.

way that is incompatible with a human right, does not apply to the making of subordinate legislation.[94] This means that, as with primary legislation, the outcome of the relevant review process would not affect the validity of subordinate legislation.

Because the review process would not affect the validity of the involved statutory provision or the lawfulness of its making, the High Court may take the view that the relevant use of proportionality analysis entails reviewing legislation on the merits. Accordingly, the High Court may conclude that this use of proportionality analysis is an exclusively non-judicial function.

It could be argued the above reasoning is flawed as judicial power clearly does include some functions that involve reviewing statutory provisions in a way that does not affect their validity. Once again, s 35(a) of the *Interpretation of Legislation Act 1984* (Vic) serves as a useful example. As mentioned previously, s 35(a) requires that a construction that would promote the purpose or object underlying an Act shall be preferred to a construction that would not promote that purpose or object. The answer to the above argument is that the judicial function required by provisions such as s 35(a) does not entail any review of the merits of the reviewed statutes. The task for a court applying s 35(a) is to endeavour to identify the involved statutory purpose or object. The merits of the reviewed statute are irrelevant. The court is not required to undertake the lawmaking role of balancing the involved rights and interests. In contrast, a court applying s 7(2) of the *Charter* when interpreting a statutory provision would be required to assess the merits of the involved statute with respect to the balance struck between the involved rights and interests.

The High Court may therefore conclude that the power to apply s 7(2) when interpreting statutory provisions is exclusively non-judicial, as it entails reviewing legislation on the merits.

5 *Conclusion on Whether the Power Would Be Able to Be Conferred on Any Court as Federal Jurisdiction*

As indicated by the above analysis, it is considered the High Court would be likely to characterise the power to apply s 7(2) when interpreting statutory provisions as exclusively non-judicial. In support of this view, it is contended the High Court may conclude that

[94] (2014) 228 FCR 87, 129–30 [182], 133 [198]–[199] (Flick, Jagot and Mortimer JJ).

creating the legislative limits of rights is an inherently legislative function and that the relevant use of proportionality analysis entails reviewing legislation on the merits.

If the characterisation of the relevant power as exclusively non-judicial is correct, that power cannot validly be conferred on any court as federal jurisdiction. The next part of this article considers whether the relevant power would nevertheless be able to be exercised in state jurisdiction.

B *Would It Be Compatible with the Requirements of Ch III of the* Constitution *for the Victorian Supreme Court to Exercise the Power when Exercising State Jurisdiction?*

Notwithstanding the absence of a constitutionally mandated separation of powers in Victoria,[95] the Victorian Parliament's legislative power to confer powers and functions on Victorian courts is limited by the *Kable* principle established in *Kable*.[96] In *Wainohu v New South Wales*, French CJ and Kiefel J conveniently summarised this principle as follows:

> Decisions of this Court, commencing with *Kable*, establish the principle that a State legislature cannot confer upon a State court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the *Constitution*, as a repository of federal jurisdiction and as a part of the integrated Australian court system. The term 'institutional integrity', applied to a court, refers to its possession of the defining or essential characteristics of a court. Those characteristics include the reality and appearance of the court's independence and its impartiality.[97]

Would the *Kable* principle result in the invalidity of any provision of the *Charter* that purports to empower the Victorian Supreme Court to apply s 7(2) when interpreting statutory provisions under s 32(1)? In order to answer this question, it is necessary to consider whether the relevant power would result in the Victorian Supreme Court no longer possessing the defining or essential characteristics of a court, including the reality and appearance of the Court's independence and impartiality.

It is considered the relevant power would not affect the reality and appearance of the Victorian Supreme Court's independence and impartiality. In exercising the power, the Court

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[95] *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).
[96] (1996) 189 CLR 51, 96 (Toohey J), 103 (Gaudron J), 116–19 (McHugh J), 127–8 (Gummow J).
[97] (2011) 243 CLR 181, 208 [44] (citations omitted).

would be independent of the political branches of government. It is acknowledged that by virtue of the involved power to create the legislative limits of rights, the Court would become a participant in the lawmaking process. However, there does not appear to be any reason to suppose that the Court would act otherwise than independently and impartially in performing this role. The Court would no longer be independent of the lawmaking process, but it would remain independent of the political branches of government. The reality and appearance of the Court's independence and impartiality would be maintained.

There is a contrary argument that the Court's independence and impartiality would be compromised because its exercise of the relevant power may in some cases result in the Court making a declaration of inconsistent interpretation under s 36(2) of the *Charter*. The view could be taken that each of these declarations is, in effect, a report to the political branches of government. Consideration of this argument would involve the question 'whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government'.[98] However, because a majority in *Momcilovic* upheld the validity of the s 36(2) declaration power when exercised in state jurisdiction,[99] the contrary argument identified here can be discounted.

Are there any defining or essential characteristics of a court, other than the independence and impartiality characteristic analysed above, that may be relevant for present purposes? French CJ, Kiefel and Bell JJ provided the following summary of these characteristics and the *Kable* principles in *North Australian Aboriginal Justice Agency Limited v Northern Territory*:

1. A State legislature cannot confer upon a State court a function or power which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the *Constitution*, as a repository of federal jurisdiction and as a part of the integrated Australian court system.

2. The term 'institutional integrity' applied to a court refers to its possession of the defining or essential characteristics of a court including the reality and appearance of its independence and its impartiality.

[98] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow).
[99] (2011) 245 CLR 1, 66–8 [92]–[97] (French CJ), 224–9 [593]–[605] (Crennan and Kiefel JJ), 241 [661] (Bell J).

3. It is also a defining characteristic of courts that they apply procedural fairness and adhere as a general rule to the open court principle and give reasons for their decisions.

4. A State legislature cannot, consistently with Ch III, enact a law which purports to abolish the Supreme Court of the State or excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the State.

5. Nor can a State legislature validly enact a law which would effect an impermissible executive intrusion into the processes or decisions of a court.

6. A State legislature cannot authorise the executive to enlist a court to implement decisions of the executive in a manner incompatible with the court's institutional integrity or which would confer on the court a function (judicial or otherwise) incompatible with the role of the court as a repository of federal jurisdiction.

7. A State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member.[100]

Apart from the independence and impartiality characteristic, none of the characteristics indicated in the above list appears to be relevant for present purposes. However, there is no complete list of the defining or essential characteristics of a court. As pointed out by Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission*, '[i]t is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court'.[101] Their Honours also said that the defining characteristics of a court are those 'which mark a court apart from other decision-making bodies'.[102]

Traditionally, one of the things that marks a court apart from other decision-making bodies is that courts do not legislate. Thus, it could be argued that a defining or essential characteristic of a court is that it does not possess legislative power. However, it seems unlikely that the High Court would accept this argument, as doing so would mean that a constitutionally

[100] (2015) 256 CLR 569, 593–5 [39] (citations omitted).
[101] (2006) 228 CLR 45, 76 [64].
[102] Ibid 76 [63].

mandated separation of powers applies in each of the States and Territories, which is contrary to existing High Court case law.[103]

Alternatively, it could be argued that a defining or essential characteristic of a court is that its judicial power to interpret statutes does not extend to legislating, except to the extent of choosing between interpretations that are reasonably open having regard to the existing statutory text and context. The High Court might accept this argument, as it is not contrary to existing case law. The suggested characteristic would not preclude every conferral of legislative power on a state supreme court. It would apply only to the conferral of legislative power that is merged with a court's judicial power to interpret statutes. If the High Court accepts this argument and concludes that it applies to the relevant power, the *Kable* principle would result in the invalidation of any provision of the *Charter* that purports to confer that power on the Victorian Supreme Court.

On the other hand, there is a counter-argument that the *Kable* principle would not so apply. According to this counter-argument, the requirement in s 32(1) for interpretations under that section to be consistent with the statutory purpose would limit the discretion of the courts to choosing interpretations that are reasonably open. Thus, so the argument goes, exercise of the relevant power in state jurisdiction would not impair the Victorian Supreme Court's institutional integrity. This supposedly would be so even if the power is not exercisable in federal jurisdiction because it entails creating the legislative limits of rights and choosing interpretations based on reviews of legislation on the merits.

As evident from this analysis, there is considerable uncertainty as to whether the *Kable* principle would result in the invalidation of any provision of the *Charter* that purports to empower the Victorian Supreme Court to apply s 7(2) when interpreting statutory provisions under s 32(1).

It is important to recognise, however, that a state law conferring a power on a state supreme court may be invalid even if the *Kable* principle is not applicable. That principle is limited to situations in which the institutional integrity of a court is impaired. It is conceivable that the conferral of a power on a state supreme court does not impair that court's institutional integrity but is nevertheless constitutionally impermissible. This situation could arise, for

[103] *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

example, where the court's exercise of the power would 'alter or interfere with the working of the federal judicial system'[104] or 'undermine the operation of Ch III'[105] or 'strike at the effective exercise of the judicial power of the Commonwealth'.[106] For the reasons outlined below, it is contended these outcomes would inevitable arise if the power to apply s 7(2) when interpreting statutes is conferred on the Victorian Supreme Court and is exercisable only in state jurisdiction.

A key feature of the working of the federal judicial system set up by ch III of the *Constitution* is that High Court decisions, apart from those made by a single Justice,[107] and their rationes decidendi bind all other Australian courts.[108] This means if the High Court has made such a decision in its appellate or original jurisdiction as to the meaning of a statutory provision, the Victorian Supreme Court is bound by that decision and its ratio decidendi. Consequently, if the Victorian Supreme Court has or acquires the power to apply s 7(2) when interpreting statutory provisions under s 32(1), that power cannot validly be used to reinterpret a statutory provision if the High Court has ruled on its applicable meaning. This is so regardless of whether the Victorian Supreme Court is exercising state or federal jurisdiction. The only exception to this limitation is where the High Court decision has ceased to be binding because of a change in law (statute or common) or facts potentially affecting the meaning of the involved statutory provision.

Nevertheless, it could be argued that it would be constitutionally permissible for the Victorian Supreme Court to use the relevant power when the Court is exercising state jurisdiction and there is no binding High Court precedent. But what would happen when the High Court hears an appeal against an interpretation given by the Victorian Supreme Court that was based on its assessment under s 7(2) of the interpreted statutory provision? If the relevant power is exercisable by the Victorian Supreme Court but not the High Court, it inevitably follows that

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[104] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 364 [78] (McHugh J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598 [37] (McHugh J); *The Commonwealth v Queensland* (1975) 134 CLR 298, 314–15 (Gibbs J, Barwick CJ, Stephen and Mason JJ agreeing).

[105] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 622–3 [36]–[37] (Gleeson CJ, Gummow and Hayne JJ).

[106] Ibid.

[107] *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499, 504 (Gummow J).

[108] *Lipohar v The Queen* (1999) 200 CLR 485, 507 [50] (Gaudron, Gummow and Hayne JJ). As to the binding force of the rationes decidendi of decisions made by the High Court in its original jurisdiction, see *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 43–4 [33]–[35] (Gleeson CJ, Gummow and Hayne JJ).

in some appeals the High Court would be forced to uphold interpretations that would not be given by the High Court if it were exercising original jurisdiction.

This would occur where, despite the Victorian Supreme Court's interpretation being reasonably open and its s 7(2) assessment being one that could reasonably be made, there is no reason why the High Court would identify or choose that particular interpretation if it were exercising original jurisdiction. An assessment under s 7(2) would be neither undertaken nor relevant if the High Court were exercising original jurisdiction, whereas such an assessment may have been a decisive factor in the Victorian Supreme Court's identification or choice of its preferred interpretation.

If the relevant power is exercisable in state jurisdiction but not federal jurisdiction, both of the following discrepancies would inevitably arise. First, there would be a discrepancy between the way the High Court is permitted to interpret statutes when exercising appellate jurisdiction and the way it is permitted to interpret them when exercising original jurisdiction. In its appellate jurisdiction, the High Court would be permitted to have regard to the proportionality (as assessed by the Victorian Supreme Court)[109] of the involved limit on a right, whereas doing so would not be permitted when the Court is exercising original jurisdiction. Secondly, there would be a similar discrepancy between the way the Victorian Supreme Court is permitted to interpret statutes when exercising state jurisdiction and the way it is permitted to interpret them when exercising federal jurisdiction.

The identification of these discrepancies should not be taken to suggest that the procedures for the High Court's appellate jurisdiction must always be the same as those for its original jurisdiction. Some differences between these respective procedures are permissible. For example, the High Court has confirmed that 'when it [ch III of the *Constitution*] refers to the appellate jurisdiction, it is speaking of appeals in the true or proper sense'.[110] This means the admissibility of evidence rules for the High Court's appellate jurisdiction differ from those for its original jurisdiction. Because such differences are constitutionally permissible, they are not discrepancies, at least not in the sense used here of differences between things that (according to the below analysis) ought to be the same. This applies equally to permissible

[109] The High Court's role with respect to the Supreme Court's proportionality assessment would be limited to determining whether any error of law occurred in the making of that assessment.
[110] *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561, 571–2 [28] (French CJ, Gummow, Hayne and Bell JJ) (citations omitted).

differences between the procedures for the Victorian Supreme Court's state jurisdiction and those for its federal jurisdiction.

Nor is it suggested that courts interpreting statutes must always do so in the same way. The problem here is not that courts use different ways of interpreting statutes, but rather that courts exercising federal jurisdiction would not be permitted to use a certain way of interpreting Victorian statutes that is supposedly permissible in state jurisdiction.

When the High Court's jurisdiction to interpret a statute is enlivened, the scope of the Court's power to interpret that statute should not depend on which jurisdiction is being exercised. The scope of the power in the High Court's appellate jurisdiction ought to be the same as the scope of the power in its original jurisdiction. Regardless of the jurisdiction being exercised, the High Court has a duty to say what the law is.[111] Statutes are laws of general application. Their meanings have legal and constitutional implications that extend beyond the interests of litigants in any particular court case. Accordingly, the scope of the High Court's power to interpret a statute should not depend on the arguments raised by litigants, or on whether appellate or original jurisdiction is being exercised. Moreover, if the meaning of a statute depended on the jurisdiction exercised by the court interpreting it, the meaning would be a matter of happenstance, which would be antithetical to the rule of law.

Another potential constitutional impediment arises from that fact that the courts have a common law power to interpret statutes. This power has constitutional dimensions that set it apart from most other common law powers. These constitutional dimensions have potentially significant implications for the validity of any provision of the *Charter* that purports to empower the Victorian Supreme Court to apply s 7(2) when interpreting statutory provisions under s 32(1).

In *Re Wakim; Ex parte McNally*, Gummow and Hayne JJ made the following statement in relation to the nature of the common law in Australia:

> [W]hen it is said that there is an 'integrated' or 'unified' judicial system in Australia, what is meant is that all avenues of appeal lead ultimately to this Court and there is a single common

[111] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J).

> law throughout the country. This Court, as the final appellate court for the country, is the means by which that unity in the common law is ensured.[112]

The unity of the common law does not mean that the common law is applied uniformly throughout Australia. The Commonwealth, state and territory parliaments may validly enact laws modifying the application of the common law in their respective jurisdictions. But, as explained below, this legislative power to modify the application of the common law is limited by constitutional requirements.

It is likely only a matter of time before the High Court makes a decision, in its appellate or original jurisdiction, that contains a binding ratio decidendi indicating the correct approach to interpreting Victorian statutes that limit rights. If the relevant power to apply s 7(2) is not exercisable by the High Court, that correct approach must surely exclude the exercise of that power. It appears inconceivable that the High Court would accept the proposition that there are two correct but mutually exclusive approaches[113] — one for use in state jurisdiction and the other for use in federal jurisdiction.

The High Court's acceptance of that proposition would mean that it is possible and permissible for a statute simultaneously to have two conflicting meanings that cannot be reconciled. As indicated by Hayne J in *Momcilovic*, the law does not countenance that possibility:

> If there is conflict between two statutes, and reconciliation is not possible, the law does not countenance simultaneous operation of the conflicting provisions. Doctrines of implied repeal resolve conflicts between legislation enacted by the one legislature. Conflicts between Imperial and colonial legislation were resolved in favour of the Imperial legislation. And in a federal system, the federal law prevails.[114]

Axiomatically, conflicts between legislation and the *Constitution* are resolved in favour of the *Constitution*. Chapter III of the *Constitution* requires the High Court to have the power, in both appellate and original jurisdiction, to make final and conclusive determinations of the meanings of state laws. The High Court would no longer have that power if it were

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[112] (1999) 198 CLR 511, 574 [110] (citations omitted).
[113] The two approaches would be mutually exclusive because courts exercising state jurisdiction would not be permitted to use the approach required in federal jurisdiction, and courts exercising federal jurisdiction would not be permitted to use the approach required in state jurisdiction. Incorporating proportionality analysis into the interpretation process would be required in state jurisdiction but forbidden in federal jurisdiction.
[114] (2011) 245 CLR 1, 133 [312].

permissible for a state law simultaneously to have two conflicting meanings that cannot be reconciled. Because the High Court would lack the power to resolve the conflict between the two meanings, it would be impossible for the Court to give a final and conclusive determination of the meaning of the involved statutory provision. An 'either or' determination of the meaning would not be conclusive; it would not conclude the matter in dispute. Moreover, the notion that a law may simultaneously have two conflicting meanings that cannot be reconciled is antithetical to the rule of law.

The following situation would arise if it were permissible for the Victorian Supreme Court to interpret rights-limiting statutes in a way that is constitutionally prohibited when federal jurisdiction is being exercised. For every Victorian statutory provision that limits a right, the application of the common law power to interpret that provision would not be the same for the Victorian Supreme Court as it would be for the High Court. With respect to the interpretation of the provision, the common law prohibition on courts legislating through interpretation would not apply when state jurisdiction is being exercised, but would apply when federal jurisdiction is being exercised.

In response to this concern, it could be argued ch III of the *Constitution* does not require that the application of the common law power to interpret statutes be uniform throughout Australia. That argument is accepted, but it is nevertheless contended ch III requires that the application of the common law power to interpret the laws of any particular jurisdiction must be the same for that jurisdiction's supreme court as it is for the High Court. As explained above, this requirement is essential to ensure the High Court retains its power under ch III to make final and conclusive determinations of the meanings of statutes.

It could also be argued that if the relevant power is exercisable by the Victorian Supreme Court but not the High Court, it does not necessarily follow that it would be possible for a statute simultaneously to have two conflicting meanings that cannot be reconciled. According to this argument, any Victorian Supreme Court interpretation resulting from its exercise of the relevant power would be valid until such time as it is superseded by a High Court decision. Thus, there would be no simultaneous operation of conflicting meanings. However, this argument can be discounted for the following reason. If the Victorian Supreme Court's interpretation is constitutionally valid, the High Court cannot give a contrary interpretation,

as doing so would be an impermissible exercise of legislative power that would change the valid meaning of the statute.

It would be no answer to these potential constitutional impediments to say that the application of the common law has been modified in state jurisdiction but not in federal jurisdiction. The application of the common law cannot validly be modified in a way that would cause the High Court to lose its power to make final and conclusive determinations of the meanings of state laws. The loss of this power of the High Court would 'alter or interfere with the working of the federal judicial system',[115] 'undermine the operation of Ch III'[116] and 'strike at the effective exercise of the judicial power of the Commonwealth'.[117]

It is therefore contended that any legislative conferral of the relevant power on the Victorian Supreme Court would be likely to be invalid.

VI CONCLUSION

According to the above analysis, there is a significant likelihood that the relevant power to use proportionality analysis as part of the interpretation process cannot validly be conferred on any court vested with federal jurisdiction.

It should be noted that the potential constitutional impediments identified in this article have a narrow range of application. They do not apply in circumstances where the use of proportionality analysis by the courts is required to determine the validity of a law or the lawfulness of an administrative decision. For example, the potential impediments do not apply to the use of proportionality analysis by the courts to ascertain whether:

- a law (for example, a law restricting the implied freedom of political communication) or administrative decision satisfies a proportionality requirement arising from the *Constitution*;
- a state or territory law satisfies a proportionality requirement imposed by Commonwealth legislation; or

[115] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 364 [78] (McHugh J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598 [37] (McHugh J); *The Commonwealth v Queensland* (1975) 134 CLR 298, 314–15 (Gibbs J, Barwick CJ, Stephen and Mason JJ agreeing).
[116] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 622–3 [36]–[37] (Gleeson CJ, Gummow and Hayne JJ).
[117] Ibid.

- subordinate legislation or an administrative decision satisfies a proportionality requirement imposed by primary legislation.[118]

The potential impediments also do not apply to the use of proportionality analysis by the Victorian Supreme Court, when exercising state jurisdiction, to ascertain whether it should make a declaration of inconsistent interpretation under s 36(2) of the *Charter*. Nor do the potential impediments apply when the thing to be assessed for proportionality is not the law itself, but rather something done or proposed to be done in applying the law in accordance with legislatively prescribed criteria that include a proportionality requirement.[119]

Arguably, there might be a way to overcome the identified potential constitutional impediments to applying the s 7(2) proportionality test as part of the interpretation process under s 32(1). The *Charter* could be amended to provide that any statutory provision that does not satisfy the s 7(2) proportionality test is invalid unless an Act of the Victorian Parliament expressly provides that the provision shall be valid and operate notwithstanding the *Charter*. However, it is doubtful whether such a provision would be effective for invalidating primary legislation. The suggested provision includes a 'manner and form' requirement (the requirement for a 'notwithstanding clause') for the making of primary legislation that limits a right. This requirement would be unlikely to be binding for any primary legislation that is not a law 'respecting the constitution, powers or procedure of the Parliament of the State' in terms of s 6 of the *Australia Act 1986* (Cth). For example, the legislation[120] containing the reverse onus provision[121] considered in *Momcilovic*[122] is not a law 'respecting the constitution, powers or procedure' of the Victorian Parliament.

In conclusion, in view of the identified potential constitutional impediments, there is considerable uncertainty as to whether the power to apply the s 7(2) proportionality test as part of the interpretation process under s 32(1) can validly be conferred on any court vested with federal jurisdiction. It should be noted that the potential impediments have implications not just for the Victorian *Charter* and the *Human Rights Act 2004* (ACT), but also for the

[118] According to the case law, the *Charter* does not impose a binding requirement for Victorian subordinate legislation to satisfy the s 7(2) proportionality test (*Kerrison v Melbourne City Council* (2014) 228 FCR 87, 129–30 [182], 133 [198]–[199] (Flick, Jagot and Mortimer JJ)).
[119] For example, s 104.4 of the *Criminal Code* (Cth) prescribes the criteria of 'reasonably necessary, and reasonably appropriate and adapted' in relation to each of the obligations, prohibitions and restrictions to be imposed by a court order under that section.
[120] *Drugs, Poisons and Controlled Substances Act 1981* (Vic).
[121] Ibid s 5.
[122] (2011) 245 CLR 1.

Queensland government's Human Rights Bill 2018 (Qld) introduced on 31 October 2018 into the Queensland Parliament. Unlike the other two human rights instruments, the introduced version of that Bill clarifies beyond doubt that proportionality analysis is intended to have a role in statutory interpretation under the proposed legislation.[123] Ironically, that clarification of meaning, if enacted, could bring the unresolved constitutional question identified in this article to a head. The courts would not have the option of circumventing that question by giving an interpretation to the effect that proportionality analysis is not intended to have a role in statutory interpretation under the Queensland legislation.

[123] Human Rights Bill 2018 (Qld) cls 8, 13 and 48.

SHORT ESSAYS

SHOULD EQUAL REPRESENTATION OF THE STATES BE RETAINED IN THE COMMONWEALTH SENATE?

Reuben Pemberton-Ovens*

I INTRODUCTION

The *Australian Constitution* was written in vastly different circumstances to those which exist in contemporary Australian society, yet some of the key dilemmas which faced the framers of the *Constitution* remain to this day.[1] One such issue is the conflicting objects of democratic majoritarian rule and equal State representation in the Commonwealth Senate.[2] Section 7 of the *Constitution* ('section 7') relevantly provides that 'equal representation of the several Original States shall be maintained' in the Senate. An examination of the historical genesis of section 7's equal State representation requirement, from the perspective of the framers of the *Constitution*, reveals that the requirement was adopted both to protect State rights by ensuring a geographically distributed legislative majority, and also as a practical compromise to ensure that smaller States would accede to a federal union. From a contemporary perspective there are compelling arguments that equal State representation is undemocratic as it creates inequality of vote values, and that the historical rationale for equality of membership centred on protecting State rights is irrelevant as the Senate has largely become a partisan house.[3] Despite these objections, there are several principled reasons why section 7 should be retained in its present form on the basis that the merits of equal geographical distribution of Senate power outweighs the negative aspects of the system.

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[1] See David Wood, 'The Senate, Federalism and Democracy' (1989) 17(2) *Melbourne University Law Review* 292, 293; Murray Gleeson, 'The Shape of Representative Democracy' (2001) 27(1) *Monash University Law Review* 1, 5; Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 164, 172–173.

[2] Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 164, 173.

[3] See Scott Bennett, 'The Australian Senate' (Research Paper No 6, Parliamentary Library, Commonwealth, 2004) 23; John Uhr, 'The Australian Senate' (Conference Paper, Ottawa: Institute for Research on Public Policy and Forum of Federations, 18 November 2008) 6–7.

II THE HISTORICAL RATIONALE FOR EQUAL STATE MEMBERSHIP IN THE SENATE

Section 7 received a great deal of debate and detailed consideration in its drafting. Indeed, it is 'well known that the design of the Senate repeatedly gave rise to the most protracted disputes during the 1890s Conventions in which the Constitution was framed.'[4] Accordingly, to ascertain why the framers of the *Constitution* gave states equal Senate membership through section 7 it is necessary to review the two dominant reasons for its adoption during the 1890s Convention debates.

The first reason was that equal State Senate membership was seen as being necessary to protect State rights.[5] It was argued that if the Senate had proportional State membership, rather than equal representation, 'the interests of the smaller States would be absolutely in the hands of the larger States'.[6] Andrew Thynne, a Queensland delegate, contended that an Australian federation without a Constitutional requirement for equal State Senate membership would be 'insecure and unsteady, and without those guards against the tyrannic exercise of the power of temporary majorities which are necessary [for] peaceful government'.[7] A dominant perspective amongst many delegates from the smaller colonies was that equal membership would ensure that 'the rights of minorities are guarded in the new constitution against hasty, corrupt, or dishonest action on a part of any section, no matter how large it may be.'[8] This view that the Senate would function not only as a house of review,[9] but also more broadly as a protector of the rights of geographical minorities throughout the country was arguably the core reason why section 7 was written to require equal State membership in the Senate.[10] The framers were fundamentally concerned with creating a

[4] John Uhr, 'Why We Chose Proportional Representation' in Marian Sawer and Sarah Miskin (eds), 'Representation and Institutional Change: 50 Years of Proportional Representation in the Senate' (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 21, citing *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 163 (William Lyne).
[5] See *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 79 (Simon Fraser); *Official Record of the Debates of the National Australasian Convention*, Melbourne, 20 January 1898, 1 (Patrick Glynn).
[6] *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 51–52 (Richard O'Connor).
[7] *Official Record of the Debates of the National Australasian Convention*, Sydney, 6 March 1891, 106 (Andrew Thynne).
[8] Ibid.
[9] Ibid.
[10] See Scott Brenton, 'State-based Representation and National Policymaking: The Evolution of the Australian Senate and the Federation' (2015) 21(2) *Journal of Legislative Studies* 270, 271; John Uhr, 'Explicating the Australian Senate' (2002) 8(3) *Journal of Legislative Studies* 3, 4.

functional federation with a strong representative government;[11] ultimately it can be said that they reached the conclusion that the equal representation of state communities was more important than equal representation of individuals from different states in attaining this goal.[12]

The second dominant reason for section 7's equal membership requirement was succinctly expressed by the then Premier of Victoria, Sir George Turner:

> Although, the larger States might fairly claim to have larger representation in both Houses, seeing that what we must keep before us is the welding of the colonies into one whole, we must be prepared to make some sacrifices. The larger colonies must be prepared to give to their smaller neighbours equal representation in the Senate body.[13]

This view was also underpinned by a concern that a failure to provide equal membership to States would produce 'a continual sense of injustice'[14] and 'neglect'[15] in smaller States which of itself would leave a constitutional 'germ of unrest which would probably develop into something much more serious.'[16] This demonstrates that framers from the larger colonies also arguably agreed to equal State representation in the Senate based upon the pragmatic conclusion that smaller colonies would never have handed over much of their powers to a federal government unless they were equally represented in at least one chamber of the federal parliament.[17]

Accordingly, there were two mains reasons why section 7 was written by the *Constitution's* framers to require equal State membership in the Senate. The first was a principled reason

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[11] See especially *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 63 (Sir Edward Braddon).

[12] James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31 *Melbourne University Law Review* 239, 256, citing Nicholas Aroney, 'Federal Representation and the Framers of the Australian Constitution' in Gabriël Moens (ed), *Constitutional and International Law Perspectives* (University of Queensland Press, 2000) 13, 15, 17, 40. See also Nicholas Aroney, 'Representative Democracy Eclipsed? The Langer, Muldowney and McGinty Decisions' (1996) 19 *University of Queensland Law Journal* 75, 100-1; Nicholas Aroney, 'A Commonwealth of Commonwealths: Late Nineteenth-Century Conceptions of Federalism and Their Impact on Australian Federation, 1890–1901' (2002) 23 *Journal of Legal History* 253, 266, 273; Nicholas Aroney, 'Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890–1901' (2002) 30 *Federal Law Review* 265.

[13] *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 39 (Sir George Turner).

[14] *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 51–52 (Richard O'Connor).

[15] Ibid.

[16] Ibid.

[17] See especially *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 49 (Richard O'Connor); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 63 (Sir Edward Braddon).

centred on the idea that equal membership was necessary to protect state rights by ensuring the equal geographical distribution of legislative power. The framers viewed this goal of decentralising and equally distributing legislative power across the nation as being of greater importance to a functional federalist system than pure vote equality between voters in different States. The second historical reason was that equal representation was ultimately 'the price that had to be paid for federal union'[18] to ensure that the smaller colonies would agree to federate. In this respect, section 7 was as much a pragmatic compromise necessitated by the concerns and demands of the smaller colonies as it was a provision intended to create a system designed around the more elegant theoretical ideals of geographically equalised federalism.

III ARGUMENTS FOR PROPORTIONAL STATE REPRESENTATION IN THE SENATE

Determining whether the *Constitution* should be altered to remove equal State representation in the Senate from section 7 requires analysis of arguments against the existing system. There are two primary arguments against retaining equal representation.

First, that equal State representation is 'extremely unjust' to voters in the larger States,[19] because it inherently subverts the 'one vote, one value'[20] principle which some argue is 'an essential principle of democracy'.[21] By requiring an equal number of Senators from each State section 7 creates significant inequality in the effective value or 'weight' of citizens' votes in different States. This has been criticised as being 'fundamentally anti-democratic'[22] and 'unrepresentative'[23] because it can also allow representatives of a geographical minority

[18] Murray Gleeson, 'The Shape of Representative Democracy' (2001) 27(1) *Monash University Law Review* 1, 6. See also John Uhr, 'Explicating the Australian Senate' (2002) 8(3) Journal of Legislative Studies 3, 4; John Faulkner, 'A Labor Perspective on Senate Reform' in Marian Sawer and Sarah Miskin (eds), 'Representation and Institutional Change: 50 Years of Proportional Representation in the Senate' (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 122; John Uhr, 'Why We Chose Proportional Representation' in Marian Sawer and Sarah Miskin (eds), 'Representation and Institutional Change: 50 Years of Proportional Representation in the Senate' (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 23.

[19] *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 165 (William Lyne).

[20] David Wood, 'The Senate, Federalism and Democracy' (1989) 17(2) *Melbourne University Law Review* 292, 295.

[21] Constitutional Commission, Parliament of Australia, *Final Report of the Constitutional Commission* (1988) vol 1, [4.145], quoted in *McGinty v Western Australia* (1996) 186 CLR 140, 202 (Toohey J).

[22] John Uhr, 'Why We Chose Proportional Representation' in Marian Sawer and Sarah Miskin (eds), 'Representation and Institutional Change: 50 Years of Proportional Representation in the Senate' (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 40.

[23] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1994, 1747 (Paul Keating), quoted in Scott Bennett, 'The Australian Senate' (Research Paper No 6, Parliamentary Library, Commonwealth, 2004) 15. See also John Faulkner, 'A Labor Perspective on Senate Reform' in Marian Sawer and Sarah Miskin

to frustrate the will of a majority of Australians in the Senate. This dilemma was well-illustrated by Justice McHugh's dicta in *McGinty v Western Australia*[24] in which His Honour explained that section 7 creates a system where 'the Senate vote of an elector in Tasmania is ten times more valuable than the Senate vote of an elector in Victoria.'[25] Proponents for replacing section 7's equal State representation with proportional State membership argue that such constitutional reform would strengthen our democracy by removing the undemocratic disproportionality that is inherent in our current system.[26]

The second argument for the amendment of section 7 is that equal State representation is no longer necessary as the Senate does not operate as 'the States' House' because Senators vote on party lines, not to protect the interests of their respective States.[27] Whilst both arguments for constitutional reform are compelling, there are several cogent reasons why section 7 should not be altered.

IV WHY EQUAL STATE REPRESENTATION IN THE SENATE SHOULD BE RETAINED

In practical terms, it is likely 'impossible'[28] to amend section 7 due to the Australian public's general historical refusal to carry referenda that alter the basic structure of the federal system or appear designed to weaken the Senate.[29] There are also cogent arguments to be made that there are numerous constitutional amendments that are of far greater importance to our democracy and which should be prioritised over pursuing the alteration of section 7. However, referendum practicality and other proposed constitutional amendments aside, it is conceptually valuable to examine three principled reasons why it is desirable to retain section 7's equal State representation requirement.

(eds), 'Representation and Institutional Change: 50 Years of Proportional Representation in the Senate' (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 122.

[24] (1996) 186 CLR 140, 237 (McHugh J) ('*McGinty*').

[25] *McGinty* (1996) 186 CLR 140, 237 (McHugh J).

[26] See John Faulkner, 'A Labor Perspective on Senate Reform' in Marian Sawer and Sarah Miskin (eds), 'Representation and Institutional Change: 50 Years of Proportional Representation in the Senate' (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 122; *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 158–159 (William Lyne). See generally *McGinty* (1996) 186 CLR 140, 274–275 (Gummow J).

[27] See Harry Evans, 'The Role of the Senate' (2001) 78 *Australian Law Reform Commission Reform Journal* 16, 17; Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1994, 1747 (Paul Keating). See also *Victoria v Commonwealth* (1975) 134 CLR 81, 121–122 (Barwick CJ).

[28] Victor Prescott, 'The Need to Reform the Constitution of Australia' (2000) 11 *Public Law Review* 106, 112.

[29] See especially Scott Bennett, 'The Australian Senate' (Research Paper No 6, Parliamentary Library, Commonwealth, 2004) 19–20. See also Hannah Gobbet et al (eds), 'Parliamentary handbook of the Commonwealth of Australia, 2017: 45th Parliament' (Commonwealth Parliamentary Handbook, Parliamentary Library and Department of Parliamentary Services, 11 March 2017) 405, 409; *McGinty* (1996) 186 CLR 140, 245–246 (McHugh J).

First, ensuring equality of State representation is more important than strict equality of Senate vote values in maintaining a functional representative democracy. While equal State representation subverts the 'one vote, one value' equality of voting power principle, it must be recognised that pure equality of voting power is not a strict requirement for representative democracy.[30] In *McGinty v Western Australia*[31] Justice McHugh opined that '[e]quality of voting power is not a fundamental feature of the Constitution. On the contrary, inequality of individual voting power is one of its striking features.'[32] Indeed, the Australian public overwhelmingly voted no in both the 1974 and 1988 referenda proposing constitutional requirements that electorates' sizes be proportional to population.[33] This demonstrates that 'the Australian people do not regard one vote one value as an essential requirement of representative democracy.'[34] Arguably it is not strict equality of voting power, but the hybrid form of equal State representation created by section 7, which is 'essential' for a properly representative federal system.[35]

Second, the equal geographical distribution of Senate representation and majoritarian power is the most equitable federal arrangement. If section 7 was altered to require population-based representation the 'legislative majority could consist of the representatives of only two states, indeed, of only two cities, Sydney and Melbourne.'[36] This could significantly undermine the political stability of the Commonwealth by creating very real sense of neglect and alienation in the less populous States through lack of effective geographical representation in the Senate.[37] The associated argument that equal State membership is no longer relevant, on the basis that the Senate no longer fulfils this role because it operates as a partisan House, fundamentally misconceives the framers' original intentions.[38] The framers intended that the

[30] See *Dixon v Attorney-General (British Columbia)* (1989) 59 DLR (4th) 247, 262 (McLachlin CJ), quoted in *McGinty v Western Australia* (1996) 186 CLR 140, 246–7 (McHugh J).
[31] (1996) 186 CLR 140.
[32] Ibid 236 (McHugh J).
[33] See Hannah Gobbet et al (eds), 'Parliamentary handbook of the Commonwealth of Australia, 2017: 45th Parliament' (Commonwealth Parliamentary Handbook, Parliamentary Library and Department of Parliamentary Services, 11 March 2017) 405, 409. See also *McGinty* (1996) 186 CLR 140, 245–246 (McHugh J).
[34] *McGinty* (1996) 186 CLR 140, 246 (McHugh J).
[35] Elaine Thompson, 'The Senate and Representative Democracy' in Sawer, Marian and Sarah Miskin (eds), 'Representation and Institutional Change: 50 Years of Proportional Representation in the Senate' (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 46.
[36] Harry Evans, 'The Role of the Senate' (2001) 78 *Australian Law Reform Commission Reform Journal* 16, 16.
[37] Evans, above n 36, 16. See especially Scott Bennett, 'The Australian Senate' (Research Paper No 6, Parliamentary Library, Commonwealth, 2004) 20, citing Sir Billy Snedden, 'Contemporary Westminster' in George Brandis, Tom Harley and Don Markwell (eds), *Liberals face the future: Essays on Australian Liberalism* (Oxford University Press, 1984) 231.
[38] John Uhr, 'The Australian Senate' (Conference Paper, Ottawa: Institute for Research on Public Policy and Forum of Federations, 18 November 2008) 7.

States' interests would be promoted 'not through uniformity of voting but through diversity of views represented within each State body of senators'.[39] Judicial consideration of the purpose of the Senate predominantly supports this interpretation; Chief Justice Barwick's dicta in *Victoria v Commonwealth*[40] is perhaps the most elucidating example:

> … the Senate was intended to represent the States, parts of the Commonwealth, as distinct from the House of Representatives which represents the electors throughout Australia. It is often said that the Senate has, in this respect, failed of its purpose. This may be so, due partly to the party system and to the nature of the electoral system: *but even if that assertion be true it does not detract from the constitutional position it was intended that proposed laws could be considered by the Senate from a point of view different from that which the House of Representatives may take*. The Senate is not a mere house of review: rather it is a house which may examine a proposed law from a stand-point different from that which the House of Representatives may have taken.[41]

Accordingly, the true purpose of section 7 was to ensure that the 'legislative majority would be geographically distributed across the Commonwealth'.[42] The Senate still achieves this purpose by ensuring that every law assented to ensure that has the support of the geographically distributed majority.[43] The framers, despite the desire to protect State interests, arguably intended to create a Senate which was geographically equalised in its membership in order to create diversity of representation and associated perspectives, not substantive uniformity of Senator voting patterns based on State origin. The equalisation of the effective value of votes in different States that would be achieved by altering section 7 to require proportional representation is of less importance to the maintenance of representative federal democracy than retaining this equal geographical distribution of Senate power and perspectives.

The third reason why section 7's equal representation requirement should be retained is that the beneficial diversity of perspectives it produces extends well beyond the legislature. The equal State composition of the Senate broadens the representation of major political parties by ensuring that the parties draw into their federal caucuses a greater number of

[39] Ibid.
[40] (1975) 134 CLR 81.
[41] Ibid 121-2 (Barwick CJ) (emphasis added).
[42] See especially John Uhr, 'The Australian Senate' (Conference Paper, Ottawa: Institute for Research on Public Policy and Forum of Federations, 18 November 2008) 7; Harry Evans, 'The Role of the Senate' (2001) 78 *Australian Law Reform Commission Reform Journal* 16, 17; *Victoria v Commonwealth* (1975) 134 CLR 81, 121 (Barwick CJ).
[43] Evans, above n 36, 16.

representatives from the smaller States.[44] This makes our federal governments truly 'representative' as it means that 'small states are well-represented in the party room',[45] resulting in federal executive policy being directly shaped by a geographically diverse array of Senators which inherently carry with them perspectives shaped by their home States.[46] Equal representation in the Senate also incentivises 'parties to campaign in every state and to formulate policies with national appeal'.[47] If the major parties did not have to compete for Senate seats drawn in equal numbers from the States, would they still be as dedicated to representing the interests of voters in smaller states and obtaining a truly national mandate to govern? Ultimately, it is naïve to suggest that they would, as it would be far more efficient to focus policy and campaigns primarily on the largest states from which the majority of Senators would be elected under a population-based system. The fact that equal State Senate membership effectively prevents political parties from neglecting voters in less populous States demonstrates the intrinsic democratic value of retaining section 7 in its current form. Amending section 7 to provide for population-based State representation would represent an abandonment of the Senate's 'greatest enduring public legitimacy'.[48]

V CONCLUSION

The framers of the *Constitution* crafted section 7 to require equal State membership in the Senate to protect State interests, ensure an equal geographical distribution of legislative power, and also as a pragmatic compromise to ensure that federation occurred. There are several compelling arguments in favour of amending the *Constitution* to have section 7 require that States are proportionally represented in the Senate based on their population. Such arguments include that equal representation is undemocratic as it creates inherent inequality in the value of votes in different States, and that the original rationale behind equal State membership is no longer relevant as the Senate is now a partisan House. Despite these arguments equal State representation should be retained, first because strict equality of vote value is less important than equality of State representation to maintaining a functional and representative federal democracy. Second, because the equal geographical distribution of

[44] Uhr, above n 38, 7.
[45] Scott Brenton, 'State-based Representation and National Policymaking: The Evolution of the Australian Senate and the Federation' (2015) 21(2) *Journal of Legislative Studies* 270, 274.
[46] See especially *Victoria v Commonwealth* (1975) 134 CLR 81, 121 (Barwick CJ). See also Scott Brenton, 'State-based Representation and National Policymaking: The Evolution of the Australian Senate and the Federation' (2015) 21(2) *Journal of Legislative Studies* 270, 271.
[47] Brenton, above n 45, 277.
[48] Uhr, above n 38, 7, citing John Uhr, 'Proportional Representation in the Senate: Recovering the Rationale' (1995) 30 *Australian Journal of Political Science* 127, 127–141.

State representation is the most equitable federal system as it ensures that all legislation passed by the Commonwealth parliament has the support of a geographical decentralised majority. Third, the retention of equal representation actively incentivises the broader political inclusion of representatives from smaller states in federal governments, whilst simultaneously prompting the major parties to tailor policy and campaigns to all States' needs irrespective of their populations. The Senate composition created by section 7 should not be regarded as obsolete or anachronistic in view of our contemporary democracy, rather it should be seen as furnishing our system with an appropriate and necessary form of enduring democratic legitimacy that is befitting of a federal polity as geographically vast as the Commonwealth of Australia.

DOES THE *AUSTRALIAN CONSTITUTION* MANDATE A FEDERAL BALANCE?

Sean McMurdo*

I INTRODUCTION

The framers of the *Australian Constitution* in the 1890s intended that the *Constitution* was a 'federal compact' between the States so that power would be balanced between the Commonwealth and the States. The Commonwealth would have powers in certain specified matters but in other specified matters the States would share power. The course of decision making by the High Court since the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[1] has led to an expansion of Commonwealth power and authority that had not been contemplated by the original drafters of the *Constitution*. In a strong dissenting judgement in the *New South Wales v Commonwealth*,[2] Callinan J invoked the original intention of the framers of the *Constitution* to strike a federal balance for the continuation and independence of the States in political power and function. This article addresses the question of whether the High Court has adequately maintained that original intention. An analysis of the High Court cases shows that in practice, the High Court has failed to strongly support the concept of a federal balance.

II JUSTICE CALLINAN'S JUDGEMENT

A *Work Choices Case*

The *Work Choices* case was a defining point of the High Court's position on the breadth of the Commonwealth powers to override the position of the States. The High Court had to determine the validity of the *Workplace Relations Amendment (Work Choices) Act 2006* (Cth), which would introduce a new system of employment agreements outside of the established industrial awards system. This required a consideration of whether such legislation was authorised under the 'corporations' head of power of s 51(xx) of the *Constitution* in addition to the powers of arbitration and conciliation under s 51(xxxv). The

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[1] (1920) 28 CLR 129 ('*Engineers*').

[2] (2006) 229 CLR 1 ('*Work Choices*').

breadth of the Work Choices legislation gave rise to the question of the Commonwealth's power to bind the States in relation to industrial legislation.

The majority of the High Court in *Work Choices* embraced the broad interpretation of the *Constitution* in favour of Commonwealth powers that had been evident since *Engineers*. The majority frequently referred to the *Engineers* case as a starting point of interpretation to rely on the words of the Constitutional text rather than to interpret that text in a wider context (such as the framing of the *Constitution*).[3] The majority emphasised that this was a matter of long-standing principles of Constitutional Interpretation and held that the *Constitution* is not to be interpreted by reference to any pre-conceived concepts such as some 'particular division of governmental or legislative power' or to any notion that the *Constitution* conserves some kind of 'static equilibrium' or 'federal balance'.[4]

B *Justice Callinan's Dissenting Judgement*

In a long and detailed dissenting judgment, Callinan J challenged the orthodoxy of the line of High Court decisions that has developed since *Engineers*.[5] He characterised the *Engineers* case as an early example of 'judicial activism',[6] and questioned the soundness of the reasoning of the majority, criticising it as 'less than satisfactory'.[7] Callinan J argued for an approach in interpretation of the *Constitution* which accorded with the original federalist structure and purposes as originally drafted.[8] He held that such an approach did not require adherence to some 'static equilibrium' but favoured a construction that would give best effect to the underlying purposes and fundamental structures of the *Constitution*.[9]

Justice Callinan was correct in his originalist interpretation of the *Constitution* which can be observed through his references to the original intentions of the States in forming a 'federal balance'.[10] The intention of those who wrote the *Constitution* was that power should be shared between the Commonwealth and the States, the States would share power in areas that were not given exclusively to the Commonwealth under the *Constitution* so that the States

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[3] *New South Wales v Commonwealth* (2006) 229 CLR 1, 71, 73, 118, 119 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[4] Ibid 72-3 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[5] Ibid 235-400 (Callinan J).
[6] Ibid 382-3 (Callinan J).
[7] Ibid 307-8 (Callinan J).
[8] Ibid 237 (Callinan J).
[9] Ibid 317-8 (Callinan J).
[10] Ibid 268-325 (Callinan J).

had 'reserved powers' to the extent not exclusively conferred on the Commonwealth.[11] There were accordingly two types of legislative powers namely, exclusive powers and concurrent powers. Concurrent powers are listed under s 51 of the *Constitution* and are available to both the Commonwealth and the States. In respect of some other matters the Commonwealth has exclusive power.[12]

The intention of the delegates at the constitutional conventions was to limit the federal power and 'put the preservation of State rights beyond the possibility of doubt'.[13] In the first 20 years after federation the High Court gave effect to this view.[14] The early High Court considered each of the States to continue to possess essential powers of autonomous self-government which would continue under the *Constitution*, only subject to specified powers conferred upon the Commonwealth (ss 51 and 52 of the *Constitution*).[15] In cases of validity of Commonwealth laws the High Court would adopt an interpretation that would preserve the reserved powers of the States.[16] The intergovernmental immunity of instrumentalities doctrine refers to whether and when State actors would be bound by Commonwealth laws and vice versa. The doctrine rested on the concept that both the Commonwealth and States each possessed their own sovereignty which required an immunity from external interference by the other.[17] The doctrine was first discussed by Griffith CJ in *D'Emden v Pedder*[18] and was exemplified in further early High Court cases.[19]

III THE DEPARTURE FROM THE ORIGINAL POSITION

The interpretive approach of the early High Court was brought to a sudden halt by the differently constituted High Court in *Engineers*. The basic approach of the joint judgement in *Engineers* was that the powers conferred on the Commonwealth by the *Constitution* were to

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[11] Dan Meagher et al, *Hanks Australian Constitutional Law: Materials and Commentary* 10th edition (LexisNexis Butterworths) 38.
[12] *Constitution* ss 51(xii), 52, 90, 114, 115.
[13] Dan Meagher et al, *Hanks Australian Constitutional Law: Materials and Commentary* 10th edition (LexisNexis Butterworths) 40: referring to Alfred Deakin in 1891.
[14] See, eg, *Tasmania v Commonwealth* (1904) 1 CLR 329; *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.
[15] *R v Barger* (1908) 6 CLR 41, 67.
[16] Nicholas Aroney et al*, The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 119.
[17] Ibid 132-3.
[18] *D'Emden v Pedder* (1904) 1 CLR 91, 109 (Griffith CJ).
[19] See, eg, *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488; *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087.

be interpreted with as much breadth as the words of the *Constitution* would permit.[20] Such an interpretive position did not have regard to the earlier doctrines of reserved powers or intergovernmental immunity of instrumentalities. *Engineers* involved a challenge to the Commonwealth's Conciliation and Arbitration Court in relation to its application to employees of State trading concerns.

The majority judgment in *Engineers* formally rejected both doctrines of reserved powers and intergovernmental immunity of instrumentalities, holding that the interpretation of the breadth of Commonwealth legislative power should not be limited or undermined by notions of some underlying policy or principle which had not been clearly stated in the *Constitution* itself.[21] The majority judgement held that the proper approach was to simply interpret the legislative heads of power in terms of ordinary rules of construction established by English law. In support of its approach, the High Court majority in *Engineers* relied on decisions of the Privy Council which gave the Commonwealth legislative powers to be 'as plenary and ample' as the powers of the British Parliament.[22] The *Engineers* approach to interpretation of the Commonwealth's powers was a radical departure from the concepts that underpinned the 'federal balance' that was revisited by Callinan J in the *Work Choices* case.

IV THE WIDENING OF POWERS FOR THE COMMONWEALTH

The expansive approach of the *Engineers* case to the interpretation of the Commonwealth's powers has led to a considerable expansion in the scope and extent of legislation covered by the Commonwealth. This is evident from a number of important cases leading to up to the *Work Choices* case. This has meant an increasingly compromised position for the States in terms of fiscal autonomy and many other areas. Although the States may conceptually have concurrent power to legislate on the same matters of the Commonwealth, in reality the Commonwealth's powers are usually exercised to override States laws (given the operation of s 109 of the *Constitution*).

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[20] Nicholas Aroney et al*, The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 134-5.
[21] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 141-54.
[22] Ibid 153.

A *Qualified Immunities for the States*

In some instances later High Court decisions have qualified the extent of reach of Commonwealth laws in relation to the States. In *Melbourne Corporation v Commonwealth*[23] the judges of the High Court took individual approaches to the limits of Commonwealth powers impacting the States, but did not endorse a coherent principle of States immunities.[24] Other cases have held that the essential question is whether the Commonwealth law impairs the capacity of a State to function autonomously.[25] Notwithstanding these qualifications, in reality this has done little to limit the operation of Commonwealth laws upon State's interests.[26]

B *The Vertical Fiscal Imbalance*

The powers and autonomy of the States have been further compromised by the increasing Commonwealth control over government revenue and allocation of government finances. The Commonwealth's power to impose income tax was confirmed by the High Court in the two Uniform Tax cases of 1942 and 1957,[27] which upheld the virtual Commonwealth take-over of the income tax system. The Commonwealth uses its powers in relation to financial grants to the States to impose conditions on the use of monies so granted.[28] The allocation of grants as between the States has become an annual event where State governments are forced to compete with each other in negotiating with the Commonwealth over such monies. The allocations to the States under the GST system has also led to an imbalance of revenues for States most recently evidenced by the low rate of return of GST revenues to the State of Western Australia. As a requirement of the GST arrangement States have had to abolish many existing taxes and have become even more reliant upon the Commonwealth.[29] Attempts

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[23] (1947) 74 CLR 31.
[24] Dan Meagher et al, *Hanks Australian Constitutional Law: Materials and Commentary* 10th edition (LexisNexis Butterworths) 637.
[25] *Austin v Commonwealth* (2003) 215 CLR 185, [217] (McHugh J).
[26] See, eg, *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548.
[27] *South Australia v Commonwealth* (1942) 65 CLR 373, *Victoria and New South Wales v Commonwealth* (1957) 99 CLR 575.
[28] Lorraine Finlay, 'The Power of the purse: an examination of fiscal federalism in Australia/Il potere della borsa: un esame del federalism fiscal in Australia' 24 (2012) *Journal of Constitutional History* [*Giornale di Storia Constituzionale*] 86-7.
[29] Ibid 88.

have been made to equalise the GST like that of a review committee,[30] however this has done little to help Western Australia.

C *Asymmetrical Doctrine of Intergovernmental Immunities*

Engineers held that both the Commonwealth and the States had reciprocal authority to make laws binding upon the other, which the High Court affirmed soon after.[31] However, the subsequent course of High Court decisions steadily eroded that proposition to the point where in *Commonwealth v Cigamatic Pty Ltd (in liq)* ('*Cigamatic*'),[32] it was held that the States did not have constitutional power to make laws binding upon the Commonwealth. This has led to an asymmetrical relationship of intergovernmental immunities where the States have only limited and highly qualified immunities from federal interference and on the other hand the Commonwealth has enjoyed supremacy with near complete immunity from any legislative reach by the States.[33] The *Cigamatic* doctrine of Commonwealth immunity has been qualified in *Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority*,[34] where the majority held that, although the States did not have power to legislate to affect the capacities and functions of the Commonwealth, the State laws could apply to Commonwealth actions done pursuant to the Commonwealth's capacities and functions. Although the qualifications in *Henderson* have clarified to some extent the role of State laws in relation to Commonwealth capacities and functions, the fundamental imbalance of the Commonwealth/State powers remains.

D *Supremacy of the Commonwealth under the Inconsistency Rule*

The Inconsistency Rule, as imposed by s 109 of the *Constitution*, applies where a valid Commonwealth and valid State Law are inconsistent, the Commonwealth law shall prevail and State law to the extent of the inconsistency will be invalid. The High Court has held many instances where Commonwealth and State laws are inconsistent both directly and indirectly and have applied s 109 in a way that considerably extends the Commonwealth's legislative reach. This is particularly the case in its approach to the 'Covering the Field'

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[30] Ibid 89.
[31] See, *Pirrie v McFarlane* (1925) 26 CLR 170.
[32] (1962) 108 CLR 372.
[33] Nicholas Aroney et al*, The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 280-1.
[34] (1997) 190 CLR 410 ('*Henderson*').

doctrine,[35] where Sir Harry Gibbs observed that this principle ensures the predominance of the Commonwealth's power at the expense of that of the States.[36]

V CONCLUSION

The original intention of the framers of the *Constitution* was, as observed by Callinan J in the *Work Choices* case, to mandate a 'federal balance' as between the Commonwealth and the States. This intention however, had been rejected in the seminal case of *Engineers* and since that time the Commonwealth's powers have been expanded at the expense of States rights. The sovereignty of the States in terms of fiscal independence and policy making have been severely compromised by the intervention of Commonwealth legislation. The majority decision in *Work Choices* is an outstanding recent example of the breadth of Commonwealth power permitted by the High Court, and the principle of federal balance is unlikely to be given support in future decisions of the High Court.

[35] See, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 489-90 (Isaacs J).
[36] Sir Harry Gibbs, 'The Decline of Federalism?' (1993) 18 *University of Queensland Law Journal* 3.

SECTION 44 OF THE *AUSTRALIAN CONSTITUTION*: OUTDATED OR STILL IMPORTANT?

Yasmin McCann*

I INTRODUCTION

It is undeniable that section 44 of the *Australian Constitution* ('section 44') has caused a lot of political upheaval in contemporary Australian politics.[1] The Australian Parliamentary Eligibility Crisis has resulted in national politicians, including 5 members of the 'Citizenship Seven', being disqualified from parliament due to not meeting section 44 eligibility requirements.[2] This has raised political debate surrounding the section, with some suggesting it is outdated and should be modified.[3] I believe that section 44 operates as intended by the founding fathers, and is not in need of reform. In order to come to this conclusion, I find it necessary to interrogate whether the original purpose of section 44 is relevant to contemporary Australia, and then whether section 44 successfully meets this purpose in practice.

II ASPECTS OF SECTION 44

Although it is undeniable that Australia as a nation has evolved since these subsections were drafted, however each subsection highlights issues that are still of utmost importance in maintaining the 'purity' of the Australian Parliament.[4] As such, I believe the underlying concepts of the section should not be removed from the *Constitution*, as doing so may jeopardise national sovereignty and integrity of the parliament for future generations of Australians.

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[1] Harry Hobbs, Sangeetha Pillai and George Williams, 'The disqualification of dual citizens from Parliament: Three problems and a solution' (2018) 43(2) *Alternative Law Journal* 73, 80.

[2] *Re Canavan* [2017] HCA 45.

[3] Harry Hobbs, Sangeetha Pillai and George Williams, 'The disqualification of dual citizens from Parliament: Three problems and a solution' (2018) 43(2) *Alternative Law Journal* 73, 76.

[4] Official Record of the Debates of the Australasian Federal Convention, Sydney, 21 September 1897, 1033.

There are five subsections within section 44, each with their own purpose in terms of maintaining eligibility standards. This essay will examine the four subsections that have caused disqualifications in recent years.

A *Section 44(i)*

Section 44(i) provides that any person who is 'allegiant' or otherwise a 'citizen of a foreign power' is ineligible to sit in Parliament.[5] The purpose of this subsection is to ensure parliamentarians have complete and undivided loyalty to Australia and avoid 'influence from foreign governments'.[6] This section was drafted to prevent 'insidious enemies of the Commonwealth' from infiltrating Parliament,[7] and 'selling our defence secrets to a foreign power'.[8]

A case that has developed legal understanding of the operation of this subsection is *Sykes v Cleary*.[9] In this case, a majority of 5:2 decided a dual citizen is ineligible to sit in Parliament unless they have taken 'reasonable steps' to renounce their foreign citizenship.[10] The case also defines the question of eligibility at the point of nomination,[11] and held that it is irrelevant whether a person knows of their foreign citizenship status.[12]

However, it was held in *Re Gallagher* that 'reasonable steps' are not enough when it is not impossible or unreasonable for the candidate to renounce their foreign citizenship.[13]

Some issues have been raised by this subsection, including uncertainty about its scope,[14] the inconsistency of international citizenship laws,[15] and the fact that many Australians are unaware of their dual citizenship status.[16]

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[5] *Australian Constitution* s 44(i).
[6] Commonwealth, *Aspects of Section 44 of the Australian Constitution Subsections 44(i) and (iv): House of Representatives Standing Committee on Legal and Constitutional Affairs*, Parl Paper No 85 (1997) 10.
[7] Official Record of the Debates of the Australasian Federal Convention, Sydney, 21 September 1897, 1013.
[8] Ibid 1014.
[9] *Sykes v Cleary* (1992) 176 CLR 77.
[10] Ibid 107.
[11] Ibid 100.
[12] Ibid.
[13] *Re Gallagher* [2018] HCA 17 [30].
[14] Commonwealth, *Aspects of Section 44 of the Australian Constitution Subsections 44(i) and (iv): House of Representatives Standing Committee on Legal and Constitutional Affairs*, Parl Paper No 85 (1997) 14-7.
[15] Ibid 20-1.
[16] Ibid 22-4.

B *Section 44(ii)*

This section serves to disqualify parliamentarians that have been 'attained of treason' or any other offence that is punishable by a prison sentence of one year or longer.[17] The treason stipulation relates closely to section 44(i) in that it relates to the need for undivided loyalty to Australia, and no other nation's governments or political agendas.

The rest of the subsection demonstrates that only those who abide by Australian laws should be bestowed with the power to assist in the lawmaking process. Parliamentarians should be upstanding citizens that serve as role models to the rest of society. This was discussed in the Convention Debates when Barton stated 'somebody might take a violent affection for a gaol-bird, and put him into parliament. We do not want that sort of thing'.[18]

This subsection was discussed in *Re Culleton [No 2]*.[19] This case involved Rod Culleton, a WA Senator, and his former conviction of larceny or theft of personal property in 2016 prior to the federal election. Although the conviction had been annulled, this was deemed irrelevant by the High Court, as he was 'subject to be sentenced for an offence punishable by one year or more' at the date of the 2016 election.[20] The annulment was deemed not to apply retrospectively, and he was therefore disqualified.[21]

C *Section 44(iv)*

Section 44(iv) states that any person who holds an office of profit under the Crown is ineligible to sit as a member of the Australian Parliament.[22] This subsection relates to the overarching separation of powers principle, by upholding the concept that the separation between the executive and legislature is maintained. As such, its purpose is to prevent the executive from being able to unduly influence the actions of the legislature.[23] Furthermore, it aims to prevent conflicts of interest between a candidate's finances and Australia's national interests.

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[17] *Australian Constitution* s 44(ii).
[18] Official Record of the Debates of the Australasian Federal Convention, Sydney, 21 September 1897, 1012.
[19] [2017] HCA 4.
[20] Ibid [22].
[21] Ibid [23].
[22] *Australian Constitution* s 44(iv).
[23] Commonwealth, *Aspects of Section 44 of the Australian Constitution Subsections 44(i) and (iv): House of Representatives Standing Committee on Legal and Constitutional Affairs*, Parl Paper No 85 (1997) 53.

This subsection was discussed in the context of the position as Local Mayor in *Re Lambie*,[24] where it was decided that this position is an office of profit, but not under the Crown – reinforcing Steve Martin's eligibility to sit in Parliament.[25]

The principle of separation of powers is still of utmost importance to the functions of the Australian Parliament,[26] and is in place to prevent one branch of government acquiring arbitrary power. I therefore believe that this subsection should not be removed from the *Australian Constitution*.

D *Section 44(v)*

Subsection 44(v) prevents any person who has an ongoing financial benefit from doing business with the Commonwealth public service from being eligible to sit in Parliament.[27] This relates to the concept that sitting members should not have any conflicts of interest arising from their complete loyalty to Australia and their business affairs. There is again focus again on the separation of powers principle, as those who are financially invested in the operations of the executive should not be able to unduly influence the actions of the legislature.[28]

The subsection was originally interpreted in *Re Webster* to only protect parliament against influence by the executive, rather than influence of individual members of Parliament.[29] This narrow view was later overturned in *Re Day*.[30] In this judgement, the High Court extended the reach of this section to also protect against any potential for influence, also including conflicts of interest between the individual member and their financial affairs.[31] This resulted in Senator Bob Day being disqualified from Parliament.

III POSSIBLE REFORM

Now that the theoretical purpose of section 44 has been determined, the next logical question to ask is whether the section adequately meets this in practice. Namely, should the section be amended, or should administrative changes should be made in order to better accommodate

[24] *Re Lambie* [2018] HCA 6.
[25] Ibid [36].
[26] Ibid.
[27] *Australian Constitution* s 44(v).
[28] *Re Day (No 2)* [2017] HCA 14 [252], [261], [262].
[29] *Re Webster* (1975) 132 CLR 270, 280.
[30] *Re Day (No 2)* [2017] HCA 14.
[31] Ibid.

the purpose of the section? My discussion revolves largely around submissions made by academics to the to the Joint Standing Committee on Electoral Matters ('JSCEM') in 2018.[32]

It has been suggested that the operation of section 44 is too harsh or does not adequately carry out its purpose.[33] Some have suggested reform through referendum is necessary, either to repeal the section, or to amend it in a way that gives the Parliament power to legislate on eligibility thereby reducing ineligibilities overall.[34] This would be achieved by inserting the words 'until the Parliament otherwise provides'.[35]

I disagree that the Parliament should have more leeway in unilaterally determining the eligibility of certain members. I agree with the submission made by Neil Cotter, namely when he states that allowing Parliamentarians to make the rules for eligibility creates an 'inherent conflict of interest'.[36] High standards for eligibility should be maintained, as the underlying concepts and values that they represent are necessary, just as they were when the *Constitution* was drafted back in the 1890s. It is integral for the Australian people to have confidence that those able to be elected are loyal to interests of Australia and its people, and equally as important to maintain public confidence by ensuring that the candidates selected through our democratic process are actually eligible to serve.

I believe that it is irresponsible to amend the *Constitution* in a way that minimises ineligibilities. Instead, I agree with Lorraine Finlay's view that 'the aim is to ensure that laws reflect minimum standards expected by Australian people so that when candidates are found to be ineligible this is based on substantial, and not merely technical, factors'.[37] Finlay then went on to suggest the creation of 'internal referral guidelines', or 'independent mechanisms'

[32] Commonwealth, *Excluded: The impact of section 44 on Australian democracy: Joint Standing Committee on Electoral Matters,* Parl Paper No 153 (2018).
[33] Harry Hobbs, Sangeetha Pillai and George Williams, 'The disqualification of dual citizens from Parliament: Three problems and a solution' (2018) 43(2) *Alternative Law Journal* 73, 77.
[34] Commonwealth, *Excluded: The impact of section 44 on Australian democracy: Joint Standing Committee on Electoral Matters,* Parl Paper No 153 (2018) 87.
[35] Commonwealth, *Excluded: The impact of section 44 on Australian democracy: Joint Standing Committee on Electoral Matters,* Parl Paper No 153 (2018) 87; Luke Beck, Submission No 16 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 9 January 2018, 1.
[36] Neil Cotter, Submission No 48 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 2018, 1.
[37] Lorraine Finlay, Submission No 51 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 9 February 2018, 1.

for referrals to prevent Parliament using the section as a political weapon.[38] I believe this approach is preferable to amending the Constitution.

It was proposed by Michael C Douglas in his submission to the JSCEM that no constitutional changes need to made to section 44(i), instead observing that the section is clear, and not procedurally unfair or otherwise unjust.[39] He went on to state that the criticism directed towards section 44(i) is better directed towards politicians who 'failed to come to terms with the plain language of our Constitution prior to seeking election'.[40] This view was also favoured by Les Yule, who went on to state that inability to 'honestly declare such details' leading to ineligibility should result in prosecution.[41]

The suggestion that candidates that falsely declare eligibility at nomination should incur penalties was supported by Mr Allan Laws. He suggested that 'ignorance is no excuse' and described the lack of penalties as 'a disgrace'.[42] I believe that this approach would certainly serve as a deterrent to candidates taking a lax approach to eligibility. I would not go as far as to support Brian Capamagian's suggestion of 'life imprisonment',[43] but would contend that some form of penalty is supported by section 46 of the *Constitution* which gives rise to the power to impose penalties on those parliamentarians who sit while ineligible.[44]

I believe that recent controversy means that there is already far greater awareness around the eligibility requirements in section 44. Professor Anne Twomey suggested in her submission that this awareness means that political parties and individual candidates will be more diligent in the future in order to avoid disqualification.[45] I agree with this statement.

It is important to note that several measures have already been taken in order to increase awareness around the section, with the Australian Electoral Commission ('AEC') offering an optional Qualification Checklist that asks questions to do with compliance of section 44

[38] Ibid 4.
[39] Michael C Douglas, Submission No 49 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 2018, 1-7.
[40] Ibid.
[41] Les Yule, Submission No 15 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 29 December 2017, 1.
[42] Allan Laws, Submission No 26 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 2018, 1.
[43] Brian Capamagian, Submission No 28 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 5 February 2018, 1.
[44] *Australian Constitution* s 46.
[45] Anne Twomey, Submission No 34 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 7 February 2018, 2.

requirements.[46] For example, questions surrounding family heritage, including the citizenship status of parents and grandparents. I believe it may be useful to make this questionnaire mandatory for all candidates. Candidates also have the ability to consent to the publication of their checklist, which is then available on the AEC website for the duration of the election campaign.[47]

I agree that the AEC should not have the ability to reject nominations based on information provided in the checklist as doing so is a risk to the perception of their position as an unbiased, independent body.[48] However, I believe making the checklist mandatory would force nominees to cast their minds to the requirements, and perhaps seek their own independent legal advice. This, as well as the newly established citizenship register created by the Federal Parliament,[49] both increase public confidence in the Parliament and make for a more transparent political system.

IV CONCLUSION

It is my opinion that the purpose of section 44, namely to maintain the 'purity of parliament',[50] is a valuable concept that has not become outdated in contemporary society. Parliament should maintain high entry standards, as doing so reinforces public confidence in Australia's political system. Although I believe that there are perhaps procedural or administrative reform options that could be implemented, I disagree with the need for constitutional reform via a referendum. It is the duty of nominees to ensure that they meet the key eligibility requirements laid out in section 44, and the time and money it takes to hold a referendum should not be sacrificed for the sake of mere convenience. I believe that it is irresponsible to erode eligibility requirements dictated in section 44 and replace them with legislation, as the power of parliament to legislate on eligibility creates a direct conflict of interest. This would undermine the integrity of the Commonwealth Parliament – something that is still of integral importance in 21st century Australia.

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[46] *Electoral Backgrounder: Constitutional disqualification and intending candidates* (30 May 2018) Australian Electoral Commission <https://www.aec.gov.au/About_AEC/Publications/backgrounders/constitutional-disqual-intending-candidates.htm>.
[47] Ibid.
[48] Commonwealth, *Excluded: The impact of section 44 on Australian democracy: Joint Standing Committee on Electoral Matters,* Parl Paper No 153 (2018) 69-71.
[49] *Citizenship Register – 45th Parliament* (25 September 2018) Federal Parliament of Australia <https://www.aph.gov.au/Senators_and_Members/Members/Citizenship>.
[50] Official Record of the Debates of the Australasian Federal Convention, Sydney, 21 September 1897, 1033.

BOOK REVIEW

BOOK REVIEW: ALEX DEAGON, *FROM VIOLENCE TO PEACE: THEOLOGY, LAW AND COMMUNITY* (HART PUBLISHING, 2017)

Augusto Zimmermann*

Dr Alex Deagon is a Senior Lecturer in the Faculty of Law at Queensland University of Technology, Brisbane. In his recent book, 'From Violence to Peace: Theology, Law and Community', an important contribution to the literature on jurisprudence and theology is provided. The book contends that the way to restore a legal community of peace is to return to a Christian theology which is informed by Trinitarian thinking grounded in the notion of a community of law as well as the notion of unity in diversity.

Ever since the coming of the Enlightenment, western elites have commonly adhered to a variety of secular faiths. In his book, Dr Alex Deagon explains how the substantial departure of the modern law from its theological origins has generated further antagonism and alienation, and, more broadly, violence. Dr Deagon advocates for an urgent return to a theology that not only reconciles faith with reason but that is also informed by the notion of unity in diversity. According to him, reconciling reason with the revelation of a benevolent Creator brings about the sort of "law of love" (to love your neighbour as yourself) that enables the legal community not just to better fulfil its professional obligations but even to go beyond merely what is required by the positive law. Also noted by him is the historical evidence that an authentic Christian faith is neither a 'blind faith' nor merely an exercise in intellectual vanity. Instead, the 'true faith' achieved by Christianity is about trusting in a benevolent God who is the ultimate source of all love and justice; an important premise that gave birth to modern constitutionalism, but that secular reason so vehemently rejects.

The book is an attempt by Dr Deagon to reconcile faith and reason, thus allowing a 'peaceful persuasion by the revelation of God's perfect being through the Trinity and Incarnation, which models and enables the peaceful coexistence of difference through self-sacrificing love'.[1] To shift the culture of law from violence to peace, Dr Deagon argues that a secular foundation for law should be replaced by the Christian idea of 'law of love'. According to him, there is a 'direct connection' between ontological violence and the disruption of peace

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[1] Alex Deagon, *From Violence to Peace: Theology, Law and Community* (Hart Publishing, 2017) 1.

through the exertion of secular power to regulate the community. Fundamentally, 'the modern legal system creates boundaries which distinguish people rather than allowing mutual giving relationships'.[2] These boundaries separate and exclude people from social harmonious relationships, disrupting communal relationships. Drawing boundaries and dividing people into various categories is a form of violence that separates individuals; although 'this is the characteristic process claimed of [secular] law'.[3] There is here a clear opposition to the dualistic violence of the radical left. Dr Deagon does not explicit say so but his view of the 'law of love' does not support dividing people into categories that are inimical of one another, such as 'included versus the excluded', thus creating 'an ever-renewed conflict' through which the traditional modes of violence can be justified and perpetuated.

However, in Christianity, writes Dr Deagon, there is no support for social exclusion but rather a Christian Trinitarian ontology which reconciles the one and the many, promoting peace through the unity of individuals in the community.[4] Understood as a set of principles which govern individual relationships within a community, such an ideal of the legal community involves, according to Dr Deagon, 'the law of love' which instructs us to love our neighbours as ourselves. This is a model of conduct based on Christian theology which, in Dr Deagon's opinion, 'allows a harmonious relationship between the individual and the society, one which avoids the violence of antagonism and alienation, and provides for a peaceful legal community which privileges one's neighbour as an individual and therefore strengthens the community as a composite of unique individuals'.[5]

But Dr Deagon also reminds us that through a series of historically contingent philosophical shifts, the idea of the 'secular' became 'naturalised as the undergirding presupposition of modern jurisprudence'.[6] This makes law rest on a 'foundation which seeks to enforce peace by violence', he says. It is an idea premised on law having an 'interest in a monopoly of violence' that preserves itself and prohibits any existence of violence outside the legal system ordained by the secular state.[7] In the context of such an important discussion, Dr Deagon argues that Duns Scotus, one of the most important philosopher-theologians of the High Middle Ages, would have inaugurated a 'theologically distorted notion of purely natural

[2] Ibid 3.
[3] Ibid 6.
[4] Ibid 7.
[5] Ibid 9.
[6] Ibid 92.
[7] Ibid 106.

knowledge, leading to a secular realm and reason'.[8] Indeed, Dr Deagon informs that, for Scotus, 'knowledge of God and His nature can come apart from God's direct revelation. Instead it comes through pure human reason'.[9] Contrary to Thomism, this medieval thinker asserted that reason and revelation are separate areas of knowledge, so that 'there is no region of overlap containing truths knowable both by reason and by revelation'.[10]

If the statement is correct, and I do not doubt it is, then it is no exaggeration to say that the British secular-empiricist philosophers from Hobbes to Austin owe their conceptualisations of the law to Scotus directly or indirectly.[11] With Thomas Hobbes, argues Dr Deagon, one finds a 'political theory separated itself from theology. Hobbes's 'natural law' articulates a series of immanent rules based on purely philosophical reflections on the necessity of individual self-preservation'.[12] Hence such a 'natural law' indeed is actually positive law. The intrinsic link between the identity of the thought structure provided in Hobbes's *Leviathan* and the theory of sovereign will of modern positivism (the will of the absolute sovereign is law, because no higher norm stands above him) is here quite evident.[13]

Dr Deagon explains that Hobbesian legal ontology is fundamentally characterised by a 'visible antagonism' or a 'clash of wills' whereby the pure sovereign power emerges as the founding presupposition for the entire legal system.[14] 'With Hobbes', he explains, 'political theory separated itself from theology. Unlike Thomist natural law, which is derived from transcendental equity surpassing human conventions, Hobbesian natural law articulates equity as a series of immanent rules based on purely philosophical reflections on the necessity of individual self-preservation'.[15] That being so, it is not difficult to understand why Hobbes defined law solely in terms of the command of the sovereign, as the entity which everyone has been obliged to obey.[16]

Dr Deagon is correct to assume that the basic goal of Hobbesian theory is to increase the power of the sovereign via the governmental monopoly of violence. In such a theory the civil ruler (or 'political sovereign') is certainly not subject to any limitations of the law. On the

[8] Ibid 92.
[9] Ibid.
[10] Wallace I Matson, *A New History of Philosophy: Ancient and Medieval* (Thomson Learning, 1988) 246.
[11] Julius R Weinberg, *A Short History of Medieval Philosophy* (Princeton University Press, 1967) 265.
[12] Deagon, above n 1, 98.
[13] Heinrich A Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (Liberty Fund, 1988) 53.
[14] Deagon, above n 1, 97.
[15] Ibid 98.
[16] Ibid 100.

contrary, the sovereign has been granted unlimited power and also relief from any form of legal obligation. Such a legal-institutional arrangement ultimately allows the sovereign to obtain the final say on all matters pertaining law, justice and morality. As Hobbes put it: 'Where there is no common power, there is no law: where no law, no injustice. Force and fraud are in war the two cardinal virtues.'[17] In other words, Hobbes believed that the ideal of justice, including in its more practical legal implications, must be entirely left to the discretion of the sovereign. Hence his famous/notorious comment that 'they that have sovereign power may commit iniquity but not injustice, or injury in the proper signification'.[18] As noted by Mortimer Sellers, 'Thomas Hobbes denied any distinction between 'right and wrong', 'good and evil', 'justice and injustice', beyond our separate and conflicting desires'. [19] According to Hobbesian theory, definitions of law, justice, right, and wrong, are entirely determined through 'the arbitrary commands of sovereign power'. [20]

Dr Deagon reminds us that the Hobbesian view of law as 'arbitrary command' is akin to John Austin's command theory and articulation of a positivist jurisprudence that entirely excluded God from law. This eighteenth-century English jurist famously opined that 'the laws of God' are not 'within the province of jurisprudence'.[21] Austin's command theory proposed a 'scientific' presentation of law that expressed little or no concern to the substantive nature of the law, or the intrinsic goodness or badness of the legal system to be objectively analysed.[22] Hence Austin's most well-known statement: 'The existence of law is one thing; its merit or demerit is another; … A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text. By which we regulate our approbation and disapprobation'.[23]

The sovereign in Austin's theory is the society's superior authority whose commands everyone habitually obeys, although the sovereign himself is not in the habit of obeying anybody else. From such a perspective, the sovereign's power is absolute or unlimited. Being absolute and indivisible, the judicial and executive functions of government are simply two different ways in which the command of the sovereign is properly executed. Accordingly,

[17] Thomas Hobbes, *Leviathan* (Penguin Books, 2017) Ch XIII.
[18] Thomas Hobbes, *De Cive* [1642] (Penguin Books, 2017) ch 14, para 8.
[19] Mortimer Sellers, 'An Introduction to the Rule of Law in Comparative Perspective', in Mortimer Sellers and Tadeusz Tomaszewiski (eds), *The Rule of Law in Comparative Perspective* (Springer, 2010) 2–3.
[20] Ibid.
[21] Deagon, above n 1, 100.
[22] J M Kelly, *Western Legal Theory* (Oxford University Press, 1992) 315.
[23] John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995) 157.

any 'law' which is not a direct product of the sovereign will is not law properly so called, but 'law' only by metaphor or analogy. Positive law thus becomes the exclusive province of lawyers, and the speculation about God's law a discussion for the theologians only. 'To say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense', Austin stated.[24] Dr Deagon concludes his critical analysis of such a jurisprudential approach with this insightful remark, indeed one of the highlights of his book:

> The very term 'positivism' itself connotes the violent positing of law, a use of force to establish and preserve the law, as well as to compel obedience to it. Integral to Austin's definition of law is this notion of sanction for disobedience, namely that obedience by which the legal subject is (en)forced through inflicted evil and pain. Furthermore, this violence in integrated with the use of theological language, such as 'sovereign' and 'command', for sovereign is an attributably traditionally ascribed to God, as it is (particularly in the Duns Scotus/Hobbesian framework for Austin). God who is a willing, superior being and has the power to enforce commends through the violent threat of punishments for disobedience. Austin explicitly admits this much when he notes that God is the ultimate sovereign. Hence, not only is Austin's theory of law characterised by violence, but his violence is linked to a distorted (pagan) theology.[25]

Rather than a legal-secular-positivist community premised upon and regulated by violence, Dr Deagon argues for a jurisprudential approach based on a theology which promotes a 'community of peace' through the 'law of love'. The peace of Trinitarian theology, according to him, is found in the fact that the Triune God (existing in a divine loving relation of Father, Son and the Holy Spirit), consequently exists in a form where disengaged individual agency is effectively impossible. The will of God is therefore realised through this 'community of love' in which the divine members of the Trinity ensure the non-arbitrary character of the creation. Hence God is not just a singular ruler who capriciously imposes his own personal will upon creation, but a community of love and perfect relationship. Such an ideal of the Triune God Dr Deagon presents as the moral basis for a legal community in which to rule is actually to serve (the idea of 'servant-leadership'), and of people who are treated with dignity and so not perceived as merely individual contracting entities regulated by means of legal violence. The best example of servant-leadership, according to him, comes directly from

[24] Ibid 158.
[25] Deagon, above n 1, 100.

Jesus Christ. Arguably, the authority of Christ is established primarily by love and in complete absence of arbitrary power. As Dr Deagon explains,

> Christ refuses to exert the power he possesses, instead resisting violent rule and establishing peace through service and the sacrifice of self; this in itself is far more powerful, and through Christ we can envisage the possibility of a similarly loving community. In this community to rule is to serve, and people are not merely individual contracting entities regulated by legal violence, but redeemed people who are part of a community operating under grace beyond legalism and characterised by mutual love, empowered and demonstrated through Christ the King, who gave himself for us.[26]

To conclude, 'From Violence to Peace' is a remarkable book that can be read not only by people who have been trained in the rigorous discussion of legal philosophy, but also by everyone who possess a general interest in theology, philosophy and the history of ideas. This is an excellent and timely book, and I deeply recommend it. Of course, I also congratulate its author, Dr Alex Deagon, on an excellent book.

[26] Ibid 183.