

# Pandora's Box

*Law as it is, and as it ought to be*

2011



# *Pandora's Box* 2011

*Law as it is, and as it ought to be*



Editors

William Isdale & Sam Hooshmand

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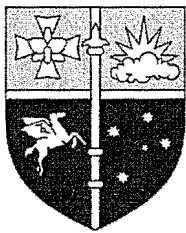
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## A NOTE FROM THE EDITORS

This year's title - 'Law as it is, and law as it ought to be' – doesn't give a lot away. Perhaps that says something about our theme this year of jurisprudence, or the philosophy of law. It resists being tethered or constrained in the scope of its enquiry. Jurisprudence is - however unsatisfactory a definition – a subject that asks us to think seriously about the nature of law. And yes, we know how trite that sounds.

In the course of our studies we all come across questions that nag at us like, 'Is there truth in interpretation?' and 'When is it ok, if ever, to disobey the law?' These questions are often frustrating and too often ignored because they don't permit of easy answers; we can't resolve such disputes by turning to a piece of legislation, or extracting a three-step test from a joint, unanimous High Court judgment.

Those who choose to face such problems head on, however, are greatly rewarded for their efforts. The ability to question and argue about more than black-letter law puts one in a unique position from which to critique existing norms and to offer alternatives. It also helps us understand the purpose of the law and to see legal problems in a larger context. Not only is this intellectually invigorating, but it has its practical benefits in a world where laws are frequently changed and often uncertain.

The selection we bring you in this edition is far from representative, but we hope it gives you a flavor of some of the questions legal philosophers try to think about – and how apt, too, given that this year marks the 50<sup>th</sup> anniversary of H.L.A. Hart's groundbreaking '*The Concept of Law*', a book which even the Natural Law theorist Mark Murphy describes in this journal as 'the greatest book on law written in the last 70 years'.

We want to thank the *Queensland Law Society* and the *University of Queensland's Office of Undergraduate Education* for the generous support that has made *Pandora's 2011* possible. Thanks also to the peer-reviewers who offered their insight, and to everyone else who has supported the project, in particular to Sam Volling, Tony Senanayake and Professor Fred D'Agostino for their guidance, and to the wonderful people at WorldWide Printing.

We owe our greatest debt to those who wrote articles for the journal. It has been a pleasure to work with and learn from them all.

Oh, and thanks also to you, Dear Reader. We trust you'll enjoy *Pandora's Box 2011*.

**William Isdale and Sam Hooshmand**  
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## **ABOUT PANDORA'S BOX**

*Pandora's Box* is the annual academic journal published by the Justice and the Law Society (JATL) of the University of Queensland. It has been published since 1994 and aims to bring academic discussion of legal, social justice and political issues to a wider audience.

*Pandora's Box* is not so named because of the classical interpretation of the story: of a woman's weakness and disobedience unleashing evils on the world. Rather, we regard Pandora as the heroine of the story – the inquiring mind – as that is what the legal mind should be.

Academic articles submitted to *Pandora's Box* are peer-reviewed through a double-blind review process and the journal is registered with Ulrich's International Periodical Directory.

*Pandora's Box* is launched each year at the Justice and the Law Society's *Annual Professional Breakfast*.

Additional copies of the journal, including previous editions, are available. Please contact [jatl@law.uq.edu.au](mailto:jatl@law.uq.edu.au) for more information.

## AN INTERVIEW ON NATURAL LAW THEORY WITH PROFESSOR MARK MURPHY<sup>1</sup>

**PANDORA'S BOX:** Hi, Mark. It's very exciting to have you here today.

**MARK MURPHY:** I'm very glad to be here.

**PB:** So today we're going to be talking about a deceptively simple question and that is: What is law? Before we sink our teeth into that, I'd really like to know how you got interested in legal philosophy and why you think the question of what the law is, is worthy of our consideration.

**MM:** So, like most philosophers, I got into it sort of accidentally. My first philosophy class was a philosophy of law class and I guess it was sort of imprinted upon me —the joy of philosophical investigation with legal questions.

One way of thinking about legal questions is that they are at the intersection of so many problems in philosophy: about how to understand the nature of social institutions, and how that differs from the way we understand natural things like water and gold. Law is in one way like water and good. It seems to be the sort of thing that we can understand by investigation of what societies are like. Legal institutions seem to form a kind that we can investigate. But law is not like water and gold. It somehow takes its nature from our own activity. Law is a normative system. It purports to give guidance and direction. But it is not an optional system of guidance like a set of recipes, say, a cookbook where you take the cookbook down only if you want to make an omelette. Okay, it tells you how to make an omelette. Law is not optional in that way. It is not a system like etiquette, either, because, after all, they don't put you in handcuffs and take you away if you use the wrong fork on the table. It is also clearly different from morality, related to it somehow, though.

[...] One reason to think about law and why it matters is that it is an institution that is very central to our life as beings. Human beings want to

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<sup>1</sup> Mark Murphy is the Robert L. McDevitt and Catherine H. McDevitt Professor of Religious Philosophy at Georgetown University in Washington, D.C. He works on moral, political and legal theory and is the author of *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2009).

This is a shortened transcript of a longer interview conducted by William Isdale and Byron Hewson at the 2011 Australian Society of Legal Philosophy's Annual Conference at UQ, organised by Dr Jonathan Crowe. A longer audio-version of this interview will soon be available on the Australian Legal Philosophy Students' Association's website ([www.alpsa.com.au](http://www.alpsa.com.au)).

understand themselves. What kinds of beings are we? Well, we are beings that form political societies; we're beings that live under the law... Some people think that the theory of law you come up with has to have immediate practical consequences in terms of how its citizens ought to behave or how judges ought to behave. I am not sure whether that's true or not. I think of that as an open question... but I will insist on the value of legal philosophy even if it turns out that it has no immediate practical benefit... not everything that we are interested in is for the sake of immediate practical application. Sometimes we study great pieces of literature to understand ourselves better, even if they don't immediately change the course of our lives.

**PB:** I am wondering if you could just tell us, in a nutshell, what you understand natural law theory to claim.

**MM:** What natural law theory claims is that, in understanding what the nature of law is, you have to understand there is a very specific sort of connection between law and what you might call—some people say—‘morality’. I like to say law and *reasonableness*, that is, what people have reason to do. The general claim is that you can't understand the features that make for law until you see that the law's point. It is to guide people, guide rational beings like ourselves, to act one way rather than another. The law's function is to give reasons.

**PB:** And how is that distinctive from what positivists say?

**MM:** The way that positivists typically defend their view requires you to accept that you can come up with a theory of law without taking any sort of stance on what people have good reason to do ... one way of putting the positivist view is that you understand law in terms of its sources, not its merits, that is how it comes into being, the facts about who is empowered to lay it down and so forth, rather than in terms of its merits, good or bad. The natural law view says no, you can't ... H. L. A. Hart's classic formulation of legal positivism explains the nature of law in terms of the acceptance of a certain rule, the Rule of Recognition by privileged people, legal officials etc ... Hart doesn't really appeal to anything about law's function or goal in doing so.

**PB:** I want to get back into that debate a bit later, between the positivists and the natural lawyers, but I would like to know a bit about the history of the natural law tradition. Is there any particular figure that you see as having really set the scene?

**PB:** Yes... if you pick up any philosophy of law anthology that has a section on natural law, there is only one figure that you can be sure will be in there, and that's St. Thomas Aquinas. St. Thomas Aquinas was a 13th century



theologian. The text on law that is central to the natural law tradition is one tiny section of a huge work of theology called *Summa Theologiae*... the first question Aquinas asks is, is law something pertaining to reason? What Aquinas says there is, unsurprisingly, yes, law is ... an ordinance of reason, for law is something that binds rational beings. In order to bind rational beings, it has to be something that is supported by reasons. That is what guides the formulation of the rest of the theory of law generally and human law in particular. There are a lot of different ways of formulating the natural law view. Some connect specifically to moral values like justice, but if you look at the tradition of natural law theorising and the way it has had a revival in the past say 30 years or so since John Finnis's *Natural Law and Natural Rights*, it seems like we have gone back to Aquinas in thinking that the central strand of the view is that there is this deep connection between what the law is and what people under it have good reason to do.

**PB:** The natural law tradition began before Aquinas, though, right?

**MM:** It has a long history. It is arguably in Aristotle ... it is definitely in the Stoics. With the Stoics, you have the idea that there is a law of nature that binds all of us, a law of divine reason. What was distinctive in Aquinas is the working out of such a theory of law in a way that systematically connects it both to moral and to human law.

**PB:** Sometimes the natural law tradition is summed up in a phrase: '*lex iniusta non est lex*'—a non-just law is no law at all. John Finnis, who you mentioned, says that this catchphrase is 'pure nonsense and flatly self-contradictory'. I was wondering what you think? Do you think this phrase is something that a natural lawyer could justifiably use as a catchcry?

**MM:** It is a good question. Finnis's view notwithstanding, it is a live issue in natural law theory. Finnis thinks that Aquinas couldn't have meant that, because Aquinas was a smart guy and smart people don't say things that are insane and flatly contradictory ... I am not confident that Aquinas didn't think this, just because I think it is not obviously insane or self-contradictory to say things like 'an unjust law is no law at all'. Finnis worries that you are saying a law is not a law. That is self-contradictory. The thing is ... we do sometimes say things like this and we make perfect sense out of it. If I can tell you a rubber duck is not a duck ... A counterfeit dollar is not a dollar ... to claim that an unjust law or a law that is unreasonable is no law at all, in the same way that a rubber duck is not a duck, is not insane or self-contradictory.

All natural law theorists want to say that it is the role of law to be a rational standard or a standard that people rationally ought act in accordance

with, but the people who defend what I call a strong version of this view want to say that if it doesn't do that, it is no law at all. It is like fool's gold and gold. It might glitter like gold but it doesn't possess the nature of the thing, so we think it is not really gold. By contrast, some folks defend what I call the weak version of the view, which says this is not the right way to think about it... we should think about law that is not a rational standard in the same way we think about frogs that have only three legs or clocks that don't tell the correct time or assertions that don't represent the world the way it is; they are not doing what they are supposed to do, they are defective, they are falling short.

**PB:** Mark, I think you defend or have been known for defending the weaker thesis. Is that right?

**MM:** Yes. The weaker thesis—it seems that in lots and lots and lots of cases, we are perfectly willing to say that something failed to be able to do its function, perform its function, and we don't say that it is no longer of that kind, it is just defective. I drop my alarm clock and it stops going off in the morning. I don't say it's not an alarm clock; I say it is an alarm clock all right but it's not working very well! What I have said so far makes sense—that we should say some laws can be defective, falling short, without failing to be a law at all. But this is not decisive; there really is this live issue between the weak and strong natural law theory.

**PB:** I get the impression that the natural law is supposedly objective and that there are these absolute moral truths out there. If natural law requires me to take that view, doesn't that bring along a lot of metaphysical baggage? Am I required to believe in the existence of something akin to Plato's Forms—that there is this independent moral realm out there?

**MM:** [...] So Aquinas thinks that all human law is rooted in the natural law, and the natural law, as Aquinas understands it, is not explained by an appeal to Platonic Forms. Aquinas's view is theistic, though. Aquinas thinks that human beings know the basic principles of morality by nature and the reason they know is that somehow God imprinted them upon us. But what a natural law jurisprudence defender is asking you to accept is only that there are norms of practical reasonableness [...] While a defender of natural law jurisprudence can defend a variety of theories of reason, it would be very strange to hold a natural law view while being a nihilist about reason, thinking that there is no such thing as having no reason to act in one way or another.

Full disclosure: I am a natural law theorist to the bone in everything, so I believe in the basics of Aquinas's view not just in natural law jurisprudence but also in ethics. So in my view, there is a natural law knowable by nature, and I

also accept the theistic story as well. But, again, that's a view I hold in ethics and political philosophy, it's not a view I hold as part of analytical jurisprudence.

**PB:** Someone like David Hume would say that morality has nothing to do with reason; it is based on evolved human feelings and sentiments, and rationality or reason in and of itself can't tell you what to do. It needs something to work on; it can only tell you how to achieve a certain end once you have some kind of underlying passion—so that seems to go against your argument about morality being based on reason.

**MM:** So the question here is, does the Humean view require you to say that there is no such thing as rational action and irrational action? Hume has a view about what makes action rational; that it ultimately serves some passion that can't itself be rationally evaluated. Where does the evaluation of actions bottom out? It bottoms out in passions that are not themselves required by reason and that's why he says:

*'tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger.*

[...] Still, there are more or less rational ways for wanting to go on in respect of your desires. If you have desires that are massively in conflict with each other, some Humeans have thought, systematising desires in a certain way might be rationally required. So even if our theory of reason is Humean, there will be such a thing as law failing to be a rational standard of conduct.

If law is trying to direct you rationally to act in a certain way, yet it is doing so in a way that would require you to act contrary to what you most desire, then the law will have to be, well, put it this way: it is trying to give you reason to do something and it is failing. That's a defect. That is the central case for being defective. Even so, if you are a nihilist who just said, 'Look, not only do we not grasp ends for a reason, no ends required by human reasons—there are no means-end connections that are rational either, there is no practical reason at all, it is just your desire and the way you happen to act.' Then, right, that is the sort of view that would be weird to [reconcile with Natural Law theory].

**PB:** Is the natural law thesis empirically testable and, if it is not, is that an argument against believing it? Is it unfalsifiable? This might be something that logical positivists like AJ Ayer might say.

**MM:** The way I try to describe a function of law is definitely guided by

empirical considerations, considerations about what law tends to do and whether or not it tends to do certain things because it enables the realisation of certain goals—so you see the law's function is to provide rational standards of conduct and our justification is that law is intended to do that in order to bring about some end, maybe generate social order or something like that, or maybe something more specific than that.

Then it is true that it would be falsifiable, right, if law didn't have any such tendency—if it turned out that law doesn't direct people in that way, it looks like that would be a reason to reject the natural law thesis.

What the natural law theory predicts is that legal systems will tend to have features that enable people to act on their rules and do so in a rational way. So they will tend to have rules that are generally formed ... These are Lon Fuller's 'internal' conditions of legality, that they tend to form rules that are clear, perspicuous, non-contradictory, all these things involved in being able to guide conduct. Or, to use Joseph Raz's ideas, they tend to be connected up with things that people already have reason to do or bear on enabling them to do those things better. There is empirical confirmation if those predictions bear out.

**PB:** Don't people disagree about what is morally required of them? How can you sort it out and be confident when you say, 'No, you're wrong. This is what the natural law requires.'?

**MM:** In one way this is a question that can be addressed to any defender of any moral beliefs... If you have any moral beliefs, people can ask why do you hold this belief rather than others. Some people disagree with you. It is the natural law view that there is such a thing as right and wrong. Some of these norms really do hold in all places at all times, though there might be some vagueness about how they apply in different societies. Everybody has a basic knowledge of what is fundamentally good. [...] This basic knowledge is available to everybody.

It is not obvious how much moral disagreement there really is. Look at basic moral norms regarding killing and lying. These are at all times treated as actions that require some sort of fairly definite justification, whereas disagreements tend to lie not in terms of whether these are actions that are generally in some way out of bounds or wrong.

**PB:** Is it intuitive?

**MM:** I guess, 'intuitive' is a way of putting it. We have sort of—the

knowledge that we have of what is fundamentally good is pretheoretical, prereflective knowledge ...

**PB:** Finnis is known for his enunciating the 'basic goods'. I was wondering if you could tell us a bit about that, just briefly.

**MM:** So Finnis's view, and I think this actually is central to the natural law tradition generally, is that the foundations of practical reasoning, the foundations of how it is reasonable to act, are certain things that are good for human beings. This is the 'welfarist' idea that the basic goods are ways in which human beings are made better or worse off. His view is that you need some starting point as a plausible way of characterising or categorising our experience with practical reason. Finnis wants to say you may have an inclination or directedness toward various goods. In his important *Natural Law and Natural Rights* book, Finnis identifies the basic goods as life, knowledge, friendship, aesthetic experience, practical reasonableness, religion and play. [...]

It is really interesting to note that Finnis's influence on the mainstream of legal theory has been massive but his influence on the mainstream of ethical theory has been minimal. With respect to matters of jurisprudence, Finnis revives classical natural law jurisprudence. He raises important questions about the methodology of jurisprudence. This is something that everybody agrees with. Positivists, natural law theorists, legal realists, acknowledge that Finnis managed to bring these issues to the fore and restated the natural law in a way that makes it intelligible, disentangles its theses, and clears up the common, erroneous images that people have of it. On the other hand, in ethics his work has mainly been influential on people who are assumed to have a prior disposition to work out matters in these sorts of terms, for example, in explicitly Catholic moral philosophy and theology. No doubt Finnis is not always thought of in happy terms. Still, he is very influential, but not so much in the moral philosophy mainstream.

**PB:** This year is also the 50th anniversary of the publication of H.L.A. Hart's, *The Concept of Law*. I was wondering how you think natural lawyers will view its legacy. Are there things that natural lawyers can get out of Hart's book and/or agree with?

**MM:** I am a natural lawyer who thinks of *The Concept of Law* as the greatest book of law written in the last 70 years. Finnis's book is great, of course, but Hart's book is really agenda-setting. Robert Nozick said of John Rawls's book, *A Theory of Justice*—Nozick was of course a serious critic of Rawls—that everyone who now talks about justice has to work within Rawls's framework or explain why not. I think that's the role that Hart's book plays in jurisprudence.

Unless you work within that framework, Hart's framework, you had best explain why not, because the view itself just seems to add so much—it has so many theoretical virtues and has so much in the way of explanatory power that, if you are going to go some other direction (as, for example, Scott Shapiro does in his recent *Legality* book), you need to explain why you are unwilling to proceed within Hart's framework (which Shapiro does).

**PB:** This is a huge question, so I don't want to go into it too much, but could there ever be a rapprochement between natural law and legal positivism?

**MM:** People try this all the time. For example, if you affirm the weak natural law thesis, that law that doesn't meet a rational standard is defective as law, some positivists say, 'Well, I believe that too, I just also think that these are still laws', and they define features of law wholly in non-normative terms in terms of acceptance of certain social rules or some sort of large scale social plan or the commands of a sovereign or whatever. I am not so confident. I thought at one point, fine, rapprochement ... You can have a nice ecumenical philosophy of law, big hug, we're all in it together. I am not so sure now. I think that the key is that the natural law theorist wants to give the weak natural law thesis a role in explaining why the law necessarily has the features that it has and that the legal positivists want to deny that role. If they don't deny it, they will end up saying things that are not positivistic, things like, 'Laws ultimately rest on moral facts,' 'There are some merits that law has to have in order to be law,' and so forth. If that is true, that doesn't look like, from my point of view, a rapprochement. It looks like legal positivism losing the debate to natural law theory.

**PB:** Of course positivists can still say that they think laws are morally bad. They just say it's still law—so isn't this just a semantic squabble about how we define the word law? You define it one way and it's law. You define it the other way and it's not law.

**MM:** That would make this debate sort of moribund, but I guess that I am not so worried about that objection. One way of thinking about it is that I don't think of myself in the work that I do in jurisprudence, I don't think that most positivists do either, as simply defining words. And, even though we use the language of conceptual analysis sometimes, to try to get a concept of law—I don't think that's—if you look at the actual practice—quite what we are doing either. It strikes me that what we are doing is more like an investigation into the nature of things rather than an investigation of a concept. So think about water. We can give an account of water as the concept used by ordinary speakers of the language, and when we talk about drinking and swimming and all that, we are confident that people are talking about the same thing. You can

come up with a concept in ordinary use but then, no matter how adequate that is, no matter how successful it is in applying to and only to instances of water and not those we don't call water, still that doesn't give us much insight into what we call the *nature* of the thing. *Why* does water have all the features that it does? An explanation of that requires investigating the nature, taking instances of that thing and saying, 'What is it about this stuff that ensures that it is going to freeze at a certain temperature, and boil at a certain temperature, and so forth?' That is not conceptual analysis any more; that's investigation into its nature. [...]

I think that there is some stuff that we disagree about that is simply conceptual; of how the concept of law is actually being used, for instance, and that's just like you how might investigate the concept of water in ordinary discourse. Once you are clear on that, there is a deeper question: What is it about law that guarantees these features are going to cluster together in the way they do? My view is that the explanation runs through the weak natural law thesis.

**PB:** So Mark, I just have one final question for you: Where next? Are there some specific problems that you see yourself trying to grapple with in the future?

**MM:** [...] I have been thinking about something you alluded to earlier: The relationship between God and morality. I have been trying to think about how theists should think about natural law. Sometimes natural law theorists put forward as the big merit of their view that it can be described so that it doesn't mention God at all, just the nature of the human good and human action. I've been wondering about whether or not this is really a merit of the view from a theistic standpoint. If being a theist means that God is at the absolute centre of everything, then how could you expect to explain morality in a Godless way? [...] So trying to tease that out has been occupying me for the last few years and my book on the subject—*God and the Moral Law: On the Theistic Explanation of Morality*—will be coming out from Oxford University Press in November or December of this year.

**PB:** Mark Murphy, thanks very much for all of your insights. It's been a great pleasure talking to you.

**MM:** Thanks for all the questions!

## FIVE QUESTIONS FOR JOHN FINNIS

JONATHAN CROWE\*

John Finnis's seminal defence of natural law theory, *Natural Law and Natural Rights*, has attracted significant commentary since it was first published in 1980.<sup>1</sup> Earlier this year, a revised edition was published, including a new postscript responding to critics.<sup>2</sup> A five volume collection of Finnis's essays, spanning topics in ethics, political philosophy, jurisprudence and theology, has also recently been released.<sup>3</sup>

It is timely, then, to reflect upon Finnis's contribution to natural law thought. What is the current status of *Natural Law and Natural Rights* within natural law scholarship? What issues have been raised concerning Finnis's theory and which of these remain unanswered? What are the central issues confronting natural law theories today?

This article outlines five pressing questions facing Finnis's version of natural law. They span a range of topics in ethics, politics and jurisprudence, including the ethical status of animals, the so-called 'marital good', the global implications of the common good, the role of legal authority and the natural law view of law. Many of these issues hold significance not only for Finnis's theory, but for natural law more broadly.

### I WHAT IS THE ETHICAL STATUS OF NON-HUMAN ANIMALS?

Finnis presents a wide ranging theory of ethics. His ethical theory begins by discussing the basic forms of good for humans. Finnis argues there are seven such goods: life, knowledge, friendship, play, aesthetic experience, spirituality and practical reasonableness.<sup>4</sup> Humans can interact with these basic goods in a range of reasonable ways. However, some types of action are ruled out by the requirements of practical rationality.

This ethical theory is equipped to answer many questions concerning the ethical status and duties of humans. However, one question that Finnis does not discuss in much detail is the ethical status of non-human animals. Do animals have rights within a natural law framework? Finnis says they do not.<sup>5</sup>

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<sup>1</sup> John Finnis, *Natural Law and Natural Rights* (1980).

<sup>2</sup> John Finnis, *Natural Law and Natural Rights* (2nd ed, 2011).

<sup>3</sup> John Finnis, *The Collected Essays of John Finnis*, vols 1-5 (2011).

<sup>4</sup> Finnis, above n 1, ch 3-4.

<sup>5</sup> Ibid 194-5.



He reasons that since animals lack the capacity to recognise, reflect upon and pursue the basic goods, they cannot bear rights.

It is true that animals are unable to pursue at least some of the basic goods on Finnis's list. However, this is perhaps not surprising, since the list was framed with humans in mind. It is a theory of what is good for humans 'with the nature they have'.<sup>6</sup> Why couldn't we also seek to describe the basic forms of good for animals? A theory of this type would ask what ends are inherently good for animals, given their natural properties.

Finnis's main objection to such a theory seems to be that animals lack the capacity to reflect upon whatever their basic goods may be and rationally order their actions to pursue them. However, this seems an unduly restrictive understanding of the good. The basic goods for humans surely guide action at both an intuitive and a reflective level.<sup>7</sup>

Finnis acknowledges as much when he describes the basic goods as 'pre-moral'.<sup>8</sup> The goods are not the product of moral deliberation; rather, they are in place prior to reflective engagement. In this respect, they differ from any substantive moral principles that one might formulate after reflecting upon the demands of practical rationality.

If the basic goods for humans operate both intuitively and reflectively, why can't animals be said to pursue basic goods at a purely intuitive level? What reason is there for thinking that reflective pursuit of basic goods is inherently more valuable than intuitive pursuit? Why should the former, but not the latter, be important in assigning rights? We should wonder whether this distinction bears the weight Finnis places on it.

The ethical status of animals is an area where contemporary natural law theorists have good reason to question Finnis's position.<sup>9</sup> The future of natural law theory may lie in taking a more sceptical attitude to sharp divisions between humans and other species of sentient creatures. This would lead to a broader and more nuanced natural law ethics.

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<sup>6</sup> Ibid 34.

<sup>7</sup> For further discussion, see Jonathan Crowe, 'Pre-Reflective Law' in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (2011).

<sup>8</sup> Finnis, above n 1, 34.

<sup>9</sup> For a more detailed critique of Finnis on this issue, see Gary Chartier, 'Natural Law and Animal Rights' (2010) 23 *Canadian Journal of Law and Jurisprudence* 33. See also Jonathan Crowe, 'Levinasian Ethics and Animal Rights' (2008) 26 *Windsor Yearbook of Access to Justice* 313.

## II IS THERE A DISTINCTIVE 'MARITAL GOOD'?

Finnis's disapproval of same sex relationships is well known.<sup>10</sup> Other members of the 'new natural law' school, such as Robert P George,<sup>11</sup> have advanced similar views. On the face of it, however, Finnis's theory of the basic goods provides little basis for this position. People in same sex relationships are, on the face of it, perfectly able to respect all the basic goods outlined above. What, then, is inherently wrong with such unions?

Finnis's most recent answer to this question involves making an addition to the list of basic goods provided in *Natural Law and Natural Rights*. He argues that marital sexual intercourse between a man and a woman partakes in a special basic good, which he calls the 'marital good'.<sup>12</sup> This special form of good is open to married, different sex couples, but not to same sex couples or, indeed, to unmarried, different sex partnerships.

There is much that is puzzling about the marital good.<sup>13</sup> In the first place, when viewed within Finnis's wider theory of the basic goods, it smacks of ad hockery. A basic good, for Finnis, is a good that is valuable in and of itself and cannot be reduced to any other form of good.<sup>14</sup> However, it is unclear what the marital good adds to a theory of the basic goods that already includes such goods as friendship, play and spirituality.

Marital relationships, it seems, are good because they partake in a particularly intense and supportive form of friendship. Married couples may also support one another in their mutual pursuit of play, spirituality and the other basic forms of good. This account seems well equipped to capture what is valuable and worthwhile about marriage. Why, then, does Finnis feel the need to posit a new addition to his original list?

Finnis seems to be motivated here partly by his emphasis on the centrality of procreation to marital sexual intercourse. Marital sex, he argues, is different from other sex due to its 'procreative significance'.<sup>15</sup> However,

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<sup>10</sup> See, for example, John Finnis, 'Law, Morality and "Sexual Orientation"' (1994) 69 *Notre Dame Law Review* 1049; 'Shameless Acts' in Colorado: Abuse of Scholarship in Constitutional Cases' (1994) 7 *Academic Questions* 10; and 'The Good of Marriage and the Morality of Sexual Relations' (1997) 42 *American Journal of Jurisprudence* 97.

<sup>11</sup> For a recent example, see Sherif Girgis, Robert P George and Ryan T Anderson, 'What is Marriage?' (2010) 34 *Harvard Journal of Law and Public Policy* 245.

<sup>12</sup> Finnis, 'Law, Morality and "Sexual Orientation"', above n 10, 1066.

<sup>13</sup> For a more detailed critique than I can offer here, see Stephen Macedo, 'Against the Old Sexual Morality of the New Natural Law' in Robert P George (ed), *Natural Law, Liberalism and Morality* (1996).

<sup>14</sup> Finnis, above n 1, 33-4.

<sup>15</sup> Finnis, 'Law, Morality and "Sexual Orientation"', above n 10, 1067.

procreation could just as well be viewed as a dimension of the basic good of life. It is difficult, then, to see what important explanatory role the marital good plays in Finnis's overall theory, except as a special device for condemning same sex and non-marital relationships.

If the marital good is discarded, very different consequences follow from Finnis's theory for the ethical status of same sex and non-marital sexual relationships. Same sex and unmarried couples, like their married counterparts, can potentially show full respect for the basic goods in their partnerships. This suggests that the gender or marital status of parties to a relationship makes no inherent difference to its ethical status.

### III WHAT ARE THE GLOBAL IMPLICATIONS OF THE COMMON GOOD?

Finnis's political theory centres on the notion of the common good.<sup>16</sup> The common good refers to the interest all members of a community have in bringing about a state of affairs where everyone can pursue the basic goods in their lives. Finnis argues that everyone has a duty to do their share to bring about the common good in their community.

This account raises an important question about the scope of the common good. How far does the common good extend? Do we only have a duty to ensure that everyone can pursue the basic goods in our own community or does the duty extend to humanity at large? The distinction has important implications for the content of our political obligations.

If the common good is conceived at a global level, this does not mean that we are free to disregard the laws of our society. However, it does mean that those laws should be viewed as part of a larger system aimed at securing global justice. Domestic laws that undermine the global common good by unreasonably elevating domestic interests over those of the global community would thereby lose a large part of their moral force.

Finnis appears sympathetic to this line of argument. He raises the question of the scope of the common good in *Natural Law and Natural Rights* and suggests he is open to a global conception of the idea that undermines the importance of national boundaries.<sup>17</sup> However, he does not go on to explore this feature of his view in much detail.

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<sup>16</sup> Finnis, above n 1, ch 6.

<sup>17</sup> Ibid 150.

Other natural law authors, such as Mark C Murphy, have tried to defend a more restricted understanding of the common good.<sup>18</sup> However, there are serious hurdles facing such a defence, as Murphy acknowledges. It therefore seems that natural law theorists may have to embrace the global common good and its potentially radical implications.

There is, then, important work to be done within natural law theory on exploring this dimension of the common good. Do Finnis's remarks commit him to a global conception of the common good and, if so, what consequences does this have for our political obligations? How far does it undermine the legitimacy of the nation state? What does it mean for the relationship between domestic and international legal orders?

#### IV IS LEGAL AUTHORITY NECESSARY FOR SOCIAL COORDINATION?

Finnis argues that the moral force of law derives from its important role in advancing the common good. He follows Thomas Aquinas in distinguishing between two types of laws.<sup>19</sup> Some laws follow from the demands of the basic goods by logical entailment. The prohibition on murder would be an example. Other laws play a coordination function. They help to put the general principles of the natural law into practice.

Laws of the second type may take different forms in different communities. For example, some societies drive on the left hand side of the road and others on the right. Neither option is inherently better than the other; what matters is that the rule is generally followed throughout the community. Finnis argues that many laws play this sort of coordinating role. Their coordinating function gives them moral force.

Finnis contends that social coordination provides a moral basis for the notion of legal authority. He argues in *Natural Law and Natural Rights* that social coordination requires 'unanimity or authority. There are no other possibilities.'<sup>20</sup> It is impractical to secure unanimous consent on the types of complex issues that arise in a large community. Legal authority is therefore necessary to solve these types of coordination problems.

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<sup>18</sup> For a detailed discussion, see Mark C Murphy, *Natural Law in Jurisprudence and Politics* (2006) ch 7. See also Jonathan Crowe, 'Natural Law in Jurisprudence and Politics' (2007) 27 *Oxford Journal of Legal Studies* 775.

<sup>19</sup> Finnis, above n 1, 281-90. See also Thomas Aquinas, *Summa Theologiae*, II-I, q 95, art 2.

<sup>20</sup> Finnis, above n 1, 232.

It is worth asking whether Finnis is right about this. Many social coordination problems—including extremely complex ones—are solved by convention, rather than the intervention of an authority.<sup>21</sup> Languages, for example, are complex sets of conventions that evolve over time in response to the need for society wide standards of communication. They work well, even though nobody planned them.

It is arguable that many other social coordination problems could be solved by convention in the absence of a centralised legal authority. This would result, if not in unanimity, then at least in something functionally very similar. There is room for debate over what types of coordination problems could and could not be solved by this method. However, the availability of convention as a mode of solving such problems raises the possibility that Finnis is overconfident in his endorsement of legal authority.

## V WHY ISN'T AN UNJUST LAW SIMPLY NO LAW AT ALL?

I turn, finally, to Finnis's views on jurisprudence. Finnis notes that the natural law tradition has long been associated with the slogan 'an unjust law is no law at all'.<sup>22</sup> Something like this idea can be found in the work of Augustine and Aristotle, but Finnis argues that it fails to capture the core of natural law jurisprudence. Indeed, he flatly rejects the slogan, characterising it as 'pure nonsense' and 'self-contradictory'.<sup>23</sup>

Murphy calls the claim that 'an unjust law is no law at all' the *strong natural law thesis*. He distinguishes it from the *weak natural law thesis*, which holds that an unjust law is merely defective, rather than invalid.<sup>24</sup> The weak natural law thesis says that an unjust law is still a law, in a sense, but it is a defective law and is therefore not a law in the best or fullest sense of the term. This is the claim endorsed by Finnis.<sup>25</sup>

Why does Finnis describe the strong natural law claim as 'pure nonsense'? His main reason seems to be that it runs counter to ordinary usage of the term 'law'.<sup>26</sup> People use terms like 'unjust law' and 'Nazi law' without any apparent contradiction. Indeed, Finnis points out that many natural law theorists have used the term 'law' in this way.

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<sup>21</sup> For discussion, see Crowe, above n 18.

<sup>22</sup> Finnis, above n 1, 363.

<sup>23</sup> Ibid 364.

<sup>24</sup> Murphy, above n 18, ch 1.

<sup>25</sup> Finnis, above n 1, ch 1.

<sup>26</sup> Ibid 364-5.

Some legal positivists, such as Joseph Raz,<sup>27</sup> have argued that this usage undermines the strong natural law claim that an unjust law is no law at all. If an unjust law is not a law, why do we call it a 'law' in the first place? Finnis agrees. This is why he says that calling something an unjust *law* and then claiming it is not a law involves self-contradiction.

However, this argument is weak. It is not uncommon for ordinary usage of a term to diverge from the best technical understanding of the associated concept or phenomenon. For example, the term 'murder', as used in everyday discourse, has a more general meaning than it does in criminal law statutes. A killing might therefore be called 'murder' in everyday discussion, but turn out after a legal analysis to be no murder at all. This sort of departure from ordinary language is far from contradictory.

It is therefore quite coherent to note that people commonly describe unjust laws as 'laws', but then go on to claim that, on the best philosophical understanding of the notion, unjust laws are not really laws at all. A much fuller exploration would be needed to see whether the strong natural law claim is true, but Finnis's objection is far from decisive. It is therefore worth asking whether he rejected the thesis too hastily.

## VI CONCLUSION

Finnis's work on natural law played a large role in reviving contemporary interest in the tradition. Nonetheless, many members of the current wave of natural law authors—such as Robert Alexy, Timothy Chappell, Gary Chartier, Mark Greenberg, Nigel Simmonds and Murphy,<sup>28</sup> to name just a few—diverge in important ways from Finnis's outlook. This diversification in natural law thinking is partly due to the unanswered challenges confronting Finnis's work, including the issues raised above.

The emergence of a new wave of contemporary natural law writers suggests that natural law theory is currently moving into its post-Finnis phase, in much the same way that legal positivism entered its post- H L A Hart phase during the 1980s and '90s. The challenges to Finnis outlined in this article, along with other related debates, may therefore provide a departure point for natural law scholarship in the years to come.

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<sup>27</sup> See Joseph Raz, *Practical Reason and Norms* (1990) 164.

<sup>28</sup> See, for example, Robert Alexy, *The Argument from Injustice* (2002); Timothy Chappell, *Understanding Human Goods* (1998); Gary Chartier, *Economic Justice and Natural Law* (2009); Mark Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 157; Nigel Simmonds, *Law as a Moral Idea* (2008); Murphy, above n 18.

# COMPULSORY VOTING: ELECTIONS, NOT REFERENDUMS

GRAEME ORR\*

For decades now, there has been no more written about or analysed issue in the regulation of democracy, or perhaps political science generally, in Australia, than compulsory voting.<sup>1</sup> Whilst compulsion remains a distinctly, though hardly unique, Australian phenomenon, there is burgeoning international interest in it, driven by ongoing concern with declining voter turnout in the west.<sup>2</sup> Amongst all this debate, scant attention however has been paid to the fundamental consideration of *what* we are asking people to do when we encourage or require them to vote.

Instead, the literature, largely produced by political scientists and economists, has focused on either of two topics. The deeper of the two is an irresolvable normative tussle over the morality of compulsory versus voluntary voting. (A stoush which pits libertarians against communitarians, culminating in a recent piece titled 'It's an Evil Thing to Make People Vote').<sup>3</sup> The normative question—about the philosophical justifications for erecting the right to vote as a duty—has been a recurring issue. Latterly, however,

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<sup>1</sup> For a sample of prominent academic literature see LF Crisp, 'Compulsory Voting in Australia' (1950) 4 *Parliamentary Affairs* 84, Colin Hughes, 'Compulsory Voting' in Colin Hughes (ed) *Readings in Australian Government* (UQ Press, 1968), Joan Rydon, 'Compulsory and Preferential: the Distinctive Features of Australian Voting Methods' (1968) 6 *Journal of Commonwealth Political Studies* 183, Neil Gow, 'The Introduction of *Compulsory Voting* in the Australian Commonwealth' (1971) 6 *Politics* 201, Ian McAllister, 'Compulsory Voting, Turnout and Party Advantage in Australia' (1986) 21 *Australian Journal of Political Science* 89, Gary Johns, 'Does Compulsory Voting Distort Electoral Outcomes?' (1998) 5 *Agenda* 367, Ian McAllister and Malcolm Mackerras, 'Compulsory Voting, Party Stability and Electoral Advantage in Australia' (1999) 18 *Electoral Studies* 217, Lisa Hill, 'A Great Leveller: Compulsory Voting' in Marian Sawer (ed), *Elections: Full, Free and Fair* (The Federation Press, 2001), Lisa Hill and Jonathon Louth, 'Compulsory Voting in Australia: Turnout With and Without it' (2005) 6 *Australian Review of Public Affairs* 25. For argument for a general audience see Padraic McGuinness, 'The Case against Compulsory Voting' and Chris Puplick, 'The Case for Compulsory Voting' in AEC (ed), *The People's Say* (AEC, 1994) 20.

<sup>2</sup> Concern with turnout and the related question of legitimacy is a perennial. Compulsion was not pioneered in Australia in the early 20<sup>th</sup> century, but Europe. (Its roots are older still, eg the short-lived Georgian (US) Constitution of 1777, or the 5<sup>th</sup> century practice of 'roping-in' Athenian citizens to force them to participate in deliberative assemblies in the agora). The revitalisation of interest in compulsory voting in the west in recent times has been traced to an influential address by an eminent political scientist: Arend Lijphart, 'Unequal Participation: Democracy's Unresolved Dilemma' (1997) 91 *American Political Science Review* 1.

<sup>3</sup> Derek Chong, Sinclair Davidson and Tim Fry 'It's an Evil thing to Oblige People to Vote' (2005-06) 21(4) *Policy* 10. For an antithetical position see Lisa Hill, 'On the Reasonableness of Compelling Citizens to 'Vote': the Australian Case' (2002) 50 *Political Studies* 80.

scholarship has tended to focus on compulsion's instrumental effects. These effects are mostly analysed as relatively fine-grained empirical questions: To what degree does compulsion improve turnout, and is this achieved mechanically or by engendering a voting norm? Does compulsion make parties lazy or does it force them to appeal broadly, beyond their bases? How does compulsion impact on partisan electoral outcomes and ultimately on policy development?

The normative and empirical questions are not entirely distinct. They unite around an axis of two themes: whether compulsion enhances or detracts from governmental legitimacy and whether it does anything for socio-political egalitarianism. Jurisprudential analysis has added little to either the normative or empirical debates. Instead, jurisprudential interest has centered on two specific legal concerns. One is constitutionality, with the Australian courts accepting that legislating for compulsory voting is within parliamentary power.<sup>4</sup> Compulsion, it might be noted, is popular in Australia: consistently well over two-thirds of respondents favour it.<sup>5</sup> The other has been a rather arid, technical debate about whether the law compels voting or merely exhorts it, by compelling turnout at a secret ballot.<sup>6</sup>

What debates and research on compulsory voting have failed to do is to conceptualise *what it is that we ask of people when they vote*. Without making that fundamental inquiry, it is difficult to fully address the question of compulsion versus voluntarism. This question is deceptively simple, or at least not susceptible of any simple definition. A practice as rich as voting, in a public poll following an election campaign, is of an order of complexity greater than, say, presenting consumers with choices between basic products or services. Voting is a multi-dimensional activity. It can be thought of as a communal experience, a mass decision-making mechanism or a liberal means to both individual citizen development and to collective, governmental accountability. Voting richly layers together rituals of communal involvement, aspects of self-expression and tribal loyalty, and elements of choice which mix rational calculations about policy options with intuitive and even irrational instincts about leaders and personalities.

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<sup>4</sup> *Judd v McKeon* (1926) 38 CLR 380; *Faderson v Bridger* (1971) 127 CLR 271.

<sup>5</sup> Indeed the figure has risen in recent decades: from 63.7% (1987) and 66.8% (1993) to 77.1% (2004) and 76.7% (2007). Support declined to 71.6% in 2010, perhaps due to the lacklustre campaign (which saw a spike in informal voting) and disillusionment over the ousting of Prime Minister Rudd. Over 85% of electors, consistent over time, say they would still vote even without compulsion. (Source of figures: Australian Election Studies, <http://nesstar.assda.edu.au/webview/>).

<sup>6</sup> Summarising that issue see Graeme Orr, *The Law of Politics* (The Federation Press, 2010) 62-65.



In this short paper, I do not seek to uncover more than a part of that richness. What I wish to argue is that there is a clear dichotomy between general elections and referendums. My argument is that voting at referendums differs from voting at elections in ways that mean compulsion is justifiable for elections, but not for referendums. To summarise the argument which follows, voting at elections invites citizens to make a regular decision about which parties they wish to represent them in parliament. Elections effectively require us to say which leadership team we would prefer in government over the next term; and in most jurisdictions also to reflect on the make-up of the upper house or house of review. In those kinds of broad, political judgments, everyone has an equal stake and everyone's voice is equally valid. Referendums, in contrast, are discrete, questions about enacting particular legal (especially, in Australia, constitutional) measures.<sup>7</sup> Indeed they are binary questions, in the form 'yes/no'. In those matters, it is unreasonable and probably counter-productive to expect every citizen to have a say.

## I THE APPARENT PARADOX OF COMPULSION

At the heart of the seemingly endless debate about compulsory voting lie apparent paradoxes: a paradox about rights and freedoms, and a paradox about legitimacy. To borrow from a Cypriot constitutional judgment, making voting obligatory 'is designed to ensure that political autonomy emanates from the people and as such is a safeguard for the sustenance of democracy'.<sup>8</sup> The paradox of turning a right to participate into a duty is thus side-stepped by arguing that the liberal promise of popular sovereignty cannot be realised if individuals are left to free-ride on the common good by opting out of electoral participation.<sup>9</sup> To Engelen:

Both liberalism and democracy are ultimately grounded on and co-originate from the fundamental principle of mutual respect for each person as a free and equal human being. ... [W]ithout popular sovereignty—guaranteed by a democracy in which people participate in the decisions that will bind them—individual rights and liberties remain purely formal and empty.<sup>10</sup>

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<sup>7</sup> A distinction is made here between issue-based referendums (whether citizen or parliamentary initiated, legislative or constitutional) and the recall referendum, which is really an inverted electoral procedure.

<sup>8</sup> *Pingoroas v The Republic* [189] LRC (Const) 201 at 210.

<sup>9</sup> Critiquing the free-rider argument, see Annabelle Lever, 'Compulsory Voting: a Critical Perspective' (2010) 40 *British Journal of Political Science* 897 at 903.

<sup>10</sup> Bart Engelen, 'Why Liberals Can Favour Compulsory Attendance' (2009) 29 *Politics* 218 at 222.

To opponents of compulsion, however, whilst stronger turnout is desirable (all other things being equal), no-one should be marshalled to the polls with the cattle-prod of legal sanctions. In this conservative, even elitist, view compulsion paradoxically imperils rather than ensures legitimacy, because some votes are more desirable than others. In Rydon's much-quoted phrase:

[W]here the apathetic and ill-informed are forced to the polls by law, it is even more likely that the 'scum and dregs' of political life will decide who is to govern the country.<sup>11</sup>

There is a deep reason however why we value as large a turnout as possible at representative elections, and it does not rest on legitimacy arguments. After all there is no magic dividing line between legitimate and illegitimate. A parliament elected on a 65% turnout can claim as much legitimacy (understood as constitutional right) as one elected on a 90% turnout.<sup>12</sup> As long as the ground rules of electoral democracy are settled in advance and are well within the bounds of fairness, then the outcome is legitimate as the product of a free and open election. No-one would argue that either compulsion or voluntarism per se is undemocratic. Otherwise countries like the UK and Australia could not be classed together as electoral democracies. For legitimacy—understood as a political rather than constitutional fact—much more important than any choice of voting rule between compulsion or voluntarism is the underlying political culture: the openness and diversity of the media, a level of equality between the key parties, and so on.

Governmental legitimacy is not, then, a product of some empirical fact such as the brute level of turnout. Nor is it reducible to the representativeness of the turnout in a numerical sense. (Certainly disparate turnout of low-economic or social-status groups can undermine social cohesion in the long run. But if the goal were strict numerical proportionality in parliamentary representation, we could just as well save the huge cost of elections and use scientific sampling methods to choose MPs). Instead, as Engelen hints, the reason compulsion is recommended for elections stems from the notion of each person as an equal political being. If democratic government is to be of

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<sup>11</sup> Joan Rydon, 'The Electorate' in John Wilkes (ed), *Forces in Australian Politics* (Angus and Robertson, 1963) 167 at 184. No less colourfully see McGuiness, above n 1 at 21, equating contemporary politics under compulsory voting with Roman bread and circuses, 'designed to appeal to unthinking but enfranchised plebs who are forced to the polls.' Rydon's 'scum and dregs' was borrowed from Bernard Shaw, and implies that the apathetic and ill-informed can be found at all levels of society (scum floats, dregs sink).

<sup>12</sup> The figures are roughly the average for recent Westminster elections (65%) and Australian national elections (90% consisting of 95% turnout on a 95% comprehensive role). But we could substitute other figures and the argument would be the same.

the people, for the people, then in two senses everyone can be required to have their say.<sup>13</sup>

The first sense is that government is by definition a broad institutional process that touches everyone's life in practice, and in theory envelopes the republican ideal of a shared public space, discourse and set of institutions. Not being a mechanical enterprise, government is presided over by people. Elections exist to fill the highest of those roles, by stocking our parliaments with people to form the executive, to vote on laws and to speak for different communities, whether geographic or values based. That republican ideal means that there are strong reasons, both symbolic and constitutive, in favour of compulsion. Whilst we do not go so far as to rope citizens in physically, as in Athens long-ago, it is proportionate to enact administrative penalties for not voting without reasonable excuse. This habituates both the governors and the governed to see voting as the fundamental and equal right of belonging to the community.

The second and related sense is that being ostensibly for all, government under electoral democracy must value each person's say equally. Certainly voluntary voting still permits each to have their say, but only compulsion (under conditions of secrecy allowing people to deliberately vote informally) formally values each elector equally. And it is in this regard that the question of what we ask of people when we ask them to vote is crucial.

## II WHAT IS INVOLVED IN VOTING?

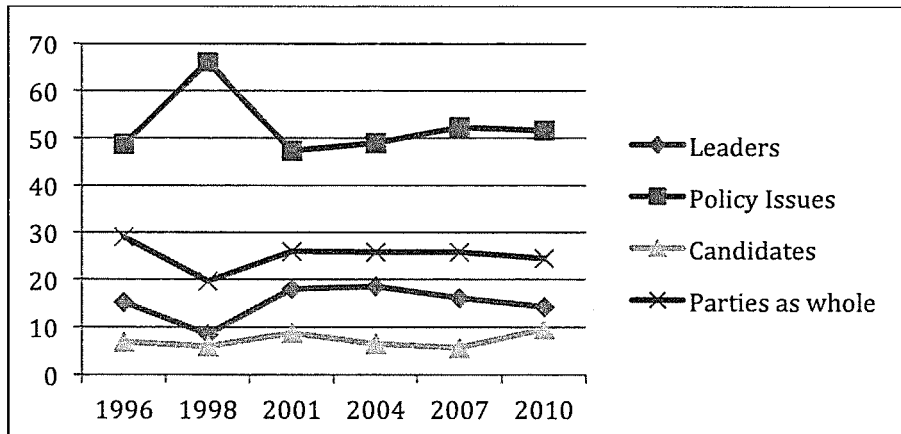
To address this question, researchers could simulate games of electoral choice, or ask electors to reflect on what motivates them when they vote. But such exercises are fraught. The process of forming political and partisan positions is multifaceted and, to a considerable extent, pre-reflective. For many, the evolution of their political leanings occurs sporadically during periods of ideological openness (eg during youth), before settling for a long period. Alternatively, political scientists can and do ask electors to nominate what they perceive as influencing how they vote. For instance, the Australian Election Study has long asked voters emerging from polling booths which of a

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<sup>13</sup> Leaving aside the distinction between compulsory *turnout* and compulsory *marking* of ballots; except to note that the legal guarantee of secrecy permits people to vote informally as a protest, and that such protest is a say in itself. In contrast, the silence of not turning out at all can embrace everything from forgetfulness through confusion to protest. Compare Lisa Hill, 'Informal Voting under a System of Compulsory Voting' in Joo-Cheong Tham et al (eds), *Electoral Democracy: Australian Prospects* (MUP, 2011) 36.

closed-set of factors was 'most important' in determining their vote. The responses generate tables like this:

'Most Important' Factor in Determining Vote (Source: Australian Election Studies)



The results tell us things we could intuit, such as that Australian politics is more leader and party-centred than local and candidate-centred. But the results need to be read with care. Policy debates are important, but whether they are the overwhelmingly dominant determinant may be doubted. Respondents to any survey are inclined to give a response that they perceive is 'acceptable'.<sup>14</sup> Of the four factors offered, 'policy issues' would sound like the most rational response. In reality, political advertising reveals that much less concrete factors are also important in swaying voters. Political advertising centres on projections of a party's brand or 'feel', communicating a sense of vision and the personality or charisma of each leader. Also, we know that many voters are staunchly wedded to a particular party, whether out of a sense of ideology, class or group identity, or simply long-held loyalty. Whilst party loyalty and class-identity may have declined somewhat, they are still strong. Over 70% of Australian electors 'never seriously contemplated' changing their first preference vote in Australian elections over the last 15 years.<sup>15</sup>

There are other, more indirect, measures of voting behaviour. The level of 'interest in politics' reported by electors is of particular interest in a compulsory voting milieu. Consistently, since data began in 1987, between 17% and 21% of

<sup>14</sup> Also known as 'social desirability' bias.

<sup>15</sup> Source: Australian Election Studies. For a detailed analysis of these ongoing studies, see Ian McAllister, *The Australian Voter: 50 Years of Change* (UNSW Press, 2011).

electors have reported 'not much' or 'no' real interest in politics.<sup>16</sup> Whilst that figure may worry opponents of compulsory voting, it would include staunch voters who long ago plumped for a particular party which aligned with their self-interest, values or worldview. A related question concerns 'when' electors 'definitely' decide how to vote. The proportion which claims it only definitively decides how to vote *during* the campaign has fluctuated between 26.6% and 42.2% since 1987. Although almost certainly overstated,<sup>17</sup> these figures imply that there are two groups who ponder how to vote during the campaign: apoliticals who tend to switch on and decide late in the campaign, and staunches who only need the campaign to decide where to allocate their second and later preferences.

The data can never fully address the question of what people do psychologically when they form electoral preferences, however. But it is clear that different people are susceptible to different factors and processes. And we would expect no less with something as complex as representative politics and parliamentary elections.

### III REFERENDUMS CONTRASTED WITH ELECTIONS<sup>18</sup>

In their study of the history and nature of referendums in Australia, Williams and Hume comment that:

[B]ecause constitutional changes can alter Australia's democratic structure, it can be argued that the duty to vote in referendums is greater than the duty to vote in ordinary elections.<sup>19</sup>

My thesis is the reverse: it is reasonable to compel voting at elections, but not to compel electors to vote on the rewording of an essentially legal document such as a constitution. There are three ways to argue this. One relates to pragmatics, one to principle, and one to participation. First, to pragmatics.

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<sup>16</sup> Source: Australian Election Studies. In 2004 the figure spiked to 24%.

<sup>17</sup> We know the 'undecided' figure is much less than this. The figures in the text are undoubtedly inflated by the term 'definitely' in the question and a perception that the better answer is to suggest that one's mind is not closed and that the campaign can make a difference.

<sup>18</sup> This section develops an argument sketched first in Graeme Orr, 'Electoral Reform as a Tonic for Referenda and Federalism' (2005) 20(2) *Australasian Parliamentary Review* 83 at 86-90.

<sup>19</sup> George Williams and David Hume, *People Power: the History and Future of the Referendum in Australia* (UNSW Press, 2010) at 49. On referendum law generally see Graeme Orr, 'The Conduct of Referenda and Plebiscites in Australia: a Legal Perspective' (2000) 11 *Public Law Review* 117.

It is often pointed out that Australia was founded as a nation through the peaceable means of the ballot box. Whilst the British authorities maintained a strong oversight over colonial affairs, and nothing could happen lawfully without Westminster's statutory authority, the Australian Constitution was adopted after a set of plebiscites in each colony.<sup>20</sup> These of course were by voluntary voting (indeed in most colonies by white, manhood rather than universal suffrage). Even more so, the State constitutions have not been adopted at a compulsory ballot, but have evolved through parliamentary amendment. It thus cannot be reasoned from arguments about symmetry that the manner of adoption of our constitutions requires ongoing compulsory voting for their reform.

It is sometimes pointed out that compulsory voting for national referendums predated compulsion for national elections.<sup>21</sup> It is fairer to note that compulsory voting was adopted first for Queensland elections (in 1914, by a Liberal administration) and then was to be trialled federally by the federal Labor government in 1915. That federal government was disappointed with the loss of eight referendum proposals in 1911 and 1913, for which it felt inclined to blame low turnout.<sup>22</sup> The irony is that, if anything, the higher turnout generated by compulsion makes referendums harder to pass.

The simplest way to scuttle reform by referendum is to appeal to uncertainty or apathy. This was neatly captured in two key slogans of the 'no' case in the 1999 Republic referendum: 'If it ain't broke, don't fix it' and 'When in doubt, throw it out'.<sup>23</sup> As Craven argues, 'confusion' is the 'napalm' of constitutional nay-sayers.<sup>24</sup> Of course the nature of law is that an onus lies on

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<sup>20</sup> Glenn Rhodes, *Votes for Australia: How Colonials Voted at the 1899-1900 Federation Referendums* (CAPSM, 2002).

<sup>21</sup> 1915—on a trial basis—versus 1924 for federal elections. See Williams and Hume, above n 19.

<sup>22</sup> These two referendum day had not been held in conjunction with elections, compared to the successful referendums of 1906 and 1910. In truth, the eight proposals were to expand Commonwealth powers, the earlier referendums were less contentious. See Harry Phillips, *Compulsory Voting: the Australian Experiment* (Western Australian Electoral Commission, 2001) 29-30.

<sup>23</sup> AEC, *Yes/No Referendum 1999: Your Official Referendum Pamphlet* (AEC, 1999) at 15 and 17 ([http://www.aec.gov.au/Elections/referendums/1999\\_Referendum\\_Reports\\_Statistics/yes\\_no\\_pamphlet.pdf](http://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/yes_no_pamphlet.pdf)) Williams and Hume, above at 253, summarise such arguments as 'don't know, vote No'. Former Chief Justice Mason identified 'ignorance of the Constitution, now a well-documented fact' as an inducement to 'no' cases: Sir Anthony Mason, 'Towards 2001—Minimalism, Monarchism or Metamorphism' (1995) 21 *Monash University Law Review* 1 at 7. It may be that more informed voters are more likely than others to say 'yes' at referendums, but not necessarily more likely to vote 'yes' than 'no': Richard Miles, 'Australia's Constitutional Referendum: A Shield not a Sword' (1998) 35 *Representation* 237 at 230-242.

<sup>24</sup> Akin to the tactics of a defence barrister muddying every argument only to remind the jury that the prosecution should prove its case beyond reasonable doubt: Greg Craven, *Conversations with the Constitution* (UNSW Press, 2004) 232-233

proponents of reform to make the case for change: but this does not mean voting on law reform should be compulsory. After all, subject only to minimal requirements of parliamentary quorums, even legislators are entitled to abstain from voting on a bill. Mandating voting at referendums gives a free kick to opponents of reform, when conservatives and progressives alike agree on one thing: the Constitution is not perfect.<sup>25</sup>

What of arguments from principle? Earlier we noted the observation of Williams and Hume that the Constitution is a fundamental document to governance. Sir Isaac Isaacs said as much when, in writing about the utility of holding referendums on the same day as elections, he claimed that '[t]he election of members of parliament is important, but infinitely less important than the questions with which [a] referendum is concerned'.<sup>26</sup> Less prosaically, but echoing the same sentiment, Craven has dismissed the idea of voluntary voting at referendums whilst we have compulsory voting at elections as 'like dressing up for take-away, but wearing thongs to the Savoy'.<sup>27</sup> The fashion and food metaphors are inapt. In truth, the idea that a constitution is the Savoy, infinitely more important than representative government itself, is a view that perhaps only a lawyer could hold.

We can have a democracy without a written constitution or a system where electors directly shape the constitution. Indeed that was the Westminster way, and it is still reflected in practice in England and the Australian states.<sup>28</sup> But we cannot have a democracy without regular elections for representative governments and parliaments. As Chief Justice Barwick argued, in his defence of compulsory voting at elections, compulsion does not require electors to find a candidate that they 'prefer' in the sense of genuinely liking. Rather, each elector 'is asked to express a preference amongst those who are available for election, that is, to state which of them he prefers, *if he must have one or more of them as Parliamentary representatives, as he must*'.<sup>29</sup>

Government, as much as taxes and death, is not just inescapable: it affects each of us in our daily lives. To require citizens to attend the polling booth or to lodge a postal ballot, with a view to counting each citizen's view about which party, candidate or leader should be their representative for the next

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<sup>25</sup> Though they disagree as to what needs rectification: top of the conservative agenda is a revitalised federalism; progressives tend to long for a bill of rights and a republic.

<sup>26</sup> Sir Isaac Isaacs, *A Stepping Stone to Greater Freedom* (Pamphlet compiling five articles from the Melbourne Age, 1946) at 8-9.

<sup>27</sup> Craven, above n 24, 229.

<sup>28</sup> Even allowing that plebiscites have been held on important issues dealing with sovereignty and devolution in the United Kingdom, and a few entrenched matters in state constitutions cannot be undone without a referendum.

<sup>29</sup> *Faderson v Bridger* (1971) 126 CLR 271 at [9] (emphasis added).

three years, is not to require some Herculean task, either physically or intellectually. In particular—and contrary to the elitist view summed up in the ‘scum and dregs’ rhetoric—it is to recognise a fundamental principle of democratic equality. One does not have to be a political aficionado or a policy analyst to have a valid say on electoral questions. As I noted earlier, there is no single metric which electors should employ in determining how to allocate their electoral preferences—and it is a good thing too. Because societies are plural and government a broad and complex activity, representative electoral politics is too rich an endeavour for there ever to be a ‘rational’ metric.

This is not to say that electoral outcomes are random. As many commentators have observed, election outcomes often appear to approximate a collective response to broad heuristics, such as ‘are people better or worse off than three years ago?’, ‘is the country heading in the right direction?’ and ‘which leader/party is more trusted?’ These are questions of everyday political opinion, questions on which every citizen’s say is of equal worth. It is this insight that justifies electoral compulsion. In addition, elections serve a ritual purpose. They are seasonal events, the one day of the year (or every three years) when a secular community is brought together.<sup>30</sup> Compulsion maps well onto that sense that elections bind the polity together and are not merely moments of partisan jostling.

Referendums to amend the Constitution—unless they go to questions of secession or devolution—are not such moments. The Australian experience is that they have been specific questions, which assume electors are interested in weighing arguments about particularistic amendments to institutional structures. In one sense, to echo Barwick CJ’s reasoning, a constitutional referendum does of course deal with an unavoidable question. Short of emigrating, every elector must live under the constitution, amended or not. But the type of question asked in a referendum is categorically different from the choice presented at an election. This difference justifies referendums being by voluntary voting, but elections by compulsory voting. A constitution is a basic law, but it is a law nonetheless. This is especially so with Australian constitutions, which overwhelmingly deal with questions of institutional structure (the division of powers in a federation, the judicial role and hierarchy) rather than questions of social rights (which dominate bill of rights debates).

The history of Australian national referendums demonstrates that the great majority of questions have indeed been fairly technical ones:<sup>31</sup> Should the

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<sup>30</sup> For more see Graeme Orr, *The Ritual and Aesthetic of Electoral Law* (2004) 32 *Federal Law Review* 425.

<sup>31</sup> For a list of questions and outcomes, see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3<sup>rd</sup> ed, Federation Press, 2002) 1303-1308.



Commonwealth have greater power over industrial relations, monopolies or aspects of transportation or commerce? When should judges retire? Even the handful of rights questions (such as those presented in 1988) could only be understood with a reasonable knowledge of institutional form and legal powers. Only rarely have questions captured a public mood (as in the 1967 question on indigenous affairs) or spoken at a symbolic level (as in the 1999 Republic and preamble questions, although even then, the head of state question was as much a technical one about defining powers and selection processes as it was one about national identity).<sup>32</sup> The national votes that have come closest to being earth-shattering or symbolically significant have, ironically, been voluntary plebiscites, not compulsory constitutional referendums. These were the 1915 and 1917 votes on conscription for overseas service (which rent the Labor Party in two) and the 1977 vote on a national song (which sowed the seed for 'Advance Australia Fair' to become the ubiquitous anthem it is today).

This is *not* to say that electors ought to pass some kind of education or intelligence test to vote in a referendum, any more than candidates must pass such a test before they can become law-makers. An educated electorate should be positively encouraged, especially for referendums. Indeed deliberative democratic procedures and better voter education are keys to constitutional reform.<sup>33</sup> Participation, the third consideration after pragmatics and principle, is important. We should encourage high turnout at referendums, but not demand it of electors who do not wish to be constitutionalists. Amending a constitution in a piecemeal, issue by issue fashion, is not the same as voting a new constitution up or down. Indeed when we hold referendums in conjunction with elections, if only for reasons of cost, turnout will be inflated compared to holding referendums as stand-alone events. Some might object that a law compelling electors to collect and deposit an election ballot, but making the referendum ballot voluntary, would be a muddy one in practice. But polling officials could simply say to each elector, 'Here are the ballots for the election, you *need* to complete and deposit them. Do you also wish to vote in the referendum as well? It is not compulsory.'

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<sup>32</sup> According to one study, the solution to the apparent paradox that Australians favour republicanism, but rejected the 1999 referendum lies in the fact that the referendum asked the 'electorate to make a complex, technical choice about the system of government, in the absence of clear partisan cues': John Higley and Ian McAllister, 'Elite Division and Voter Confusion: Australia's Republic Referendum in 1999' (2002) 41 *European Journal of Political Research* 845 at 845.

<sup>33</sup> See Williams and Hume, above n 19, ch 7 ('Getting to Yes').

#### IV CONCLUSION

The ballot booth is neither the Savoy nor a take-away outlet. To quote the poet Les Murray, it was conceived, in the Victorian era of enfranchisement and the secret ballot, as a 'closet of prayer'.<sup>34</sup> A secular prayer, through which ordinary people would secure some power over their masters. Australia played its role, in spreading the franchise, implementing the untraceable and official ballot, and making respectable the practice of compulsory voting at elections. Compulsion at elections is justifiable, for reasons of egalitarian principle argued here, and because the nature of voting for a representative government is something which implicates everyone. Voting to amend constitutions as technical as ours, state or national, is a categorically different type of democratic activity. When Australia federated, 'the people' (albeit mostly white men) were consulted, but not compelled. If, in that originary moment, it was not necessary to compel everyone to have a say on the drafts of the Constitution, it seems odd that we would today require everyone to have an opinion on the typically legalistic and often abstracted issues of piecemeal constitutional reform.

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<sup>34</sup> 'My Ancestress and the Secret Ballot, 1848 and 1851' in Les Murray, *Collected Poems* (Duffy and Snellgrove, 2002) 433.

# POSITIVISM AND THE SEPARATION OF LAW AND JURISPRUDENCE

DAN PRIEL\*

The mark of contemporary analytic jurisprudence is its intellectual isolation. I have in mind three kinds of isolation:

(1) *Isolation from legal practice*: legal philosophy is largely uninterested in legal practice. It is not uncommon to find a book in legal philosophy that does not cite a single case or statute and seems little interested in the actual attitudes of legal practitioners. Indeed, the feeling one sometimes gets from jurisprudential work is that referring to actual legal practice is something of a philosophical sellout, that a concern for the everyday workings of a legal system is something that somehow undermines the purity of philosophical inquiry into law. When this attitude is coupled with the view that legal philosophy should focus only on those features that legal systems necessarily have, the result is the kind of inquiry that almost inevitably ignores almost every aspect of law. This attitude is sometimes accompanied by the view that considers looking for practical relevance to jurisprudential inquiries as somehow unnecessary or even wrong. Jurisprudential work is justified as the search for knowledge for its own sake, one that therefore need not have any practical relevance. It is even sometimes suggested that to look for such practical relevance—something that could serve as a check against this sort of isolation in jurisprudential work—is an ‘anti-philosophical’<sup>1</sup> misunderstanding of what jurisprudence is about. The result is that the sort of object that remains for inquiry is not recognisably the law that most lawyers, or lay people, have in mind when they talk about law. Worse still, as a result of this isolation jurisprudence fails at achieving even the more modest aim of illuminating aspects of legal practice. Despite claims for providing a ‘descriptive’ account of the nature of law, the result is something that, I suspect, would be unrecognisable to most practitioners.

(2) *Isolationist methodology*: the predominant view in legal philosophy is opposed to the relevance of potential insights from the natural and the social sciences.<sup>2</sup> The main ‘device’ used is conceptual analysis from the so-called ‘internal point of view’. This expression means different things to different

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<sup>1</sup> John Gardner, ‘Legal Positivism: 5½ Myths’ (2001) 46 *American Journal of Jurisprudence* 199 at 203. Quite a few great philosophers, including some that Gardner mentions as founders of legal positivism were anti-philosophical according to that standard.

<sup>2</sup> On this matter I say much more in ‘Jurisprudence between Science and the Humanities’, 3 *Washington University Jurisprudence Review* (forthcoming 2012), available at <http://ssrn.com/abstract=1566858>, and Dan Priel, ‘Toward Classical Legal Positivism’, unpublished manuscript, available at <http://ssrn.com/abstract=1886517>.

scholars, and here I will not try to disentangle all those different meanings. But in different ways they all use this expression to block inputs from other disciplines. For H.L.A. Hart, for example, the internal point of view, among other things, was contrasted with the methods of the natural sciences that he considered 'useless' for the purpose of explaining social normative phenomena. What Hart offered instead was armchair sociology. One might have thought Hart's 'descriptive' approach that sought to understand normative behavior by appeal to certain people's attitudes would look favorably to psychology for some closer insight into the way people actually reason. In reality, however, psychological literature has had little impact on his work or the work of the many legal philosophers who have sought to further develop his ideas.

(3) *Law as distinct from other things*: If the first and second isolations were negative in nature, this one is part of the subject's positive agenda. A second feature of the isolationist approach is the tendency to try to define law by distinguishing it from other things, instead of focusing on what law does or can do.<sup>3</sup> The main focus of attention has been the boundary of law and morality, which consciously or not, has probably contributed to another kind of isolation, this time between legal philosophy and the rest of the legal academia, where it seems, a different boundary—between law and politics—has been the focus of greater attention.<sup>4</sup>

A second, related, debate has been concerned with the boundary between different jurisprudential theories, one between legal positivism and natural law, and increasingly in recent years among legal positivists themselves. At times these debates developed to a meta-debate, not about the boundaries between law and morality, but on the correct way of understanding the boundaries between competing jurisprudential theories. In both cases, after much work, it often seemed that what distinguishes the competing factions is very little indeed.

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<sup>3</sup> Legal positivists have been much influenced here by the work of Joseph Raz. See in particular his 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823. For recent statements on the significance of this inquiry see John Gardner, 'Nearly Natural Law' (2007) 52 *American Journal of Jurisprudence* 1 at 13-14; Scott J. Shapiro, *Legality* (Cambridge: Harvard University Press, 2011) Ch. 1.

<sup>4</sup> If we are to believe Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850—2000' in David M. Trubek & Alvaro Santos (eds) *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 19, 21, then the boundary between law and morality is typically a mid-to-late nineteenth century concern, whereas the concern with the boundary between law and politics is the one dominating discussion in legal circles in this era. I think this is largely correct and reflects the massive growth of law that came with the advent of the welfare state, a development that inevitably forced law into much greater contact with politics. These developments have had no discernable impact on analytic jurisprudence.

## I

Hart, and the brand of legal positivism he inaugurated, played a major role in establishing these isolations (hence my rather unkind homage to the title to his classic essay).<sup>5</sup> We now know that Hart had relatively little interest in the work of most legal academics;<sup>6</sup> that he sought to translate the question 'what is law?' to the question of the connections and boundaries between law and morality;<sup>7</sup> that he considered his work as primarily methodologically neutral, and that he explicitly defended a methodology of 'understanding' that was designed to fulfill a task scientific method could not.<sup>8</sup> The way the domain of 'general jurisprudence' is currently understood, with its concern with the question of the 'nature' of law, with the primary given in it to legal validity, are all products of his isolationist attitude.

In some respect this approach has been a spectacular success story: it effectively created a new area of inquiry. Legal philosophy, as the term is currently understood, did not exist before the twentieth century. This may sound like an audacious claim, and obviously false one—what about Plato, Aristotle, Aquinas, Hobbes, Bentham, Kant (the list goes on and on)? Were they not legal philosophers? In a sense they were, but their work was not within that unique genre that is twentieth century analytic jurisprudence. What I mean by this is an intellectual domain that may be defined as 'the philosophical inquiry about law that is (or purports to be) non-normative'. None of these thinkers, nor the many other philosophers who wrote about law throughout the centuries could be said to have engaged in this sort of inquiry. Indeed, before the twentieth century the conscious division between jurisprudence (in this sense) and moral and political philosophy simply did not exist. To see the difference consider between the old and the new jurisprudence note that the concern with legal validity, that is so central to contemporary jurisprudence, is conspicuously absent from earlier works.

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<sup>5</sup> Hans Kelsen probably bears a considerable share as well, but at least in the English speaking world his direct influence is less pronounced. His indirect influence, however, is probably immense, for it is through him, I think, that Anglophone legal philosophy received the idea, developed earlier in German legal positivist circles of making 'legal validity' the primary concept of jurisprudence. I make these claims tentatively as they deserve further investigation.

<sup>6</sup> See Nicola Lacey, 'Analytical Jurisprudence versus Descriptive Sociology Revisited' (2006) 84 *Texas Law Review* 945 at 951-53.

<sup>7</sup> See H.L.A. Hart, 'Legal Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593; H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994) at 7-8. Here it was also the work of Joseph Raz that has been very influential.

<sup>8</sup> See 'Jurisprudence between Science and the Humanities', above n 2, at 36-38. On the contrast between (humanistic) 'understanding' and (scientific) 'explanation' see G.H. von Wright, *Explanation and Understanding* (London: Routledge and K. Paul, 1971).

As a result the works of many philosophers who do not fit this mold are now often neglected. Bizarrely, not to say perversely, the one pre-twentieth century philosopher whose work is closest in spirit to contemporary jurisprudence is John Austin, a minor figure in the history of thought. Together with Hart he became a founding father of sorts of contemporary jurisprudence,<sup>9</sup> at the expense of the complete neglect of the work of the much greater lights of, say, David Hume, Adam Smith, Henry Sidgwick, all of whom wrote about law in a manner that does not fit the narrow mold of analytic jurisprudence. Even Thomas Hobbes and Jeremy Bentham, often considered early proponents of legal positivism, had to have many of their ideas ignored and others 'Austinified' in order to fit the strictures of contemporary analytic jurisprudence.

Within these strictures, that is, when accepting the three isolations, legal positivism is true almost by definition. Once again, you may think I am exaggerating: aren't, say, Ronald Dworkin or John Finnis analytic legal philosophers, who are not legal positivists? Analytic jurisprudence, so the argument goes, is a set of research questions (primarily the concern with the question 'what is law?') and a commitment to a particular method of addressing those questions (the application of the methods of analytic philosophy to questions about law). Nothing in that leads inevitably to legal positivism. The truth, however, that the three isolations go beyond these commitments to subject-matter and method. Dworkin, despite sharing some of the isolationist tendencies identified above, has sought to draw some links to the work of practicing lawyers, to other fields in philosophy, as well as to the work of other legal academics. In the case of Finnis, the way this was done was a bit more subtle: Finnis has engaged in discussion with the more isolationist 'descriptive' work of Hart and Raz, but he has made it clear now that his work on natural law is 'normative, practical, moral.'<sup>10</sup> but in the very same book he rejected a central tenet of the isolationist attitude: the concern to separate jurisprudence from normative inquiry. In his more recent writings in jurisprudence, he has been more explicit in rejecting the presuppositions of Hart's work.<sup>11</sup>

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<sup>9</sup> In my view there has been a subtle and unacknowledged shift from Austin to Hart in the way the domain of jurisprudence has been understood. See Dan Priel, 'H.L.A. Hart and the Invention of Legal Philosophy', *Problema* (forthcoming 2012).

<sup>10</sup> John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011) at 418.

<sup>11</sup> See John Finnis, 'Law and What I Truly Should Decide' (2003) 48 *American Journal of Jurisprudence* 107; John Finnis, 'H.L.A. Hart: A Twentieth Century Oxford Political Philosopher' (2009) 54 *American Journal of Jurisprudence* 161. I argue at greater length about the difference between Finnis's methodology and that of analytic jurisprudence in Dan Priel, 'Description and Evaluation in Jurisprudence' (2010) 29 *Law and Philosophy* 633.

There is thus an ironic twist to Brian Leiter's claim that 'legal positivism stands as victorious as any research program in post-World War II philosophy'.<sup>12</sup> In a sense he is right: as legal philosophy did not exist (in the sense explained above) before the twentieth century and as legal positivism is in effect analytic jurisprudence with the three isolations. But, and this is the heart of my argument, this has been a pyrrhic victory, for it was achieved by effectively defining competition away from the debate. The terms of the debate—what was considered as part of the 'permissible' moves within it—were set in such a way that legal positivism was bound to end up 'victorious.' By defining legal philosophy as concerned primarily with the nature of law, by defining the nature of law as understood by the conditions of legal validity, and by defining legal validity as understood by practitioners (and not as the result of a broader normative inquiry), the 'winner' in the debate was simply not in question.

The interesting question, then, is why the isolationist approach has proven so attractive to legal philosophers? This question is, of course, not susceptible to a simple answer. For Hart, for example, part of the story probably had to do with his ethical (or rather metaethical) skepticism. Isolating legal philosophy from moral philosophy allowed him to avoid the need to engage with a question he felt unsure about.<sup>13</sup> Via a somewhat different route the same is true of Kelsen (whose ethical skepticism was more strongly and explicitly pronounced). The time in which both wrote their main works in jurisprudence was also a period in which political philosophy was thought 'dead',<sup>14</sup> and so it may have seemed fruitless to attempt to tie legal philosophy to political philosophy. But beyond these rather narrow concerns, there was perhaps also an idea, probably not fully recognised in Hart's work, but I think increasingly clear and intended as we approach the present, that the isolationist approach could secure legal philosophy from being overtaken by any other discipline. This may have reduced the opportunities for interactions with other disciplines, but—what is in fact the very same thing—those other disciplines could not pose a serious challenge to legal philosophy. In other words, isolationism meant both that from within the 'truth' of legal positivism could not be questioned, and from without the questions and methods legal philosophy could not be challenged.

That this was a pyrrhic victory can be seen from the status of the subject in legal academia. It is no secret—and I have encountered such attitudes myself

<sup>12</sup> Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and on Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007) at 2.

<sup>13</sup> Hart comes close to admitting that in Hart, above n 7, at 620-21.

<sup>14</sup> For these attitudes toward political theory (especially in Oxford) around this period see Brian Barry, *Political Argument* (Berkeley: University of California Press, 2nd ed., 1990) at xxxi-xxxviii.

from many people—that analytic jurisprudence is no longer held in high regard in many law schools. I have heard many scholars with background or interest in philosophy saying that they do not find the debates in the area interesting. I have heard it from younger scholars in the United States that work in this area is not likely to get one hired. Even in Britain where analytic jurisprudence is more prominent, in an increasing number of law schools analytic jurisprudence is often considered a spent force. The response one sometimes encounters among legal philosophers is that this lack of interest is due to the fact that most academic lawyers are not philosophically sophisticated enough, or simply not smart enough, to understand the debates. It is notable, however, that other philosophers, including moral and political philosophers, presumably sufficiently intelligent and philosophically astute, and working on close issues, seem equally uninterested in these debates. I have even heard it suggested that general jurisprudence is no longer attractive because its major questions have been, more or less, solved. That, however, to me reflects more an implication of the isolationist attitude noted above than reality. The questions of jurisprudence seem to have been solved only because the isolationist attitude eliminated the possibility of real debate.

A crisp demonstration of the shift that the isolationist attitude has brought about can be gleaned from a subtle but important shift in the meaning of 'general jurisprudence.' These days the term typically means that part of jurisprudence that talks about law in general, as opposed to philosophical or theoretical discussion on tort, contract, intellectual property or what have you. It is interesting to compare this to the two close but different contrasts in Bentham's work. Bentham distinguished between universal and local jurisprudence and between expositor and the censor. The local/universal distinction was about 'the law of such or such a nation or nations in particular' as opposed to the 'the law of all nations whatsoever.' The expositor/censor distinction was about the distinction between 'what the law is' and 'what it ought to be,'<sup>15</sup> or in modern more parlance, roughly between the work of the doctrinal ('black letter') and that of the legal reformer. With regard to the 'definition which there has been occasion here and there to intersperse' in his discussion, 'particularly the definition ... given of the word *law*,' he considered it to belong to universal jurisprudence, although he warned (a warning not always heeded by contemporary legal philosophers) that this usage may be inaccurate since 'in point of usage, where a man, in laying down what he apprehends to be the law, extends his views to a few of the nations with which his own is most connected'. It is, rather, in the 'censorial line', the normative domain that considers particular legal areas in which 'there is the greatest room

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<sup>15</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1996) 293-95.



for disquisitions that apply to the circumstances of all nations alike'.<sup>16</sup> It is this that allowed Bentham to offer his legislation drafting services for the whole world. In other words, for the most part it was the censorial (normative) work that belonged to universal jurisprudence, whereas the more 'descriptive' expository work (what we would now call doctrinal scholarship) that was local.

The redefinition of general jurisprudence as the part of the discussion not concerned with particular legal areas only makes sense, is in fact necessary, to maintain one of the isolation of jurisprudence from political theory.

## II

Legal philosophy can continue to exist in the same way it has been existing for some time now, as a niche subject that interests an ever smaller number of people, devoid of important questions and interesting answers. Alternatively, it can abandon the misguided Platonic search for a set of necessary features that all laws have and join the rest of the academic world. I started with three isolations that pervade contemporary jurisprudence. The first step to renewal would come from trying to adopt their opposites. What this means is for the most part rather self-explanatory, but a few comments may be in order:

(1) *Jurisprudents should take more interest in legal practice, and through it in politics and political theory.* Too many debates in jurisprudence are not about law but about the writings of other legal philosophers. This is to a great extent inevitable. Part of the life of any intellectual discipline consists of refining and challenging past ideas. But jurisprudence seems to have lost touch with what it is supposed to be about: law at the expense of often scholastic debates among legal philosophers. Here are some topics that are properly 'general' and theoretical but do not fit mainstream views as to what general jurisprudence should be about: the relationship between law and other social institutions; law in a democracy; comparative jurisprudence; law in the welfare state; the role and significance of path dependency in the law; evolutionary ideas in the law; law and well-being; the political aspects of legal taxonomy; what psychological research about morality and politics tells us about the shape law has taken, and many others. All these topics will force legal philosophers to think more and more clearly about the actual practice of law. As I see it, these questions are not merely efforts at diversifying or branching out. Properly thought through they will prove valuable to anyone interested in an answer to the question 'what is law?'

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<sup>16</sup> Ibid. at 295; cf Dan Priel, 'One Right Answer? The Meta-Edition', in W.J. Waluchow, ed., *The Nature of Law* (Oxford: Oxford University Press, forthcoming 2012), available at <http://ssrn.com/abstract=1835982>.

(2) *Jurisprudents should embrace science*: science is the greatest success story of the last three centuries. And the success shows no signs of abating. Area after area that we were once told were beyond the realm of science have proven up to the task. Jurisprudence has gone in the opposite direction. The historical route leading from Bentham to Austin to Hart to Raz involves the successive cutting of whatever ties to science were there by earlier generations of legal philosophers. This was a conscious commitment to the view that the fundamental questions of jurisprudence are beyond the ken of science, that philosophical reflection is fundamentally different and in some respect opposed to a scientific one. As we have seen, this attitude required both a commitment to what properly belonged to jurisprudence and to a certain corresponding methodology. I believe there is little to support this view and many reasons to reject it. Philosophers in other areas increasingly recognise that science is their friend, not their competitor; legal philosophers should follow suit.

(3) *Jurisprudents should attempt to offer models of law instead of identifying its essence or nature*: Instead of the search for necessary conditions for the 'nature' of law, instead of looking for the existence conditions that all legal systems necessarily have, legal philosophers should aim to compare what may be called 'models' of law. This approach aims to identify not all the features that something must have in order to be law, but rather some features that help explain certain important features about law. The aim here is to recognise that illumination in the explanation of social institutions often comes from isolating certain features and offering a simplified mechanism that explains them. In the context of law this could mean at least two different things. One is the recognition that laws in different environments (pre-modern versus modern; democratic versus non-democratic; in a contemporary welfare state versus before the welfare state; in a globalised world versus the pre-globalised world) have to address different concerns and that therefore concepts like the rule of law, obligation, or coercion, have therefore taken a different shape. Different models can illustrate these differences. The second way is even more interesting: we often recognise that the same function can be performed in different ways. A steam engine and an internal combustion engine both perform a similar function even though the way they do so is different. Similarly, different legal systems may perform the same function through different mechanisms. Once again, jurisprudence could help not only identify functions that legal systems perform but also suggest different models for the different ways in which these functions may be realised.

## III

If what I said above is true, it *will* mean the death of legal philosophy as the term is currently understood by many of its practitioners. That is not to be lamented. It *may* also lead to the death of legal philosophy in the broader sense of the term—philosophical reflection about law—as a viable object of inquiry. This sort of inquiry might end up subsumed (in the way it used to be subsumed) under moral or political philosophy, or social philosophy, or another discipline altogether (political science, psychology). Perhaps this is the ultimate fate of an attempt at philosophical inquiry of a social phenomenon. Perhaps jurisprudence will be able to reinvent itself in an interesting and novel manner, as the ‘location’ for gathering the insights from various disciplines none of which takes special interest in the law. Jurisprudence thus understood might be the name we give to the attempt to come up with a unifying account of those different perspectives on law. This may prove the end of jurisprudence as we know it. This means legal philosophers face a dilemma: either continue in the same manner jurisprudence is practiced today, slowly but steadily becoming less and less relevant, less and less read, and less and less cared for; or reinvent it in some way. Paradoxically, it is the former approach that is more likely to keep jurisprudence alive, simply because the three isolations have created such a secure bubble for jurisprudence that no other discipline could challenge it; and as a result of the marginalization of jurisprudence that came with the three isolations, no-one would bother. But in this way jurisprudence will be alive in the same way that a man in a coma is alive. Making jurisprudence relevant risks the eliminating it as a distinct sub-discipline, as it will no longer be able to claim for itself a unique set of questions that are beyond the purview of other disciplines. I think it is a risk worth taking.

**H.L.A. HART, JULIUS STONE AND THE STRUGGLE  
FOR THE SOUL OF LAW\***  
MICHAEL KIRBY AC CMG\*\*

I TWO NOTABLE LIVES

The publication of Nicola Lacey's *A Life of H L A Hart - The Nightmare and the Noble Dream*<sup>1</sup> is a notable event. If jurisprudence is the study of the principles of law and legal systems and the theories about their fundamental basis, a biography of one of the twentieth century's most significant contributors to the discipline is to be welcomed.

Books on the lives of judges and other lawyers are comparatively few - for the obvious reason that those who succeed are commonly obliged to lead rather dull lives. Success in the practice of law exacts a cost. Normally, it imposes a limitation on publishable extracurricular activities that might otherwise add spice to a life so as to make it worth reading about. If this is so of the actors who take part in the dramas of courtrooms, how much truer it is of scholars who spend most of their lives in studies and classrooms, writing down their analysis of the underlying foundations of law and obedience to law and teaching often ungrateful students. Such scholars will usually be viewed as poor prospects for an interesting life story. If we want to read their theories, we can go directly to their writings, without troubling ourselves too much about their personal circumstances.

Yet, in the past decade, two books have been written on notable legal philosophers. Nicola Lacey's biography of Herbert Hart complements Leonie Star's 1992 work *Julius Stone - An Intellectual Life*<sup>2</sup>. Professor Lacey's recent study is the more substantial one, half again as long and more intensive in the description of the inner life of the subject. However, for Australians, Julius Stone is probably viewed as having enjoyed the greater impact. He lived and worked amongst us for most of his professional life. Hart visited Australia but once, in 1971. Yet both of them continue to be, for Australians, leading expositors of the principles of legal philosophy. Somehow, they seem larger than life. The new life of Hart confronts us with an insight into the rivalry between these two very different scholars. Nicola Lacey helps us to see the

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\*\* First published (2005) 27 *Sydney Law Review* 323. Reproduced with the written permission of the author. Based on an address at a seminar on legal biography, Australian National University, Canberra, 17 December 2004.

<sup>1</sup> Oxford University Press, 2004 ('Lacey').

<sup>2</sup> Oxford University Press in association with Sydney University Press, 1992 ('Star').

similarities and differences in their views, which, in turn, grew out of the contrasting stories of their external and internal lives.

Inspired by Lacey's eminently readable account of Hart's life, I will collect some of the similarities and differences between Hart and Stone. By any account, each was an important thinker and writer for English-speaking people in the field of jurisprudence. The core of Hart's professional work was performed as Professor of Jurisprudence in the Oxford Law discipline - a post he held from 1953 until 1969. Julius Stone, after a controversial start, served as Challis Professor of Jurisprudence and International Law at the University of Sydney from 1941 to 1972. Both of them held academic and other appointments before and after these central assignments within distinguished universities on the opposite sides of the world. Stone, for instance, after finishing at Sydney University was quickly welcomed into the newly established Law School at the University of New South Wales. This was to prove a safe haven for him, in many ways more welcoming and congenial than the Sydney Law School had been. But it was around their primary professional appointments, that both scholars built a great deal of national and international activity in teaching and writing about jurisprudence. Both were to play important parts in the development of an understanding about the law, and not only within the legal profession.

## II STUDY IN SIMILARITIES

The similarities between Stone and Hart are not difficult to perceive. Each was born into a family of Jewish immigrants who had settled in England in the nineteenth century before the *Aliens Immigration Act* 1905 (UK) placed restrictions upon such immigration. Stone's family had fled intensified anti-Semitism in Lithuania. Hart's family derived from East Prussia, in what is now part of Poland. When, years later, Hart was confronted by a boastful matron who said that her forebears were robber barons from the border country of England, Hart gently responded, that his forebears were 'robber tailors in the East End'<sup>3</sup>.

Stone's father was a cabinet-maker who had settled in Leeds where he brought up his large family that included the gifted Julius. Hart's father was also 'in trade'. Sim Hart, given like his son to periods of deep introspection and depression, was a furrier. He was to end his life in suicide.

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<sup>3</sup> Lacey, 13.

From their earliest days, the two young Jewish boys, each born in 1907, were to taste anti-Semitism. During the Great War, a mob of anti-German locals gathered outside the Stone family business, threatening damage and mayhem. Stone's father, wearing a skull cap, confronted them bravely pointing out that he had sons fighting for the King in France and promising to kill them if they touched his property, even if he were to hang for it<sup>4</sup>. The mob retreated. These events in Leeds left a bitter memory and a scar on Stone's psyche. Hart, whose family was somewhat better off, was to taste serious racial discrimination later in his life, when perhaps he could cope with it more readily.

Both boys won scholarships that helped them to advance their education and to lift them out of the economic and social disadvantages into which they were born. Hart received more encouragement in his education from his family. One suspects that Julius continued to advance only through the power of his considerable will and a frenetic energy that was to continue all his days.

Both Hart and Stone went up to Oxford where their dazzling intellectual gifts were quickly recognised. Stone was soon attracted to the lectures in international law given by J L Brierley, who enlivened the young man's interest in the potential of the League of Nations to protect ethnic minorities, a matter naturally close to Stone's interests. The banishment of Jews from various parts of Europe, which was to herald even worse events in the 1930s, engaged Stone's attention. It led to the second string to his bow, namely his deep interest in international law. If Hart was to develop a second string, it lay in the field of causation in the law - actually an unresolvable philosophical quandary that was to produce, with his friend Tony Honoré, the masterpiece *Causation in the Law* - a book often cited by courts in all parts of the world when judges are confronted with vexed problems of this kind<sup>5</sup>.

Whereas Hart welcomed his absorption into the Brahmin world of Oxford of the 1930s, Stone was more critical of that environment. Each of them had an outsider's scepticism about the self-satisfaction and unquestioning privilege of the Oxonian world view. Stone was to do more about it. Pursuing his interests in international law, he took up a Rockefeller Fellowship to further his studies in this discipline at Harvard University. There he came under the eye of Professor Manley O Hudson. His father did not approve of his academic pursuits. But Stone had by now determined to follow the life of a legal scholar. Hart stayed in England and, being more Anglophile by disposition, was quickly absorbed. For a time he pursued quite a successful

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<sup>4</sup> Star, 3.

<sup>5</sup> See eg *Chappel v Hart* (1998) 195 CLR 232 at 243 [24] per McHugh J; at 270 [93.6] of my own reasons; at 283 [116] per Hayne J.

career as junior counsel at the Chancery Bar in London. It was a career that left him unsatisfied. He yearned for a return to Oxford and to scholarship in the field of jurisprudence.

At Harvard, Stone fell under the spell of the sociological school of jurisprudence that predominated there. It had been cultivated at Harvard by Dean Roscoe Pound, who held successive appointments there between 1913 and 1937. Karl Llewellyn and Jerome Frank were other contributors to the Harvard dedication to viewing law as a social discipline. They rejected the purely analytical approach of the legal positivism and the verbal analysis taught at the English universities. For a restless, critical outsider, like Stone, Harvard must have been a breath of fresh air. It afforded an injection of legal realism at a critical phase in Stone's intellectual development, that Hart was to miss. Years later, in 1956-57, in the 'jurisprudence year' of the Harvard Law School, Stone and Hart were to come together to teach their separate classes to the fortunate Harvard students. Stone was in the mainstream of the predominant jurisprudential theories of the Harvard School. He fitted naturally into that place, where he had once, still in his twenties, almost received appointment as Dean<sup>6</sup>. Hart seemed less comfortable and attracted smaller classes. But he received greater accolades and was honoured by the invitation to deliver the O W Holmes Lecture - a privilege that was thought to engender envy in the ambitious Stone<sup>7</sup>.

In striking out on their careers, both Stone and Hart suffered burdens of discrimination because of their Jewish ethnicity. In Stone's case, it was immediate and significant. It is now known that his numerous attempts to secure academic appointments were frustrated, despite his brilliant scholarly achievements on both sides of the Atlantic, by referee reports that cautioned about his Jewish background and attitudes and his Zionist inclinations. Because Hart was more ambivalent about his Jewish origins, and definitely unattracted by Zionism, he suffered less on this score. However, in Nicola Lacey's book there is one instance that shows the prejudice that ran deep and may have been replicated in unknown ways during Hart's career.

After serving many years within New College at Oxford University, Hart applied to be elected Principal of Hertford College. By this stage (1971) he had a beautiful house in Oxford where, with his wife Jennifer, he had raised their children. He did not want to move to the Principal's lodgings within Hertford College and raised this issue, only to be assured that it would not create a difficulty. Later he was solemnly told that the College constitution obliged the

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<sup>6</sup> Star, 41ff.

<sup>7</sup> Lacey, 197-202.

Principal to live within the College, residing outside 'only in cases of emergency'. On this footing Hart, with a little encouragement, withdrew.

Years later, when the Chancellor of Oxford University, the former British Prime Minister Harold Macmillan<sup>8</sup>, was sitting next to Hart at a College feast, they fell into talk about Macmillan's role as Visitor to Hertford College. Macmillan disclosed that he had only had one problem. It concerned a proposal of the College to appoint, as Principal of the College, a lawyer who was a Jew. Macmillan said that the appointing committee had not realised this fact and was concerned, upon the discovery, that it would not look good to turn down 'a perfectly reputable man because he was a Jew'. Yet 'luckily' they discovered the requirement of the College constitution that the Principal should live in the lodgings. So they used this as the excuse to turn the candidate away, without mentioning his religion.

Little did Macmillan know that Hart was the person of whom he was speaking. Ever the Englishman, Hart did not embarrass Macmillan by revealing the truth. He said later, on telling the story, that it would have been too painful to have done so. Hypocrisy triumphed. In this, as in other things, Hart was to regret his silence and to regard it as a mistake. One can be absolutely sure that Julius Stone would not have kept the secret to himself. But then, Macmillan would have never raised the issue with Stone for whom Jewishness was a central, and never secret, aspect of his being.

To some degree, both Hart and Stone felt themselves strangers in the law schools to whose chairs they were appointed. Hart, who had turned his back on the practice of law which he regarded as restricting, never truly viewed himself as a teacher of law. For Hart, his discipline was philosophy, with particular attention to legal applications. Stone was not particularly happy in the environment of the Sydney Law School. His arrival had been tumultuous. Unable to secure professorial appointment to academic positions in Britain or North America, because in part of the offending references, Stone had ultimately accepted the post of Dean at the University of Auckland, in New Zealand. It was from there, in 1941, that he was recruited to the Challis Chair in Sydney. His appointment was attacked in the press and criticised in the Sydney University Senate. It became a public controversy. There were many who urged that the post should be filled by an Australian, specifically an ex-serviceman or someone who had done his patriotic duty. However, for some that was simply the stated obstacle.<sup>9</sup>

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<sup>8</sup> Lacey, 313.

<sup>9</sup> Star, 60.



For others, Stone's Jewishness was raised, as if it were a disqualification for the appointment. Supporters in Sydney sprang to his defence. One, himself Jewish, hinted obliquely that Stone had performed work for the security services in New Zealand, of importance to the war effort there. Hart, in England, was by this time working for MI5 and MI6 in the British Security Service. However, Stone immediately let it be known to the protagonists in Sydney that this was false. He refused to compromise. For him, the motion for rescission of his appointment was pure anti-Semitism. In the end, the rescission was not carried. Stone took up the post. Yet from the start, his welcome at the Sydney Law School was less than entirely warm. Even in the 1950s, when I was at the Sydney Law School as a student, he was housed in tiny quarters with his loyal secretary Zena Sachs and his surrounding and visiting group of scholars - a kind of intellectual Siberia with few connections with the teachers of the common law. Stone was often treated (and sometimes seemed to view himself) as an alien in the Sydney Law School. His subjects of jurisprudence and international law were viewed by some judges, practitioners and scholars as separate and distinct - not quite legal subjects.

To a lesser extent, Hart suffered a similar fate; but in his case it was mainly of his own choosing. Hart was intensely irritated by the excessive deference shown by legal scholars in Britain to the judiciary and practising legal profession. He refused to sprinkle his essays, referring to recent judicial decisions, with the usual phrase 'with great respect'. For him, ideas were either supportable or insupportable. There was no need to show the forced deference exhibited to the judiciary in those days.

Both Stone and Hart recognised that a point was reached where law ran out. Each understood that, ultimately, law was a social construct, with a vital function to perform in society. Obedience to the law could not be explained solely from within the law's own paradigm. However, whereas Hart sought to find explanations for most of law's binding force within the structure of primary and secondary rules, Stone emphasised the need to look beyond law's rules to social forces to explain the principle of obedience and the limits to which that principle could be pushed.

Both Stone and Hart were greatly influential with their students. Each of them had a gift, and predilection, to choose particular students, encouraging them in their studies. Hart did so, to a very large extent, as examiner for many postgraduate degrees. Stone selected students whom he regarded as specially talented. He then engaged some of them in his prolific writings, effectively as research assistants. This is how I came to know Julius Stone.

In my late years at the Sydney University Law School, Stone was involved in the rewriting of his monumental work *Province and Function*<sup>10</sup>. The three successor volumes, which were to be published in the 1960s, required extensive new work. Stone engaged me to analyse a vast mass of written materials provided by his colleague Ilmar Tammelo, from translations from the original Russian on the then current Soviet view of the Marxist theory of the withering away of the State. I clearly remember sitting in Stone's study at his home on the north shore of Sydney, where, under a reproduction of Rembrandt's masterpiece *de Staalmeesters*, we laboured over our differences. In the end, my valiant efforts were rewarded with a single sentence acknowledgment in the Preface to one of the new volumes<sup>11</sup>.

At the time, I viewed this as an unequal reward for heroic labour. As I look back, I can see that my true reward was working closely with this dynamic and energetic intellectual. Then, it seemed as if I was part of Stone's slave labour. Now, I can see that he was doing me a big favour. Stone's choice of his students and the rewards he offered us have left insights that last our entire lives. So it was with Hart's students. Interestingly, however, Hart's students tended to have more than profound respect for their master. Hart somehow won deep personal affection as well. He was a more spontaneous, personal, excited man. He was constantly sharing the wonder of experience and of thoughts and legal analysis. With Stone, one always felt the constraints imposed by the rush of time. Time was precious. Stone could spare us only so much of it. Respect rather than affection was the feeling that I believe most of Stone's students and assistants felt towards him.

Both Stone and Hart were to have an impact on the society in which they worked that went far beyond that normal to a philosopher or professor of jurisprudence. In Hart's case, the impact could probably be seen most clearly in the exchange of opinions he had with Lord Devlin over the role of law in upholding public morality<sup>12</sup>. In Stone's case, his influence on public dialogue was wide and of long standing. Often as a young man I listened to him broadcast 'News Commentary' just before the national radio news on the Australian Broadcasting Commission. Stone was a prolific commentator and writer in the popular media. He frequently contributed to discussion about international law and the United Nations. But for the appointment of Sir Percy Spender to fill a seat available to Australia on the International Court of

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<sup>10</sup> *The Province and Function of Law: Law as Logic, Justice and Social Control* (AGP, Sydney, 1946).

<sup>11</sup> *Legal System and Lawyers' Reasonings*, Maitland, Sydney, 1964.

<sup>12</sup> The debate between Hart and Devlin is described in Lacey, 6-7, 256-261. Hart's lectures on 'Law and Morals' followed closely the argument in his *Law, Liberty and Morality* (OUP, Oxford, 1963). Hart also had famous debates with Professors Lon Fuller and Hans Kelsen, described in Lacey, 197-202, 252-253.

Justice, Stone might well have received an appointment to that august judicial body. Such was not to be. Stone and Hart were public intellectuals. Each was engaged with his society. Each contributed to the world of ideas beyond the academic cloisters.

Both Stone and Hart were blessed with loving wives and talented children. Mrs Rea Stone was a fiercely loyal companion to Julius. She shared the triumphs and the disappointments. In his early days, she often acted as his secretary and assistant. Their highly talented children have continued to play a role in Australian society and beyond. Some members of the family have gone on to contribute to the law<sup>13</sup>. Of course, they saw Stone as a loving father and grandfather. They would have seen the softer elements of his personality. Perhaps another book needs to be written to supplement Leonie Star's biography on the public life of Stone. It would be a book that told more of his inner-workings.

Inner thoughts are displayed, with strengths and weaknesses, in Nicola Lacey's more intense book on Hart. In some senses, Lacey's is a psychological study. It reveals more of Hart's inner-being - and especially in his relationship with his highly talented wife, Jennifer. The occasional tensions and difficulties in their relationship are disclosed, in a way that is not identified in the case of Stone. One gets a feeling that Stone's home life was tranquil and private - a refuge of loyal support that he did not always have from colleagues in his professional life. Both Hart and Stone had a considerable support system that is essential to a public figure, whoever they may be.

Jennifer Hart has written her own biography<sup>14</sup>. It gives her story, in a way that Rea Stone never did write or would have written. We get comparatively few insights into the Stone family life from Leonie Star's book. It is not coincidental that throughout that book Julius Stone is described by his biographer as 'Stone' whereas throughout the book on H L A Hart, he is described as 'Herbert'.

Stone was reputed to have had a special empathy for migrant students studying law at the Sydney Law School. Because this was not my minority, it was not a side of Julius Stone that I ever saw. To the Anglo-Celtic majority, Julius was impressive, talented, energetic - but always the professor, always a little remote. Hart, as Lacey describes him, made deep personal friendships with students - he engendered affection, even more precious than respect.

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<sup>13</sup> Including his daughter-in-law, Margaret Stone, now a judge of the Federal Court of Australia and his grand-daughter Adrienne Stone, now a faculty member of the Australian National University.

<sup>14</sup> Jennifer Hart, *Ask Me No More*.

### III STUDY IN CONTRASTS

The similarities of Hart and Stone were thus profound. But so were the differences. It is now necessary to mention some of the chief of these.

Gustav Mahler once said 'I am thrice homeless, as a native of Bohemia in Austria, as an Austrian among Germans and as a Jew throughout all the world. Everywhere an intruder, never welcomed'<sup>15</sup>. Whilst Hart and Stone shared a double exclusion - their Jewishness and modest class origins - Hart, like Mahler, added a third layer, although in all likelihood a different one. It is brought out with great sympathy and sensitivity in Nicola Lacey's biography.

Hart came to accept himself as basically homosexual. In 1937, at the time of his appointment to his first substantive academic post in New College, Oxford, he confided to his friend Christopher Cox: 'I am or have been a suppressed homosexual (I see you wince) and would become more so (I mean more homosexual and less suppressed) in Oxford'<sup>16</sup>. In the same way as with his Jewishness, Hart was ambivalent about his homoerotic feelings. He was also acutely conscious of the social prejudices about homosexuality, and especially at his time of reaching sexual maturity.

It was a painful journey for Hart to come to terms with this aspect of his nature, assuming that he ever fully did. His sexual orientation did not mean that he loved his wife, Jennifer, any the less. On the contrary, in every department except the physical, their personalities complemented each other. He told her, quite candidly, from the start, that hers was 'the only woman's body I've ever loved' or from which he had 'any physical pleasure'. As Lacey points out, the revelation, in a letter, illuminated 'the stunted nature of Herbert's emotional life and his ambivalent sexual feelings'. Almost certainly it had led to bullying at school and teasing during Hart's early years at Oxford.

Marriage, and a physical sexual life was not impossible for Hart. So, in the manner of many in those times, he proceeded to marry Jennifer and to father their children. He attempted self-analysis both about his diminishing interest in sex and his feeling of being emotionally closed<sup>17</sup>. He confided his anxieties in letters and in his diaries, from which Lacey quotes extensively.

As a human story, it is tragic to read the suffering and denial evident in the quoted passages. Physical expression of Hart's sexual identity is frequently mentioned or hinted at. But it is not developed and appears less significant

<sup>15</sup> G Mahler, quoted M Kennedy, *Mahler*, J Dent & Sons, London, 1974 (2nd ed, 1990), 2.

<sup>16</sup> Quoted Lacey, 61.

<sup>17</sup> Quoted Lacey, 111.

than the frustration of being forced into deprivation and pretence. Yet one very good result came out of this denial and for it a wider world of ideas must be thankful. The events must first be placed in their historical context.

The disruptions of the Second World War led to many challenges to the established legal and social order, in Britain and elsewhere. In the post-War world, things long accepted were subjected to critical scrutiny. Alfred Kinsey, a biologist who was expert in the gall wasp and working at Indiana University, in 1948 published his path-breaking report on *Sexuality in the Human Male*<sup>18</sup>. In 1953, he published the companion volume on *Sexuality in the Human Female*<sup>19</sup>. These volumes demonstrated the significant proportion of people in American society who identified, to themselves at least, as exclusively or mainly homosexual in orientation. The likelihood that this was true of other societies, indeed of the human species, became gradually accepted. The message crossed the Atlantic.

In Britain, the Wolfenden Committee embarked upon the inquiry that led to the recommendation of substantial changes in the criminal laws against adult consensual homosexual acts<sup>20</sup>, the so-called 'unnatural offences'. This proposal was published in September 1957. In 1959, Lord Devlin delivered the Maccabean Lecture in Jurisprudence to the British Academy. He used the occasion to attack the general principle of the Wolfenden Report. According to Devlin, social morality was a seamless web. Once the law withdrew from the support of a distinctively Christian morality, the result would be a breakdown in the British social order. Thus, society had the right to punish with criminal sanctions private immorality that caused indignation or disgust to the majority<sup>21</sup>.

Patrick Devlin's views were anathema to Hart's liberal principles. In response, in July 1959, he gave a talk on BBC Radio, 'Immorality and Treason'. It was later published in *The Listener*. Hart drew upon the principle of John Stuart Mill that the only justification for invoking the coercive power of the state - especially in criminal law - was the necessity of preventing harm to others. Hart did not publicly associate himself with the homosexual law reform campaign that was established to support the Wolfenden proposals. Doing so would not only have been contrary to his attitude to his own

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<sup>18</sup> A C Kinsey, W B Pommeroy and C E Martin, *Sexual Behaviour in the Human Male* (1948, Saunders, Philadelphia).

<sup>19</sup> A C Kinsey, W B Pommeroy, C E Martin, P H Gebhard, *Sexual Behaviour in the Human Female* (1953, Saunders, Philadelphia).

<sup>20</sup> *Royal Commission into Homosexual Offences and Prostitution*, Cmnd 247, HMSO 1947.

<sup>21</sup> P Devlin, Maccabean Lecture noted in Lacey, 221: see also P Devlin, *The Enforcement of Morals*, (OUP, Oxford, 1965); cf N Lacey, C Wells and D Meure, *Reconstructing Criminal Law*, (Weidenfeld & Nicolson, London, 1990) at 3, 311-312.

Britishness and sense of uninvolvedness. It would also have been a difficult step for a man to take who, at the very least, was bisexual, whilst maintaining his own peace of mind and personal relationships.

Driven by events and doubtless his own deep feelings, Hart began giving a number of lectures on the differences between himself and Devlin. They attracted large audiences and much scholarly notice. They took Hart into profound questions concerning the limits of democratic lawmaking and the ways in which those limits could be spelt out, respected and maintained in a principled way. These were ideas he was later to express in his most famous work, *The Concept of Law*. However, for the public in Britain, it was his work as a gentle, reasoned advocate of reform of the law on homosexual conduct that had the largest impact.

Hart gave dignity and reason to the cause that Sir John Wolfenden had advanced on pragmatic grounds. He gave a principled basis for supporting the reforms that eventually made their way into the statute books in England in the form of the *Sexual Offences Act* 1967 (UK). It is possible that the passage of such significant changes to the law would not have been so easy and swift, in the face of such powerful conservative opposition, had it not been for the strong intellectual engagement of Herbert Hart. Of course, we now know that he spoke from his own experience. But he presented his views in the language of philosophy and reason. As the opinion of a married man with three children, they doubtless assumed the respectability of apparently total neutrality. As it happened, the stated opinions were fully consistent with Hart's general views on liberty and the role of law in attaining it. Hart's world view had a unity. But his opinions had an edge to them and this gave them a special conviction and sense of urgency which struck a chord in the British public mind.

Years later - and long before I knew of the revelations about Hart appearing in Nicola Lacey's biography - I read for some purpose the entry on Jeremy Bentham in the *Biographical Dictionary of the Common Law*<sup>22</sup>. In the middle of the discussion of the range and volume of Bentham's writing - and the description of his many proposals for change stretching from improved school education, economic theory, English grammar and birth control - was mentioned Bentham's demands for 'a sceptical examination of ... homosexuality'. The author who wrote the entry on Bentham was identified as 'H.L.A.H.'<sup>23</sup>. He quoted J S Mill's description of Bentham as 'a boy to the last'. This was the way Hart is also described in Lacey's biography - a man who

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<sup>22</sup> A W B Simpson (ed), Butterworths, London, 1984, 45.

<sup>23</sup> *Ibid*, 46.

never threw off the wonder of youth and a fascination in new things and new ideas.

We are given few, if any, similar insights into the most private thoughts of Julius Stone in Star's biography. Certainly on the issue of homosexual offences, Stone, writing from Auckland in 1941, showed none of the sensitivities later evident in Hart's writings on the subject. To the contrary, his views reflected the somewhat unyielding opinions of that time<sup>24</sup>. Never in all my dealings with him did Stone ever intrude the slightest reference to his personal or sexual life. So far as we know, Stone kept no tell-tale diaries, as Hart did, to reveal to a later generation intimate personal thoughts of such a character. His marriage to Rea was revealed in public as close, mutually supportive, loyal and traditional. No windows are opened by Star, or anyone else, into the private *persona* of Julius Stone.

One can imagine that the revelations, to the world at large, of Herbert Hart's sexuality in the Lacey biography would be painful, at least to some members of the Hart family and some close friends, especially of the older generation. In a way, this course is similar to the disclosure to a mass audience, in the recent film *Kinsey*, that Alfred Kinsey was also bisexual and had homosexual experiences that were important to him. Critics of the *Kinsey* film<sup>25</sup> condemn the way in which Kinsey's self-interest overlapped his research on human sexuality and, as they claim, distorted the presentation of his data and his conclusions. Doubtless, some of the same critics, if they did not regard it as too esoteric, would say the same things about Herbert Hart's response to Lord Devlin.

Yet for the progress of humanity along a path of rationality, science and truth, the world, and not just members of sexual minorities and their families, must be specially grateful to people such as Kinsey and Hart. In a way, too, the world must be grateful for the genetic or other factors that not only affected their sexual orientation but also propelled them into doing something to improve society's response to this phenomenon they knew well from their own life's experiences.

The closest that Stone came to a passion of the heart affecting his scholarship was his fierce loyalty to the State of Israel. For Stone, this was a

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<sup>24</sup> See J Stone, 'Propensity Evidence in Trials for Unnatural Offences', (1941) 15 *Australian Law Journal* 131 at 131-132 (referring to 'powder puffs commonly used in [gross indecency offences]' and 'certain pervertedly indecent photographs' that were found and admitted into evidence although not used in the alleged offending). However, Stone was critical of the method of judicial reasoning 'with respect', as he stated at 134.

<sup>25</sup> Fox Searchlight Pictures, *Kinsey*, released 15 November 2004. The film was directed by Bill Condon and Liam Neeson appears as Alfred Kinsey.

cause of the emotions and of ethics as he viewed them. His feelings grew out of his own experiences of anti-Semitism, his witness to the sufferings of the Holocaust and his belief that the creation of a homeland for the Jewish people was both timely and necessary. It led some of his colleagues to express fear even to discuss Israel with him. However, in a letter in August 1967, Stone asserted that his writings demonstrated not bias towards Israel but bias towards justice. For justice, he was unwilling to suppress his 'passion'<sup>26</sup>. Zionism was to split the small Jewish community in Australia during the Second World War and thereafter. Some Australian Jews, such as Sir Isaac Isaacs, past Justice and Chief Justice of the High Court of Australia and Governor-General, were opposed to Zionism. Stone was appalled. He wrote an open letter to Isaacs which later grew into an extended essay, *Stand Up and be Counted*<sup>27</sup>.

Upon these matters, and Zionism generally, Hart was much closer to the opinion of Isaacs. He was somewhat ambivalent about his Jewishness and sceptical concerning the creation of a new State in the middle of the Arab world. Upon this matter, he felt and thought more as an Englishman than as a Jew. When, eventually, in later years, he travelled to Israel for the first time to give a lecture, he was tackled by one of his hosts on why he had not come earlier. For Hart, this presented a difficult problem.

During the visit to Israel, Hart was invited to attend a meeting at the Palestinian University of Bir Zeit. Several of the western scholars present, but not the Israelis, accepted the invitation. Hart did not. He did not want to upset his hosts. As with his reaction to Harold Macmillan, this portrayed Hart not so much as a Jewish scholar as manifesting the attitudes of an English gentleman. There would be little doubt that Stone would have felt aggrieved and angry about Hart's neglect of Israel and his failure to rally to its cause. Amongst homosexuals, there are similar controversies today. Some regard their sexuality as a wholly private issue, the revelation of which might do them harm. Others reject that notion and insist that wrongs and stigmatisation will never disappear until all who are affected nail their colours to a new mast. For Julius Stone, Zionism was undoubtedly an affair of the heart and the mind, taught by experience. For his 'rival', the closest he came to such a public motivation was on the deeply personal, and then still secret, issue of his sexuality.

A big change came over Stone's career with his effective banishment to the Antipodes. Of course, he maintained his links with scholars in Britain and

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<sup>26</sup> Stone quoted in Star, 189. Compare his identical response 40 years earlier to anti-Zionist expression in England: Star, 44.

<sup>27</sup> *Stand up and be Counted: An Open Letter to the Right Hon Sir Isaac Isaacs PC GCMG on the 26th Anniversary of the Jewish National Home*, Ponsford, Sydney, 1944.



North America. He returned regularly and held some joint posts. But his daily work for most of his life in Sydney, before the advent of fast and cheap transportation, meant that inevitably he was cut off to some extent from the intellectual mainstream of his discipline. Hart, on the contrary, was at the centre of it in Oxford. Moreover, he was there at a time in legal developments when the writings of the leading scholars at Oxford, like the writings of the leading judges in the English courts, had a profound and continuing influence in all parts of the Commonwealth of Nations and in the United States.

If today H L A Hart is cited frequently in United States judicial opinions and scholarly texts, it is probably because of the fact that Hart remained at a global hub of intellectual endeavour. Stone, to a large extent, was geographically sidelined. Yet it was the great fortune of Australia and New Zealand that Stone came to this part of the world. In a sense, he brought with him the school of jurisprudence that Roscoe Pound had built at Harvard, adapting it to his own views.

Stone's writings and thoughts were to carry an impact in the theory of ideas about law akin to that which, earlier, William Blackstone's writings on the common law were to play in the United States. After the Revolution, cut off from the source and stimulus by formal connection with the English courts, the Americans were highly dependent on Blackstone's *The Commentaries on the Laws of England*<sup>28</sup>. That work became the source of basic legal principles that the early judges and lawyers of the United States carried in their knapsacks as that nation was opened up and brought under the rule of law. Stone did not attempt an encyclopaedia of the law. But he did write a major statement on the theories of law. Its full impact was only to be felt in a latter time as his ideas about what law was, how it came to be expressed and what values underpinned it gathered supporters with each year of graduates who were submitted to Stone's teaching.

Stone was, in truth, a vital antidote in his time to the established school of legal positivism that had taken root in Australia and whose finest expression was found in the commitment of Chief Justice Sir Owen Dixon to the resolution of great disputes by 'strict and complete legalism'<sup>29</sup>. At such a time, the powerful instruction of Stone concerning the legal categories of indeterminate reference; the leeways for judicial choice; and the manner in

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<sup>28</sup> Published London, 1765-1769.

<sup>29</sup> Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi at p xiv. See generally P Ayres, *Owen Dixon: A Biography* (Miegunyah Press, Carlton, 2003), 292. For differing views see J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110; and a repost by the author (2004) 24 *Australian Bar Review* 219 based on M D Kirby, *Judicial Activism: Authority, Principle and Policy and the Judicial Method* (Hamlyn Lectures, 2003), Sweet & Maxwell Limited, London, 2004.

which the *ratio decidendi* of cases was to be found and extended, came to influence increasing numbers of Australian judges and lawyers.

Stone's leeways for choice were not totally open-ended. He did not support the tyranny of judicial whim. He was a strong proponent of the rule of law. It would be a mis-statement of his theory of law to suggest that he favoured unbounded judicial creativity or discretion about law. However, his central contribution was to teach that some creativity is inevitable, inescapable and desirable.

It is impossible to understand the creative period of the High Court of Australia in the 1990s, when Sir Anthony Mason was Chief Justice, without an awareness of the powerful impact of Stone's teaching on at least three members of the Court at that time - Mason, Deane and Gaudron.

If, for the time being, there has been something of a return to the commitment to 'doctrine' of earlier times, it seems unlikely, in the long run, that Stone's message will not prevail in Australia. In my experience, it is an accurate description of the way judges, especially in final courts, exchange private thoughts about issues of legal policy and principle relevant to their decisions. The most that Stone taught was that judges should be honest and transparent in their exposure of the considerations of legal policy and principle as well as legal authority, that influence their decisions. They should be themselves aware of the way such considerations influence their approaches to ambiguous expressions in the Constitution, the contested language of legislation and disputed principles of the common law. The furtherance of these ideas will remain Stone's great achievement in the Antipodes. If he, rather than Hart, has had the greater impact amongst Australian lawyers, it is, perhaps, because we had the greater need for his instruction.

There were differences between Hart and Stone in their attitudes to the world and its ways. Hart absorbed more closely the techniques and habits of English expression. To some extent he seemed, consciously or unconsciously, to play the role of the absent-minded English professor. He was more urbane, witty, less intense and less driven than Stone. He was given to understatement, where Stone would sometimes err on the side of overkill. Famously, Stone's writings are full of the most copious footnotes in which he details the sources of his ideas with total intellectual honesty. This is done, not only from a personal sense of truthfulness, but to provide the reader who is interested with material that can back up Stone's propositions and expand knowledge on the particular point, if that is desired. Hart's writings, by way of contrast, are briefer, more discursive and less given to references and citations.

Those who like the English minimalism of Hart's expression applaud his willingness to state directly his own opinions, without troubling the reader needlessly about the opinions of others. Some critics suggested at the time that Stone had erred by giving so much attention to the opinions of others that he sometimes failed to state clearly his own conclusions - or to give enough time and space to formulating and expressing them.

Stone was conscious of this criticism. However, he was unimpressed by it. When Hart's classic work *The Concept of Law* was published in 1961, it was immediately hailed as a brilliant work 'more forceful and convincing' because Hart banished the very few references to other writers that he felt it necessary to make to a few endnotes at the back of the book<sup>30</sup>. For Stone, this was heresy in jurisprudence, above all subjects. In one of the successor volumes to his great work *The Province and Function of Law*, Stone responded directly to Hart's approach<sup>31</sup>:

'A book may be inadequate in range even if it is *not* primarily a book about other books, or is primarily a book about *one* other book. In our view it is very likely to be inadequate unless it refers to what *many* other books contain. In truth, however, the mere *degree* of reference to other works is not the point at all. Adequacy of range depends on *which* other books, and *how they are presented* in relation to living issues of today. It depends above all on whether there is provided for modern issues an awareness which will allow the reader to find and pursue *his* interests without the massive inheritance of juristic learning. The teacher certainly is not entitled (even unconsciously) to fix his students in a mere matrix of his own range of concern'.

Unapologetically, I am a disciple of the Stone school. Perhaps it comes of growing up with, and contributing to, works that were copiously footnoted with ample references to sustaining materials. Without such citations, there is a risk that elegantly expressed idiosyncrasies and verbal dexterities will submerge the complexities and intellectual divisions over a topic that should be acknowledged, even if not always embraced.

The understatement of Hart's writings was also connected with his disdain for the sociology of jurisprudence that Stone had learned from Roscoe Pound and others at Harvard. If jurisprudence is an analytical discourse involving the examination of rules, by verbal techniques designed to reduce propositions to their absolute core and essence, the manner of writing apt to that view will inevitably differ from that appropriate to one who sees the complexities of law

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<sup>30</sup> Star, 160.

<sup>31</sup> J Stone, *Legal Systems and Lawyers' Reasonings*, 7.

as a social discipline, serving various often conflicting societal functions. Thus, the different modes of writing that Stone and Hart exhibit is partially the result of the different schools of jurisprudence to which they respectively belonged.

Hart was squarely placed in the English analytical school of verbal discourse and analysis. Stone crossed over. He was aware of that school and, where necessary, could perform legal analysis as well the next scholar<sup>32</sup>. Like Hart, Stone was most comfortable in the legal speculations of jurisprudence. He simply used different tools. They took him to a wider ambit of source materials. They led to writing that was at once more diffuse and less sharp; more detailed and sometimes less precise. But for those of Stone's persuasion, declarations are not necessarily convincing, even when the declarant is as distinguished a mind as Herbert Hart.

Stone loved honours. In his lifetime, he was honoured by society and the academy. Hart, on the other hand, was ambivalent about such things. He often displayed a republican attitude to the symbols and trappings of worldly success. The disdain that he felt for the excessive deference amongst English academics to the judiciary flowed into his attitude to civil honours. He was critical of his friend, Isaiah Berlin for accepting a knighthood. This, and news that Berlin had had an affair with his wife, Jennifer Hart, led to unresolved feelings to which the knighthood probably contributed.

Hart's views were put to the test in the 1960s when he was informed of the offer of a knighthood to himself. He declined on the basis that 'such honours should be given in recognition of public service as distinct from academic merit or scholarship'<sup>33</sup>. He said he was not qualified for the honour. If a similar honour had come in Julius Stone's direction (as it well might in those days) I do not believe that he would have declined. There was an element of insecurity in Stone's personality that was missing in the case of Herbert Hart.

Both Stone and Hart were appointed Queen's Counsel and both enjoyed this honour. Whereas in England the appointment of academics to the silk robe was not unknown, in Australia small world provincialism intruded. The President of the New South Wales Bar, when told that the government was considering such an appointment for Stone, responded that doing so would devalue the appointment as a mark of professional success<sup>34</sup>. This was a

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<sup>32</sup> J Stone, 'The Rule of Exclusion of Similar Fact Evidence: England' 46 *Harvard Law Review* 954 (1933); J Stone, 'Propensity Evidence in Trials of Unnatural Offences' (1941) 15 *Australian Law Journal* 131; J Stone, *Precedent and Law: Dynamics of Common Law Growth*, Butterworths, Sydney, 1985.

<sup>33</sup> Lacey, 274.

<sup>34</sup> Star, 257.

remarkable response given that the comment was made by one of Stone's finest pupils, R P Meagher, later a Judge of Appeal who knew well the English tradition. Stone was sensitive to the issue. However, the State Premier of the day (Mr N K Wran QC) also a former pupil and admirer of Stone, was insistent. The postnominals were added. When, at a celebration, Stone met one of his pupils who had also been appointed one of Her Majesty's counsel, he exclaimed 'Oh, a real silk'<sup>35</sup>.

According to Lacey's biography, Hart was a gentler, kinder and less abrasive personality than Stone could sometimes be. Hart's devotion to his students, particularly those undertaking doctoral studies and preparing for academic life, was legendary. Stone, on the other hand, was more distant, at least if my experience is any guide. He perceived, quite clearly, the privilege and advantage that he extended to his students by entering into intellectual dialogue with them. In my experience, he did not become personal or warm. His relationship with his pupils was that of the pedagogue. And it did not much change with passing time.

When, in 1975, I was appointed to chair the first national law reform commission in Australia, Stone took part in a seminar reception held soon after at the University of New South Wales where he had by then become a member of the Faculty. At one point in the exchanges, Stone asked how I would go about challenging the fundamental precepts of the Australian law of contract and tort. I answered that I would consider each case within the references assigned to the Commission by the federal Attorney-General, that being the requirement of the statute<sup>36</sup>. However, I went on to describe the importance that I attached to the Commission proving useful to the Parliament and elected governments. If we were not pragmatic to some degree, but prepared marvellous scholarly reports with little chance of adoption, we would be failing in our duty under the statute and the Commission would probably be abolished (as was soon to happen in Canada). Stone fixed me with an icy look. 'One day', he declared, 'the Law Reform Commission will have a chairman who is up to the challenge that is required by the present state of the law'.

Stone's radical instincts were the same as mine. But mine were tempered by institutional necessities and my perception of political realities. In this, I was striving to be true to a rabbinical instruction that Stone was fond of repeating and which was read at his funeral: '[i]t is not for you to complete the task; but neither are you free to desist from it'<sup>37</sup>. The Commission, for me, was not wholly a body of scholars. Stone's cutting comment left a mark on me; but

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<sup>35</sup> Star, 258.

<sup>36</sup> Now *Australian Law Reform Commission Act 1996* (Cth), s 20.

<sup>37</sup> *Ethics of the Fathers*, quoted Star, xii.

I never doubted that mine was the correct view. His capacity occasionally to wound people, even those who were his friends and devoted students, was a reason why he came to be known as prickly. It sometimes led to retaliation, sadly evident all too often in his years in the Law Faculty of the University of Sydney. Our relationship was quickly restored to its earlier equilibrium. However, such a public and direct confrontation, as occurred in my case, was by no means unique. Stone had an uncompromising directness that matched his sharp intellect.

Stone was hypersensitive. He did suffer many wrongs in his life. He was not a person simply to accept these. Hart, on the other hand, adapted to English habits which teach kindness in public exchanges (sometimes accompanied by the opposite behind the back). Living with Herbert Hart as teacher and mentor would probably have been an easier journey than living with Julius Stone. On one occasion, Hart unintentionally caused affront to Stone. He said that, in Stone, English jurisprudence had at last found its Pound. Stone took this as a suggestion that he had merely copied his work from Pound and resented the statement. But even Stone's sympathetic biographer acknowledges that Hart had simply meant that Stone had managed to bring an understanding of sociological jurisprudence to the English scene<sup>38</sup>.

Although in earlier years, as 'rivals', Hart and Stone had shared a fragile relationship, in later times their association became somewhat less strained. When Hart came to Australia and New Zealand and met Stone in Sydney, he found him 'thinner, nicer, less egocentric'<sup>39</sup>. Whether Julius Stone modified his assessment of Hart is unrecorded.

#### IV CONCLUSIONS

By the test of citations in judicial and scholarly writings, Hart's sparser texts out-perform today those of Stone in continuing influence. The latter died, after a long struggle with lung cancer, which he faced with outstanding fortitude, on 3 September 1985. Hart had a longer life, but the last years of it were full of gloom, melancholy, depression and self-criticism. In his eighties, Hart was subjected to electroconvulsive therapy, a treatment available for the disorders of depression at that time. He was confined for a short period to a mental hospital. Yet, on his discharge, he continued to write essays for the *New York Review of Books*, the last of them published in 1986. Hart was

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<sup>38</sup> Star, 159.

<sup>39</sup> Quoted Lacey, 136.

discouraged by his fading intellectual life but, in his last year, his emotional connections with his children were the source of most of his joys.

To the end, Hart retained a fascination of his wife, Jennifer. As Professor Lacey puts it<sup>40</sup>:

'Though the emotional ground that lay between them was never really made up, Jennifer worked valiantly to adapt the changed circumstances brought about by Herbert's need for physical care in the last two years of his life and to overcome her impatience at his increasing preoccupation with the state of his health'.

Hart was ultimately wheelchair bound, enveloped by the melancholy beauty of the late music of Schubert and Beethoven. He died in his sleep on 19 December 1992.

The passing of two such scholars would normally be privately mourned but go largely unremarked, except amongst friends and a small cadre of grateful pupils. Yet now we have Nicola Lacey's outstanding book on the life of H L A Hart. For Australians, it provides a good companion to the earlier, briefer story by Leonie Star of the life of Julius Stone.

Although the perceptions that each of these highly individualistic scholars had of law and its theories and operation were distinct and different, each knew, and taught, that a point is reached where law, as rules, runs out. The value of recording the lives of these teachers is that the subject of their fascinations is not, in the end, one for lawyers only. Law is the essential life-blood of a modern democracy. How it is found; what it means; how its ambiguities are resolved; why we obey it; when we should disobey it and with what consequences - these are issues for citizens, not just for lawyers, still less for philosophers alone.

The world of the common law was lucky to secure at the same moment two young Englishmen, of Jewish descent, raised in the common law, who thought and wrote and argued on these subjects, sometimes with each other. They were both outsiders. Perhaps that fact gave them a capacity to stand beyond the circle and to look at the law derived from England more critically and without undue deference. These were precious qualities that they each brought to their writings. If the clarity and comparative simplicity of Hart's writing style ensures that his work endures with a continued impact throughout the world of our legal system, this is partly because he stayed in the northern hemisphere and partly because of the continuing fascination of analytical and

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<sup>40</sup> Lacey, 358.

linguistic jurisprudence wherever English law is taught and practised. For Australians, Stone was more important because he provided the precious alchemy that would enable us, after a long silence, to break the spell of the declaratory theory of the judicial function and to look for a better theory.

Each scholar was to some extent an alien to the common law. Yet each knew it well, with all of its foibles. Each could teach their theories from that viewpoint. Fortunate was Australia that Julius Stone devoted most of his professional life to writing and teaching in our midst. Fortunate is the whole common law world that Nicola Lacey has now written her tender, affectionate, insightful description of the personal and intellectual life of Herbert Hart.

Three centuries ago John Arbuthnot declared that biography was 'one of the new terrors of death'. On this account Hart and Stone had no need for fear. They knew that, in all ages, ideas are the most enduring forces for change in the world. Stone and Hart. Hart and Stone. Each utilised to the full their great natural gifts of intelligence, perception and analysis. Whether they know it or not, every common lawyer is richer for the work of such scholars. Now we can seek to know both of them from books that describe their lives and work. We can perceive the similarities. We can understand the differences.



50 YEARS ON—A NORMATIVE DEFENCE OF HART'S  
'THE CONCEPT OF LAW'  
KYLA REID\*

Fifty years after it was written, Hart's *The Concept of Law* provides legal philosophers, practicing lawyers and judges with important resources for considering the legitimate role of legal decision-making within modern constitutional societies. Hart's *The Concept of Law* is often criticised as providing an inaccurate portrayal of the actual behaviour of legal officials. That said, his theory provides attractive *normative* resources for considering how legal officials ought to behave. In addition to providing an important normative argument for a particular method of judicial decision-making for modern constitutional democracies, the normative interpretation of Hart's canonical text may provide a rebuttal to some of the more recent and more convincing criticisms that have been leveled, most notably by Jeremy Waldron, against the entire practice of judicial review.

I THE CONCEPT OF LAW

For Hart, a legal system is the union of primary and secondary rules. Just as the outside observer of the traffic light may interpret the red traffic light as a sign that people will stop, the outside observer may interpret the law as a sign that people will behave in certain ways<sup>1</sup>. According to the outside perspective, all rules appear as primary rules—rules of obligation—that forbid certain behaviour and require the performance of other behaviour. Adopting the perspective of those already committed to the validity of the legal order—or what Hart calls the internal perspective<sup>2</sup>—allows the observer to acknowledge the importance of an additional kind of rule—the secondary rule. Hart states, 'while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be

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<sup>1</sup> H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) 87-8.

<sup>2</sup> *Ibid* 108

conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined'<sup>3</sup>.

The most important of the secondary rules is the rule of recognition, which 'specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts'<sup>4</sup>. It is the rules of recognition that unify the primary rules into one legal order. The legal order is not just made of individual rules regarding individual behaviour and various social practices; to be 'a system' at all, it must contain a principled way to determine the rules from the non-rules. As Hart argues, 'by providing an authoritative mark[,] ... the rules are now not just a discrete unconnected set but are, in a simple way unified'<sup>5</sup>.

Legal validity, according to Hart, is not constituted by adherence to laws of morality or justice, but to the secondary rules<sup>6</sup>. A distinction can be drawn between moral rules of obligation and legal rules of obligation. Legal rules are those made and recognised as so by the secondary rules; moral rules, while they may influence the content of those legal rules, are not made so via the secondary rules. As Hart notes, '[s]tandards of conduct cannot be endowed with, or deprived of, moral status by human *fiat*, through daily use of such concepts of enactment and repeal shows that the same is not true of law'<sup>7</sup>.

Legal officials should determine what is the valid law in a given case through reference, not to the moral content of those laws nor to the society's morality, but to the secondary rules, including the rule of recognition<sup>8</sup>. In plain cases, the correct answer that accords with the rule of recognition is clear and judicial decision-making should be characterised by a high degree (if not total) judicial agreement<sup>9</sup>. Hart recognises that legal decision-making is not always this straightforward; legal decision-making is not always a matter of one clearly correct choice. In more difficult cases—where there exists what Hart calls a penumbra of doubt—judges must exercise judicial discretion<sup>10</sup>, as the existing resources of the law do not provide for one clearly correct answer. I quote Hart at length;

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<sup>3</sup> Ibid 92

<sup>4</sup> Ibid

<sup>5</sup> Ibid 93

<sup>6</sup> Ibid 165

<sup>7</sup> Ibid 171

<sup>8</sup> Ibid 100

<sup>9</sup> Ibid 123

<sup>10</sup> Ibid 123-4

The discretion thus left to him by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice. He chooses to add to a line of cases a new case because of resemblances which can reasonably be defended as both legally relevant and sufficiently close. In the case of legal rules, the criteria of relevance and closeness of resemblance depend on many complex factors running through the system and on the aims or purpose which may be attributed to the rule. To characterise these would be to characterise whatever is specific or peculiar in legal reasoning.<sup>11</sup>

In places where the law has an 'open texture'<sup>12</sup>, judges and other legal officials are left with a choice about whether a specific interpretation should be deemed valid or not. While the secondary rules provide strict guidelines to legal officials as to what are and are not legitimate interpretations in many cases, they do not, in all cases, completely determine the outcome. According to Hart, '[h]ere at the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function which administrative bodies perform centrally in the elaboration of variable standards'.<sup>13</sup>

## II AN INACCURATE EMPIRICAL PICTURE

The most notable critic of Hart's rule-discretion description of judicial decision-making is Ronald Dworkin. Dworkin has criticised Hart's positivism for several reasons, but most relevant for our purposes is his argument that Hart presents an inaccurate depiction of what legal officials actually do. Dworkin argues that Hart's rule/discretion account of the law and legal decision-making is untenable because 'when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards'<sup>14</sup>.

For Dworkin, the idea that law is based on rules, with the supplement of judicial discretion in hard cases, ignores in the importance of principles to legal reasoning. Dworkin argues that unlike rules, principles do not function in an all-or-nothing way; they do not simply apply in a way that completely constrains judicial decision-making or fail to apply at all. He writes, '[a] principle like 'No man may profit from his own wrong' does not even purport

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<sup>11</sup> Ibid 124

<sup>12</sup> Ibid 131

<sup>13</sup> Ibid 132

<sup>14</sup> Ronald Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth & Co, Ltd., 1978) 22

to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision'<sup>15</sup>. For Dworkin, legal rules overly bind judicial decision-making in a way that principles do not. Similarly, judicial discretion presents an inaccurate picture of judicial decision-making, where 'the judge [is] free to adopt his personal preferences as legal standards'<sup>16</sup>. For Dworkin, this is patently not true; '[the judge] is subject to the overriding principle that good reasons for judicial decision must be *public* standards rather than *private* prejudice. And he is subject to principles stipulating how such standards shall be established and what judicial use shall be made of them'<sup>17</sup>.

How, then, do judges know how to weigh various principles in their decision-making? Here, Dworkin argues that judges make use of the notion of 'fit.' He argues,

[a] thoughtful judge might establish for himself, for example, a rough 'threshold' of fit which any interpretation of data must meet in order to be 'acceptable' on the dimension of fit, and then suppose that if more than one interpretation of some part of the law meets this threshold, the choice among these should be made, not through further and more precise comparisons between the two along that dimension, but by choosing the interpretation which is 'substantively' better, that is, which better promotes the political ideals he thinks correct.<sup>18</sup>

But, how exactly do judges make the law the best it can be? How do they know they are achieving Dworkin's interpretative vision of the law? For Dworkin, when law is indeterminate or a court is faced with a hard case, it makes little sense to understand the judge as making new law. Rather, it is a truer interpretation about what legal decision-making is about to understand the judge as re-interpreting the law within a set of constraints. Dworkin writes,

[w]hen good judges try to explain in some general way how they work, they search for figures of speech to describe the constraints they feel even when they suppose that they are making new law, constraints that would not be appropriate if they were legislators. They say, for example, that they find new rules immanent in the law as a whole, or that they are enforcing an internal logic of the law through some method that belongs more to philosophy than to politics, or that they are the agents through

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<sup>15</sup> Ibid 26

<sup>16</sup> Ronald Dworkin, 'Judicial Discretion' (1963) 60(21) *The Journal of Philosophy* 624 at 634

<sup>17</sup> Ibid 634-5

<sup>18</sup> Ronald Dworkin, 'Natural Law Revisited' (1982) 34(2) *University of Florida Law Review* 165 at 171

which the law works itself pure, or that the law has some life of its own even though this belongs to experience rather than logic<sup>19</sup>.

Dworkin argues that the law is indeterminate but not in a way that allows judges to act as legislators or act on the basis of their own personal morality. They must interpret the concepts of the law in light of societal norms and constitutional values<sup>20</sup>. On this account, Hart is just wrong about what the law is and what judges are doing when they are making legal decisions.

### III THE NORMATIVE VALUE OF HART'S CONCEPT OF LAW

Why then reflect on Hart's *The Concept of Law*, fifty years after the fact? If Hart is wrong about judicial decision-making, why not consign his theory to the graveyard of legal philosophy? Despite Hart's inaccuracy in describing what it is that judges and other legal officials are doing, there is an alternative, albeit much more anachronistic, interpretation of Hart's *The Concept of Law*. On this normative interpretation, Hart is presenting a picture of how judges *should* make their legal decisions.

First, a normative reading of Hart's *The Concept of Law* provides a method of judicial decision-making that is compatible with extra-legal moral criticism of the law. Hart argues that the best place for moral criticism of the law is from the outside of the official system. Even Dworkin acknowledges that judges may not necessarily be the best moral reasoners; 'intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries,' the public, under a non-positivistic theory of judicial decision-making, must be willing to 'accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly special'<sup>21</sup>. Unlike Dworkin who seems to advocate that citizens in constitutional democracies should accept the fallible moral reasoning of their judges, Hart argues that positioning this moral debate 'outside the official system'<sup>22</sup> enables individuals to preserve their capacities to resist iniquitous laws.

That said, even if judges are in fact superb moral reasoners, there is an additional reason for arguing that moral criticism of the law is better placed outside of the law; by placing moral criticism inside legal reasoning, a greater

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<sup>19</sup> Above n. 14 at 112

<sup>20</sup> Above n. 14 at 87)

<sup>21</sup> Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996) 74.

<sup>22</sup> Above n. 1 at 206

distribution of power is given to legal officials, who are appointed and not directly accountable to the public through democratic decision-making procedures. By explicitly restricting judicial decision-making to exclude moral reasoning, Hart's *The Concept of Law* forces political communities to explicitly engage with the question of who are the legitimate moral decision-makers in constitutional democracies. Hart implies the importance of democratic procedures to moral decision-making in political communities:

The denunciation of restriction on liberty might be met by the claim that the sacrifice of liberty to social or economic equality or security was itself justified. Such differences of weight or emphasis placed on different moral values may prove irreconcilable. They may amount to radically different ideal conceptions of society and form the moral basis of opposed political parties. One of the great justifications of democracy is that it permits experimentation and a revisable choice between such alternatives.<sup>23</sup>

Here, democratic procedures are praised as providing citizens with the opportunity to experiment with different moral commitments in the context where decisions are relatively revisable and decision-makers are accountable. As Hart implies, when legal officials, especially High Court Justices, make decisions, they become entrenched within the legal order, part of precedent and difficult to easily overturn, revise or revoke. For Hart, the very purpose of the law is to provide society with general rules that are predictable to general classes of people<sup>24</sup>. To expect legal decision-makers to be open to moral experiments is to misinterpret this purpose. Restricting the legal system to the question of legal validity reinforces to everyone—legal officials, politicians and the electorate—that legitimacy primarily rests in the democratic process. The judiciary should not be expected to undertake this important role with exceptional skill, flexibility or democratic accountability.

Second, by drawing attention to the role of discretion within some judicial decision-making (even if Hart himself overstates its role), Hart's *The Concept of Law* reminds legal officials of the importance of their role in constituting political community and thus, encourages judges and other legal officials to weigh the costs of exercising their discretion. Equating moral values with legal validity only serves to obscure the difficult decisions that legal officials occasionally face. Reflecting on the revival of Natural Law arguments 'in Germany after the last war [World War II] in response to the acute social problems left by the iniquities of Nazi rule and its defeat'<sup>25</sup>, Hart objects to the tendency to decree Nazi laws as invalid. For Hart, if judges and other legal

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<sup>23</sup> Ibid at 179

<sup>24</sup> Above n. 1 at 121

<sup>25</sup> Ibid at 204

officials are going to be in the business of making significant legal decisions, they cannot do so in this overly simplistic way. He argues,

if inroads have to be made on this principle [of *nulla poena sine lege*] in order to avert something held to be a greater evil than its sacrifice, it is vital that the issues at stake be clearly identified. At least it can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law, that this offers no disguise for the choice between evils which in extreme circumstances may have to be made.<sup>26</sup>

Here, legal officials are presented with cases that present no one clear, correct answer. They must use reasoning to determine what is the best course of action because the law, in these most difficult of cases, is indeterminate.

This seems to be a distinctively different story of personal judicial responsibility than the one painted by Dworkin. He writes of his idealized judge, 'his theory identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality supposed by the laws and institutions of the community'<sup>27</sup>. For Dworkin, judges are only responsible for their construction of the community's morality, which then affects how they decide hard cases. The very idea of law provides judges with direction in determining the institutional rights of the competing parties. However, positivists remain unconvinced by this story. How does the idealized judge know that the community as a whole shares his construction of the political and constitutional morality? How does the idealized judge ensure his construction of the political morality is not merely the unconscious importation of his own moral commitments into the law? Dworkin and others following him seem unable to provide clear answers to these questions beyond stating that such a judge would use 'his own judgment to determine what legal rights the parties before him have, and when that judgment is made nothing remains to submit to either his own or the public's convictions'<sup>28</sup>.

Such is not the case for Hart. While judicial discretion certainly gives judges more latitude in using their own personal judgments to resolve hard cases, judicial discretion does not mean that judges should refrain from or are incompetent to make such difficult decisions. Rather, the concept of law provides legal officials with no sanctuary from their responsibility in how to exercise their own legal judgment. Here, on Hart's account, judges and other

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<sup>26</sup> Ibid at 207

<sup>27</sup> Above n. 14 at 126

<sup>28</sup> Ibid at 125

legal officials are fully responsible for the ways in which they choose to exercise their judicial discretion. A judge that accepts normative positivism cannot justify their decision-making through appeals to supposedly shared normative beliefs. Accepting that a certain area of judicial decision-making is left open to discretion means that judges can be held accountable for the exercise of that discretion. The use of their discretion inevitably embroils them in public debate. Appeals that they are 'judges not politicians'<sup>29</sup> are not sufficient in a community that takes democratic legitimacy seriously in contexts where unelected judges exercise discretion.

#### IV NORMATIVE LEGAL POSITIVISM AND THE CRITICISM OF JUDICIAL REVIEW

There is an additional reason to take this normative reading of Hart's positivism seriously. Hart's normative positivism may provide advocates of (some form of) judicial review with a potential rebuttal to Jeremy Waldron's recent criticisms. Waldron argues that judicial review should be rejected as necessary in democratic society because it neither

provide[s] a way for a society to focus clearly on the real issues at stake when citizens disagree about rights... [and by] privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.<sup>30</sup>

Waldron argues against the three standard outcome-based arguments in support of judicial review of disputes about legal rights<sup>31</sup>. Outcome-based reasons, according to Waldron, argue that judicial review of rights disputes lead to better results for rights-holders than alternative systems. By the time cases where rights are in dispute reach the high courts, the individual and their unique rights complaint have often been obscured in lieu of more abstract legal argumentation about the nature and meaning of rights in general<sup>32</sup>. Additionally, the reliance on the text of a particular Bill of Rights may be a blessing as well as curse '[b]ecause judges [often] ... cling to their authorizing

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<sup>29</sup> C. Babington and J. Becker, 'Judges Are Not Politicians', *Washington Post*, 13 September, 2005 <<http://www.washingtonpost.com/wp-dyn/content/article/2005/09/12/AR2005091200642.html>> (Retrieved June 1, 2011).

<sup>30</sup> Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2005) 115 *Yale Law Journal* 1346 at 1353.

<sup>31</sup> *Ibid* at 1379

<sup>32</sup> *Ibid* at 1379-80



texts and debate their interpretation rather than venturing out to discuss moral reasons directly'<sup>33</sup>. Last, the reason-giving of judges is constrained—and rightly so—by the concern with the constitution, statute and precedent, effectively preventing judges from adequately engaging with the substantive moral claims that are at the heart of the right disagreement before them<sup>34</sup>. Outcome-based reasons, according to Waldron, do not present an unambiguous case in favour of judicial review.

In addition, process-based reasons provide a devastating case against judicial review. Process-based reasons provide dissenting citizens with convincing answers to two questions: (1) why are a particular group of individuals privileged to make the decision?; and (2) even if we accept their appointment as decision-makers, why weren't the opinions of dissenting decision-makers given more weight?<sup>35</sup>. In a comparison of the capacity of legislators and the capacity of judges to give convincing answers to these two questions, Waldron argues that the case is ultimately made against judicial review. While Waldron willingly accepts that decisional majorities can also be wrong when they make decisions about individual rights<sup>36</sup>, the fact that they are directly accountable to the public favours legislative supremacy against judiciary review. He writes, '[l]egislators are regularly accountable to their constituents and they behave as though their electoral credentials were important in relation to the overall ethos of their participation in political decision-making. None of this is true of Justices.'<sup>37</sup>. For Waldron, given that the outcome-based reasons do not unambiguously support judicial review and the process-based reasons seem to explicitly favour legislative supremacy, then judicial review should be greeted with extensive skepticism in constitutional democracies.

Waldron's argument against judicial review provides a strong criticism of Dworkin's principled-based understanding of the law. According to Dworkin, judges are uniquely placed to make evaluations about rights. He writes,

[t]he difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying these clauses fully as law must be an

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<sup>33</sup> Ibid at 1381

<sup>34</sup> Ibid at 1383-4

<sup>35</sup> Ibid at 1387

<sup>36</sup> Ibid at 1400

<sup>37</sup> Ibid at 1391

activist court, in the sense that it must be prepared to frame and answer questions of political morality.<sup>38</sup>

For Dworkin, a society that takes rights seriously must be a society that accepts and empowers an activist judiciary with substantive power of legislative review. Waldron has argued that this is simply not the case. To quote Waldron at length;

[d]isagreement about rights is not unreasonable, and people can disagree about rights while still taking rights seriously. In these circumstances, they need to adopt procedures for resolving their disagreements that respect the voices and opinions of the persons—in their millions—whose rights are at stake in these disagreements and treat them as equals in the process. At the same time, they must ensure that these procedures address, in a responsible and deliberative fashion, the tough and complex issues that rights-disagreements raise. Ordinary legislative procedures can do this ... and an additional layer of final review by courts adds little to the process except a rather insulting form of disenfranchisement and a legalistic obfuscation of the moral issues at stake in our disagreements about rights.<sup>39</sup>

## V HART'S WAY OUT

While Waldron's arguments against judicial review are particularly targeted at Dworkin's account of judicial decision-making in a society that takes rights seriously, the normative reading of Hart's positivism may provide advocates of judicial review a way to defend judicial review. This is the case for three reasons; (1) the normative reading of Hart's positivism does not necessarily require the strong form of judicial review, (2) it alleviates concerns about democratic legitimacy by constraining judges within the rules, and (3) the notion of judicial discretion may encourage judges, where appropriate, to reason directly about the moral matter at hand without feeling the need for textual or legal formalism.

Waldron defines weak judicial review as a system where 'courts may scrutinize legislation for its conformity to individual rights but they may not decline to apply it (or moderate its application) simply because rights would otherwise be violated'<sup>40</sup>. Waldron notes but does not assess the justifiability of this weaker form of judicial review. Yet, it is this weaker form of judicial review that the normative reading of positivism defends. Hart indicates that it is the

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<sup>38</sup> Above n. 14 at 147

<sup>39</sup> Above n. 29 at 1406

<sup>40</sup> Ibid at 1355

judge's role to deem legislation valid or invalid, but he remains silent on whether this requires deciding on the rights of the parties before him<sup>41</sup>. While Hart is not explicit about whether a judicial declaration of invalidity results in a declaration (weak judicial review) or a striking down of the legislation (strong judicial review), nothing Hart says in *The Concept of Law* would require that judges exercise their review in the strong form. A judiciary that fulfilled its role in deciding the validity of law seems entirely consistent with a judiciary that is limited to only weak judicial review.

That said, even if we read this form of review—of deeming legislation legally invalid—as a strong form of review, the normative reading of Hart's positivism provides additional resources for avoiding Waldron's criticisms. The form of judicial decision-making that is consistent with Hart's positivism is one that is heavily constrained by rules. Hart includes within the secondary rules, 'rules empowering individuals to make authoritative determinations about whether on a particular occasion, a primary rule has been broken ... Besides identifying the individuals who are adjudicate, such rules will also define the procedure to be followed'<sup>42</sup>. Here, adjudicators are not free to adjudicate on the primary rules wantonly but are constrained in their actions by the rules of adjudication, which eliminates the possibility of deeming a law invalid on the basis of moral concerns. Hart writes, 'it does not follow ... that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice'<sup>43</sup>. One of Waldron's primary criticisms of judicial review concerns democratic legitimacy, quoting U.S. Supreme Court Justice Scalia, he writes,

[a]s long as the Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone ... But if in reality our process of constitutional adjudication consists primarily of making *value judgments* ... then a free and intelligent people's attitude toward us can be expected to be (*ought to be*) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better.<sup>44</sup>

As indicated earlier, Hart seems to regard the democratic decision-making of the legislature a more appropriate place for these sorts of value judgments<sup>45</sup>. For Hart, legal reasoning should be concerned exclusively with the matter of legal validity, where the unique training of legal officials helps legitimate their

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<sup>41</sup> Above n. 1 at 102

<sup>42</sup> Ibid at 94

<sup>43</sup> Ibid at 181

<sup>44</sup> Above n. 29 at 1390-1

<sup>45</sup> Above n. 1 at 179

decision-making on these matters. Judges are constrained in the content and form of their ability to deliver judgments by the prescriptions of normative positivism, at least partially alleviating Waldron's concerns about a democratic deficit.

Last, the normative reading of Hart's *The Concept of Law* requires judges to admit that they exercise discretion where there are no clear rules. As Hart writes, '[w]hen the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us'<sup>46</sup>. He continues, '[i]n these cases it is clear that the rule-making authority must exercise a discretion and there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests'<sup>47</sup>. Because Hart admits, unlike Dworkin, that the law alone does not also have the answers, normative positivism provides judges with a method to exercise their powers of legislative review in a manner that avoids one of Waldron's central criticisms. Waldron argues, 'it is part of the modus operandi of courts to seek textual havens for their reasoning, and they will certainly tend to orient themselves to the text of the Bill of Rights in a rather obsessive way'<sup>48</sup>. By drawing attention to the ways in which judicial interpretation always includes discretion, Hart's positivism denies judges the ability to constantly retreat to the text. When they are exercising their discretion, they will be able to engage directly with the individual reasons at stake in a particular dispute, instead of burying them in abstract discussions of a particular texts meaning.

## VI CONCLUSION

Fifty years after its initial publication, Hart's *The Concept of Law* remains an important contribution to the philosophical study of the law. Its importance is not explicable solely by its high citation rate or prominent role in the on-going debates within legal philosophy. Hart's *The Concept of Law* is also important because his normative argument for a particular form of judicial decision-making. While Hart's positivism may provide an inaccurate picture of the ways in which judges currently engage in legal reasoning and decision-making, his positivism presents an alternative normative picture of what judges and other legal officials *should* be doing when they determine what is and is not the law.

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<sup>46</sup> Ibid at 126

<sup>47</sup> Ibid at 128

<sup>48</sup> Above n. 29 at 1381

On the normative reading of Hart's positivism, judges should conceive of themselves as constrained by rules and, in the limited number of cases where they are not, as making a choice and, consequently, making law. Such a normative framing of Hart's *The Concept of Law*, not only sidesteps the criticism that his positivism is empirically inaccurate regarding the behaviour of judges and legal officials, but also provides a potential defence of a (positivist) form of judicial review against the recent criticism leveled by Jeremy Waldron. While a complete positivist response to Waldron's critique of judicial review is beyond the scope of this paper, Hart's emphasis on rules and discretion is consistent with a weak form of judicial discretion, alleviates concerns about democratic legitimacy by constraining judges with rules, and encourages judges, where appropriate, to reason directly about the moral matter at hand without appeals to textualism or formalism.

# BANNING ORDERS AND DRINK SAFE PRECINCTS IN QUEENSLAND: A STEP IN THE RIGHT DIRECTION?

SEONE WOOLF\*

With alcohol-related violence on the rise in Australian jurisdictions, the Queensland Government is attempting to take the initiative to reduce the number of these incidents. In response to the *Inquiry into Alcohol Related Violence* (the Inquiry) by the Law, Justice and Safety Committee, amendments have been made to the *Penalties and Sentences Act* 1992 (Qld), the *Bail Act* 1980 and the *Liquor Act* 1992 (Qld) to allow for a broader range of penalties for alcohol-related offences.

During attendance at the Brisbane Magistrates Court for the Justice and the Law Society's *Magistrates Work Experience Program*, I saw first-hand a case in which a banning order was made under s43J(1) of the *Penalties and Sentences Act* 1992 (Qld). The offender was charged with several counts of assault which had taken place in a licenced premises within the Fortitude Valley Drink Safe Precinct. Despite its name, the banning order did not prohibit the offender from entering the designated area as conditions were appended in order to allow the offender to access their place of employment between business hours in compliance with s43J(5)(a)(2) of the Act.

## I ALCOHOL RELATED VIOLENCE IN AUSTRALIA

The link between violence and alcohol is a complex one and subject to personal factors such as age, gender, personality traits as well as environmental and cultural issues.<sup>1</sup> While alcohol related violence is not a new phenomenon, it has recently become a focus for public health and safety authorities across Australia due to an epidemic of binge drinking among young Australians as well as 'glassing' incidents. The Inquiry addressed the issue of a nationwide 'new drinking culture' in which alcohol has shifted from being an 'element of socialisation' to being consumed solely for the purpose of becoming intoxicated.<sup>2</sup>

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<sup>1</sup> Australian Institute of Criminology, *Key Issues in Alcohol-Related Violence: Summary Paper No.4* (2009) [1]

<<http://www.aic.gov.au/publications/current%20series/rip/1-10/04.aspx>> on 22 July 2011.

<sup>2</sup> Law Justice and Safety Committee, *Inquiry into Alcohol-Related Violence* March 2010 Report No.74 [23].

## II RECOMMENDATIONS BY THE LAW, JUSTICE AND SAFETY COMMITTEE

Recommendations 15 and 16 of the Inquiry called for the sentencing range for alcohol related offences to be increased and for the courts and police to be empowered to ban offenders from specified areas.<sup>3</sup> While the Queensland Government supported Recommendation 15 in theory, it stated that no amendment to the *Penalties and Sentences Act 1992* was required as courts already take 'intoxication' into account when determining sentencing outcomes. In addition, it asserted that introducing specific penalties for alcohol-related offences would 'remove the ability of the court to consider the many different circumstances in which alcohol is involved.'<sup>4</sup> Nonetheless, Recommendation 16 was accepted to be used in conjunction with the temporary exclusion powers of police and licensees.

## III DRINK SAFE PRECINCTS

In conjunction with banning orders, other amendments, including the insertion of Part 6B of the *Liquor Act 1992* (Qld), have established Drink Safe Precincts with the purpose of 'minimising harm, and the potential for harm, from alcohol abuse and misuse and associated violence and minimising alcohol-related disturbances, or public disorder, in a locality.'<sup>5</sup> Banning orders will therefore work in conjunction with a 'place based management strategy' focusing on geographic areas deemed to be at high risk due to the confluence of licenced premises in the area.<sup>6</sup> Three target areas – Surfers Paradise, Fortitude Valley and Townsville – have been selected as pilots in this program. In addition, a banning order may be imposed as part of an offender's conditions of bail (under s of the *Bail Act 1980*) or as a civil order under the *Liquor Act 1992*. Contravention of the order can mean a fine of up to \$4,000 or up to one year of imprisonment. An initiative in the United Kingdom called *Tackling Alcohol-Related Street Crime* (TASC) was launched in 2000 with the aim of reducing alcohol related crime and disorder. Under this project, a number of

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<sup>3</sup> Ibid.

<sup>4</sup> Government of Queensland, *Government Response to the Inquiry into Alcohol-Related Violence*, (2010) [9]

<<http://www.parliament.qld.gov.au/documents/committees/LJSC/2009/alcohol-related-violence/responseReport74.pdf>> at 29 May 2011.

<sup>5</sup> Section 173O *Liquor Act 1992* (Qld).

<sup>6</sup> Office of Liquor and Gaming Regulation, *Parliamentary Inquiry into Alcohol-Related Violence*, <<http://www.olgr.qld.gov.au/stories/alcoholrelatedviolence2.shtml>>, at 29 May 2011.

'hot spots' were identified and over half of the incidents recorded were associated with licensed premises.<sup>7</sup> Similarly, a study by the Department of Epidemiology and Biostatistics in Texas revealed an increase in crime density in areas with greater prevalence of alcohol outlets.<sup>8</sup>

#### IV REPORTED BANNING ORDERS

Statistics on the number of banning orders issued since the legislative amendments are currently unavailable making it difficult to assess whether this new corrective order is being used. However, several cases besides the order witnessed have been reported in the media due to the novelty of this new sentencing option. The first breach of the order in Queensland was committed by a 21 year old male who was fined \$750 for the breach of his banning order by means of entering the Surfers Paradise Drink Safe Precinct.<sup>9</sup> As of April 2011, 7 banning orders were reported to have been issued by the courts with 29 more awaiting finalisation.<sup>10</sup>

The offences which resulted in a banning order being issued included:

- common assault
- armed so as to cause fear or alarm
- disorderly in licensed premises
- assault occasioning bodily harm
- obstructing police
- public nuisance<sup>11</sup>

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<sup>7</sup>Mike Maguire and Hilary Nettleton, *Reducing Alcohol-Related Violence and Disorder: An Evaluation of the TASC Project* (2003) 33.

<sup>8</sup> D.M Morgan, Li Zhu and Scott Horel, 'Drug 'hot-spots', Alcohol Availability and Violence,' (2009) 24 *Drug and Alcohol Review*, 3.

<sup>9</sup>Roberts, Neil (Ministerial Media Statement, 17 March 2011)

<<http://www.cabinet.qld.gov.au/mms/StatementDisplaySingle.aspx?id=74045>> at 28 August 2011.

<sup>10</sup> James O'Loan and Alison Sandy, 'Police Say Violence Crackdown Working,' *The Courier Mail*, 19 April 2011,

<http://www.couriermail.com.au/ipad/police-say-violence-crackdown-working/story-fn6ck51p-1226041180600>.

<sup>11</sup> Office of Liquor and Gaming Regulation, *Three Month Snapshot: Drink Safe Precinct Trials*, (2011) <<http://www.olgr.qld.gov.au/resources/liquorDocs/DSP-snapshot-cumulative.pdf>> at 29 May 2011.



## V LESSONS FROM OTHER JURISDICTIONS? – THE VICTORIAN MODEL

The legislative amendments in Queensland have been modelled on similar actions implemented in Victoria. Since December 2007, the Victorian Government has made allowance for police to exclude troublemakers from designated entertainment areas for up to 24 hours as well as enabling the courts to issue orders to further exclude the offender for a maximum of 12 months.<sup>12</sup> Unfortunately, information regarding the success of the Victorian model is limited as comparative data is unavailable thus far.

In collaboration with these new penalties, the Victorian Alcohol Action Plan includes other measures to combat the effects of alcohol-related violence, alcohol-related health problems and other anti-social behaviour. For example, the Victorian Government plans to spend \$4.3 million for an awareness campaign to encourage a safe and sensible approach to alcohol use, \$4.7 million for early intervention and prevention initiatives to encourage problem drinkers to seek help or change their drinking habits, \$9.4 million on support for health care professionals trained in treating alcohol-related problems and investment into higher definition security cameras in licensed venues to aid in the identification of offenders.<sup>13</sup> It is hoped that these initiatives will work in conjunction with the exclusion orders to educate offenders about the risks associated with alcohol.

## VI RECOMMENDATIONS

While mere exclusion from an area with licensed premises may seem to be a simple and cost effective method of minimising the harm from violent, intoxicated offenders, in order to truly impact on the level of alcohol-related violence in Queensland, these banning orders must be vigorously enforced. If police are not vigilant in identifying and removing these repeat offenders from the designated Drink Safe Precincts, the efficacy of this new order will be significantly reduced. The Queensland Hotels Association has called for 'improved identification of repeat offenders, and more careful and thoughtful follow-up by the justice system' in order to 'consistently and forcefully reinforce the message that individuals who fail to meet the community's standard of behaviour in entertainment venues will be identified and excluded

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<sup>12</sup> Government of Victoria, *Alcohol Action Plan 2008-2013: Restoring the Balance*, (2008), <[http://health.vic.gov.au/drugservices/downloads/action\\_plan.pdf](http://health.vic.gov.au/drugservices/downloads/action_plan.pdf)> at 28 August 2011.

<sup>13</sup> Office of the Premier, *Victoria's Alcohol Action Plan to Restore the Balance*, (Media Release, 2008), <[http://www.legislation.vic.gov.au/domino/Web\\_Notes/newmedia.nsf/b0222c68d27626e2ca256c8c001a3d2d/60e7e9870472aaefca2574400003f258!OpenDocument](http://www.legislation.vic.gov.au/domino/Web_Notes/newmedia.nsf/b0222c68d27626e2ca256c8c001a3d2d/60e7e9870472aaefca2574400003f258!OpenDocument)> at 28 August 2011.

from those venues if they visit violent or repeat anti-social acts on other patrons.<sup>14</sup> Banning orders will only achieve the aim of harm minimisation through the co-ordinated efforts of police, courts and licensees.

In order to extract the maximum benefit for those subject to the order, additional conditions such as participation in a substance abuse program or anger management courses should be imposed in conjunction with the banning order. As the infrastructure for these programs already exists within Queensland courts, it would not be a stretch for magistrates to join these orders so that during the period of prohibition, the offender is required to engage in some form of rehabilitation. Banning orders must be considered as only one step towards better management of alcohol and drinking practices. For example, more emphasis must be placed on the responsible service and consumption of alcohol through initiatives similar to those instituted by the Victorian Government.

While there is a large body of anecdotal evidence regarding alcohol-related violence in Australia, better methods of data collation must be adopted to ensure that the number of banning orders imposed and the number of breaches of those orders are recorded. Despite the work of organisations like the National Drug and Alcohol Research Centre and the Alcohol and Other Drugs Council of Australia, it is apparent that there is a deficit of information regarding alcohol-related violence, new developments in Australian drinking culture (including 'glassing' attacks) and the outcomes of recent legislative and policy amendments. Without this data, it is unclear as to whether new penalties including banning orders have succeeded in reducing alcohol-related offences in high-risk areas and further legislative measures may be enacted blindly.

## VII FINAL THOUGHTS

Imposing banning orders on offenders will hopefully have a beneficial effect on three parties – potential victims, the liquor industry including owners and operators of licenced premises within Drink Safe Precincts, and the offenders themselves. However, it is questionable whether banning orders alone are anything more than a short-term Band-Aid for a growing problem.

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<sup>14</sup> Justin O'Connor, CEO of the Queensland Hotels Association in *The Shout, Licensees 'Cautiously Optimistic' on DSP Trial*, (2011), <<http://www.theshout.com.au/2011/04/21/article/Licensees-Cautiously-Optimistic-on-DSP-Trial/DJHHLAVCWFC.html>> at 28 August 2011.

Studies by public health authorities indicate that 38% of victims had also reported consuming alcohol at the time the crime was perpetrated.<sup>15</sup> This indicates that the victim's intoxication level may also be a significant factor in the circumstances surrounding the crime<sup>16</sup>. As such, banning orders against the offender may be seen as addressing only part of the overall problem of a drinking culture that is progressively more violent. Obviously, while it is beyond the scope of the court to penalise victims of crime, it is important to continue to promote awareness about the increased likelihood of violence in situations where alcohol is being consumed.

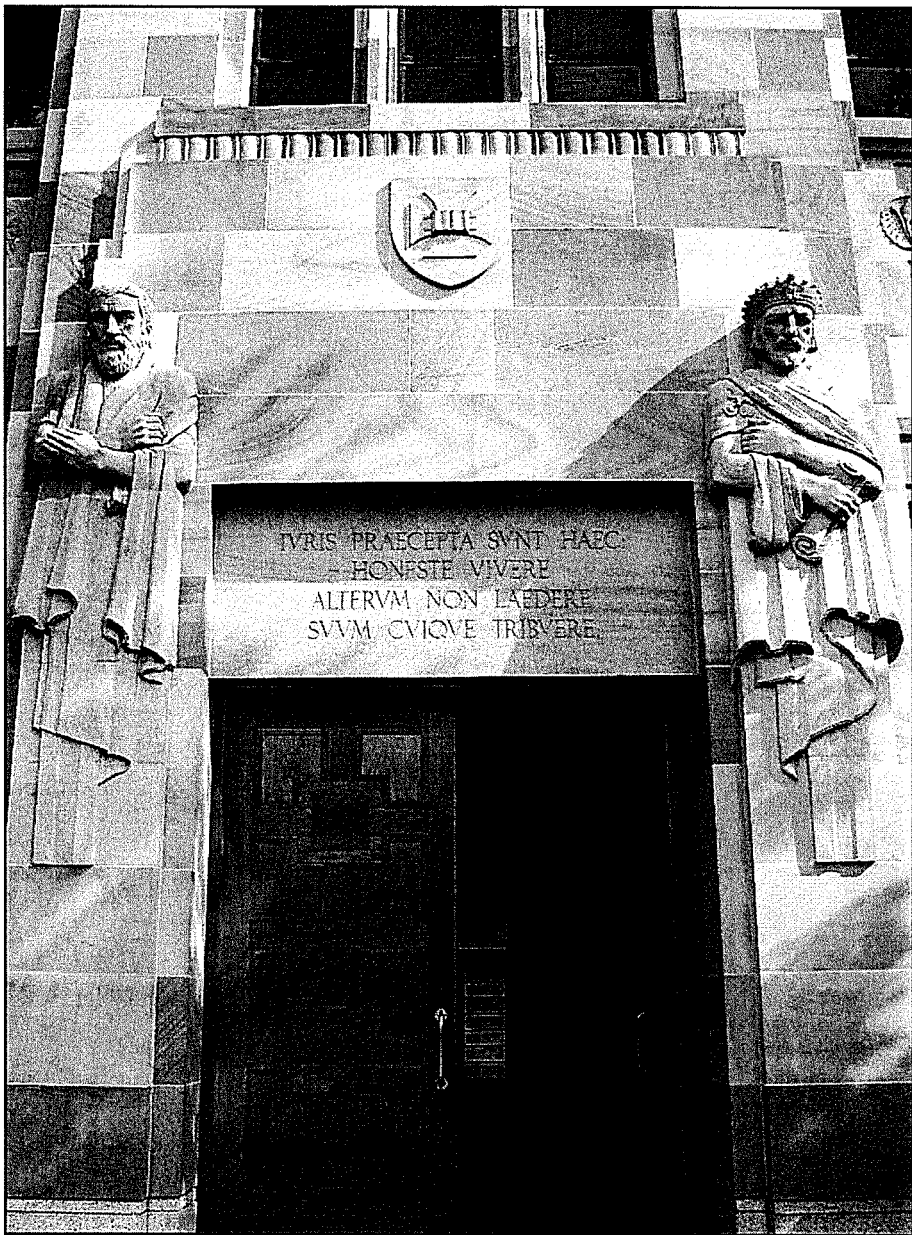
In theory, banning orders will assist in preventing an individual repeatedly offending (at least within the specified Drink Safe Precinct) for the duration of the order. Given the types of crimes that these orders are aimed at, it is unlikely that these orders will act as a deterrent to offenders who are unlikely to have the capacity to make rational behavioural decisions at the time. Rather, these orders simply seek to remove problematic individuals from areas where they are most likely to cause harm to other patrons. While the ostensible rationale behind banning orders has been cited as the minimisation of harm or the potential for harm from alcohol misuse, removing an offender from a high risk area merely relocates the troublesome individual without addressing the underlying factors contributing to alcohol-related violence such as poor anger management and a dangerous new drinking culture.

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<sup>15</sup> Australian Institute of Criminology, above n1, 1.

<sup>16</sup> Sally Brinkman, Tanya Chikritzhs, Tim Stockwell et.al, 'An Indicator Approach to the Measurement of Alcohol-Related Violence' in Paul Williams (ed), *Alcohol, Young Persons and Violence* (2001) 61, 63.





*[Busts of Plato and Justinian at the entrance to the T.C. Beirne School of Law, The University of Queensland.]*

# PLATO AND JUSTINIAN IN THE HISTORY OF WESTERN LAW

AMELIA BROWN\*

Every time students at the University of Queensland pass through the northern door of the Law School in Forgan Smith, they encounter two of the giants of Western law: Plato and Justinian.<sup>1</sup> Both these men are carved in half-length portrait busts flanking the doorway, Plato in the cloak of a Greek philosopher to the left as one enters, and Justinian in his Roman imperial regalia to the right. Why were these two men chosen? They symbolize the Western legal tradition upon which Australian law rests: Plato represents Greek legal theory, and Justinian, Roman theory and practice. Both men have been famous since Antiquity for their substantive contributions to legal theory, though their legal output, character and historical context were quite different.

Plato was an Athenian aristocrat, and the most famous student of the philosopher Socrates, who lived in the late 5th and early 4th centuries BC. After the court-ordered suicide of Socrates in 399 BC, Plato established a school in a park on the north side of Athens dedicated to the local hero Academus- the first 'Academy'. Here, and on trips abroad, Plato trained a generation of students- including Aristotle- in the Socratic method and *philosophy*, the love of wisdom. This involved testing received wisdom, through dialectic, to establish universal (or 'Platonic') truths, and outline the best possible political, legal and personal systems for human life. Plato wrote extensively on all these topics, usually in the form of a dialogue, where he portrayed numerous characters arguing for different sides of a given question (with one side sometimes superior). His dialogues were highly influential for the development of ancient legal theory, read and discussed throughout Antiquity, and translated from Greek into Latin.

His most notable work of legal theory is entitled *Laws*. It was one of his last dialogues, and, uniquely, does not include Socrates in the discussion which an Athenian, a Cretan and a Spartan have about the ideal legal system. The Athenian, perhaps a cover for Plato, dominates the discussion. He argues that written laws should include philosophical justifications, and form the proper backbone of state systems of public administration, education and justice. Together, Plato and his pupil Aristotle established both the methods and the essential texts for legal scholarship in Greek, which the Romans took

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<sup>1</sup> For more information on these busts and the friezes above the Law entrance, see Brian Pascoe (ed), *A Guide to the Great Court* (University of Queensland Press, 1992) 88-93.

as a foundation for their own legal scholarship alongside the ancient laws and customs of the city of Rome.

Justinian had a much lowlier background than Plato, but came to wield even greater power over the development of Western law. As Roman emperor from 527 to 565 AD, he ordered and supervised the codification of Roman law which forms the basis for many Western (and colonial) civil codes to this day. He was born in the central Balkans, but came to Constantinople (modern Istanbul), the capital city of the Roman Empire, when he was a young man, and succeeded his uncle Justin on the throne of the Roman empire. Justinian's portrait beside the UQ Law School door is based on the mosaic depicting him as Emperor from the church of San Vitale in Ravenna, Italy.

The sixth century AD was an era of grave threats to the Roman Empire, both external, in the form of barbarian invasions from northern Europe and Persian attacks from the East, and internal, as conversion to Christianity was enforced, and Christianity itself continued to splinter into rival sects. Justinian directed the Roman armies in an ambitious project to recover the Western Mediterranean, built grand churches like the Agia Sophia (Holy Wisdom, still a monument of Istanbul), and supervised the most extensive codification of Roman law ever made: the *Corpus Iuris Civilis*, or Body of Civil Law.

This began with the Justinianic Code (*Codex Iustinianus*), a compilation of existing imperial laws (or *constitutiones*) from the emperor Hadrian onwards. Then Justinian ordered further works to be crafted by a team of lawyers, scholars and imperial officials led by the jurist Tribonian: the *Digest* (*Digesta*), a summary of jurisprudence, the *Institutes* (*Institutiones*), a legal textbook, and finally the *Novels* (*Novellae*), Justinian's own laws, in both Latin and Greek. The inscription over the door of the UQ Law School is from the Latin beginning of the *Institutes*, Justinian's manual for teaching Roman law to students throughout the Roman empire: *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*. This translates as, 'The precepts of Law are these: to live honestly, not to harm another, and to grant to each that which is his (or hers)' (*Institutes* 1.1). Still good words to live by, and to guide the study and practice of law.

## BOOK REVIEW: ALLAN'S 'THE VANTAGE OF LAW'

MICHAEL PHILLIS\*

Professor James Allan's recent book, *The Vantage of Law*,<sup>1</sup> (VL) is a wide-ranging account of, variously, the separation of law and morality, the role of judges as legal and moral agents, and bills of rights.

Allan takes the same basic approach to each problem: he denies the truth (or, even assuming the truth, any effect) of any mind-independent normative claim. Accordingly, he takes a number of broad positions within positive and natural law traditions, and later constitutional interpretation, and subjects them to empirical analysis. One consequence of this approach is that *The Vantage of Law* reads more as a work of legal education than a cohesive legal theory, as any position Allan might be taken to advance rests on a long chain of contestable empirical claims. This is broadly in keeping with his position as a sceptic even of a concept of law.<sup>2</sup>

The way in which these empirical claims are presented is the most distinctive part of VL, as Allan poses empirical questions (e.g. 'Should we insist that what law is be kept separate from what law ought to be?')<sup>3</sup> and answers from any of nine distinct vantages.<sup>4</sup> This is a continuation of what he sees as a similar, although more limited, approach by previous authors in the positivist and realist traditions (especially HLA Hart and Oliver Wendell Holmes, respectively), and forms the basis of an attack on natural law generally and the concept of rights, and bills of rights, particularly.

Allan also seeks to marginalise deontic rights theorists (in particular Ronald Dworkin) by expanding the type of legal system to which a concept of law could apply, giving him four paradigm legal systems: Benevolent, Wicked, Theocratic, and So-So. As one might expect, the existence of these legal systems tends to undermine assumptions about universal characteristics of law, and undermines theories of law (such as Dworkin's) which are built up from theories of adjudication.

VL is divided up into three parts, of two chapters each. The first part deals with the separation of law from morals, using the concept of vantages to

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<sup>1</sup> James Allan, *The Vantage of Law: Its Role in Thinking about Law, Judging and Bills of Rights* (Ashgate, 2011).

<sup>2</sup> Ibid 1.

<sup>3</sup> Ibid 11.

<sup>4</sup> Concerned Citizen, Judge, Bad Man, Visiting Martian, Legislator, Omniscient Being, Moral Philosopher, Sanctimonious Man, and Law Professor.



play with the identity of the person defining both 'law' and 'morals'. The overarching enquiry here is whether better consequences come from separating law from morals, or from eliding them. Given the number of possible positions, Allan presents each argument remarkably concisely and, for the most part, clearly.

The second part focuses largely on Jeremy Waldron's work on disagreement and dissensus, and deals with theories of interpretation, the relevance of the moral or normative preference of judges, and the relevance of the separation thesis to the rule of law. Allan takes a thin conception of democracy as being most consistent with the good consequences flowing from the separation of law from morality, and deals with the empirical arguments around judicial review and judicial reasoning.

The third part deals specifically with bills of rights, criticising the conceptual underpinnings of entrenched rights (constitutional or statutory), and making empirical claims about the (generally sub-optimal) consequences of bills of rights. The third part draws on much of the material from the previous two parts, and through a series of provocative claims seeks to undermine many of the good consequences presumed to flow from bills of rights.

While consideration of multiple vantages and legal systems enriches this discussion, it can also make the structure of arguments difficult to follow, as Allan's preference for consequentialism means that there can be, at any one time, several contestable empirical claims, often with quite a few variables.

Many of the arguments run between chapters, and it may have been helpful to have a much clearer picture of the claims that were to be made in each part and chapter. Allan's decision to keep citation to an absolute minimum means that the argument is uncluttered and generally argued from first principles, although a real difficulty with this approach is the lack of reference to alternative views on contestable claims, especially early on.

While Allan has generally referred back to points that have already been argued, he rarely foreshadows future arguments. Although this is broadly in keeping with the sceptical nature of the book, it makes many of the empirical claims less persuasive than they might otherwise be. One pervasive example is the idea that the only 'honest' way to interpret statutes is accordingly to author's intent.<sup>5</sup> While originalism and author's intent are argued out in a later chapter, it is frustrating that for much of the first half of the book, normative claims are made with no reference to later arguments in support of them,

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<sup>5</sup> Allan, above n 1 34.

giving the impression to the first time reader that the claim will simply be left to stand on its own.

One of the best uses of the 'vantages' approach was the way in which the role of judges was discussed. Allan has worked through quite a broad range of interpretive methods clearly and approachably, itself an achievement. He also sets out a substantive position on the consequences of interpretive methods, and uses this to help build up a further substantive conception of democracy. As a continuation on this theme, Allan discusses the difference between the rule of law and 'Rule by Judges', which is based largely around how judges feel themselves to be restrained by abstract ideas, and the way in which those ideas are given currency. Both of the conceptions Allan builds up are deeply sceptical; as with most of the positions he sets out, this part of the book is based on an interesting series of empirical claims, which may persuade or challenge the reader.

Allan's sceptical approach to bills of rights owes much to this discussion of judges, and substantive claims about democracy. While space does not allow a real discussion of Allan's position, his scepticism of bills of rights rests on two further claims: theories which conceive of rights as goods in themselves fail to resolve the conflict between autonomy and judicial review (as opposed to majoritarian decision-making), and the costs of institutionalising a paternalistic (assumed here to be correct in what it says to be the consequentially best course of action) view of rights will generally outweigh the costs of allowing citizens to make their own (probably sub-optimal) choices. Much of the further discussion of bills of rights goes to developing the second of these two claims.

While the claims Allan makes against bills of rights ultimately rest on this Benthamite starting point, there is much fruitful discussion of the competing instrumental advantages of conceptions of legislative supremacy and judicial review. It is really one of the major strengths of the approach in *VL* that one could reject many of the empirical claims made and yet find the empirical analysis of various normative claims worthwhile.

At times, Allan takes a slightly reductive view of natural law theories, but this is adequately dealt with by the fact that his position is just a set of falsifiable claims, sometimes adopting radically sceptical positions. While natural lawyers are unlikely to be convinced, Allan's writing style will ensure that the audience for this book is quite broad, and the aim here appears to be just as much provocation as persuasion.

*VL* is an impressive piece of work which, while provocative in some of its foundational claims, serves as an effective survey of and empirical challenge to

much of the conceptual background to rights and counter-majoritarian judicial review. Allan's aim was 'to offer the reader some thought-provoking insights into the issues' discussed, and he has done so in an entertaining and highly descriptive way.

## BOOK REVIEW: STONE'S 'SHOULD TREES HAVE STANDING?'

ALEJANDRA MANCILLA\*

The end of the hour was approaching and the students in Christopher Stone's class on property and law were starting to pack up. Societies, like human beings —Stone had been explaining —, progress through different stages of sensitivity. In the case of ownership, each change in the law regarding what was thought to be legitimate property had also typically triggered a change in social consciousness. Thus, for example, the institution of the will — the power to control one's property after death— had affected our views on mortality. At this stage, Stone realised that he needed to say something shocking enough to win back the audience's attention. It was then that he ventured the following question: 'What would a radically different law-driven consciousness look like? ... One in which Nature had rights, ... Yes, rivers, lakes, ... trees ... animals. How would such a posture *in law* affect a community's view *of itself*?'<sup>1</sup>

The attempt succeeded at recapturing the students' interest, but now the law professor was left with a challenging piece of homework, namely, how to give a coherent account of nature having legal rights. The answer came out months later in the *Southern California Law Review*, under the suggestive title, 'Should Trees Have Standing?'<sup>2</sup> (hereafter, *Trees*). It is usually the case that big breakthroughs in our unquestioned paradigms often happen accidentally, without our even intending them. Stone's *Trees* was such a breakthrough.

To mark the 35<sup>th</sup> anniversary of this landmark essay, a third updated edition has appeared, where *Trees* is followed by a collection of other essays by Stone on law, morality and the environment. Climate change, the depletion of marine resources, the challenges posed by industrial agriculture and the evolution of the concept of 'sustainable development' are some of the topics covered. Throughout, Stone expounds and expands on his original thesis that voiceless natural objects should have the right to be legally represented in courts, through special, statutory guardians or trustees who defend their interests. He also explores difficult and fascinating questions in the field of environmental ethics and law, like the rights of future generations and the problem of free riding in the global commons —particularly urgent today,

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<sup>1</sup> Christopher Stone, *Should Trees Have Standing? Towards Legal Rights for Natural Objects* (Oxford University Press, 2010) p. xi.

<sup>2</sup> Christopher Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450.

when the need to regulate the emission of national greenhouse gases appears more pressing than ever, and the pollution and over-harvesting of the oceans continue. Finally, Stone examines in detail the various indirect ways in which nature and natural entities can be and have been defended and protected under the law, both in the U.S and internationally, even though their rights have not yet been directly recognised. The author insists throughout the text that while these alternative paths may be strategically useful, theoretically they are too contrived, and will eventually prove insufficient.

After summarising *Trees* and signalling its influence in the history of environmental law, in what follows I briefly examine three interesting problems that this and the later essays present from a philosophical perspective; namely, the definition of natural objects, the moral status of future generations and the idea of guardianship.

## I TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS

In *Trees*, Stone enumerates the three necessary and sufficient conditions for an object to have legal standing, i.e., to initiate an action in court or, more precisely, to institute judicial review. First, it must be able to institute actions at its behest (this does not mean that they have to speak for themselves, but merely that they can have someone speak for them, as is also the case of states, infants, incompetents, corporations, universities, etc.). Secondly, in determining the granting of legal relief, the court must take direct injuries to it into account. Thirdly, the relief must be to the benefit of it; for example, by making it 'whole' again.

Insofar as these three conditions are met by natural objects such as forests, rivers or species, their assigned representatives or guardians should be able to file suit when they consider that their interests might be adversely affected.<sup>3</sup>

But is something really won by granting legal personality to natural entities? Can't we get the same results just by using specific legal rules? To these questions, Stone replies that the language of rights gives a flexibility and open-endedness that no fixed list of norms can offer. But, above all, it works at

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<sup>3</sup> One of the objections to Stone's proposal was that such a system had already been implemented in the U.S. to some extent. For example, the American Department of Interior was conceived as such a guardian for federal public lands. The author, however, deems this specific mechanism insufficient for two reasons: first, it leaves out private and local public lands; and it has to answer to institutional goals, which many times are at odds with the goals of the natural objects under protection.

the socio-psychological level, hopefully letting a new collective consciousness dawn. Despite the fact that, up until the time of his writing, all developments concerning the protection of nature had been justified for the sake of human interests<sup>4</sup>, Stone already saw some signs that suggested that the environment was starting to matter for its own sake. For example, the idea had emerged that at least some wilderness areas should be left undeveloped. Of course, it is always possible to say that it is not the wilderness areas *themselves* that we are protecting, but the wilderness areas *for future generations of human beings*, who will have a recreational and aesthetic interest in them. Stone dismisses this conservationist claim, however, because it begs the question, as it takes for granted exactly what he is trying to disprove.

Inspired by F.D. Rudhyar's account of the Earth as a living organism (reminiscent of James Lovelock's 'Gaia' theory), Stone wonders instead what a legal system would look like that took a holistic and non-anthropocentric approach to rights, rather than our prevailing one, largely individualistic and anthropocentric. In this he appears as a soothsayer anticipating the global environmental crises of the decades to come: from the depletion of the ozone layer to global warming; from the massive extinction of species to the pollution of the oceans.

It was very timely for Stone that, just as he was writing *Trees*, the perfect case appeared to put his theory into practice. In *Sierra Club v. Hickel*,<sup>5</sup> the U.S. Forest Service had granted a permit for Walt Disney Enterprises to develop Mineral King Valley, in the Sierra Nevada Mountains in California, and the Sierra Club had brought suit for an injunction, saying that the 35 million dollar complex would damage the aesthetic and ecological balance of the area. The Ninth Circuit Court of Appeals, however, rejected it, on the grounds that the club had no standing, because they did not meet the second condition above: namely, they could not show that they were going to be directly injured by the construction of the project. Stone then came with the idea to designate Mineral King as the plaintiff and Sierra Club as its guardian.

*Sierra Club v. Morton* (the name of the new Secretary of Interior) was already under review by the Supreme Court when *Trees* made its way to William O. Douglas, one of the Justices to decide on the case. And although the Supreme Court finally upheld the decision of the Ninth Circuit, the decision came with Douglas's dissent and with his endorsement of Stone's theory. If

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<sup>4</sup> Cf. the *National Environmental Policy Act* (1970), which in its preambulatory Declaration of National Environmental Policy aims at 'restoring and maintaining environmental quality to the overall welfare and development of man', and to exist with nature in 'productive harmony' (p. 23).

<sup>5</sup> *Sierra Club v. Morton*, 405 U.S. 727 (1972).

ships and corporations are given legal personality in litigation —Douglas argued following Stone—, why not grant the same right to valleys, lakes, swamplands, 'or even air that feels the destructive pressures of modern technology and modern life? ... Contemporary public concern for protecting nature's ecological equilibrium —he continued— should lead to the conferral of standing upon environmental objects to sue for their own preservation.'<sup>6</sup>

The story did not end there. Redrafting its complaint by accentuating how damages to the area would affect the 'associational interests' of its members, and claiming that the Forest Service had violated the novel National Environmental Policy Act, the legal defence of the Club then appealed on remand and finally won, when in 1978 Mineral King Valley was incorporated to Sequoia National Park.<sup>7</sup>

In terms of its legal impact, the immediate reaction to *Trees* in the U.S. was a wave of suits filed by non-humans; among them, the river Byram, the endangered Hawaiian bird Palila and the Death Valley National Monument.<sup>8</sup> However, this trend was short-lived and not very successful. Rather, the most important and enduring tactic for nascent environmental lawyers came to be suits filed in the name of human individuals or groups, claiming that the damage to the environment was a cognizable injury to them. This was possible thanks to the liberalization of judicial standing, in which the courts relaxed the traditional standing requirements (especially, that the plaintiff has suffered 'injury in fact').<sup>9</sup> Another important development was the gradual creation of public trustees for natural resources, like the National Oceanic and Atmospheric Administration (NOAA), in charge of protecting fish and marine mammals and their ecosystems within the U.S. fisheries zone.

Overall, however, the anthropocentric and individualistic approach to legal rights has remained almost undisputed in the last 35 years, both in the U.S. and globally,<sup>10</sup> a fact that Stone laments throughout the book, insofar as it

<sup>6</sup> Ibid at 741-42 (Douglas dissenting).

<sup>7</sup> Cf. <http://www.princetonindependent.com/issue01.03/item10d.html>

<sup>8</sup> Stone, above n 1 xvi.

<sup>9</sup> Cf., for example, *NRDC v. Winter*, where a number of conservation groups sued the U.S. Navy in their own names, as would-be wildlife observers of the whales off the San Diego coast, that were being affected by the Navy's sonar testing.

<sup>10</sup> Some isolated exceptions at the global level have been Ecuador's 2008 Constitution, which devotes one whole chapter to the rights of nature, and states that 'Nature or Pacha Mama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. ... Every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution.' Cf. p. 232, footnote 43, and <http://yasuni-itt.gob.ec/%C2%BFpor-que-ecuador-propone-la-iniciativa-yasuni-itt/la-iniciativa-yasuni-y-los-derechos-de-la-naturaleza>. More recently,

forces lawyers to make *ad hoc* cases to defend natural objects, instead of filing suits directly on their behalf, which would be 'a better fit with the real grievances', and 'better suited to moral development.'<sup>11</sup>

To some extent, this approach replicates itself at the level of ethics. Although during the last decades the main crusade of environmental philosophers has been to argue for the intrinsic value of nature more broadly,<sup>12</sup> thus turning it into a proper object of moral consideration, the main ethical theories still largely ignore other-than-human subjects and, when they include them, they do so for instrumental reasons or indirectly, but hardly ever for their own sake (the most notable exception being utilitarianism, which extends the moral realm to include at least all sentient beings, insofar as they are capable of experiencing pleasure and pain).<sup>13</sup>

Having said this, *Trees* has arguably been more influential outside than inside the law. Especially at the level of environmental ethics, this essay is a classic reference when it comes to topics like the way we think about guardianship, our ontology of things in the natural order and the manner in which we assign interests in the context of environmental protection.

## II NATURAL OBJECTS, FUTURE GENERATIONS AND A GUARDIAN FOR EACH AND EVERYONE

Apart from being an excellent reference book for those interested in the development of environmental law and litigation in the U.S. but also internationally, this collection will also interest anyone with a taste for deeply

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in April 2011, Bolivia was the first to grant equal rights to nature and humans, under its 'Law of Mother Earth'. Cf. <http://www.guardian.co.uk/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>

<sup>11</sup> Stone, above n 1 65. Stone writes, regarding *NRDC v. Winter* above: 'What is strained, silly and 'ingenious' is the theory of lawyers (!) that a suit to stop the Navy from killing whales is on behalf, not of the whales who may disappear, but of people piqued about no longer getting the thrill of seeing whales spouts as often.'

<sup>12</sup> Cf., for example, Kenneth Goodpaster, for whom the necessary and sufficient condition to be morally considered is to be alive: Kenneth E. Goodpaster, 'On Being Morally Considerable,' *The Journal of Philosophy* 75, no. 6 (1978). For Holmes Rolston III, the relevant feature is to tend to goals, consciously or unconsciously: Holmes Rolston III, 'Environmental Ethics: Values in and Duties to the Natural World,' in *The Broken Circle: Ecology, Economics, Ethics*, ed. F. Herbert Bormann and Stephen R. Kellert (New Haven: Yale University Press, 1991). For Arne Naess, there is a fundamental equality among all living things: Arne Naess, 'The Basics of Deep Ecology,' *The Trumpeter* 21, no. 1 (2005). For Paul Taylor, individuals, species and even ecosystems are moral subjects with a good of their own, insofar as they can be benefited or harmed: Paul Taylor, *Respect for Nature* (Princeton: Princeton University Press, 1986).

<sup>13</sup> Cf., most notably, Peter Singer, *Animal Liberation* (New York: Harper Collins, 2002).



philosophical problems. As a lawyer working in the world of actual decision-making, however, the author tends to dispatch in a paragraph or two problems which have troubled philosophers—and especially ethicists—for decades. In what remains, I briefly present three such problems, with no intention of offering a satisfactory answer, but with the hope of at least signalling their complexity; a complexity which cannot be dismissed so quickly.

First, in *Trees* and throughout the book, Stone assumes that we know what we talk about when we are talking about 'natural objects'. However, he never offers a definition of what they are, but rather enumerates different things that we may call by that name. Among many others: a stream;<sup>14</sup> the lawn in front of his house;<sup>15</sup> nonhuman life;<sup>16</sup> wilderness areas;<sup>17</sup> the environment;<sup>18</sup> animal species;<sup>19</sup> and Matthew, a chimpanzee.<sup>20</sup> Now, the main problem with such a broad-brush approach is that, when it comes to assigning interests and, furthermore, legal (and moral) rights to such a diverse list, the results will differ wildly, and so will the recommendations as to how to take them into account properly.

For one thing, the interests of individual animals should not be mistaken with the interests of a species as a whole (assuming the latter has any). That a chimp does not want to spend its life in a cage seems quite uncontroversial, but that the species *Pan Troglodytes* does not want to become extinct seems much more difficult to corroborate. Moreover, it is not clear how we should rank the interests of individual natural objects and species as a whole when they collide. For example, in *Palila v. Hawaii Dept. of Land and Natural Resources* (1979), a suit was brought in the name of this endangered bird species against the state agency which allowed feral sheep and goats to invade their habitat.<sup>21</sup> But why should the interests of an endangered bird species matter more than those of individual goats and sheep? Just because they are endangered? If we offer this as a reason, it would seem that what lurks in the background are not really the interests of the species themselves, but those of human beings to preserve greater biodiversity—which is precisely the justification that Stone is trying to avoid.<sup>22</sup> On the other hand, if we believe that the reason to assign extra value

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<sup>14</sup> Stone, above n 1 7.

<sup>15</sup> Ibid 11.

<sup>16</sup> Ibid 21.

<sup>17</sup> Ibid 24.

<sup>18</sup> Ibid 25.

<sup>19</sup> Ibid 61.

<sup>20</sup> Ibid 164.

<sup>21</sup> Ibid 193.

<sup>22</sup> Arguably, this is the motivation behind a project like The Economics of Ecosystems and Biodiversity (TEEB), which makes an economics case for their conservation, and seeks to assign

to an endangered species is that biodiversity is intrinsically valuable, then much more needs to be said to justify this claim.

When it comes to assigning interests to natural objects which are not even alive, the problem worsens. Although we may concede that, as the author points out, the lawn 'tells' us when it wants water by its dry appearance and lack of springiness, it is much more difficult to agree that a river can 'tell' us that it does not want to become polluted —unless by the 'river' we understand the aggregate of individuals that inhabit it. If we opt for the latter answer, however, we veer again toward the standard individualistic type of justification that Stone wants to leave behind.<sup>23</sup>

A second object to which Stone devotes his attention is future generations of humans, to whom the present generation holds, if not duties derived from correlative rights, at least certain responsibilities.

That we do have responsibilities toward those yet unborn is not, however, such an easy claim to make. On the contrary, what has come to be known as the 'Non-Identity Problem' troubles metaphysicians and ethicists. First formulated by the British philosopher Derek Parfit, it could be summed up thus: On the one hand, we normally think that we do something wrong when we affect someone's interests negatively. On the other hand, we also know that the social policies that we implement in the present will affect the details of the lives lived in our community from now on, and consequently, the very coming into existence of future people. Now, if some such a policy worsens the quality of life in the future, most of us tend to think that it is wrong. But why is it wrong, if it affects the interests of no one yet in existence and, furthermore, if those who will be born in the future in a sense owe their very existence to that policy?<sup>24</sup>

With Parfit, I believe that the correct conclusion to be drawn from this is that we must reject the view that a choice cannot have bad effects if it will make no one worse-off. However, even if this means granting that we have a certain responsibility toward those to come, we may still wonder what that responsibility amounts to, a question which is above all a moral one. As Stone recognises, we may think that we owe future generations a certain level of

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economic value on non-human organisms in order to protect them for future generations. Cf. <http://www.teebweb.org/>

<sup>23</sup> Stone is right to point out that the problem of guessing the interests of natural objects has been overstated. After all, it could be said to be analogous to the Attorney General guessing the interests of the United States, or to a board of directors guessing the interests of a corporation, and nobody seems to complain about these. — Stone, above n 11.

<sup>24</sup> Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1987), pp. 377-78.

welfare, a 'portfolio of assets' which may vary with time;<sup>25</sup> but we can also, more strongly, think that we should leave those to come a fixed legacy of specific and non-negotiable assets—for example, the Grand Canyon—, even if keeping them might reduce both our wealth and theirs. The choice between welfarism and preservationism (as these two positions are labelled), is not an obvious one and theorists on both sides have spent a considerable amount of ink and effort to defend each.

Thirdly and lastly, assuming that we have figured out which natural objects deserve our attention and what kind of responsibility we have toward future generations of humans —i.e., welfarist or preservationist—, Stone advocates the idea of guardianship as the best way to protect their interests, as well as the best way to protect the global commons.<sup>26</sup> This is purportedly one of his most innovative contributions to the fields of environmental law and environmental ethics, but it is not exempt from problems. To some extent, Stone acknowledges this, especially when it comes to deciding how to choose the right guardian for different objects, and how to resolve conflicts that may occur between them. Regarding the former point, it is not obvious who has the moral authority (let alone the legal one) to claim guardianship over, say, a tropical forest or an endangered species. Going back to *Mineral King v. Morton*, ten other environmental groups could have appeared alongside Sierra Club, all claiming their legitimate right to be the guardians of the forest, probably all of them with different interpretations of what the forest—or some specific natural objects within it— truly 'wanted'. Thus, although the purpose of guardianship is to give a voice to the voiceless, the ultimate decision of who the voice of the voiceless will be, and what that voice will say, remains under human jurisdiction.

Regarding the latter point, it is not clear how disputes would be resolved when conflicts of interest arose between different natural objects, or between these and a group of future humans, or between two groups of future humans at different points in time. At least in the second case, Stone does not choose the obvious answer; namely, that priority should always be given to our species. On the contrary, he proposes to 'reinforce the case for Guardians for natural objects ... since our decisions on whether to make, e.g., whales and songbirds planetary heirlooms will strongly influence—we might say, is logically prior

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<sup>25</sup> Stone, above n 1 118.

<sup>26</sup> The global commons refers to those regions of the planet and its surrounding space that lie outside the territorial sovereignty of states, thus constituting a 'No Man's Land'. They include the atmosphere, outer space, and the high seas, sea beds and sub surfaces not enclosed by any coastal state, and even Antarctica, whose ownership is presently in limbo (Ibid 126). The global commons, under Stone's scheme, ultimately get 'indirect' protection through the guardians of the natural objects that constitute them.

to— the value future persons will place on those *things*; and the decisions regarding those things might most appropriately be made through decisions informed by thing-specific Guardians.<sup>27</sup> This, however, is disputable and, again, deserves a longer justification.

Having said this, it is only fair to say that Stone's book is a goldmine of empirical data, most valuable for those interested in environmental problems and the way that both the Legislatures and the Courts have dealt with them so far, both in different countries and internationally. But above all, it is a valuable collection of innovative ideas and proposals for alternative normative frameworks (legal and moral) that would help us to cultivate a much healthier relationship with nature. As with any good book, that it leaves many questions unanswered or insufficiently developed is not a drawback, but a virtue. After 35 years, Stone and *Trees* still give plenty of food for thought, making this book indispensable reading for anyone interested in these fields.<sup>28</sup>

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<sup>27</sup> Stone, above n 1 104.

<sup>28</sup> I am grateful to Holly Lawford-Smith, Jonathan Pickering and Steve Vanderheiden for their input and comments on earlier versions of this review.